Comments to the Australian Treasury consultation on financial market infrastructure reforms

Executive Summary

ISDA and FIA, together "the Associations", appreciate the opportunity to comment on the draft financial market infrastructure (FMI) reform package. In particular, the Associations carefully considered the proposed crisis resolution regime, providing the Reserve Bank of Australia (RBA) with powers to step in and resolve a crisis affecting a domestic central counterparty (CCP), with the aim to ensure the continuity of critical clearing functions and maintain financial stability in Australia.[1] However, we have serious concerns with some of the provisions contemplated in the draft regime. We would appreciate if the issues that we highlight in our response (such as the ability of the RBA or statutory manager to direct and make changes in the operating rules, the lack of explicit definitions of and safeguards around the resolution powers and the interaction with close-out netting) could be addressed, otherwise there is a real risk that the willingness of market participants to clear trades with a CCP subject to this regime could be adversely affected.

Crisis management provisions

We would welcome further clarity of the RBA's intention regarding the powers it will receive through the implementation of the act, in particular in relation to its powers to give direction to CCPs under resolution. It is crucial that specific limitations be explicitly defined in primary legislation, on the extent to which the RBA (or a statutory manager) may draw on funds from clearing members to fund a resolution or reduce, amend or deny clearing members' rights to initial margin posted to the CCP (and other important matters identified in this submission). Currently, the potential impact of such powers on market participants using a domestic CCP under resolution is not clear. Additionally, we seek further clarification on how the proposed reforms take into consideration existing standards from the Financial Stability Board[2] regarding CCP resolution. Moreover, we strongly recommend the addition of specific provisions in primary legislation to ensure that any funds drawn from clearing participants (members and clients) for resolution purpose entitles them to compensation, in line with the "no creditor worse off" principle set out in the FSB Key Attributes and 2017 Guidance on CCP resolution.[3]

We appreciate the clarity provided in these draft regulations regarding the RBA's role in assisting a foreign regulator resolving a crisis at an overseas CCP providing services in Australia. However, we note that draft legislation does not explicitly distinguish between

[1] We appreciate that the draft legislation introduces powers in relation to FMIs other than CCPs, but our response focuses specifically on powers related to CCPs.

[2] We are referring to the following policy documents from the FSB, relevant to CCP resolution: 2014 Key Attributes (FMI Annex), 2017 Guidance on CCP resolution and resolution planning, 2020 Guidance on Financial Resources, 2023 CCP resources 'toolbox' consultation

[3] For more detail on the safeguards and limitations that the Associations call for in relation to CCP resolution tools, we invite you to refer to the FIA-IIF-ISDA response to the FSB resolution toolbox consultation (November 2023): Response-to-FSB-on-CCP-Resolution-Resources.pdf (isda.org).

domestic and overseas CCPs with regards to crisis management provisions. The recognition of the home jurisdictions' regulatory authority is extremely important, and we would suggest to make it explicit in legislation that the crisis management powers set out therein are only relevant for domestic clearing and settlement facilities.

Furthermore, we would like to emphasize the significance of legal certainty concerning the enforceability of netting and collateral arrangements for CCPs, including those outlined in their operating rules and related documentation as well as OTC derivatives and other financial markets arrangements they engage in. This legal certainty is critical to the stability of the Australian financial system. In light of this, we have outlined below specific comments on how the proposed resolution regime interacts with existing protections of close-out netting and collateral arrangements as established by the Payment Systems and Netting Act 1998 (Cth) ("**Netting Act**").

Crisis prevention provisions

Regarding the provision on crisis prevention, we welcome the inclusion of well-defined of specific powers for the RBA to step in early and to give direction to a CCP in difficulty. We also welcome the power granted to the RBA to establish resolvability standards, and we look forward to any forthcoming consultation from the RBA on that topic. To enhance clarity for industry participants, we recommend the RBA considers the CPMI-IOSCO guidance on recovery[4] of FMI when developing these standards and take into account similar regulation in the EU and the UK.

Enhancing and streamlining ASIC's licensing and supervisory powers

We welcome the additional clarity provided in the draft legislation regarding ASIC's powers in relation to the licensing regime for foreign market operators and overseas clearing and settlement facilities providing services in Australia. We look forward to ASIC's additional clarification on its assessment of "materiality" and encourage ASIC to adopt a proportionate and deferential approach, in line with IOSCO's good practices on deference.[5]

This response covers the positions of our members on the buy-side and sell-side. The paper does not reflect the views of many CCPs, and many of the CCPs are in disagreement with the views.

