July 22, 2020

Mr Christopher Kirkpatrick
Secretary of the Commission

Ms Sarah E. Josephson
Deputy Director, Division of Clearing and Risk

U.S. Commodity Futures Trading Commission (the **CFTC**)
Three Lafayette Center
1155 21st Street, NW
Washington, DC 20581
United States of America

Dear Mr Kirkpatrick and Ms Josephson,

RIN number 3038- AE 33

Amendments to Swap Clearing Requirement Exemptions Under Part 50

Thank you for the opportunity for the New South Wales Treasury Corporation (**TCorp**) to provide comments on the CFTC's Notice of Proposed Rulemaking (**NPR**) outlining proposed amendments to section 2(h)(1) of the Commodity Exchange Act (**CEA**) (the **Clearing Requirement**) to address and codify the treatment of swaps entered into by certain central banks, sovereign entities, and international financial institutions.

This submission provides feedback on the proposed definition of '*sovereign entity*' detailed in Part II, paragraph (II)(A)(2) of the proposed rule amendment. This submission supplements the request for interpretive guidance submitted by TCorp on behalf of itself, the Queensland Financing Authority, the Treasury Corporation of Victoria, the South Australian Government Financing Authority, the Western Australian Treasury Corporation and the Tasmanian Public Finance Corporation (collectively, the **Australian Central Borrowing Authorities**) dated 27 August 2019 which TCorp submitted to the Division of Clearing and Risk (**DCR**) and Division of Swap Dealer and Intermediary Oversight (**DSIO**) (the **TCorp Letter**). Enclosed for ease of reference is a copy of this TCorp Letter and its supporting materials.

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Questions:

***Question 1:* Should the Commission consider adopting an alternate definition for 'sovereign entity'?**

TCorp strongly supports the proposed codification of the exception to the Clearing Requirements through the NPR, but submits that the spirit of comity and the traditions of the international system, as expressed by the CFTC in the End-User Exception to the Clearing Requirement dated July 19, 2012 (including the pre-amble thereto (the **End-User Exception**)[1], would be better supported if foreign governments, including states and their instrumentalities (such as agencies, departments, or ministries), were included within the definition of *'sovereign entity'*.

We note the following in support of our submission:

(A) using the Australian federal system as an example, this expanded definition of *'sovereign entity'* better recognizes the nuances of how sovereign authority is constitutionally embedded and exercised in different jurisdictions; and

(B) this expanded definition aligns with the treatment given to the Australian Central Borrowing Authorities in Australia and internationally (in accordance with the principles of comity and reciprocity).

The Clearing Requirement represents a significant impediment to the Australian Central Borrowing Authorities in accessing the United States swap market. Imposing the Clearing Requirements on TCorp (and the other Australian Central Borrowing Authorities) would impact its ability to deliver on its core public purposes and functions, which in turn has consequences for the pursuit of governmental objectives on a State and indeed national level[2]. It also puts United States swap dealers at a competitive disadvantage to other global swap dealers[3].

[1] We refer to the CFTC's comments in relation to the exception for "foreign governments" from the Clearing Requirement as set out in the End-User Exception to the Clearing Requirement dated July 19, 2012 (including the pre-amble thereto (the End-User Exception), as set out in more detail in the TCorp Letter.

We note in particular CFTC's comment that "[c]anons of statutory interpretation assume that legislators take account of the legitimate sovereign interest of other sovereign nations when they write American laws" 1 and "[g]iven these considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks and international financial institutions should not be subject to Section 2(h)(1) of the CEA."

[2] See paragraph 3(vii) of the TCorp Letter for further information on the impact to the Australian Central Borrowing Authorities.

[3] See paragraph 3(vi) of the TCorp Letter for further information.

(A) Roles of the State and Federal Government in Australia

(i) Concurrent and cooperative federalism in Australia

Given the different systems of federalism throughout the world, the CFTC should not limit its conception of 'sovereign entities' based on the American distinction between states and the federal government, as doing so may adversely impact foreign governments (including states and their instrumentalities) in countries with more integrated systems.

Paragraphs 3(i), (ii) and (iii) of the TCorp Letter detailed the form of federalism in Australia. In summary, the Australian system operates under a system of concurrent and cooperative federalism where the Australian federal government and individual State governments exist as independent bodies politic but within a financially and fiscally integrated system.

Whilst fiscal dependence is recognized as a feature of federation, there is substantial variation in the magnitude. The financial dependence of the States on the Commonwealth is amongst the highest of federations behind only Belgium and Austria[4].

The background for the magnitude of financial dependence in Australia was outlined in paragraphs 3(ii) and (iii) of the TCorp Letter and includes: States conceding income taxing powers to the Australian federal government in return for redistribution of Goods and Services Tax[5], and the constitutional ability of the Commonwealth to assume the debts of a State[6]. This is by way of example, in direct contrast to the

[4] IMF Fiscal Decentraliztion Database (2016 data). Note that Data is unavailable for Mexico, another federation.

[5] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9798/98cib05.

[6] Section 96, 105 and 105A of the Australian Constitution accessible at the following link: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.aspx.

immunity of state debts embedded in the Eleventh Amendment of the United States constitution[7] with supporting judicial precedent of the United States Supreme Court[8].

(ii) The importance of the Australian Central Borrowing Authorities on a State and National Level

We note the CFTC's comment on page 20 of the NPR:

> "…*Under this definition, "sovereign entity" would not include state, regional, provincial, or municipal governments. The Commission continues to believe, as it did in 2012, that most of these entities are predominantly engaged in non-banking and non-financial activities related to their core public purposes and functions and therefore are not likely to be "financial entities" ineligible to elect an exception from the Clearing Requirement under section 2(h)(7)(C) of the CEA…*"

As noted in Annex 1 of the TCorp Letter each of the Australian Central Borrowing Authorities are responsible for providing financing to, and for the benefit of, the relevant State government, public authorities and other public bodies or agencies of that State. That is to say, the Australian Central Borrowing Authorities do in fact predominantly engage in financial activities and such activities are central and vital to the core public purpose under their enabling legislation and the broader governmental objectives of the relevant State[9].

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[7] "*Federalism – Based Limitations on Congressional Power: An Overview*", September 2018, Congressional Research Service; "*Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*", Kenneth Thomas, September 2013, Congressional Research Service. Refer also "*Its Hour Come Round At Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty First Century*", Ernest A. Young, Harvard Journal of Law & Public Policy Vol.35, 594. Also "*The Constitutional Law of State Debt*", Emily D Johnson & Ernest A.Young, 2012, Duke Journal of Constitutional Law & Public Policy, Vol 7:1, 118.

[8] Refer to judicial authority for state sovereign immunity (Eleventh Amendment) and Constitution challenges to Congress enumerated Spending Clause powers and the Tenth Amendment of the U.S Constitution: Seminole Tribe v Florida 517 U.S 44, 72-73 (1996); Federal Maritime Commission v South Carolina Ports Authority 535 U.S 743, 760 (2002); National Federation of Independent Business v Sebelius 56 7U.S_132 S.Ct 2566 (2012); South Dakota v Dole 483 U.S 203 (1987).

[9] The central role of the Australian Central Borrowing Authorities in the affairs of government is well recognized in Australia:

> *"…Decisions about the establishment and structure of central borrowing authorities were matters for each individual State. Within the terms of the Gentlemen's Agreement, however, some acquiescence of the Loan Council was required to prevent deductions of the borrowings of a central borrowing agency on behalf of smaller authorities from the State's larger authorities program. That acquiescence was forthcoming in 1982 under 'approved working arrangements' which were swept away with the Gentlemen's Agreement itself two years later. In the wake of the 1982 Loan Council decision, all States established central borrowing agencies. The agencies, which still exist, operate at a sophisticated level and borrow funds domestically and overseas. A significant proportion of the borrowed funds, moreover, finds its way into the consolidated revenue of the State concerned. The precise technique whereby this achieved varies between States but all rely on a very literal interpretation of the power in clause 5 of the Financial Agreement for a State to borrow from sources within the State. The result is that the Financial Agreement can now be by-passed entirely, even for the purposes of government borrowing."*

Page 206, *Government Borrowing in Australia, Cheryl Saunders,* Melbourne University Law Review [Vol.17, December '89], accessible at the following link: http://www5.austlii.edu.au/au/journals/MelbULawRw/1989/16.htmll

The Australia Loan Council was formally established in 1927, as a means of coordinating borrowings undertaken by the Commonwealth on behalf of the States. The original ambit did not encompass borrowing by State semi-governmental and local authorities which was resolved in 1936 under a so called

Indeed, given the level of financial and fiscal integration between the federal government and State governments, the Australian Central Borrowing Authorities serve a key role in the governmental objectives of Australia on a national level including the undertaking of public infrastructure investment projects and delivering on mutually agreed national priorities.

As noted in the TCorp Letter, the entry into of swap transactions to hedge or mitigate exposure to interest rate, foreign exchange and/or commodity risks is an important part of the Australian Central Borrowing Authorities role in support of the pursuit of governmental objectives in a financially and fiscally sound manner.

Since the TCorp Letter, the economic impact of the global pandemic has increased the Australian Central Borrowing Authorities need to access the United States swap markets. In Table 2 of paragraph 3(vi) of the TCorp Letter we outlined our projected annual borrowing programme. In December 2019, the projected term funding requirement increased to AU$17 billion in connection with the New South Wales Government's half yearly budget review[10]. Whilst the release of the New South Wales Government budget for the 2020-2021 fiscal period has been deferred and expected to be released following the National Cabinet (refer to the Annexure of this submission) deliberations[11], TCorp's projected annual borrowing programme is expected to increase. From the period of March to May 2020, TCorp issued further fixed and floating rating bonds totalling AU$10 billion (increasing cumulative borrowings to AU$27 billion) to support the New South Wales Governments Economic Stimulus Package undertaken in connection with COVID-19[12]. These bond issuances encountered diminished capability of the United States swap counterparty's to provide associated swap hedging consistent with the experiences referenced in the TCorp Letter.

Not including state governments and their instrumentalities (agencies, departments, or ministries) of a foreign jurisdiction within the definition of *'sovereign entity'* would run counter to the spirit of comity and the traditions of the international system. Adopting and codifying an exclusionary position disregards the legitimate sovereign interests of foreign governments which will have unintended consequences. As outlined in this submission and the TCorp Letter, the activities of the Australian States

'Gentlemen's Agreement'. Further information on the Australia Loan Council is accessible at the following link: https://www.aph.gov.au/binaries/library/pubs/bp/1993/93bp29.pdf.

[10] https://www.tcorp.nsw.gov.au/resource/TCorp-2019-20-annual-borrowing-programme-mid-year-update.pdf

https://www.budget.nsw.gov.au/sites/default/files/budget-2019-12/2019-20%20Half-Yearly%20Budget%20Review%20%281%29.pdf

[11] https://www.treasury.nsw.gov.au/sites/default/files/2020-03/20200320%20-%20Dominic%20Perrottet%20med%20rel%20-%20NSW%20Treasurer%20confirms%202020%20Budget%20deferral.pdf

[12] https://www.treasury.nsw.gov.au/Covid-19Stimulus

undertaken by the Australian Central Borrowing Authorities impacts the governmental policies of Australia at the national level.

(iii) Recent Changes to the Australian Federal System

We would also like to take this opportunity to supplement the information in the TCorp Letter by outlining in the Annexure of this submission some recent developments in Australia including the establishment of a National Cabinet and other impacts of the COVID-19 pandemic which:

(1) further demonstrates the integrated and distinguishable form of federalism in Australia; and

(2) will result in increased fiscal requirements, and expected reliance on U.S swap dealers to assist with hedging activity.

(*B*) *The Treatment of the Australian Central Borrowing Authorities within Australia and Internationally*

As noted in paragraph 3(v) of the TCorp Letter there is a benefit to treating the Australian Central Borrowing Authorities consistently across the clearing and margin rules of all major jurisdictions.

