

SCHEDULE 9 FORM OF LEGAL OPINION IN RESPECT OF THE COUNTER-INDEMNITY

A. OPINION REGARDING COUNTER-INDEMNITY

A.1. THIS OPINION IS FOR USE FOR AUSTRALIAN INCORPORATED ELIGIBLE INSTITUTIONS ONLY IN RESPECT OF THE COUNTER-INDEMNITY

The Commonwealth of Australia
c/- Scheme Administrator
Australian Government Guarantee Scheme for
Large Deposits and Wholesale Funding
c/- The Secretary
Reserve Bank of Australia
GPO Box 5367
SYDNEY NSW 2001

Dear Sirs

[insert name of Eligible Institution] (“Issuer”)

Deed of Counter-Indemnity dated [insert date] (“Counter-Indemnity”) given in favour of the Commonwealth of Australia (“Commonwealth”)

We refer to the entry by the Issuer into the Counter-Indemnity in respect of which we have acted as legal advisers to the Issuer which is an authorised deposit-taking institution under the *Banking Act* 1959 of Australia (“Banking Act”).

This opinion relates only to the laws of New South Wales (“NSW”), [insert a reference to the jurisdiction in which the Issuer is registered if not NSW] and the Commonwealth of Australia (together the “Relevant Laws”) and is given on the basis that it will be construed in accordance with the laws of NSW. We express no opinion about the laws of any other jurisdiction or factual matters.

Documents

We have examined copies (certified or otherwise identified to our satisfaction) of the following documents relating to the Counter-Indemnity:

- a. the Deed of Guarantee dated [*insert date*] executed by the Commonwealth (“**Guarantee**”);
- b. the Counter-Indemnity;
- c. [*insert details of the authorisations and any power of attorney in respect of the entry into, and performance of obligations under, the Counter-Indemnity*];
- d. the certificate of registration and the constitution of the Issuer; and

- e. the authority to carry on banking business in Australia given in favour of the Issuer dated [insert date] under the Banking Act.

In this opinion the expression “laws” means the common law, principles of equity and laws constituted or evidenced by documents available to the public generally.

Assumptions

We have relied on the assumptions specified in section 129 of the *Corporations Act 2001* of Australia (“Corporations Act”) and assumed:

- a. the authenticity of all signatures, seals, duty stamps and markings;
- b. the completeness, and conformity to originals, of all documents submitted to us;
- c. that all authorisations referred to above remain in full force and effect;
- d. that the Counter-Indemnity has been duly authorised and executed by the Commonwealth;
- e. on, and immediately following, the execution of the Counter-Indemnity, the Issuer was solvent;
- f. that, if an obligation is to be performed in a jurisdiction outside Australia, its performance will not be contrary to an official directive, impossible or illegal under the law of that jurisdiction; and
- g. that no person has been, or will be, engaged in conduct that is unconscionable, dishonest, misleading or deceptive or likely to mislead or deceive, or any other conduct in contravention of Parts 2E.1, 5.7B or 7.10 of the *Corporations Act* or Part 2 of the *Australian Securities and Investment Commission Act 2001* of Australia.

We have not taken any steps to verify these assumptions.

Searches

We have examined and relied on an inspection of the public records of the Issuer in extract which are available to the public and obtained from the Australian Securities and Investments Commission in [insert place] as at [insert time] local time on [insert date]. These records are not necessarily complete or up to date. We have not examined any documents filed by the Issuer nor have we made any other searches.

Opinion

On the foregoing basis and subject to the qualifications set out below, we are of the opinion that:

- a. the Issuer:
 - i. is incorporated and validly existing under the laws of Australia; and

- ii. is capable of suing and being sued in its corporate name;
- b. the Issuer has:
 - iii. the corporate power to enter into the Counter-Indemnity and to observe its obligations under it; and
 - iv. taken all corporate action required on its part to authorise the execution, delivery and observance of its obligations under the Counter-Indemnity;
- c. under the Relevant Laws, the obligations of the Issuer in respect of the Counter-Indemnity are legal, valid, binding and (subject to the terms of the Counter-Indemnity) enforceable.

The expression “enforceable” means that the relevant obligations are of a type that the courts enforce and does not mean that the obligations will necessarily be enforced in all circumstances in accordance with their terms; and

- d. the execution and delivery of the Counter-Indemnity and the observance of obligations under it has not violated and will not contravene any Relevant Law or its constitution.