[4] 2017 CPMI-IOSCO Guidance on recovery of financial market infrastructures
[5] FR06/2020 Good Practices on Processes for Deference (iosco.org)

Detailed comments

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

• how the new law is intended to operate;

• whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;

• the use of relevant examples, illustrations or diagrams as explanatory aids; and

• any other matters affecting the readability or presentation of the explanatory material.

Our response is structured to cover individually the 3 chapters presented in the exposure draft explanatory material: Chapter 1 – FMI reform: establishing a crisis management regime; Chapter 2 – Crisis prevention (RBA powers); Chapter 3 – FMI Reform - Enhancing and streamlining ASIC's licensing and supervisory powers.

1. Comments on provisions set out under Chapter 1 – FMI reform: establishing a crisis management regime

1.1 *Crisis management regime – resolution powers*

(i) Circumstances

We welcome the clarity provided in the draft law regarding the circumstances within which the new powers may be used. Two of the circumstances are defined as: "the licensee notifies the RBA that […] it is likely to cease providing critical services" and "the licensee notifies the RBA its financial viability is or is likely to be at risk". We recommend that the RBA does not await such notification from the licensee, but should able to proactively intervene if the RBA identifies that the provision of critical services and/or financial viability of the licensee is or is likely to be at risk.

(ii) RBA role in overseas CCP resolution

We welcome the clarity provided in these draft regulations on how the RBA would assist a foreign regulator to resolve a crisis at an overseas CCP providing services in Australia taking into consideration the primacy of the home jurisdictions' regulatory authority. However, we note that draft legislation does not explicitly distinguish between domestic and overseas CCPs with regards to crisis management provisions. While it is clear that Section 848A recognises the primacy of a foreign regulator's action in the event of an overseas clearing and settlement facility in crisis, it is not explicit that the other sections under consultation only apply in the event of a crisis affecting a domestic clearing and settlement facility. The recognition of the home jurisdictions' regulatory authority is extremely important, and we would suggest to make it explicit in legislation that the crisis management powers set out therein are only relevant for domestic clearing and settlement facilities.

(iii) RBA's powers in domestic CCP resolution scenario

We note that the draft legislation details the RBA's power to step in and i) appoint a statutory manager, ii) initiate a transfer of business or shares to a third party, iii) issue binding directions, iv) operate stays and moratoriums provisions.

We support the establishment of this regime. However, we strongly recommend adopting explicit definitions of the powers, tools and resources the RBA would expect to use in a crisis situation. Considering the newly appointed statutory manager would have the ability to take a wide range of actions, such as exercising powers under the CCP's operating rules, or "do anything else, in the name of the body corporate and on its behalf for the purpose of resolving a crisis", we recommend explicit clarifications should any resolution tools and resources be used beyond those defined in the CCP rulebooks used.

Furthermore, we note that the statutory manager would be able to, subject to directions from the RBA, recapitalise the CCP. However, we suggest further clarity regarding the source of funds used for recapitalisation purpose. As noted in our response to the FSB consultation on the toolbox approach[6], recapitalisation should ensure that future ownership of the resolved CCP is aligned accordingly with the loss allocation in resolution.

Additionally, we also request further details if it is envisaged that the statutory manager have powers to call on additional funds from the CCP's clearing members such as tear up transactions or haircut variation margin gains, which are powers included in other CCP resolution regimes, such as in the EU and UK, and also contemplated in the FSB CCP resolution "toolbox" approach[7]. Such powers come with significant damaging impacts on clearing members and should therefore be accompanied by explicit limitations and safeguards, defined in primary legislation, to provide market participants an appropriate level of legal certainty as to what resolution action they might be subject to.

Similarly, the directions that the RBA may issue to facilitate resolution include a number of powers that appear far-reaching, with potential significant impact on market participants, such as:

- "to do or refrain from doing anything under the CCP's operating rules or procedures";
- "to amend its operating rules without having to consult participants";
- "not to pay or transfer any amount or asset to any person, or create an obligation (contingent or otherwise) to do so (unless pursuant to an order of a court or a process of execution)";
- "to do, or refrain from doing, anything else the RBA considers relevant in relation to maintain the stability of the financial system or to continue to provide critical clearing and settlement facility services".