To supplement the information supplied in the TCorp Letter we note the following:

(i) Treatment of the Australian Central Borrowing Authorities within Australia

In Australia bonds issued by the Australian Central Borrowing Authorities are recognized as high grade government bonds in the same way as bonds issued by the Australian federal government and the governments of other sovereign nations.

The Australian central bank, the Reserve Bank of Australia (the **RBA**), recognizes the bonds issued by the Australian Central Borrowing Authorities as government bonds. This consistent approach corroborates the key role played by Australian Central Borrowing Authorities in the resilience of the Australian financial system.

On 16 March 2020, the Governor of the RBA issued a statement[13] confirming its willingness to purchase government bonds (including those of the Australian Central

[13] https://www.rba.gov.au/media-releases/2020/mr-20-07.html

https://www.treasury.nsw.gov.au/sites/default/files/2020-03/Dominic%20Perrottet%20media%20statement%20-%20NSW%20Treasurer%20welcomes%20RBA%20announcement.pdf

Borrowing Authorities) in the secondary market to support the smooth functioning of the market, which it identified as a key pricing benchmark for the Australian financial system.

Monitoring of financial market volatility by the RBA continues, with public announcements that it will undertake necessary activity to achieve its target yield on 3-year Government bonds[14].

The recent recognition of Central Borrowing Authorities within the category of government bond is not unprecedented. In 2015 the RBA established its Committed Liquidity Facility (**CLF**)[15] as part of Australia's implementation of the Basel III liquidity standards requiring authorized deposit-taking Institutions (**ADIs**) to hold sufficient High-Quality Liquid Assets (**HQLA**)[16].

ADI's in jurisdictions with a shortage of domestic currency HQLA were able to satisfy prudential Liquidity Coverage Ratios (**LCR**) if they successfully obtained the CLF. The following statement from the RBA outlines its rationale for recognising bonds issued by the Australian Central Borrowing Authorities:

> *"The Australian dollar securities that have been assessed by APRA to be HQLA are Australian Government Securities (AGS) and securities issued by the central borrowing authorities of the states and territories (semis). All other forms of HQLA available in Australian dollars are liabilities of the Reserve Bank, namely banknotes and Exchange Settlement Account (ESA) balances. For securities to be considered HQLA, the Basel liquidity standard requires that they have a low risk profile and be traded in an active and sizeable market. AGS and semis satisfy these requirements since they are issued by governments in Australia and are actively traded in financial markets. In contrast, there is relatively little trading in other key types of Australian dollar securities, such as those issued by supranationals and foreign governments (supras), covered bonds, ADI-issued paper and asset-backed securities (Graph 1). Given this, these securities are not classified as HQLA."*

In July 2019, the RBA announced[17] its intention to reduce the overall size of the CLF in recognition of inter-alia: increased stock of government bonds in the market, higher availability of HQLA and improved turnover ratios.

[14] https://www.rba.gov.au/media-releases/2020/mr-20-11.html

[15] https://www.rba.gov.au/publications/bulletin/2019/sep/the-committed-liquidity-facility.html

[16] Refer to the Australian Prudential Regulation Authority (**APRA**) Liquidity prudential requirements detailed in Prudential Standard APS 210 accessible at the following link: https://www.legislation.gov.au/Details/F2017L00047/Download

[17] https://www.rba.gov.au/speeches/2019/sp-ag-2019-07-23.html

As additional context, the Australian Prudential Regulation Authority (**APRA**) also treats bonds issued by the Australian Central Borrowing Authorities in the same manner as other sovereign bonds for regulatory capital purposes. For the purposes of the capital adequacy prudential requirements which apply to ADIs detailed in Prudential Standard APS 112[18], the Australian Central Borrowing Authorities and other offshore governments are recognized as a *'sovereign'*:

> *"Sovereigns include the Commonwealth, State and Territory governments in Australia (including State and Territory central borrowing authorities), central, state and regional governments of other countries, the Reserve Bank of Australia and central banks of other countries, and the international banking agencies and multilateral development banks qualifying for a zero per cent risk weight as set out in Attachment A of this Prudential Standard."*

(ii) Treatment of the Australian Central Borrowing Authorities Internationally

The approach and recognition of the RBA and APRA aligns with the position of the European Commission and the Hong Kong Monetary Authority (**HKMA**).

Specifically the European Commission's amendment of EU Regulation 648 / 2012 (**EU Exemption**) issued on 2 March 2017 included Australia as a specified jurisdiction where central banks and public bodies charged with or intervening in the management of public debt are exempted from the clearing and reporting requirement. The EU Exemption recognizes the combined impact of monetary responsibilities and management of sovereign debt in the functioning of interest rate markets, and the consequent need to coordinate these functions. Furthermore the European Commission had regard to the comparative treatment of public bodies charged with the management of public debt under national laws, as well as the risk management standards applicable to the derivative transactions entered into by those bodies.

Similarly the Hong Kong Monetary Authority (**HKMA**) Margin Requirements[19] also recognize the interplay of prudential requirements through the exclusion of a 'Public Sector Entity'[20] as a covered entity. An entity must be recognized by a relevant banking supervisory authority outside of Hong Kong (whether by means of legislation or a public notice or otherwise) as a public sector entity for the purpose of applying preferential risk weighting treatment under the following capital adequacy standards to qualify as a 'Foreign Public Sector Entity':

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[18] https://www.legislation.gov.au/Details/F2018L00531/Html/Text#_ftn41

[19] https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/CR-G-14.pdf

[20] Refer to section 2 of the HKMA Banking (Capital) Rules accessible at the following link: https://www.elegislation.gov.hk/hk/cap155L.

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- The document entitled "International Convergence of Capital Measurement and Capital Standards" published by the Basel Committee in July 1988; or[21]

- The document entitled "International Convergence of Capital Measurement and Capital Standards – A Revised Framework (Comprehensive Version)" published by the Basel Committee in June 2006[22].

(iii) Reciprocity

The Australian Central Borrowing Authorities and foreign state governments are excluded from Australian clearing and margining requirements under the *ASIC Derivative Transaction Rules (Clearing) 2015* (Cth)[23] (**Australian Clearing Requirements**), and the *Banking, Insurance, Life Insurance and Superannuation (prudential standard) determination No, 1 of 2019 – Prudential Standard CPS 226 Margining and risk mitigation for non-centrally cleared derivatives*[24] (**Australian Margin Rules**).

As we noted in the TCorp Letter, the CFTC has determined Australia as a comparable jurisdiction for the purposes of margin for uncleared derivative requirements[25], however this does not fully address the concerns of the Australian Central Borrowing Authorities.

2. *If so, what definition should the Commission consider?*

We propose the following alternative approaches to recognize sovereigns:

(A) Granting an exemption to all foreign sovereign entities

The CFTC could consider extending the definition of *'sovereign entity'* to include all states governments (including agencies, departments, or ministries) outside of the United States. If the CFTC is of the view that such a definition would be too broad, in keeping with the June 2020 IOSCO Good Practices on Processes for Deference Report[26] we have included some additional conditions and formulations for the definition of *'sovereign entity'*.

[21] https://www.bis.org/publ/bcbs04a.htm.

[22] https://www.bis.org/publ/bcbs128.htm.

[23] https://www.legislation.gov.au/Details/F2015L01960.

[24] https://www.legislation.gov.au/Details/F2019L01506.

[25] Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, accessible at the following link: https://www.cftc.gov/sites/default/files/2019-03/federalregister032719.pdf.

[26] Specifically Good Practice 2 and Good Practice 3 – International Organization of Securities Commissions (IOSCO) Good Practices on Processes for Deference Report FR/06/2020 June 2020 accessible at the following link: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD659.pdf

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(B) Granting exemption to specifically named jurisdictions:

Similar to the EU Exemption this approach would afford the CFTC the ability to recognize any sovereign entity (whether a central, state or other public authority) as a '*sovereign entity'* if prescribed criteria were satisfied.

Relevant criteria could include:

- constitutional basis for sovereign authority;
- comparable recognition of the State or public authority as a *'sovereign'* under national laws;
- risk management standards applicable to the derivative transactions entered into by those bodies; and
- whether the CFTC has issued a "Comparability Determination" with respect to the sovereign entity's jurisdiction.

(C) Recognition of public sector entities based on government ownership:

The presently proposed definition of "*'sovereign entity'* " is retained, but in addition to this definition, based on a hybrid of the Canadian OSFI Margin Requirements and Switzerland FMIA Margin Requirements[27], the CFTC could recognize State or public authorities as a *'sovereign entity'* if the entity is:

- involved with the management of public debt in an offshore jurisdiction; and
- is directly or wholly owned by a government (whether state or federal) in that offshore jurisdiction.

(D) Alignment with the capital adequacy standards under national laws:

This approach is akin to the HKMA Margin Requirements where an entity could qualify as a *'sovereign entity'* if it is recognized by a relevant banking supervisory authority internationally (whether by means of legislation or a public notice or otherwise) to be a public sector entity for the purpose of applying preferential risk weighting treatment under capital adequacy standards formulated in accordance with Basel standards.

[27] FMIA Article 94(2) Entity

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<u>Question 2:</u> Should there be criteria for determining if transactions with a 'sovereign entity' should be exempt from the Clearing Requirement and, if so, what criteria would be appropriate?

See our responses in paragraph 2 (above) detailing alternative approaches to recognize sovereigns.

<u>Question 3:</u> Request on the use of swaps by central banks, sovereign entities, and international institutions, including quantitative data where available.

As noted in Annex 1 of the TCorp Letter, the Australian Central Borrowing Authorities expected to exceed the material swap exposure threshold comprise a small proportion of global government sector entities identified in the CFTC's Office of the Chief Economist Issues Report on Initial Margin Phase 5 – 24 October 2018[28].

By virtue of their enabling legislation, the Australian Central Borrowing Authorities enter into swaps for hedging purposes as a risk management tool with prescribed parameters. The restriction of the Australian Central Borrowing Authorities activities to their statutory public mandate ensures that their activities have a primary effect outside of the United States. The non-centrally cleared derivative exposures of Australian Central Borrowing Authorities are collateralized under credit support agreements with the benefit of a statutory guarantee with associated liabilities payable out of the Consolidated Fund of the relevant State. In addition to the explicit financial support noted in the TCorp Letter (with the updates set out in this letter), under the Australian Constitution the Australian federal government is able to assume or make agreement with respect to a State's public debts[29]. The embedded constitutional support is politically insulated because of the double majority referendum requirements in section 128 of the Australian constitution, which provides that any proposed alteration to the Constitution must be approved by: (a) a national majority of electors across Australia and (b) a majority of electors in a majority of the States. We submit that the recognition of Australian Central Borrowing Authorities as sovereign entities would have inconsequential impact on systemic risk given the sufficiency of these safeguards.

[28] https://www.cftc.gov/PressRoom/PressReleases/7834-18

[29] Section 105 and 105A Australian Constitution accessible at: https://www.legislation.gov.au/Details/C2013Q00005

We are very appreciative of the Commission's willingness to engage with us in respect of these issues and are pleased to further discuss any aspects of this submission by contacting any of the undersigned signatories.

Respectfully submitted,

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With a copy to:

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Annexure

Updates on the Australian System Following the TCorp Letter

The National Cabinet in Australia:

In 1992, the Australian federal government and the States established the Council of Australian Governments (**COAG**[30]) chaired by the Prime Minister and represented by the First Ministers and the President of the Australian Local Government Association (**AGLA**) to manage matters of national significance or matters requiring coordinated action by the States. On 13 March 2020 the COAG agreed to a national action and protocols to support a consistent approach to contain the COVID-19 pandemic. The Australian Prime Minister also established a new National Cabinet body[31] with distinguishable membership from the existing COAG intergovernmental forum[32]. In addition the National Cabinet was established in the format of the Australian federal government cabinet guidelines as noted by the Australian Prime Minister in the accompanying remarks[33]:

> *"I want to thank the premiers and the chief ministers for their support in bringing together this national cabinet. It has now been established formally under the Commonwealth government's cabinet guidelines. And it has the status of a meeting of Cabinet that would exist at a federal level, as does the meetings of the AHPPC and the national coordinating mechanism, which is feeding up into those arrangements."*

The ability of the National Cabinet to rapidly coordinate the national response to the COVID-19 pandemic has resulted in its permanent retention to replace the COAG. The National Cabinet continues with the specific remit of job creation and implementing economic reform to assist the rebound of the Australian economy[34].