Qualifications

This opinion is subject to the following qualifications:

- a. the nature and enforcement of obligations may be affected by lapse of time, failure to take action, laws and defences generally affecting creditors’ rights, court orders, public policy, restitution and the discretionary nature of equitable remedies;
- b. the rights of a party to the Counter-Indemnity to enforce its rights may be limited or affected by:
 - i. breaches by that person of its obligations under the Counter-Indemnity, or misrepresentations made by it in, or in connection with, the Counter-Indemnity, the Guarantee or an Eligibility Certificate (as defined for the purposes of the Guarantee);
 - ii. conduct of that party in relation to the Counter-Indemnity, the Guarantee or an Eligibility Certificate which is unlawful;
 - iii. the invalidity or unenforceability of the Guarantee or an Eligibility Certificate; or
 - iv. conduct of that person in relation to the Counter-Indemnity, the Guarantee or an Eligibility Certificate which gives rise to an estoppel or claim against that person by the person against whom it is seeking to enforce its rights under the Counter-Indemnity;
- c. the Relevant Laws may require that parties act reasonably and in good faith in their dealings with each other, discretions are exercised reasonably and opinions and determinations are based on good faith;
- d. we express no opinion as to:

- i. the severance of invalid or unenforceable provisions, an indemnity for legal costs, provisions precluding oral amendments or waivers;
 - ii. whether a judgment for a monetary amount would be given in a currency other than Australian dollars or the date on which a conversion from a foreign currency would be made for the purpose of enforcing a judgment; or
 - iii. whether the Issuer is in compliance with any prudential standard, prudential regulation or direction made by the Australian Prudential Regulation Authority;
- e. court proceedings may be stayed if the subject of the proceedings is concurrently before another court and a document may not be admissible in court proceedings unless applicable stamp duty has been paid; and
- f. claims against the Issuer are subject to the provisions of sections 13A and 16 of the Banking Act and section 86 of the *Reserve Bank Act* 1959 of Australia. In addition, under section 15C of the Banking Act, the fact that an ADI statutory manager (as defined in the Banking Act) is in control of the Issuer's business is not a ground for any other party to a contract to which the Issuer is a party to deny any obligations under that contract, accelerate any debt under that contract or close out any transaction relating to that contract.

Benefit

This opinion is addressed to you personally and may not, without our prior written consent, be:

- a. relied on by another person;
- b. disclosed, except to persons who in the ordinary course of government have access to your papers and records on the basis that they will make no further disclosure; or
- c. quoted or referred to in a public document.

This opinion is strictly limited to the matters stated in it and does not apply by implication to other matters.

This opinion is given in respect of the Relevant Laws which are in force at 9.00 am on the date of this letter.

Yours faithfully

A.2. THIS OPINION IS FOR USE FOR FOREIGN ADI ELIGIBLE INSTITUTIONS ONLY IN RESPECT OF THE COUNTER-INDEMNITY

The Commonwealth of Australia
c/- Scheme Administrator
Australian Government Guarantee Scheme for
Large Deposits and Wholesale Funding
c/- The Secretary
Reserve Bank of Australia
GPO Box 5367
SYDNEY NSW 2001

Dear Sirs

[insert name of Eligible Institution] (“Issuer”)

Deed of Counter-Indemnity dated [insert date] (“Counter-Indemnity”) given in favour of the Commonwealth of Australia (“Commonwealth”)

We refer to the entry by the Issuer into the Counter-Indemnity in respect of which we have acted as legal advisers to the Issuer which is an authorised deposit-taking institution under the *Banking Act 1959* of Australia (“Banking Act”).

This opinion relates only to the laws of New South Wales (“NSW”), [insert a reference to the jurisdiction in which the Issuer is registered if not NSW] and the Commonwealth of Australia (together the “Relevant Laws”) and is given on the basis that it will be construed in accordance with the laws of NSW. We express no opinion about the laws of any other jurisdiction or factual matters. We have relied upon the attached opinion of [insert details of foreign law counsel] dated [insert date] in relation to the Issuer and the laws of [insert jurisdiction of incorporation of foreign ADI] (“Foreign Law Opinion”).

Documents

We have examined copies (certified or otherwise identified to our satisfaction) of the following documents relating to the Counter-Indemnity:

- a. the Deed of Guarantee dated [insert date] executed by the Commonwealth (“Guarantee”);
- b. the Counter-Indemnity; and
- c. the authority to carry on banking business in Australia given in favour of the Issuer dated [insert date] under the Banking Act.

In this opinion the expression “laws” means the common law, principles of equity and laws constituted or evidenced by documents available to the public generally.

Assumptions

We have assumed:

- a. as confirmed in the Foreign Law Opinion, that the Issuer is duly established and existing and has status as a legal entity under the laws of [*insert jurisdiction of incorporation of foreign ADI*] with full power and authority to enter into and observe its obligations under the Documents and to own and possess its properties and conduct its business;
- b. that the Foreign Law Opinion is true and correct in all respects and none of the qualifications made in the Foreign Law Opinion affects the matters opined on in this opinion;
- c. the authenticity of all signatures, seals, duty stamps and markings;
- d. the completeness, and conformity to originals, of all documents submitted to us;
- e. that the Counter-Indemnity has been, or will be, duly authorised and executed by the Issuer and the Commonwealth;
- f. on, and immediately following, the execution of the Counter-Indemnity the Issuer was solvent;
- g. that, if an obligation is to be performed in a jurisdiction outside Australia, its performance will not be contrary to an official directive, impossible or illegal under the law of that jurisdiction; and
- h. that no person has been, or will be, engaged in conduct that is unconscionable, dishonest, misleading or deceptive or likely to mislead or deceive, or any other conduct in contravention of Parts 5.7B or 7.10 of the *Corporations Act 2001* ("Corporations Act") or Part 2 of the *Australian Securities and Investment Commission Act 2001* of Australia.