By way of example, a CCP's operating rules generally govern arrangements such as provision of initial margin and other important rights of a clearing member including in respect of events of default, close-out netting and other provisions important for a clearing member to manage its risks under cleared contracts with the CCP. Introducing uncertainty as to the existence or nature of these arrangements, the ability

[6] Response-to-FSB-on-CCP-Resolution-Resources.pdf (isda.org)
[7] 2023 CCP resources 'toolbox' consultation

of the RBA or statutory manager to potentially change these rights (including without consultation) has the potential to adversely impact clearing members' assessment of the sound legal basis of those operating rules and may also have implications on how clearing members must treat their exposures to the CCP from a capital perspective.

The powers provided to the RBA to amend the CCP's rules create uncertainty on the recovery and resolution boundary. We query whether the RBA would use this power to introduce resolution-type measures into CCP's rulebooks. It is unclear from the consultation if the RBA would so introduce such measure ahead of a resolution event, or once a resolution event has materialised.

Overall, we would welcome clarity as to how the RBA would consider resorting to such powers, which carry significant financial stability risks because of their potential impacts on clearing members, incentives, and market confidence more generally. You will find more details on these points in our response to the FSB consultation on the CCP resolution toolbox approach.

(iv) Safeguards and compensation

We would urge the Government to include explicit safeguards and limitations around the use of such powers in primary legislation. As noted above, the draft legislation would enable the RBA to issue a wide variety of far-reaching directions and give a statutory manager broad powers. The legislation should include explicit safeguards such as:

- Limiting the extent to which the RBA or statutory manager may create an obligation on market participants to provide funds to the CCP in a resolution scenario.[8] For example, there should be an explicit limitation that the RBA and statutory manager may take action with the effect of haircutting variation margin once in a resolution scenario. Similarly, the RBA and statutory manager should be restricted to limited number of cash calls on clearing members;
- Explicitly defining protection of funds provided by clearing members to meet initial margin requirements. The legislation should clarify that the RBA will not issue any direction and a statutory manager may not be able to take any action that would resemble haircutting initial margin;
- Clearly delineating between tools that can be used in default and/or non-default loss scenarios[9]: in particular, any tools allocating losses to market participants akin to cash calls or variation margin gains haircutting should be explicitly ruled out in non-default loss scenarios, and accompanied with strict safeguards and compensation in default-loss scenarios;
- Ruling out any tool forcing allocation of losses to clearing participants;
- Including mandatory compensation further to the use of any tools that draw resources from clearing participants, in effect promoting the "no creditor worse

[8] This safeguard would be helpful to address a risk that these types of powers afforded to the RBA and statutory manager under this regime might be taken to give rise to unlimited liabilities for the clearing participants under the operating rules, which may cause concern under the Australian prudential framework.

[9] By default losses we refer to losses caused by the default of a market participant. Non-default losses are losses that are not related to default events, for example arising from legal, custody, investment or operational risks, as set out in the CPMI-IOSCO report on non-default losses: Report on current central counterparty (CCP) practices to address non-default losses (NDL) (bis.org)

off" principle, in line with the FSB Key Attributes, and as further developed in the 2017 Guidance on CCP resolution;[10]

- Including an explicit safeguard which prevents the performance of functions or the exercise of powers by the RBA or a statutory manager which would otherwise result in the provision of services or transfers of assets between related bodies corporate within a corporate group other than for fair value or the use of funds of an entity to increase the levels of capital of another entity within the same corporate group without shareholder agreement. There are analogous safeguards in the resolution regime for authorised deposit-taking institutions ("**ADIs**") under the Banking Act 1959 (Cth) ("**Banking Act**").[11]

While a separate issue to the critical safeguards described above, we suggest that the Government consider including an explicit protection for persons that are required by the RBA or a statutory manager to provide information and documents to assist crisis management (e.g. under sections 833E and 844B) that the relevant information and documents are not admissible in evidence against the individual in a criminal proceeding or a proceeding for the imposition of a penalty (other than a proceeding in respect of the falsity of the information or document). There are analogous safeguards in the resolution regime for ADIs under the Banking Act.[12]

(v) Transparency and predictability

We note that these powers provide a lot of flexibility to the RBA, and it is unclear based on the consultative documents how the RBA intends to use these powers. We are particularly concerned with the explicit inclusion of a power to amend the CCP's rules "without having to consult participants", and the ability for the RBA to take wide-ranging actions, including creating potentially unexpected obligations, presumably on participants.