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[30] https://www.coag.gov.au/about-coag

[31] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7245039%22

https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/AustralianCovid-19ResponseManagement

https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7243295%22

[32] National Cabinet membership excludes the President of the Australian Local Government Association.

[33] https://www.pm.gov.au/media/transcript-press-conference

[34] https://www.pm.gov.au/media/update-following-national-cabinet-meeting

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The unique form of concurrent federalism and constitutional recognition of the collective sovereignty between the Australian federal government and the States[35] detailed in the TCorp provides the requisite authority for establishment and continuation of the National Cabinet.

Updates to National Partnership Payments:

The National Partnership payments for specified projects and reforms outlined in Annex 2 of the TCorp Letter were updated on 13 March 2020 to include[36]:

- *National Partnership Agreement on COVID-19 Response*[37]:

  Under this partnership agreement the Australian federal government agreed to provide additional funding to assist with costs incurred by State health services in responding to the COVID-19 pandemic. This partnership agreement recognizes the shared responsibility of the Australian federal government and the States for health services with the following categories of contributions to the States:

  (i) Upfront advance payment - totaling AU$100 million distributed to States on a population share basis;

  (ii) Hospital Services Payments – contribution of the Australian federal government of 50% of costs incurred by States for the diagnosis and treatment of COVID-19 (and suspected) cases; and

  (iii) State public Health Payments - contribution of the Australian federal government of 50% of costs incurred by States for other activity to manage the outbreak of COVID-19[38].

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[35] Section 51 (xxv), (xxxvii), (xxxviii), 106, 107 and 108 Australian Constitution accessible at: https://www.legislation.gov.au/Details/C2013Q00005

Section 7 and 15 Australia Act 1986 (Cth) accessible at: https://www.legislation.gov.au/Details/C2004A03181

Refer also Anne Twomey publication "*The States, the Commonwealth and the Crown – the Battle for Sovereignty,* Papers on Parliament No. 48 (January 2008) accessible at: https://www.aph.gov.au/senate/~/~/link.aspx?_id=76D508CC96314F19A371171C7A270930&_z=z

[36] https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-13-march-2020

[37] https://www.coag.gov.au/meeting-outcomes/coag-meeting-communique-13-march-2020

[38] https://www.pm.gov.au/media/coronavirus-public-health-partnership-states-commonwealth-meet-50-cent-state-costs

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- *National Partnership on Disaster Risk Reduction*[39]*:*

  Under this partnership agreement, the Australian federal government agreed to provide additional financial support to assist States recovery efforts resulting from the unprecedented scale of the destruction and disruption caused by the 2019-2020 bushfires.

  This partnership agreement recognizes the mutual interest of the Australian federal government and the States to achieve a reduction of disaster risk outcomes through a contribution to be distributed to States upon satisfaction of National Disaster Risk Reduction Framework milestones and priorities[40].

  The funding under the National Partnership on Disaster Risk Recovery supplements existing the joint Disaster Recovery Funding Arrangements (**DRFA**) implemented by the Australian federal government and States on November 2018[41]. The DRFA recognizes the financial burden imposed on respective States in undertaking their primary responsibility of responding and provide relief and recovery assistance. Under the DRFA, the Australian federal government may provide up to 75% of the assistance for eligible expenditure of the States. Some eligible categories do not require prior approval of the Australian federal government and relates to expenses incurred by the States to assist individuals to alleviate personal hardship, restore public assets, supporting, among others, primary producers and small businesses by way of concessional loans, subsidies or grants. Other categories require agreement from the Prime Minister if the impact of a disaster is severe.

Updates to National Agreements Payments:

On 29 May 2020, in conjunction with the continuation of the National Cabinet, the Australian Prime Minister announced an increase totalling AU$131.4 billion funding to public hospitals over five years from 2020–2021. These payments supplement the National Agreement payments for specific delivery sectors including Health, Education, Skills and Workforce that was referenced in Annex 2 of the TCorp Letter[42].

[39] Refer footnote 37.

[40] https://www.coag.gov.au/sites/default/files/communique/national-partnership-agreement-disaster-risk-reduction.pdf

[41] https://www.disasterassist.gov.au/disaster-arrangements/disaster-recovery-funding-arrangements

https://www.disasterassist.gov.au/Documents/Natural-Disaster-Relief-and-Recovery-Arrangements/drfa-factsheet.PDF

[42] https://www.pm.gov.au/media/commonwealth-and-states-sign-131-billion-five-year-hospitals-agreement

August 27 2019

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U.S. Commodity Futures Trading Commission (the **CFTC**)
Three Lafayette Centre
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Request for Interpretative Guidance on behalf of certain Australian Central Borrowing Authorities

Dear Mr. Hutchison and Mr. Sterling

Following our meetings of July 16 and July 17 2019 with the Commissioners and representatives of the Division of Clearing and Risk (**DCR**) and the Division of Swap Dealer and Intermediary Oversight (**DSIO**), the New South Wales Treasury Corporation (**TCorp**) submits this request for interpretative guidance on behalf of itself and the Queensland Treasury Corporation (**QTC**), the Treasury Corporation of Victoria (**TCV**), the South Australian Government Financing Authority (**SAFA**), the Western Australian Treasury Corporation (**WATC**) and the Tasmanian Public Finance Corporation (**Tascorp**) (together, the **Central Borrowing Authorities**).

This letter requests that the DCR and/or the DSIO provides interpretative guidance to the Central Borrowing Authorities confirming that each of the Central Borrowing Authorities is a "foreign government" for the purposes of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (**Dodd-Frank**) and therefore outside of the scope of, *inter alia,* the requirement to submit certain swap transactions entered into with U.S. swap dealers for clearing through a derivatives clearing organization pursuant to Section 2(h)(1)(A) of the U.S. Commodity Exchange Act (the **CEA**) (the **Clearing Rules**) and the margin requirements adopted pursuant to, and under, Dodd-Frank (the **Margin Rules**)[1].

This letter supplements the following materials previously shared with the CFTC:

(a) the letter dated May 24 2019 from the Australian Financial Markets Association (**AFMA**) to the CFTC Commissioners (set out at Annex 1 to this letter) (the **AFMA Letter**);

[1] This includes both the initial margin rules adopted by the CFTC and those adopted by the Prudential Regulators.

(b) AFMA's responses dated on or about July 9 2019 to questions raised by certain CFTC staff members (the **AFMA Responses**), submitted by the Australian Securities and Investment Commission (**ASIC**);

(c) the slides presented by TCorp at the meetings referred to above and sent to the Commissioners, the DCR and the DSIO on July 22 2019 (set out at Annex 2 to this letter) (the **TCorp Presentation**); and

(d) the letters sent by TCorp to the Commissioners and representatives of the DCR and the DSIO dated July 26 2019.

1. The Requested Interpretation

For the reasons set out in this letter, the Central Borrowing Authorities respectfully request that the DCR and/or the DSIO issues interpretative guidance confirming that each of the Central Borrowing Authorities is a "foreign government" as defined in the CFTC's Final Rule on the End-User Exception to the Clearing Requirement dated July 19, 2012 (including the pre-amble thereto) (the **End-User Exception**) and is not subject to the Clearing Rules or the Margin Rules. We note that the CFTC expressly contemplated such relief in the context of the End-User Exception to the Clearing Rules, where it stated:

> *"Any exemptive or interpretative determinations based on the specific nature or circumstances of a particular entity [may be] addressed on a case by case basis, with the benefit of all relevant facts and circumstances through the interpretative or exemptive relief processes under the CEA and the [CFTC's] regulations."*[2]

2. "Foreign Governments" under the End-User Exception

In the End-User Exception the CFTC recognized that:

> *"There are important public policy implications related to the application of the end-user exception, and the clearing requirement generally, to foreign governments, foreign central banks and international financial institutions".*[3]

The CFTC went on to note that:

> *"Canons of statutory interpretation assume that legislators take account of the legitimate sovereign interests of other sovereign nations when they write American laws"; and*
>
> *"There is nothing in the text or history of the swap-related provisions of Title VII of the Dodd-Frank Act to establish that Congress intended to deviate from these traditions of the international system by subjecting foreign governments, foreign central banks, or international financial institutions to the clearing requirement set forth in Section 2(a)(i) of the CEA".*[4]

[2] See p.42561 of the End-User Exception.
[3] See p.42561 of the End-User Exception.
[4] See p. 42562 of the End-User Exception.

In conclusion with respect to "foreign governments", the CFTC stated that:

> *"Given these considerations of comity and in keeping with the traditions of the international system, the Commission believes that foreign governments, foreign central banks and international financial institutions should not be subject to Section 2(h)(1) of the CEA".*[5]

The End-User Exception therefore clearly provides that "foreign governments" are not subject to the Clearing Rules.

3. **The Central Borrowing Authorities as "Foreign Governments"**

We respectfully submit that each of the Central Borrowing Authorities should be categorized as a "foreign government" for the following reasons:

(i) Public Purpose and State Guarantee

Each Central Borrowing Authority is established by legislation and bound by the public purpose outlined in its enabling legislation. Annex 1 to this letter provides details of the enabling legislation and statutory guarantee for each Central Borrowing Authority.

Each Central Borrowing Authority is responsible for providing financing to, and for the benefit of, the relevant State government, public authorities and other public bodies or agencies of that State. The provision of financing by the Central Borrowing Authority is for the purpose of implementing policies which include policies in selected areas that were developed in conjunction with the Commonwealth of Australia (the **Australian Federal Government**). This includes the financing of public development projects such as infrastructure, health and education in the relevant State.[6] In connection with this the Central Borrowing Authorities enter into swaps transactions to hedge or mitigate their exposure to interest rate, foreign exchange and/or commodity risks.

The obligations of each Central Borrowing Authority under the swaps transactions it has entered into are guaranteed by the relevant State. The Australian Federal Government provides funding support to each State through the channels described in paragraph 3(ii) below and through the Australian Constitution provisions described in paragraph 3(iii) below. If such a guarantee were to be called upon, it would be payable from the relevant State's "consolidated fund" incorporating the financial support from the Australian Federal Government.

(ii) The Concurrent or Co-operative System of Federalism in Australia

Australia has a federal system of government with three levels: (i) the Australian Federal Government, which is responsible for national issues such as defence, foreign affairs, trade and social security, (ii) the States[7], which are responsible for providing services and undertaking public infrastructure

[5] See p. 42562 of the End-User Exception.
[6] For example, TCorp's establishing legislation states that TCorp's object is to provide financial services for or for the benefit of the New South Wales government, public authorities and other public bodies in the State of New South Wales.
[7] References in this letter to "State" or "States" are to the Australian States. Where reference is made to a U.S. State the phrase "U.S. States" is used.

investment projects for their residents in the specific sectors and also delivering on national priorities agreed with the Australian Federal Government; and (iii) local government.[8]

Australia's federal system differs significantly from the federal system in the U.S. Australia operates under a "concurrent" or "co-operative" form of federalism. Under this form of federalism there is enhanced interaction between the different levels of government when compared with the more formal separation between the U.S. federal government and the U.S. States.

The scope and delineation of responsibilities between the Australian Federal Government and the States is founded in section 51 of the Australian Constitution[9]. Furthermore constitutional precedence is accorded to the Australian Federal Government. Specifically section 52 of the Australian Constitution grants the Australian Federal Government exclusive power to enact legislation in matters where the Constitution grants it exclusive authority. Additionally section 109 of the Australian Constitution provides that Australian Federal Government law shall prevail in the event of any inconsistency with State law.