We have not taken any steps to verify these assumptions.

Searches

We have examined and relied on an inspection of the public records of the Issuer in extract which are available to the public and obtained from the Australian Securities and Investments Commission in [*insert place*] as at [*insert time*] local time on [*insert date*]. These records are not necessarily complete or up to date. We have not examined any documents filed by the Issuer nor have we made any other searches.

Opinion

On the foregoing basis and subject to the qualifications set out below, we are of the opinion that:

- a. the Issuer would be recognised as a legal entity in the Relevant Jurisdictions under either the common law or the *Foreign Corporations (Application of Laws) Act 1989* of Australia due to the recognition of the Issuer as a legal entity under the laws of [*insert jurisdiction of incorporation of foreign ADI*];
- b. the Issuer is registered under the Corporations Act as a foreign company carrying on business in Australia;
- c. under the Relevant Laws, the obligations of the Issuer in respect of the Counter-Indemnity are legal, valid, binding and (subject to the terms of the documents) enforceable.

The expression “enforceable” means that the relevant obligations are of a type that the courts enforce and does not mean that the obligations will necessarily be enforced in all circumstances in accordance with their terms; and

- d. the execution and delivery by, or on behalf of, the Issuer of the Counter-Indemnity and the observance of its obligations under it has not violated and will not contravene any Relevant Law.

Qualifications

This opinion is subject to the following qualifications:

- a. the nature and enforcement of obligations may be affected by lapse of time, failure to take action, laws and defences generally affecting creditors’ rights, court orders, public policy, restitution and the discretionary nature of equitable remedies;
- b. the rights of a party to the Counter-Indemnity to enforce its rights may be limited or affected by:
 - i. breaches by that person of its obligations under the Counter-Indemnity, or misrepresentations made by it in, or in connection with, the Counter-Indemnity, the Guarantee or an Eligibility Certificate (as defined for the purposes of the Guarantee);
 - ii. conduct of that party in relation to the Counter-Indemnity, the Guarantee or an Eligibility Certificate which is unlawful;
 - iii. the invalidity or unenforceability of the Guarantee or an Eligibility Certificate; or
 - iv. conduct of that person in relation to the Counter-Indemnity, the Guarantee or an Eligibility Certificate which gives rise to an estoppel or claim against that person by the person against whom it is seeking to enforce its rights under the Counter-Indemnity;

- c. the Relevant Laws may require that parties act reasonably and in good faith in their dealings with each other, discretions are exercised reasonably and opinions and determinations are based on good faith;
- d. we express no opinion as to:
 - i. the severance of invalid or unenforceable provisions, an indemnity for legal costs or provisions precluding oral amendments or waivers;
 - ii. whether a judgment for a monetary amount would be given in a currency other than Australian dollars or the date on which a conversion from a foreign currency would be made for the purpose of enforcing a judgment; or
 - iii. whether the Issuer is in compliance with any prudential standard, prudential regulation or direction made by the Australian Prudential Regulation Authority;
- e. regulations in Australia restrict or prohibit payments, transactions and dealings with assets having a prescribed connection with certain countries or named individuals or entities subject to international sanctions or associated with terrorism;
- f. court proceedings may be stayed if the subject of the proceedings is concurrently before another court and a document may not be admissible in court proceedings unless applicable stamp duty has been paid; and
- g. claims against the Issuer are subject to the provisions of section 11F of the Banking Act and section 86 of the *Reserve Bank Act 1959* of Australia.¹

Benefit

This opinion is addressed to you personally and may not, without our prior written consent, be:

- a. relied on by another person;
- b. disclosed, except to persons who in the ordinary course of government have access to your papers and records on the basis that they will make no further disclosure; or
- c. quoted or referred to in a public document.

This opinion is strictly limited to the matters stated in it and does not apply by implication to other matters.

¹ If this opinion is being given in respect of the Bank of China this qualification should be replaced with the following:

claims against the Issuer are subject to the provisions of sections 13A and 16 of the Banking Act and section 86 of the Reserve Bank Act 1959 of Australia. In addition, under section 15C of the Banking Act, the fact that an ADI statutory manager (as defined in the Banking Act) is in control of the Issuer's business is not a ground for any other party to a contract to which the Issuer is a party to deny any obligations under that contract, accelerate any debt under that contract or close out any transaction relating to that contract.

This opinion is given in respect of the Relevant Laws which are in force at 9.00 am on the date of this letter.

Yours faithfully