The lack of clarity, transparency and guidance regarding the RBA's resolution plan is very concerning. Clearing participants will likely assess the worst-case scenario and act accordingly to protect their interests. Such actions could be detrimental to a successful resolution.

Therefore, we would very much welcome more transparency and a narrowly defined scope regarding how the RBA's intentions on using these powers. We strongly suggest considering a provision requiring the RBA to explicitly assess the impact of any direction it may take in a resolution scenario on market participants (Clearing Members and Clients).

We understand that the RBA might issue, in its own time, a guidance document setting out how it would use the broad powers granted through this bill. While our preference is to further specify the limits of these powers in primary legislation, we would encourage (*in addition to* specifying limits of these powers in primary legislation) the RBA to provide as much clarity and transparency as possible on the tools it would use in a resolution scenario, including details on calibration of

[10] Guidance on Central Counterparty Resolution and Resolution Planning (fsb.org)

[11] See section 14AAA (Safeguards on exercise of Banking Act statutory manager's powers and functions) of the Banking Act.

[12] See e.g. sections 14A(3), (4) and (4A), 14AD(5) and (6) and 52F of the Banking Act.

resolution tools, on the approach to recapitalisation (as developed above), as well as on compensations. As an example of an approach we suggest the Government consider taking in Australia, the special resolution regime established for CCPs in the United Kingdom under *Financial Services and Markets Act 2023* sets out a requirement in schedule 11 of that Act that HM Treasury must issue a code of practice about the use of the stabilisation powers (which is to provide guidance on specified matters) and that the Bank of England (as resolution authority) must have regard to it in conducting a resolution. HM Treasury has recently published a code of practice for the special resolution regime for CCPs.[13]

We also believe that these new powers granted to the RBA should be supported by the establishment of a dedicated CCP resolution unit.

(vi) Special resolution fund

We note that the proposed regime includes the permission for the Treasurer to activate the appropriation of up to $5 billion per event to maintain the operations of a domestic CCP during a crisis. We also note that it is expected that "funds will be recovered after the crisis is resolved", as set out in the explanatory memorandum (paragraph 1.91). We would welcome further clarity in primary legislation as to who the Treasurer would turn to when looking to recoup the funds used through this mechanism. We would also welcome more clarity around the circumstances within which such fund may be used, whether it would be to address temporary funding needs or absorb losses.

1.2 *Stays and moratoria*

The new resolution regime in proposed Part 7.3B of the Corporations Act, as well as the new directions powers and changes to the existing Part 7.3 of the Corporations Act made in Treasury Laws Amendment (Measures for Consultation) Bill 2023: FMI new and enhanced regulatory powers, introduce various new stays and moratoria. We acknowledge that many of these are substantively similar to existing stays known to Australian law and that stays on certain rights (subject to certain criteria and time periods) are a feature of effective resolution regime.

However, certainty, clarity and transparency in relation to the interaction between these stays and moratoria and the existing protections afforded under the Netting Act is crucial, particularly to the exercise of contractual termination rights, the enforcement of security and certain other rights in relation to netting and collateral arrangements for CS facility licensees, including under their operating rules and related documentation and OTC derivatives and other financial markets arrangements which they enter into.

Accordingly, we have the following specific comments:

(i) Interaction with the Netting Act

We strongly support the longstanding policy of the Australian Government and regulators that the Netting Act prevails despite any other law and appreciates the

[13] See https://assets.publishing.service.gov.uk/media/65982b8c614fa2000df3a975/FINAL_CCP_Resolution_Regime_Code_of_Practice.pdf.

efforts of prior reforms (including those relating to collateral protection, porting, and arising from G20 OTC derivative reforms) giving effect to this policy.

We note that the protections in the Netting Act apply to discrete actions such as terminating obligations, calculating termination values and a net cash amount becoming payable, enforcing security, and transferring rights and obligations as well as other dealings with property. This is consistent with the approach taken in other similar legislative frameworks around the world which protect close-out netting and related rights in other jurisdictions. Generally, these protections are understood as not extending to protecting the beginning or continuation of court or tribunal proceedings (as these actions are generally taken without the need for a court or tribunal process).