Section 51(iii) 86 and 90 of the Australian Constitution grants the Australian Federal Government exclusive taxing authority for the imposition of uniform customs, of excise and the bounties on the production or export of goods. The Goods and Services tax referenced in the TCorp Presentation falls within this exclusive constitutional domain of the Australian Federal Government. Additionally the States have not made constitutional concessions or taken steps to duplicate income tax imposed by the Australian Federal Government. The redistribution of tax revenue to States as detailed in the TCorp Presentation assists the Australian Federal Government to achieve its overarching policy objectives under the authority of section 96 of the Australian Constitution. This overarching policy objective is to ensure that services are distributed fairly amongst the citizens of Australia irrespective of the economy and population of each State.

The mechanics, methodology and administrative arrangements to support the redistribution of tax revenues and other financial arrangements to the States is enabled by Australian federal legislation (including the Federal Financial Relations Act 2009 (Cth)[10] and the COAF Reform Fund Act 2008 (Cth)[11] and the Intergovernmental Agreement on Federal Financial Relations effective 1 January 2009[12]. The oversight of these arrangements is undertaken by the Council on Federal Financial Relations, which is chaired by the Treasurer of the Australian Federal Government and has its membership comprising of the Treasurers of each of the respective States.

The Australian Federal Government and the States therefore interact closely on the development and delivery of policy. Additionally the Australian Federal Government plays a very active role in providing explicit financial support to each of the States.

The Australian Federal Government provides this financial support through various channels, including distribution of federal taxation revenues. Certain grants may be given to the States for use in specific sectors and national partnerships where the Australian Federal Government supports the delivery of certain reforms or projects. Whilst the examples of the grants[13] prescribed for expenditure on specific

[8] The local government level is not relevant to the relief being sought in this letter.
[9] https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.aspx
[10] https://www.legislation.gov.au/Details/C2018C00482
[11] https://www.legislation.gov.au/Details/C2019C00195
[12] http://www.federalfinancialrelations.gov.au/content/intergovernmental_agreements.aspx
[13] https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp17

sectors and the national partnership payments outlined in Annex 2 are specific to the State of New South Wales, the same principle applies to the other States[14]. This financial support from the Australian Federal Government to each of the States and the constitutional support described in paragraph 3(iii) below demonstrates the extremely strong collaboration that exists between the State and the Australian Federal Government within the Australian federal system.

(iii) Constitutional Support for the debts of the Australian States under the Australian Constitution

Pursuant to authority embedded in sections 96, 105 and 105A of the Australian Constitution[15], the Australian Federal Government can provide financial assistance, assume public debts or make agreements with respect to a State's debts.

Section 105 of the Australian Constitution enables the Australian Federal Government to unilaterally assume the debts of a State and seek indemnification in respect of the assumed debt from surplus revenue payable to the States. The Australian Federal Government has the absolute and unilateral discretion to invoke this authority without consulting any of the States. It is contemplated that this authority would be invoked to prevent contagion risk to other States resulting from fiscal indiscretions of another State.

The Australian Federal Government also has the constitutional authority under section 105A to make agreements with any State in respect of its public debts. This provision was inserted by constitutional referendum in 1928 as part of a framework agreed by the Australian Federal Government and States for assistance with debt reduction. The insertion of section 105A in the Australian Constitution also provided States assurance that they could rely on the Australian Federal Government for financial assistance without any precondition of the Australian Federal Government having available surplus revenue.

The constitutionally enshrined mechanisms for the Australian Federal Government to provide constitutional support to the States can be contrasted with the position in the U.S, where the U.S. federal government has generally resisted intervening to bailout U.S states or assume their debts and, although it has not been fully considered by the U.S. Supreme Court, there is some doubt as to whether or not such an act would be permitted by the U.S. constitution.[16] Although the U.S. federal government may provide direct state aid through certain means, there are examples where the U.S. federal government has not intervened to assume the debts of a U.S. state. For example, the U.S. federal government allowed eight states to default between 1839 and 1842, Arkansas defaulted on its debts without U.S. federal government support in 1933 following the Great Depression, and U.S. federal government funds were not provided to assume the debts of New York City during the New York fiscal crisis of 1975. These examples are also indicative of the more separated form of federalism that exists in the U.S. when compared to the concurrent or co-operative form of federalism in Australia. The oversight and command which the Australian Federal Government takes for the fiscal discipline of the States is enabled by the Council on Federal Financial Relations and associated legislation detailed in paragraph

[14] There is variation in the quantum of the grants and national partnership payments to other States.
[15] Refer footnote 10.
[16] See, for example, "The Constitutional Law of State Debt" by Emily D. Johnson and Ernest A. Young prepared for the Duke Journal of Constitutional Law & Public Policy symposium, February 10, 2012.

3(ii) and aforementioned Constitutional provisions. These Constitutional provisions were invoked during the Great Depression when the Australian Federal Government intervened as a result of New South Wales Government's failure to make coupon payments to bond holders. To provide certainty to bondholders and reinforce the aforementioned Constitutional provisions, in 1932 the Australian Federal Government enacted the Financial Agreements (Commonwealth Liability) legislation[17]. Pursuant to this legislation the Australian Federal Government has the ability to seek recovery from a State for the liability assumed as a consequence of invoking these legislative provisions[18]. The validity of these constitutional and legislative provisions have been judicially determined by the Australian High Court[19].

The Central Borrowing Authorities also submit that the broad discretionary power conferred on the Australian Federal Government is a more robust form of financial support than a statutory guarantee which may be trigger dependent (for example, generally a guarantee would be only be triggered if a State's debt is due and payable) and may be revoked or amended through political acts. The embedded constitutional support of the Australian Federal Government is substantially insulated from political risk. This is because section 128 of the Australian Constitution mandates that constitutional amendments must be approved by a double majority in a referendum following the successful passage through the bicameral legislature to effect constitutional amendments. Any amendment to the embedded constitutional support of the Australian Federal Government would therefore need to be approved through this process.

As the Central Borrowing Authorities benefit from broad discretionary powers conferred on the Australian Federal Government by the aforementioned mentioned constitutional provisions and such provisions are robust from political risk, the Central Borrowing Authorities respectfully requests the Commission adopt a "substance over form" approach in considering such financial support.

(iv) Consistency with a previous CFTC determination in relation to the End-User Exception

Categorizing each of the Central Borrowing Authorities as a "foreign government" would be consistent with the interpretation given by the CFTC in relation to KfW as described in the pre-amble within the End-User Exception.[20] With respect to KfW the CFTC noted that KfW is "a non-profit, public sector entity responsible to and owned by the federal and state authorities in Germany, mandated to serve a public purpose, and backed by an explicit, full statutory guarantee provided by the German federal government" and therefore categorized it as a "foreign government".[21] Each of the Central Borrowing Authorities is a non-profit, public sector entity that has financial support provided by both the relevant State and the Australian Federal Government. We respectfully submit that the CFTC apply a consistent standard of interpretation and categorize the Central Borrowing Authorities as "foreign governments" given they share all of the key features identified by the CFTC with respect to KfW. In fact, the nature of the financial support provided to the Central Borrowing Authorities by the Australian Federal Government is arguably stronger than the financial support provided to KfW, because to our knowledge

[17] https://www.legislation.gov.au/Details/C2004C00484
[18] Section 4 (4) of the Financial Agreements (Commonwealth Liability) Act 1932
[19] New South Wales v Commonwealth (No 1) [1932] HCA 7, 46 CLR 155; New South Wales v Commonwealth (No 2) [1932] HCA 8 46 CLR 235, New South Wales v Commonwealth (No 3) [1932] HCA 12 46 CLR 246
[20] See footnote 12 to the End-User Exception.
[21] See p. 42561 of the End-User Exception.

the German federal government does not constitutionally guarantee, or take responsibility for, the debts of German states.

(v) Cross-border Comparability and Reciprocity

We believe that the Central Borrowing Authorities should be treated consistently across the clearing and margin rules of all major jurisdictions. In this regard we note that pursuant to section 752(2)(a) of Dodd-Frank, the CFTC is directed to consult and coordinate with other regulators "on the establishment of consistent international standards with respect to the regulation of swaps and swap entities". The Central Borrowing Authorities are exempt from the Australian clearing[22] and margin[23] rules and the E.U. clearing and margin rules. We respectfully submit that the CFTC provides the interpretative guidance requested in this letter so that the Clearing Rules and Margin Rules in the U.S. are consistent with those in Australia and the E.U. The Central Borrowing Authorities reiterate the commentary from ASIC accompanying the AFMA Responses, which urges the CFTC to pursue reciprocity in a manner consistent with the comity principles articulated by the CFTC in the End-User Exception.

In this regard the Central Borrowing Authorities note the CFTC's comparability determination in relation to Australia (the **Comparability Determination**).[24] In the Comparability Determination the CFTC determined that:

> "*the scope of entities subject to the non-centrally cleared derivatives requirements under the laws of Australia is comparable in purpose and outcome to the scope of entities subject to the CFTC Margin Rule".*[25]

Under the terms of the Comparability Determination, if a U.S. swap dealer is a "Covered Swap Entity" under the CFTC's margin rules and is also an Australian Prudential Regulation Authority covered entity (an **APRA Covered Entity**), that swap dealer may classify its counterparties in accordance with the Australian margin rules with respect to determining whether margin must be exchanged.

Whilst the Central Borrowing Authorities welcome the Comparability Determination it does not fully address the concerns of the Central Borrowing Authorities in two important respects. Firstly, it does not apply to non-centrally cleared swap transactions with a swap dealer that is an APRA Covered Entity also subject to the margin rules published by the Prudential Regulators. Secondly, it does not apply to non-centrally cleared swap transactions entered into between a Central Borrowing Authority and a U.S. registered swap dealer that is subject to the CFTC's margin rules and that is not an APRA covered entity. We refer to the AFMA Responses for examples of the trading relationships affected by these two issues.

In the interests of ensuring the consistent application of regulation across jurisdictions and in light of the definitional asymmetries that are not addressed through the Comparability Determination, we

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[22] The Central Borrowing Authorities are not captured by the ASIC Derivative Transactions Rules (Clearing) 2015 which mandates Clearing of selected derivative transactions if an Australian Clearing Entity meets the clearing threshold and transacts with an Eligible Counterparty ((Australian Clearing Entity, Foreign Clearing Entity or Foreign Internationally Active Dealer) - Rules 1.2.4 to 1.2.7.

[23] APRA Prudential Standard CPS 226 a Covered Counterparty specifically excludes 'sovereigns' and "public sector entities". Consequently the Central Borrowing Authorities are excluded from the application of the Australian Margin Rules

[24] Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, accessible at: https://www.cftc.gov/sites/default/files/2019-03/federalregister032719.pdf

[25] See p. 19 of the Comparability Determination.

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respectfully submit that the each of the Central Borrowing Authorities be categorized as a "foreign government" that are not subject to the Clearing Rules or the Margin Rules.

(vi) Competitive Disadvantage for U.S. swap dealers and Central Borrowing Authorities

It is the desire of the Central Borrowing Authorities to continue entering into swaps transactions with U.S. swap dealers to mitigate market, liquidity and concentration risk. However, in the absence of the requested interpretative guidance U.S. swap dealers are not able to enter into certain swap transactions with the Central Borrowing Authorities and consequently the Central Borrowing Authorities access to U.S. swap dealers will continue to be severely limited.

As of today the Central Borrowing Authorities are unable to enter into interest rate swap transactions that are subject to the Clearing Rules with U.S. swap dealers because of the requirement that such swap transactions are centrally cleared. As a result, the Central Borrowing Authorities enter into such transactions with other swap dealers (for example, E.U., and Australian dealers) that are not subject to mandatory clearing requirements when transacting with the Central Borrowing Authorities. This puts the U.S. swap dealers at a competitive disadvantage as they cannot service the Central Borrowing Authorities. It also means that the Central Borrowing Authorities cannot access the liquidity and potentially beneficial pricing that is available from U.S. swap dealer counterparties. This will be exacerbated when the initial margin requirement under the Margin Rules applies to the Central Borrowing Authorities as, from that point onwards, the Central Borrowing Authorities will not be able to enter into a broader range of swap transactions with U.S. swap dealers.

