

UPDATE 6
1 August 2003

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[U6.01] 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 other than Part 20 was updated in March 2003 (see Update 4) 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. Part 20 is now updated on the same basis, save that it retains some suggested language for users that remain on the 1992 ISDA Master Agreement.

By publishing Update 6, 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 Part 20 of this Guide replaced on 1 August 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] and [20.19A]).

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.

[U6.02] GST Provision

Part 20 has been updated to include a suggested clause for use by parties that wish to protect themselves against the risk that the National Electricity Code may be amended so that spot prices for electricity are published on a GST inclusive basis, rather than the current GST exclusive basis.

[U6.03] Close-out Calculations

Following the decision in *Enron Australia Pty Limited (In Liquidation) v Integral Energy Australia* [2002] NSW SC 753 the working group decided that it would no longer recommend that references of determinations on close out (and equivalent events) be made by experts selected by AFMA.

[U6.04] “Deemed” ISDA Master Agreements

Amendments have been made to that part of Part 20 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).

[U6.05] Amendment Agreement

A pro-forma Amendment Agreement has been incorporated in the OTC Guide for the assistance of parties that wish to amend an existing 1992 ISDA Master Agreement in all or any of the following ways:

- to incorporate the recommended wording at [3.17];

- to delete the previously recommended wording as to Reference Market-makers;
- to modify certain provisions to reflect certain provisions of the 2002 ISDA Master Agreement relating to the use of the term “Close-out Amount” in lieu of “Market Quotation” and “Loss”;
- to incorporate the most recent form of Addendum No. 13.

[U4.07] Addendum No. 13

A minor amendment has been made to Addendum No. 13 to ensure that it covers both electricity and REC Transactions.