Accordingly, we agree with the proposal in the draft legislation and explanatory materials published as part of the FMI reform package (together the "**Reform Materials**"), particularly the proposed sections 841C and 847D of the Corporations Act which clarify that, to the extent that there is inconsistency between the sections named in those sections (being sections 841A (*Stay on enforcing rights merely because the body corporate is under statutory management or subject to a transfer determination*), 841B (*Self-executing provisions*), 847B (*stay on exercising termination rights*) and 847C (*Self-executing provisions*)), the Netting Act will prevail.

However, in respect of the other stays set out in Reform Materials, particularly those which expressly refer to close-out netting and the enforcement of security in sections 842B (*Restrictions on exercise of third party property rights*), 823V *(All Reserve Bank powers under this Part—not grounds for denial of obligations)* and 849E *(Exercise of Reserve Bank powers under this Part not grounds for denial of obligations*), the Reform Materials do not expressly acknowledge the primacy of the protections afforded to close-out netting and the enforcement of security under the Netting Act. It would be helpful to make it clear as to the interaction of between the stays set out in the Reform Materials and the Netting Act, and strongly suggest that the Netting Act prevails as set out in sections 841C and 847D, to avoid any risk that those stays imply a repeal of, or at least create an inconsistency with, the Netting Act to the extent of those stays.

This would seem consistent with the Government's stated policy intention as demonstrated by the statements in the proposed explanatory memorandum published as part of the Reform Materials ("**Explanatory Memorandum**"), such as the statements at paragraphs 1.222 ("*This is intended to ensure that current protections under the PSN Act are retained and the rights of counterparties to close-out netting contracts are clear.*") and 1.268 ("*The PSN Act and the AML/CTF Act are important to take precedence. … Given the policy significance of these obligations, this provision has been included to ensure these amendments do not unintentionally affect the operation of the AML/CTF Act and PSN Act.*").

If it is helpful to the Government, this could be achieved by:

(a) amending the Corporations Act to state that, to the extent of any inconsistency between any section in Parts 7.3 or 7.3B (or Chapter 7 or the Corporations Act

more generally) (not just sections 841A, 841B, 847B and 847C only), the Netting Act prevails to the extent of any inconsistency; and

(b) identifying in the Netting Act all the relevant stay provisions listed in the Reform Materials as "specified provisions" (and *not* "specified stay provisions").

(ii) Potential adverse impact of section 836D on payment obligations, grace periods and events of default

We consider it important to raise a possible interpretation of section 836D (Time for doing act does not run while act prevented) that could have a negative unintended consequence on market participants' certainty about payment obligations, grace periods and events of default, the existence of which are fundamental to market participants being able to effectively manage their risk through close-out netting and enforcement of security. This is a result of Part 7.3B of the Corporations Act granting materially broader powers to the RBA and a statutory manager compared with those a voluntary administrator may be granted under existing Australian law,[14] and the combination of these broad powers (particularly the ability of the RBA to give a direction to a body corporate "not to pay or transfer any amount or asset to any person". Importantly, there does not appear to be an equivalent section to section 836D in the resolution regime for ADIs under the Banking Act.

The potential negative unintended consequence arises in the following circumstance (note this is provided by way of example only, there may be other situations which give rise to similar unintended consequences):

(a) An entity which can be subject to a direction by the RBA under Part 7.3B has payment obligations under, for example, its operating rules, an ISDA Master Agreement or other financial contract.

(b) That contract provides for a payment to be made on or by a particular date, and provides that if the payment is not made within a particular period after the due date that failure constitutes an event of default which gives the payee rights (e.g. close-out netting rights, etc, depending on the contract).

(c) It would seem possible to say that this payment is, for the purpose of an agreement or instrument, an act which must be done within a particular period or before a particular time (whether by reference to the payment due date or by the end of the grace period).

(d) Then it is noted that the RBA has the power to give a direction under Part 7.3B that the entity is not to make a payment. Presumably a direction could be given not to make the payment for a set time period or not to make the payment indefinitely (either could cause concern, as described below).

(e) It would seem possible to say that the giving of this direction (noting such direction is given under Part 7.3B) means, substantively, "this Part" (as described in section 836D(b)), being Part 7.3B, prevents the act (being the payment) from being done within that period or before that time.