TCorp regularly issues fixed and floating rate bonds and have appointed U.S. banks as part of the syndicate. Below is a table setting out two of TCorp's recent debt issuance transactions where U.S. banks were part of the syndicate, but could not provide the associated swap hedge as they are cleared products:

Table 1:

Issuance Date	Type	Maturity	Volume
24 June 2019	Syndicated bond issuance	20 April 2029	A$2.0bn
8 November 2018	Inaugural Green Bond Issuance	15 November 2028	A$1.8bn

The debt issuance proceeds are on-lent by TCorp to eligible New South Wales Government agencies. In practice, TCorp may issue a volume of debt that is greater than its present loan demand. Any residual debt and maturity mismatch is hedged with interest rate swaps. The U.S. banks that are appointed as arrangers and underwriters to the debt issuance syndicate cannot participate in the related swaps transactions because of the Clearing Rules. This puts them at a competitive disadvantage relative to swap dealers from other jurisdictions that are not subject to mandatory clearing or margin requirements when entering into swaps transactions with the Central Borrowing Authorities. Additionally U.S swap dealers do not, and will not, have the ensuing risk benefit associated with the inclusion of highly rated Central Borrowing Authorities as counterparties in their swap portfolios.

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The competitive disadvantage faced by the U.S. swap dealers is likely to be significant in the coming years because certain Central Borrowing Authorities will significantly increase their debt issuance and associated hedging activity. For example, TCorp's projected annual borrowings over the next four years is noted in Table 2 (below):

Table 2:

TCorp projected annual borrowing programme

Budget forecast 2019/20	**2019-20 $A bn**	**2020-21 $A bn**	**2021-22 $A bn**	**2022-23 $A bn**
New client loans	9.7	8.3	9.6	11.6
Projected term maturities	3.6	5.5	5.4	5.3
Total term funding requirement	13.3	13.8	15.0	16.9

Given the forecast increase in TCorp's borrowing requirement in the coming years, the potential volume of swap transactions which U.S. swap dealers would be excluded is material. We believe that this current competitive disadvantage could be alleviated if the interpretative guidance requested in this letter is provided.

(vii) Impact of the Clearing Rules and the Margin Rules on the Ratings and Foreign Currency Exposures of the Central Borrowing Authorities

As referred to in paragraph 3(vi) above, the Central Borrowing Authorities want to continue entering into swaps transactions with U.S. swap dealers. However, the Central Borrowing Authorities are mindful of the impact of Clearing Rules and the Margin Rules on their external credit ratings and foreign exposure policies.

Each of the Central Borrowing Authorities currently collateralize their non-centrally cleared swap transaction's mark-to-market exposures with cash in Australian dollars pursuant to credit support arrangements. If the Central Borrowing Authorities are subject to the Clearing Rules and the Margin Rules they would be required to fund and deposit additional cash and securities (either to clearing houses or third party custodians) when entering into swap transactions with U.S. swap dealers. This presents two issues.

First, in 2012 New South Wales enacted the Fiscal Responsibility Act[26] which mandates that the State of New South Wales maintain an external credit rating of AAA with fiscal targets to achieve this objective. The Treasurer of New South Wales is legislatively required to provide public disclosures in relation to the performance of this fiscal strategy. The requirement to post significant amounts of cash and securities would require a further increase borrowings which could impact negatively on the external credit ratings of the respective State entities.

[26] https://www.legislation.nsw.gov.au/#/view/act/2012/58/full

Second, if the Central Borrowing Authorities are subject to the Clearing Rules and the Margin Rules, their U.S swap dealer counterparties will post and collect cash and securities denominated in foreign currencies as collateral (for example, cash or securities denominated in U.S. dollars, Euros, Sterling or Japanese Yen). The Central Borrowing Authorities will therefore have foreign currency exposures that are contrary to their respective foreign exchange exposure policies and will have to incur significant costs to build infrastructure to support the posting and receiving of collateral in foreign currencies and the associated monitoring and management of such foreign exchange risk.

Having regard to the two factors identified above, the material costs in complying with the Clearing Rules and the Margin Rules and the fact that the Central Borrowing Authorities are not subject to equivalent Australian or E.U. rules, the Central Borrowing Authorities will be unlikely to continue entering into swap transactions with U.S. swap dealers absent the interpretative guidance requested in this letter.

(viii) Low Systemic Risk to the U.S. and global financial system

The swaps entered into by each of the Central Borrowing Authorities pose very low systemic risk to the U.S. and global financial system for the following reasons.

The Central Borrowing Authorities' swap exposures are a small proportion of the exposures of the global government sector entities identified in the CFTC's Office of the Chief Economist Issues Report on Initial Margin Phase 5 dated 24 October 2018.[27]

(ix) U.S. States as "Financial Entities"

The Central Borrowing Authorities understand that the CFTC may be concerned that the interpretative guidance proposed in this letter could subject it to similar requests from U.S. states and U.S. local government entities. Unlike the Central Borrowing Authorities, the CFTC has already noted in the End-User Exception that most U.S. states and U.S. local government entities are not engaged in activities that are in the business of banking, or are financial in nature. Instead the CFTC expects that most U.S. states and local government entities are predominantly engaged in other, non-banking and non-financial activities and may therefore rely on the End-User Exception.[28] For this reason the Central Borrowing Authorities believe this counter-argument to be mitigated.

4. **Application of the Margin Rules to "Foreign Governments"**

Each of the Central Borrowing Authorities respectfully submits that as a "foreign government" it should be excluded from the Margin Rules in a similar manner to the Clearing Rules. We believe this is supported by the arguments outlined above and the following:

(i) Comity

In the End-User Exception the CFTC expressly recognized that:

[27] Available here: https://www.cftc.gov/PressRoom/PressReleases/7834-18
[28] See p.42563 of the End-User Exception

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> *"There is nothing in the text or history of the swap-related provisions of Title VII of the Dodd-Frank Act to establish that Congress intended to deviate from these traditions of the international system by subjecting foreign governments, foreign central banks, or international financial institutions to the clearing requirement set forth in Section 2(a)(i) of the CEA."*[29]

Likewise, there is nothing in the text or history of Title VII of Dodd-Frank that suggests an intention on the part of Congress to subject "foreign governments" to the Margin Rules. The Central Borrowing Authorities respectfully request that the CFTC applies comity principles and determines that as a "foreign government", the Central Borrowing Authorities are not subject to the Margin Rules.

(ii) Inconsistency of Policy

There is an inconsistency if the Central Borrowing Authorities are "foreign governments" and therefore not subject to the Clearing Rules but subject to the Margin Rules. Despite a "foreign government's" swap transactions being outside of the Clearing Rules such swap transactions would still be subject to the Margin Rules. This would be inconsistent from a policy perspective as it would introduce costs associated with initial margining where Central Borrowing Authorities previously had an exemption from the Clearing Rules. This inconsistency may force Central Borrowing Authorities to centrally clearing swap transactions notwithstanding the exemption from the Clearing Rules.

(iii) Terrorism Risk Insurance Program Reauthorization Act of 2015

It is clear from the policy objectives underpinning Dodd-Frank and the rules promulgated thereunder that clearing and margin are intended to be interdependent regulatory requirements aimed at ensuring that in-scope counterparties properly manage counterparty credit risk in relation to both their cleared and uncleared swap transactions. The principle that those entities that are not subject to the Clearing Rules should also be outside of the scope of the Margin Rules was the primary reason why Congress introduced Title III, Section 302 of the Terrorism Risk Insurance Program Reauthorization Act of 2015 (**TRIPRA**). It is apparent that Congress, when introducing TRIPRA, intended to create an exclusion from the Margin Rules for any entity that is not subject to the Clearing Rules, regardless of the basis for exclusion. In this regard, we note the statements by Representative Lucas (R-OK 3rd District):

> *"[TRIPRA] ensures that those businesses which have been exempted from clearing requirements of their trades are also exempted from margining their trades, just as Congress always intended."*[30]

We believe that, based on the clear intention of Congress, "foreign governments" should be excluded from the Margin Rules as they are excluded from the Clearing Rules.

Both the CFTC's margin rules and the PR's margin rules state that their respective margin rules shall not apply to:

[29] See p. 42562 of the End-User Exception.
[30] Congressional Record 160:150 (December 10, 2014), P. H8987

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"A swap in which a counterparty (1) qualifies for an exemption under Section 2(h)(7)(A) of the Commodity Exchange Act, (2) qualifies for an exemption issued under Section 4(c)(1) of the Commodity Exchange Act for cooperative entities as defined in such exemption, or (3) satisfies the criteria in section 2(h)(7)(D) of the Commodity Exchange Act [...]."[31]

While the Central Borrowing Authorities acknowledge that they are not relying on any of the express exemptions under the above identified prongs, rather they are relying on the broader relief that was afforded in the context of the End-User Exception that established these prongs. This broader relief has exactly the same effect for the purposes of the Clearing Rules as relying on the express exemptions under the prongs identified above. There are unintended consequences if an entity that is outside of the Clearing Rules because of the three prongs above can avail itself of TRIPRA but an entity that is outside of the Clearing Rules because of the broader relief granted by the CFTC in the final rule establishing such prongs cannot rely on TRIPRA. Furthermore such an interpretation would put "foreign governments" and others at a material disadvantage which clearly was not the intention when TRIPRA was introduced by Congress.[32] To deny the application of TRIPRA in this instance on the basis of a narrow reading of its purpose does not accord with comity principles or Congressional intent, leading to an inconsistent policy outcome.

Accordingly, the Central Borrowing Authorities submit the appropriate interpretation of the Margin Rules (as amended by TRIPRA) is one that provides that any entity that is outside of the scope of the Clearing Rules as a result of the entire contents of the End-User Exception final rule published by the CFTC is also outside the scope of the Margin Rules. This interpretation would cover not only the specific three prongs identified above but also the CFTC's determination that "foreign governments" are not subject to the Clearing Rules, which formed part of the End-User Exception final rule.

Such an interpretation would provide a result that respects comity principles, is consistent with the Congressional intention behind the introduction of TRIPRA and would avoid the inconsistent policy result identified above.

5. The USD50 million Threshold and Delay to the initial margin requirement for certain entities

The Central Borrowing Authorities note the statement dated July 23 2019 from the Basel Committee and IOSCO agreeing to a one-year extension of the final implementation phase of the initial margin requirements for non-centrally cleared derivatives.[33] Whilst this additional time is helpful, it does not provide relief from the Clearing Rules currently in effect and, as stated above, such rules currently have a detrimental impact on the Central Borrowing Authorities' ability to transact swap transactions with U.S. swap dealers. In addition, the Central Borrowing Authorities will still likely be subject to the initial margin requirement under the Margin Rules from September 2021 and certain U.S. swap dealer counterparties of the Central Borrowing Authorities do not benefit from the Comparability Determination.

The position taken by global regulators, including the CFTC, in relation to the USD50 million threshold and the obligation to put in place the arrangements and documentation required to exchange initial

[31] See p.637 of the CFTC's final margin rules and p.74843 of the Prudential Regulators' final margin rules (with necessary amendments between the two).
[32] See the comments of Representative Lucas referred to at footnote 20.
[33] Available here: https://www.iosco.org/news/pdf/IOSCONEWS540.pdf

margin is also noted. Whilst this is also helpful, it does not provide relief from the Clearing Rules and the larger Central Borrowing Authorities expect to exceed the USD50million threshold in due course.

We would be happy to discuss this letter further at your convenience. In the meantime please do not hesitate to contact the undersigned for any queries.

