

UPDATE 4
28 March 2003

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[U4.01] 2002 ISDA Master Agreement

In January 2003 ISDA published a new version of its Master Agreement known as the “2002 ISDA Master Agreement”. The entire Guide has been updated so that it now operates on the assumption that parties newly entering into an ISDA Master Agreement do so using the 2002 ISDA Master Agreement (however, there are some references to the 1992 ISDA Master Agreement in Parts 22 and 26 that have not yet been updated).

Before the publication of Update 4 of this Guide on 28 March 2003, this Guide provided commentary on the 1992 ISDA Master Agreement. By publishing Update 4, AFMA is not to be taken to be recommending that parties redocument existing 1992 ISDA Master Agreements or that it is no longer appropriate to enter into a 1992 ISDA Master Agreement. AFMA recognises that parties may have commercial and legal reasons for wanting to retain or enter into new 1992 ISDA Master Agreements. Commentary referencing the 1992 ISDA Master Agreement can be found in the history versions of this Guide replaced on 28 March 2003. Of course, care needs to be taken when using historical commentary to ensure that all relevant legal issues are taken into account. For example, it is recommended that the decision in *Enron Australia Pty Limited (In Liquidation) v Integral Energy Australia* [2002] NSW SC 753 be considered in the context of any new or existing 1987, 1992 or 2002 ISDA Master Agreement (see [3.17]).

Generally, and subject to the comments in the previous paragraph, given that there are a number of improvements in the 2002 version, we recommend that it is preferable for parties to agree to adopt the 2002 version.

[U4.02] Netting Opinion

The legal analysis in Part 23 has been updated so that it now comments on the enforceability of Close-out Netting under the 2002 ISDA Master Agreement where one party to the Master Agreement is an Australian company and either the Master Agreement is governed by Australian law or the Master Agreement is governed by New York or English law and the Australian company has become subject to insolvency proceedings.

[U4.03] FRA Basis Formula

An amendment has been made to the FRA Basis Formula set out at [5.34](5) to make it clear that references to the Floating Rate are references to the Floating Rate plus or minus the spread (if any).

[U4.04] ISDA Definitions

A comment has been inserted towards the front of each product specific part (for example [6.03]) recommending that readers read commentary at [U1.01]-[U1.08] explaining a number of important changes effected in this Guide on 1 January 2002. Readers are referred in particular to the comments at [U1.04] which is a reminder of the importance of ensuring that Confirmations are produced that are consistent with ISDA Definitions.

[U4.05] “Deemed” ISDA Master Agreements

Amendments have been made to those parts of the Guide recommending wording to include in Confirmations where parties want to deem an ISDA Master Agreement to be in existence before they have actually signed one. The wording now recommended is that recommended by ISDA on page 35 of the 2000 Definitions. However, we recommend that legal advice be obtained if you want to rely

only on wording to this effect (and not on a signed ISDA Master Agreement) in order to constitute a Close-out Netting Contract for the purpose of the Payment Systems and Netting Act 1998 (Cwlth).

[U4.06] Novation Agreement

Amendments have been made to Part 24 to reference the appropriateness of using the ISDA published Novation Agreement.

[U4.07] Linear Interpolations

A comment has been inserted in relevant product specific commentary recommending that participants consider where they should specify in their Confirmations that “Linear Interpolation” is to apply (see page 14 of the 2000 ISDA Definitions) if the designated maturity does not match one of the terms for which BBSW is calculated. For example see [6.15](e).

[U4.08] Bond Options

Some amendments have been made to Part 13 to clarify some of the commentary relating to Bond Options.

[U4.09] Safes and FRBs

The parts of the Guide dealing with safes and FRBs (Part 14 and Part 9 respectively) have been removed as these products are not common in the Australian market.