[14] See section 451D of the *Corporations Act 2001* (Cth).

(f) It would then seem possible that section 836D could be interpreted as meaning in this context that the period (perhaps the grace period) is extended, or the time (perhaps the time for payment or payment due date) is deferred, because of section 836D according to how long Part 7.3B prevented the act from being done.

The risk of this interpretation being taken by a court with regard to section 836D causes significant concern, as the practical impact means that a market participant trading with an entity that could be subject to a direction (or other action under Part 7.3B which results in a payment not being made or some other obligation not being performed) is faced with the uncertainty as to whether a due date for payment of an amount or performance of an obligation, or any set grace period, does not operate as agreed in the operating rules or relevant contract but rather may be extended or deferred by operation of section 836D. While it is accepted that the impact of Part7.3B may be that a payment is not made or obligation is not performed (e.g. because a direction is given to not make the payment or perform the obligation), it would seem appropriate that the consequences of that non-payment or non-performance are what the parties have agreed in the operating rules or relevant contract. It is important that this be the case in order for the Netting Act to be able to properly protect the rights we understand it is intended to protect (e.g. close-out netting rights etc). Similarly, it is important that any power that the RBA or a statutory manager has to change the terms of operating rules or contracts do not extend to being able to amend these fundamental terms on which parties rely for their risk management and the capital treatment of their exposures to any entity that is to be subject to the exercise of resolution powers.

(iii) Reference to "prohibition on beginning or continuing court proceedings"

We would be grateful if the Government could please clarify the meaning set out in paragraph 1.222 of the Explanatory Memorandum:

"*The moratorium provisions do not apply to payments and property transfers to the CS facility which has the effect of protecting the enforcement of eligible netting and collateral arrangements provided by the PSN Act. This includes approved real time gross settlement systems, approved netting arrangements, close out netting contracts and market-netting contracts that will be unimpacted by the moratorium provisions,* ***aside from the prohibition on beginning or continuing court or tribunal proceedings.****"* (emphasis added).

We would suggest it would not be necessary to indicate that any prohibition on beginning or continuing court proceedings prevails of the protections in the Netting Act, as the protections afforded under the Netting Act do not expressly extend to beginning or continuing court proceedings (they focus on protecting close-out netting, the enforcement of security and related rights and transactions).

We consider that any such provision that had this effect could create uncertainty as to the intended primacy and scope of the protections of the Netting Act, which would be detrimental to FMI operators and participants in, and systemic stability of, the Australian market.

Generally, we support the implementation of legislation clearly identifying that the Netting Act applies despite any other law (including any of these moratoria). We would ask the Government to consider clarifying or removing this point in the Explanatory Memorandum.

(iv) Exclusion of certain netting contracts and collateral arrangements

In respect of the stays in sections 841A and 847B, while proposed sections 841C and 847D clarify that the Netting Act prevails to the extent of any inconsistency over sections 841A, 841B, 847B and 847C, we would like to request that Government consider expressly excluding contracts, agreements and arrangements such as:

(a) contracts, agreements and arrangements that govern, or are directly connected with, a derivative or securities financing transaction;

(b) contracts, agreements or arrangements that are flawed asset arrangements;

(c) close-out netting contracts (such as ISDA Master Agreements and relevant futures agreements) and related security agreements;

(d) contracts, agreements and arrangement that govern the operating rules (other than the listing rules) of financial markets or of a clearing and settlement facility;

(e) approved netting arrangements;

(f) netting markets and market netting contracts and related security agreements;

(g) contracts used in connection with approved RTGS systems, approved netting arrangements and market netting contracts and other contracts used in financial markets which are set out in Regulation 5.3A.50 of the Corporations Regulations 2001 (Cth) (which sets out certain prescribed kinds of contracts, agreements and arrangements that are not subject to the stay of enforcing rights when the party is under administration and which is replicated for the purposes of the other existing "ipso facto" stays under Australian law).

The exclusion of these contracts from the stays in sections 841A and 847B would ensure that parties to these contracts, agreements and arrangements have legal certainty as to their ability to exercise rights under them (including rights which are fundamental to their effective operation, such as calling for margin, which may not themselves be rights expressly protected under the Netting Act).