Respectfully submitted,

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With a copy to:

Commissioner Heath P. Tarbert (Chairman)
Commissioner Rostin Behnam
Commissioner Dan M. Berkovitz
Commissioner Brian D. Quintenz
Commissioner Dawn DeBerry Stump
Mr Suyash G. Paliwal, Director of Office of International Affairs

U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
United States of America

ANNEX 1

AFMA LETTER TO CFTC

24 May 2019

Commissioner J. Christopher Giancarlo (Chairman)
Commissioner Rostin Behnam
Commissioner Dan M. Berkovitz
Commissioner Brian D. Quintenz
Commissioner Dawn DeBerry Stump

U.S. Commodity Futures Trading Commission (the "***CFTC***")
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
United States of America

Dear Commissioners

This Proposal is submitted by the Australian Financial Markets Association ("***AFMA***") on behalf of its members: New South Wales Treasury Corporation ("***TCorp***"), Queensland Treasury Corporation ("***QTC***"), Treasury Corporation of Victoria ("***TCV***"), South Australian Government Financing Authority ("***SAFA***"), Western Australian Treasury Corporation ("***WATC***") and Tasmanian Public Finance Corporation ("***Tascorp***"), collectively the "***Australian Sovereign Entities***".

In the absence of an exemption or regulatory relief it is likely that the Australian Sovereign Entities are, or will be, captured by certain U.S. derivative regulations imposed by Title VII of the Dodd Frank Wall Street Reform and Consumer Protection Act ("***Dodd Frank***"). In particular, it is likely that the Australian Sovereign Entities:

1. are required to submit swap transactions that are entered into with U.S. persons and are subject to the mandatory clearing requirement under Dodd Frank to a derivatives clearing organization (*the* "***Clearing Requirement***"); and

Australian Financial Markets Association
ABN 69 793 968 987
Level 25, Angel Place, 123 Pitt Street GPO Box 3655 Sydney NSW 2001
Tel: +612 9776 7995 Email: dlove@afma.com.au

2. will be required to exchange initial margin in relation to non-centrally cleared swap transactions entered into with U.S. swap dealers or major swap participants from September 1st, 2020 pursuant to: (i) the margin requirements adopted by the CFTC under section 4s(e) of the U.S. Commodity Exchange Act ("***CFTC Rules***"), or (ii) the margin requirements adopted by the Prudential Regulators pursuant to section 4s(e) of the U.S. Commodity Exchange Act and section 15F(e) of the U.S. Securities Exchange Act of 1934 ("***PR Rules***, and together with the CFTC Rules, the "***IM Rules***")[1].

Pursuant to Title III of the Terrorism Risk Insurance Program Reauthorization Act of 2015 [2], if the Australian Sovereign Entities are exempt from the Clearing Requirement they are not subject to the IM Rules.

The Proposal therefore asks the CFTC to determine that each of the Australian Sovereign Entities is a '*foreign government*' for the purposes of the Final Rule on End User Exception to the Clearing Requirement ("***End User Exception***") dated July 19, 2012[3] and therefore not subject to the Clearing Requirement or the IM Rules.

Each of the Australian Sovereign Entities are established by legislation and bound by the public purpose outlined in their respective enabling legislation. Additionally each of the Australian Sovereign Entities are expressly backed by a statutory guarantee of the relevant State and any amounts payable under such statutory guarantee are payable from the "Consolidated Fund" of the relevant State. The taxation revenues of the Australian States include grants from the Commonwealth Government[4]. **Attachment A** summarises the relevant enabling legislation and statutory guarantee for each Australian Sovereign Entity. Importantly, sovereignty in Australia is vested collectively in the Commonwealth of Australia and all of the States (rather than just the Commonwealth of Australia alone).[5] Under this form of federalism (referred to as "cooperative" or "concurrent" federalism) , and in contrast to the more formal separation between federal government and states in the United States of America and Canadian federal systems, the

---

[1] The Australian Sovereign Entities are also required to exchange variation margin in relation to certain non-centrally cleared swap transactions.

[2] Section 302 of Title III to the Terrorism Risk Insurance Programme Reauthorization Act of 2015 accessible at: https://www.govinfo.gov/content/pkg/BILLS-114hr26enr/html/BILLS-114hr26enr.htm) .

[3] End-User Exception to the Clearing Requirements for Swaps; Final Rule 17 CFR Part 39 accessible at: https://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-17291.html

[4] Section 51 (ii) and Section 90 Australian Constitution accessible at: https://www.legislation.gov.au/Details/C2013Q00005.

Revenue includes grants and goods and services tax (GST) distributed to States under horizontal fiscal equalisation (HFE) arrangements. Refer Intergovernmental Agreement (IGA) on Federal Financial Relations accessible at: https://www.cgc.gov.au/about-us/fiscal-equalisation

[5] Section 51 (xxv), (xxxvii), (xxxviii), 106, 107 and 108 Australian Constitution accessible at: https://www.legislation.gov.au/Details/C2013Q00005

Section 7 and 15 Australia Act 1986 (Cth) accessible at: https://www.legislation.gov.au/Details/C2004A03181

Refer also Anne Twomey publication "*The States, the Commonwealth and the Crown – the Battle for Sovereignty,* Papers on Parliament No. 48 (January 2008) accessible at: https://www.aph.gov.au/senate/~/~/link.aspx?_id=76D508CC96314F19A371171C7A270930&_z=z

Commonwealth of Australia and the States interact cooperatively and collectively to develop and deliver policy in certain areas.

AFMA advocates that each of the Australian Sovereign Entities should be categorised as a '*foreign government'* and consequently should not be subject to the Clearing Requirement or the IM Rules. AFMA respectfully submits this proposed course of action is appropriate for the following reasons:

1. **Comparability:**

   Categorising each of the Australian Sovereign Entities as a '*foreign government*' would be comparable with the exemption afforded to the Australian Sovereign Entities under the Australian clearing[6] and margin rules[7], Canadian Office of the Superintendent of Financial Institutions Canada ("***OFSI***") Margin requirements[8] and the European Markets and Infrastructure Regulation ("***EMIR"***)[9]. In the interests of consistency AFMA respectfully requests that the CFTC follows the regulatory position under the Australian margin and clearing rules, the Canadian margin rules and EMIR.

   AFMA notes that pursuant to the CFTC's comparability determination for Australia (the "***Comparability Determination"***)[10], the CFTC determined the scope of entities subject to the non-centrally cleared derivatives requirements under the laws of Australia are comparable in purpose and outcome to the scope of entities subject to the CFTC Rules. The request made in this Proposal is therefore consistent with the CFTC's conclusions in the Comparability Determination.

   In fact, under the terms of the Comparability Determination, if a dealer is a "Covered Swap Entity" under the CFTC Rules and is also an Australian Prudential Regulation Authority ("***APRA***") covered entity, that dealer may classify its counterparties in accordance with the Australian margin rules with respect to determining whether initial or variation margin must be exchanged.[11] Therefore, non-centrally cleared swap transactions between an Australian Sovereign Entity and a U.S. registered swap dealer that is also an APRA covered entity may not be subject to the CFTC Rules. Whilst this is, in AFMA's view, the correct outcome and supports the Proposal, it does not provide full relief for the Australian Sovereign Entities because it does not apply to non-centrally cleared swap transactions subject to the PR Rules and it does not apply to non-centrally cleared swap transactions entered into between an

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[6] Australian Sovereign Entities are not captured by the ASIC Derivative Transactions Rules (Clearing) 2015 which mandates Clearing of selected derivative transactions if an Australian Clearing Entity meets the clearing threshold and transacts with an Eligible Counterparty ((Australian Clearing Entity, Foreign Clearing Entity or Foreign Internationally Active Dealer) - Rules 1.2.4 to 1.2.7.

[7] APRA Prudential Standard CPS 226 a Covered Counterparty specifically excludes 'sovereigns' and "public sector entities". Consequently the Australian Sovereign Entities are excluded from the application of the Australian Margin Rules

[8] '*Excluded Covered Entity*' definition under OFSI Margin Requirements includes entities directly or wholly owned by government and sovereigns.

[9] EU Commission Delegated Regulation 2017/979 granted exemption to Australia, Canada, Hong Kong, Mexico, Switzerland in addition to Japan and United States (granted March 2013) in relation to central banks and bodies charged with or intervening in the management of public debt in Australia.

[10] Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, accessible at: https://www.cftc.gov/sites/default/files/2019-03/federalregister032719.pdf

[11] See page 18 of the Comparability Determination.

Australian Sovereign Entity and a U.S. registered swap dealer that is not an APRA covered entity.

2. **Comity:**

In the Final Rule in relation to End User Exception the CFTC observed there was nothing in the text or history of the swap related provisions of Dodd Frank to establish that Congress intended to deviate from these traditions of the international system by subjecting foreign governments, foreign central banks or international financial institutions to the clearing requirement set forth in Section 2(h)(1) of the Commodity Exchange Act. Additionally given considerations of comity, it was not necessary to determine if these entities are 'financial entities' under Section 2(h) of the Commodity Exchange Act. AFMA respectfully submits that categorising the Australian Sovereign Entities as "*foreign governments*" would be consistent with comity principles.

3. **Systemic Risk posed by Australian Sovereign Entities:**

The Australian Sovereign Entities that would exceed the material swap exposure threshold comprise a small proportion of global government sector entities identified in the CFTC's Office of the Chief Economist Issues Report on Initial Margin Phase 5 – 24 October 2018 [12].

By virtue of their enabling legislation, each of the Australian Sovereign Entities enter into swaps for hedging purposes as a risk management tool with prescribed parameters. The non-centrally cleared derivative exposures of Australian Sovereign Entities are collateralised under credit support agreements, and each of the Australian Sovereign Entities has the benefit of a statutory guarantee with associated liabilities payable out of the Consolidated Fund of the relevant State. Furthermore under the Constitution of the Commonwealth of Australia the Commonwealth is able to assume or make agreement with respect to a State's public debts [13]. The surplus revenues of the Commonwealth payable to States may be utilised to meet interest of any assumed debts of a State.

Accordingly AFMA respectfully submits the statutory safeguards which support the Australian Sovereign Entities (as set-out in Attachment A) are a significant risk mitigant to derivative exposures of U.S. swap counterparties and significantly reduces the risks introduced to the U.S. and global financial system by the Australian Sovereign Entities. Additionally the enabling legislation of each of the Australian Sovereign Entities which restricts the respective organisational activities to the statutory prescribed public mandate ensures that their activities have a primary effect outside of the United States.

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[12] https://www.cftc.gov/PressRoom/PressReleases/7834-18

[13] Section 105 and 105A Australian Constitution accessible at: https://www.legislation.gov.au/Details/C2013Q00005

4. **Consistency:**

AFMA notes that in the Final Rule in relation to the End-User Exception to the Clearing Requirement the CFTC determined that KfW is a "*foreign government*"[14]. As Australia has a distinguishable '*concurrent*' form of federal government[15] whereby the individual States and the Commonwealth of Australia interact cooperatively and collectively to develop and deliver policy in certain areas, AFMA believes that each of the States and their related Australian Sovereign Entities should be regarded as a "*foreign government*" for the purposes of the End-User Exception. In addition, AFMA believes it is important to note that under the statutory guarantees provided to each of the Australian Sovereign Entities, the recourse is ultimately to a Consolidated Fund which includes revenues from taxes distributed by the Commonwealth of Australia[16]. On this basis AFMA believes the Australian Sovereign Entities should each be regarded as a "*foreign government*" and therefore AFMA respectfully submits that it would be appropriate to grant that the Australian Sovereign Entities a similar determination as the CFTC's determination in relation to KfW

We would welcome the opportunity to discuss the contents of this letter with you and your staff. A designated contact of the Australian Sovereign Entities will make contact via their U.S legal advisor to arrange a convenient time to discuss. In the meantime please do not hesitate to contact the undersigned on +612 9776 7995 or by email dlove@afma.com.au for any queries.

Yours Sincerely

David Love
General Counsel & International Adviser

[14] See footnote 12 of the End-User Exception to the Clearing Requirements for Swaps; Final Rule 17 CFR Part 39 accessible at: https://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-17291.html

[15] Contrast with the Canadian form of co-ordinate form of federalism. Refer footnote 4. Also refer to "*Australian Federalism: The Role of States*" paragraphs 1.23 to 1.34 accessible at: https://www.parliament.vic.gov.au/archive/fsrc/report2/body/chapter1.htm

[16] Refer footnote 4.

Attachment A relevant enabling legislation and statutory guarantee for each of the Australian Sovereign Entity.

Australian Sovereign Entity	***Enabling Legislation and Public Mandate***	***Statutory Guarantee***	***Miscellaneous***
New South Wales Treasury Corporation ("***TCorp***")	Treasury Corporation Act 1983 (NSW) https://www.legislation.nsw.gov.au/#/view/act/1983/75/sec6 Section 5 object of the Corporation is to provide financial services for or for the benefit of the Government, public authorities and other public bodies in New South Wales.	✓ • Section 6.26 (Mandatory statutory guarantee of certain borrowing repayments) Government Sector Finance Act 2018 (NSW); • Section 6.27 (Discretionary Guarantee) Government Sector Finance Act 2018 (NSW); • Section 6.33 (Appropriation for liabilities) Government Sector Finance Act 2018 (NSW); • Section 22(B) (Discretionary guarantee) and section 22I (Appropriation) under Public Authorities (Financial Arrangements Act 1987 (NSW) is continued by the transitions and savings provisions contained in the Government Sector Finance Act 2018 (NSW), Schedule 1, Division 5 section 13(2) which provides that any guarantees provided continues in forces until	Fiscal Responsibility Act 2012 (NSW) https://www.legislation.nsw.gov.au/#/view/act/2012/58/part1/sec3

		they end despite the repeal of the Public Authorities (Financial Arrangements Act 1987 (NSW). https://www.legislation.nsw.gov.au/#/view/act/2018/55/part6/div6.5/sec6.26	
Queensland Treasury Corporation ("***QTC***")	Queensland Treasury Corporation Act 1988 (QLD) http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/qld/consol_act/qtca1988375/ Section 16 object of the Corporation to: • act as financial institution for the benefit of and the provision of financial resources and services to statutory bodies and the State; • enhance the financial position of the Corporation and other statutory bodies and the State; • to enter into and perform financial and other arrangements that in the	✓ • Section 32 (Statutory Guarantee) Queensland Treasury Corporation Act 1988 (QLD); • Section 33 (Discretionary Guarantee) Queensland Treasury Corporation Act 1988 (QLD); • Section 34 (Appropriation) Queensland Treasury Corporation Act 1988 (QLD).	

	opinion of the Corporation have as their objective either: advance of the finance interests of the State; the development of the State or any part thereof; or the benefit of persons or classes of persons resident in or likely to have an association with Queensland.		
Treasury Corporation of Victoria (***"TCV"***)	Treasury Corporation of Victoria Act 1992. http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/consol_act/tcova1992381/ Section 6 object of the Corporation to: • act as financial institution for the benefit of the State of Victoria and participating authorities; • enhance the financial position of the Corporation and of participating authorities of the State; and	✓ • Section 32 (Statutory Guarantee) Treasury Corporation of Victoria Act 1992; • Section 33 (Discretionary Guarantee) Treasury Corporation of Victoria Act 1992; • Section 34 (Appropriation for Guarantee) Treasury Corporation of Victoria Act 1992. http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst10.nsf/DDE300B846EED9C7CA257616000A3571/297F7D81F3E74E2AC	

	• provide services in an effective, efficient and competitive manner.	A2583660003F8D5/$FILE/92-80aa044%20authorised.pdf	
South Australian Government Financing Authority ("***SAFA***")	Government Financing Authority 1982 (SA) http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/sa/consol_act/gfaa1982340/ Section 11 functions of the Authority are to: • develop and implement borrowing and investment programmes for the benefit of semi governmental authorities; • act as captive insurer of the Crown, including undertaking and carrying on the business of insurers, re-insurers and co-insurers of all of any risks of the Crown; • provide advice to the Crown on issues relating to the insurance	✓ • Section 15(1) (Government Guarantee) Government Financing Authority Act 1982 (SA); • Section 15(2) (Government Guarantee) Government Financing Authority Act 1982 (SA). http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol_act/gfaa1982340/s15.html	

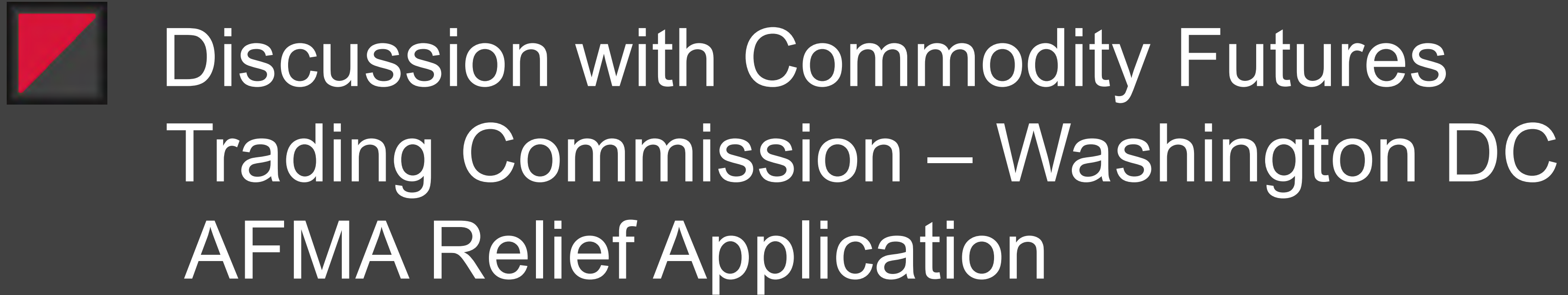
	and management of risks of the Crown. • engage in other financial or insurance related activities determined in be in the interest of the State.		
Western Australian Treasury Corporation (“***WATC***”)	Western Australian Treasury Corporation Act 1986 http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/wa/consol_act/watca1986476/ Section 9, the functions of the Corporation are to: • borrow money from any person and to lend to authorities; • develop and implement borrowing programmes; • manage financial rights and obligations of the Corporation and authorities;	✓ • Section 13 (1) (State Guarantee) Western Australia Treasury Corporation Act; • Section 13 (2) (State Guarantee) Western Australia Treasury Corporation Act.	

	• advise authorities on financial matters • accept moneys from authorities on deposit and in trust for investment either in the name of the authority concerned or the Corporation; • undertake negotiations for authorities in relation to borrowing or transactions.		
Tasmanian Public Finance Corporation (“***Tascorp***”)	Tasmanian Public Finance Corporation Act 1985 http://www.austlii.edu.au/cgi-bin/viewdb//au/legis/tas/consol_act/tpfca1985339/ Section 11, the functions of the Corporation are to: • borrow and implement borrowing and investment programmes for the benefit of participating authorities; and • engage in such other activities relating to the finances of the Government of the State or participating authorities as are	✓ • Section 15 (1) (Government Guarantee) Tasmanian Public Finance Corporation Act 1985 • Section 15 (2) (Government Guarantee) Tasmanian Public Finance Corporation Act 1985 http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/tas/consol_act/tpfca1985339/s15.html	

	contemplated by this Act or approved by the Treasurer.		

ANNEX 2

TCORP PRESENTATION



16 and 17 July 2019

Outline

1. Introduction:
   - AFMA and Australian Sovereign Entities
   - TCorp
2.
   - Australian – Concurrent form of Federal Government
   - Explicit Financial Support from the Commonwealth Government to States
3. Summary of AFMA relief request
4. Supporting Rationale and risk mitigants
5. CFTC-Australia Comparability Determination
6. Questions and Contacts

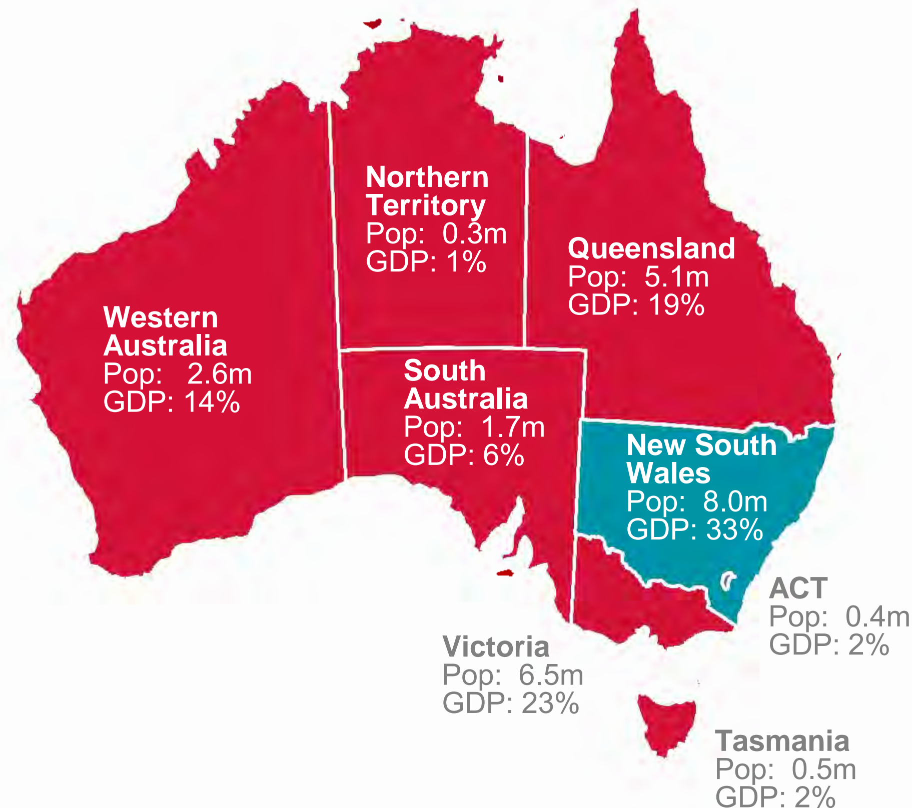
Introduction

Follow-up to letter from the Australian Financial Markets Association (AFMA) dated 24 May 2019. Also here to provide any additional responses directed from the CFTC Staff to the Australian Securities and Investment Commission (ASIC).

We are representing the following Australian Sovereign Entities

- New South Wales Treasury Corporation
- Queensland Treasury Corporation
- Treasury Corporation of Victoria
- South Australian Government Financing Authority
- Western Australia Treasury Corporation
- Tasmanian Public Finance Corporation

Introduction



Source: ABS 5220.0, 3101.0

New South Wales Treasury Corporation ("TCorp")

- Established in June 1983 under the Treasury Corporation Act 1983 of New South Wales (the "TCA").
- TCorp is subject to the control and direction of the NSW Treasurer. The management of daily affairs is delegated to the Chief Executive in accordance with policies determined by TCorp's Board of Directors.
- TCorp is bound by the public purpose detailed in the TCA "*to provide financial services for or for the benefit of the Government, public authorities and other public bodies*".
- The scope of financial services activities and eligible NSW public sector entities is regulated by the Government Sector Finance Act 2018 of New South Wales (the "GSF Act").

Australian – Concurrent form of Federal Government

- Education
- Police
- Health
- Ports
- Water
- Electricity
- State Taxes

Commonwealth (Cth) Government (1901)

- Universities
- Defence
- Foreign Affairs
- Trade
- Social Security
- Industry Policy
- Income Tax, Company Tax & GST

New South Wales (NSW)

Victoria (VIC)

Queensland (QLD)

Western Australia (WA)

South Australia (SA)

Tasmania (TAS)

Australia operates under a Federal system with three levels of government.

The Commonwealth is responsible for national issues and sources revenue principally from income and company taxes.