Further, we respectfully submit that the exclusion of these contracts would be consistent with the policy position that the Australian Government adopted in relation to the other "ipso facto" stays (albeit it is acknowledged that some different policy drivers apply in respect of the proposed resolution regime for FMIs as opposed to the insolvency proceedings in respect of which the existing "ipso facto" stays apply).

This clarity would be most welcome to the market and would preserve the effective operation of contractual arrangements such as close-out netting contracts which are important to the safe and efficient operation of the Australian financial system.

(v) Rights not subject to the stay

We would also like to highlight to the Government that paragraph 1.258 of the Explanatory Memorandum states, in respect of the stay in section 841A that:

"*Notwithstanding the operation of the stay, a counterparty maintains the ability to enforce a right for reasons such as where the body corporate has failed to meet payment, performance or other obligations under the agreement such as a default management or recovery action. [Schedule 1, item 14, subsections 841A(11) and (12) of the Act]*"

We strongly support the policy intention of this statement, which appears consistent with the drafting of section 841A(1) (given that 841A(1) is focused on specific reasons for enforcing rights).

However, it is not entirely clear to us how "*subsections 841A(11) and (12) of the Act*" support such statement, as those subsections don't seem to relate to this issue. We would be grateful if the Government could consider clarifying paragraph 1.258.

(vi) Section 847B (Stay on exercising termination rights)

We would also like to seek clarity from the Government in respect of the note after section 847B(1) which states:

"*This result is subject to subsections (5) and (7) of this section*".

Section 847B does not appear to have subsections (5) – (7).

***(vii)* Particular transfers of body corporate are void unless they are done in particular way**

Section 834B provides that if a body corporate under statutory management purports, or person purports on behalf of a body corporate under statutory management, to enter into a transaction or dealing affecting property of the body corporate, the transaction or dealing is void unless (subject to s843B(3)) the statutory manager entered into it on the body corporate's behalf, or the statutory manager or the RBA consented to it in writing before it was entered into, or it was entered into under an order of the Court. We assume that this is not intended to mean that contracts entered into with clearing members under the ordinary operation of a CCP's operating rules or securities or other instruments transferred between participants in the ordinary course of business of a settlement facility are intended to be void. We would be grateful if this intention could be clarified.

1.3 *Transfers*

We fully support proposed section 839A (*Partial transfer of netting contracts void*) to clarify that partial transfers of certain close-out netting contracts, market netting contracts, specified types of related security, and approved netting arrangements, are void. It is most welcome that the transfer powers would not be able to be exercised in a way that disrupts netting sets or separate collateral from associated positions. This is particularly important to a CS facility licensee.

2. Comments on provisions set out under Chapter 2 – Crisis prevention (RBA powers)

We welcome the definition of specific powers for the RBA to step in early and to give direction to a CCP in difficulty and the power for the RBA to set resolvability standards, and look forward to any forthcoming consultation from the RBA on that topic. For greater

understandability for industry, we would encourage the RBA to have regard to the CPMI-IOSCO guidance on recovery of FMI when developing these standards.

3. Comments on provisions set out under Chapter 3 – FMI reform – Enhancing and streamlining ASIC's licensing and supervisory powers.

We note the redistribution of various Ministerial powers to ASIC in relation to the supervision and licensing of market operators and clearing and settlement facilities in the spirit of streamlining the regime. We welcome the additional clarity provided in the draft legislation as regards' ASIC's powers in relation to the licensing regime for overseas market operators and clearing and settlement facilities providing services in Australia. The proposed 2-step approach to determine whether an overseas facility should be licensed or exempt from licensing in Australia, 'step 1' connection to Australia and 'step 2' materiality of the connection, seems sensible. We look forward to ASIC's clarification on its assessment of materiality and would encourage ASIC to adopt a proportionate and deferential approach, in line with IOSCO's good practices on deference.[15]

[15] FR06/2020 Good Practices on Processes for Deference (iosco.org)

Appendix

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 77 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C.

FIA represents a wide array of market participants from around the world that depend on these markets. Our members include client clearing firms, exchanges and clearinghouses, executing brokers, software vendors, legal firms, consultants, and proprietary trading firms. Our membership is corporate, and our work supports the cleared derivatives industry as a whole. Our purpose is to provide a voice for each of our member firms by partnering with global regulators, promoting industry-led best practices, supporting efficiency and innovation, and protecting the integrity of derivatives markets. Please visit www.fia.org for more information.