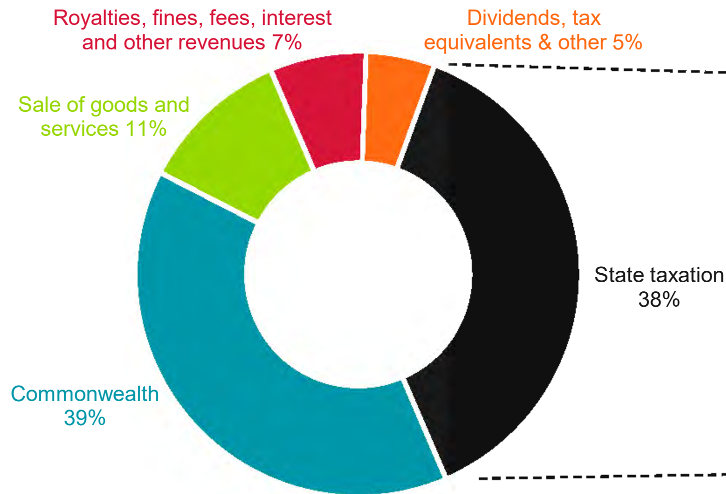
State governments are primarily responsible for providing services and undertaking public infrastructure investment

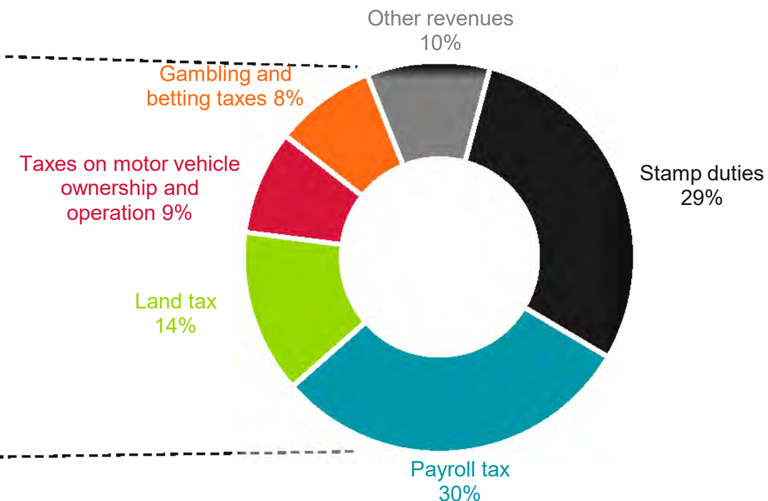
Explicit Financial Support from the Commonwealth Government (Cth) to States

NSW revenue

2018-19 Estimated budget: $81.1bn
2019-20 Budget : $84.3bn

2018-19 Composition of total revenue



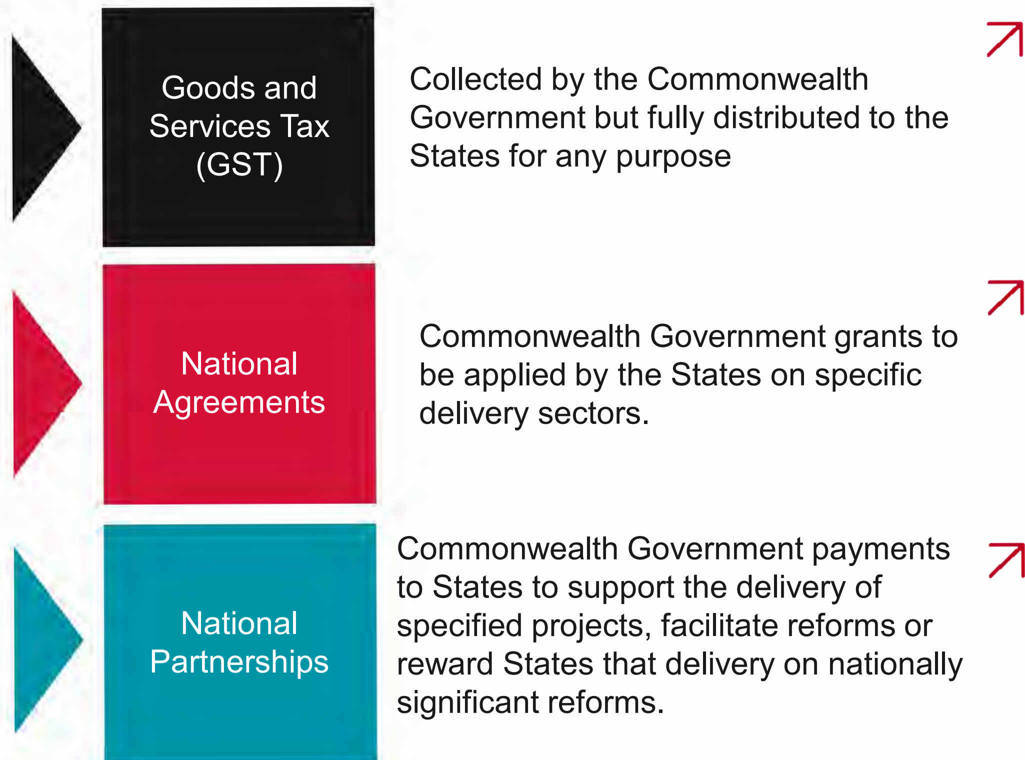


Source: NSW Budget Papers 2019-20

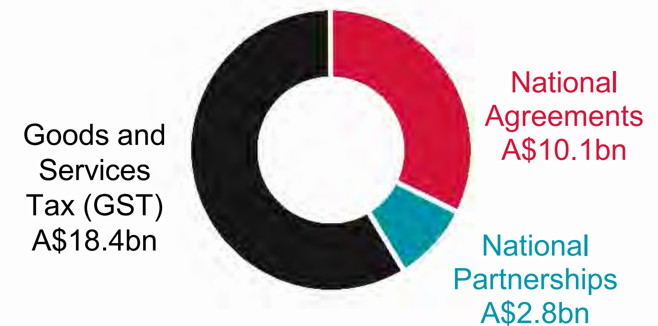
NSW GOVERNMENT | tcorp

Explicit Financial Support from the Commonwealth Government to States

Collectively State revenues provide only about half of what they spend each year. The Commonwealth Government supports the States through a clear series of explicit financial arrangements pursuant to arrangements detailed in the Intergovernmental Agreement on Federal Financial Relations ratified by the Council of Australian Governments (COAG).



NSW EXAMPLE: Commonwealth Government payments to NSW | 2018-19: $31.3bn (forecast)



National Agreements	
Health	A$6.7bn
Education	A$2.4bn
Housing	A$0.5bn
Skills and Workforce	A$0.5bn
National Partnerships	
Transport	A$1.7bn
Other	A$1.1bn

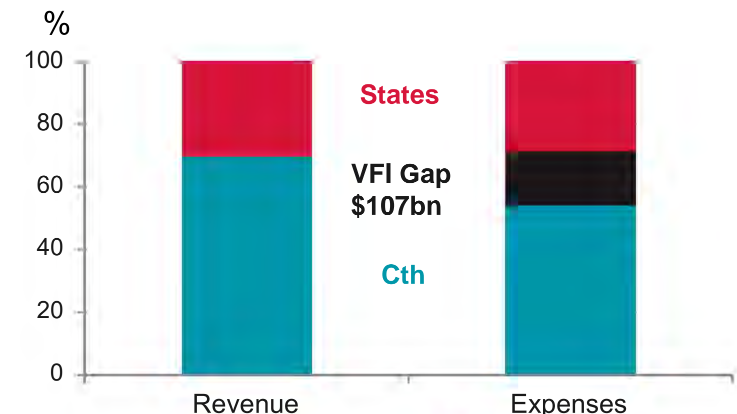
Source: NSW Budget Papers 2019-20

Explicit Financial Support from the Commonwealth Government to States

- Disproportionate level of tax revenue and expenses between Commonwealth Government and the States results in structural imbalance.
- Structural explicit financial support between the levels of government to ensure provision of services to the population.
- Ratings agencies repeatedly refer to these arrangements as *“the strong institutional framework benefiting State governments in Australia”*

Vertical Fiscal Imbalance

- The Cth collects **70%** of public sector revenues.
- Cth accounts for **55%** of public sector expenditure.
- The vertical fiscal imbalance is **15%.**
- The Cth advances revenues to the States to cover the imbalance.



AFMA relief request

1

Australian Sovereign Entities above the AANA Threshold (US $8bn) will be required to exchange IM in relation to non-centrally cleared swap transactions entered into with U.S. swap dealers or major swap participants from September 1st, 2020 pursuant to both the CFTC and PR Rules (the "IM Rules"). The CFTC's Comparability Determination for Australia does not address the definitional asymmetry of "foreign government" under the Dodd Frank Clearing Rules.

2

Pursuant to Title III of the Terrorism Risk Insurance Program Reauthorization Act of 2015 ("TRIPRA"), if the Australian Sovereign Entities are exempt from the clearing requirement they are not subject to the IM Rules.

3

CFTC has acknowledged that exemptive or interpretative determinations may be addressed on a case-by-case basis.

4

We are seeking a determination by the CFTC that each Australian Sovereign Entity is classified as a "foreign government" for purposes of the CFTC's End-User Exception therefore not subject to the clearing requirement or the IM Rules.

Supporting rationale and risk mitigants

Ensure comparability with EU, Australian and Canadian rules:

- Australian Sovereign Entities are exempt under Australian, Canadian and EU margin rules.

Concurrent Federalism:

- Australia's model of federalism is different to the U.S.
- Sovereignty is vested collectively in the federal and state governments (not a clear separation between the layers)
- Federal government and states cooperate collectively to develop and deliver policy

Features of Australian Sovereign Entities mean they should be categorized as a "foreign government":

- Established by legislation for a defined public purpose
- Swap obligations guaranteed by the State and guarantee funded in part by Federal government resources
- Under the Constitution of the Commonwealth of Australia the Commonwealth is able to assume or make an agreement with respect to a State's public debts

Comity

CFTC has acknowledged that Congress did not intend to subject foreign governments to the clearing requirement.

Supporting rationale and risk mitigants

Very low Systemic Risk to the U.S. or global system

- Australian Sovereign Entities' exposures are a small proportion of global government sector entities
- Each entity can only use swaps for hedging / risk mitigation under their enabling legislation
- Guarantee and Australian federal government support (see above)
- Mark-to-market exposure collateralised under VM credit support documents
- Zero threshold and ratings triggered Termination Event and Independent Amount.

Consistency with KfW determination

Given the key features of the Australian Sovereign Entities, a determination would be consistent with that given to KfW by the CFTC.

- KfW is responsible to and wholly owned by the German Federal Government (80%) and the German State Governments (20%)
- Bound by public purpose
- Explicit support by the German Federal Government
- Not for profit
- Public sector entity

Like KfW, TCorp acts as a development bank. TCorp provides financing for public development such as infrastructure projects: rail, road, airports, water systems and electricity grids.

Competitive disadvantage

Potential competitive disadvantage for certain U.S. swap dealers trading with Australian Sovereign Entities.

CFTC-AUS Comparability Determination

	Australian Sovereign Entity
U.S. swap dealer is a CFTC Covered Swap Entity + APRA covered entity	
U.S. swap dealer is a PR Covered Swap Entity + APRA covered entity	
U.S. swap dealer is a CFTC Covered Swap Entity + not APRA covered entity	

- Swaps between an Australian Sovereign Entity and a U.S. swap dealer subject to the PR Rules **do not** benefit from CFTC-AUS comparability – PR rules continue to apply
- Swaps between an Australian Sovereign Entity and a U.S. swap dealer not subject to the Australian rules **do not** benefit from CFTC-AUS comparability

Result:

- Potential competitive disadvantage for certain U.S. swap dealers trading with Australian Sovereign Entities.
- Inconsistent treatment of Australian Sovereign Entities (both within U.S. regulations and when compared with position under E.U. and Australian rules).

CERTIFICATION PURSUANT TO CFTC REGULATION 140.99(C)(3)

As required by CFTC Regulation 140.99(c)(3), we hereby (i) certify that the material facts set forth in the attached letter dated August 27, 2019 are true and complete to the best of our knowledge; and (ii) undertake to advise the CFTC, prior to the issuance of a response thereto, if any material representation contained therein ceases to be true and complete.

Fiona Trigona

Head of Funding and Balance Sheet

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