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The logo for Ashurst, featuring the word "ashurst" in a lowercase, bold, sans-serif font.

Dear Sirs

AUSTRALIAN LAW LEGAL OPINION GIVEN IN CONNECTION WITH PROVISION BY LCH LIMITED OF CLEARING AND CLIENT CLEARING SERVICES – SWAPCLEAR SERVICE

You have asked us to provide advice in respect of the Relevant Laws (as defined below) in response to certain questions raised by LCH Limited (**LCH** or **you**) in the legal opinion questionnaire document provided to us by you on 18 May 2018 relating to membership, insolvency, security, set-off and netting and client clearing (**Instructions**).

The relevant questions are set out in full in Section 2 of this advice together with the corresponding responses.

Terms not otherwise defined in this advice shall have the meaning ascribed to such terms in the General Regulations, Procedures, Default Rules, Settlement Finality Regulations and Product Specific Contract Terms and Eligibility Criteria Manual published on LCH's website as at the date of this opinion (**LCH's Rulebook**).

1. INTRODUCTION AND SCOPE OF ADVICE

1.1 LCH is a London-based clearing house which provides, on a global basis, clearing services in respect of a range of different asset classes and serving major international exchanges and platforms, as well as over-the-counter markets.

1.2 LCH is licensed under Part 7.3 of the *Corporations Act 2001* (Cth) (**Corporations Act**) to operate a clearing and settlement facility (**CS facility**) in Australia. Under its licence conditions, LCH is only authorised to operate the SwapClear facility in respect of interest rate derivatives and inflation rate derivatives entered into over-the-counter (**SwapClear Service**) in Australia.

This advice is given in respect of the SwapClear Service only and not in respect of any other LCH services.

1.3 Our advice is given in respect of Clearing Members each of which is an Australian company (as defined below) that is either:

- (a) an authorised-deposit taking institution (**ADI**) authorised under the *Banking Act 1959* (Cth) (**Banking Act**); or

- (b) a holder of an Australian financial services licence (**AFS Licensee**),
- but that is not:
- (c) an insurance company;
 - (d) a trustee of a trust (including a superannuation trustee and a responsible entity of a managed investment scheme); or
 - (e) a statutory corporation, a government authority or the Crown.

Each such Clearing Member is referred to as a **Relevant Clearing Member**.

1.4 In this advice:

- (a) **2013 Amendment Act** means the *Corporations and Financial Sector Legislation Amendment Act 2013* (Cth);
- (b) **ASIC** means the Australian Securities and Investments Commission;
- (c) **Australian company** means a company which is either registered or taken to be registered as a company under the Corporations Act;
- (d) **Clearing Member Contract** means the agreement between LCH and a Relevant Clearing Member comprising the Clearing Membership Agreement between them, the terms of each and every Relevant Contract between them and LCH's Rulebook;
- (e) **Netting Act** means the *Payment Systems and Netting Act 1998* (Cth);
- (f) **Parties** means LCH and a single Relevant Clearing Member to which this advice applies, and a reference to a **Party** is a reference to either of them;
- (g) **PPSA** means the *Personal Property Securities Act 2009* (Cth);
- (h) **PPS Register** means the Personal Property Securities Register established under the PPSA;
- (i) **Relevant Contract** means a Contract between LCH and a Relevant Clearing Member;
- (j) **Relevant Jurisdictions** means the States of New South Wales, Victoria, Western Australia, Queensland and South Australia and the Australian Capital Territory and the federal jurisdiction of the Commonwealth of Australia;
- (k) **Relevant Laws** means the laws of the Relevant Jurisdictions and the federal laws of Australia as they apply in the Relevant Jurisdictions;
- (l) if an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing; and
- (m) headings are for convenience only, and do not affect interpretation.

- 1.5 For the purposes of preparing our advice we have only reviewed the following documents:
- (a) LCH's Rulebook;
 - (b) the Instructions (as provided to us by you on 18 May 2018);
 - (c) a Clearing Membership Agreement (as defined in LCH's Rulebook) which is substantially in the form appended as Annexure C of this opinion letter (**Clearing Membership Agreement**);
 - (d) a deed of charge to be entered into between a Relevant Clearing Member and LCH in respect of all charged property transferred to LCH by that Clearing Member which is substantially in the form of the Deed of Charge set out in Annexure D (**Deed of Charge**) and which contains no material modifications to the wording set out in Clauses 2 (*The Secured Obligations*) and 3 (*Charge*) of that annexed form (for the avoidance of doubt, a change to the numbering of the clause or other provision in which the relevant wording appears in a particular deed of charge would not (in either such case) of itself constitute a "material modification" for these purposes);
 - (e) the Security Deed (as defined in LCH's Rulebook) which is substantially in the form appended as Annexure E of this opinion letter;
 - (f) a backup clearing member agreement to be used in circumstances where the Defaulting Clearing Member or Backup Clearing Member is incorporated in Australia and which is substantially in the form of the backup clearing member agreement set out in Annexure F; and
 - (g) a porting agreement to be used in circumstances where the Defaulting Clearing Member or Backup Clearing Member is incorporated in Australia and which is substantially in the form of the porting agreement set out in Annexure G.
- 1.6 The documents in paragraphs 1.5(a), (c), (d), (e), (f) and (g) are together referred to in this advice as the **LCH Agreements**.
- 1.7 Our advice is given in respect of the specific questions raised by LCH as set out in Section 2.
- 1.8 This advice is given on the basis that LCH is not at any time itself insolvent for the purposes of any insolvency law and is not subject to any Insolvency Proceeding or Reorganisation Measure.
- 1.9 This advice relates only to the Relevant Laws in force at 9.00 am (Sydney time) on the date of this advice. We express no opinion on the laws of any other jurisdiction. This advice is given on the basis that it will be construed in accordance with the Relevant Laws.
- 1.10 We are not expressing any opinion as to any matters of fact.
- 1.11 We express no opinion on taxation or stamp duty matters, other than to note that stamp duty under the Relevant Laws may be payable on a document and a document may not be enforceable or admissible in evidence unless any stamp duty that is payable on it has been paid.

2. **ADVICE**

On the basis of the matters in section 1 and the assumptions in paragraph 3.1 and subject to the qualifications in paragraph 3.2, we make the following statements of opinion. These statements of opinion are summary conclusions on specific questions which you have raised.

2.1 Membership

2.1.1 Are there any statutory limitations on the capacity of, or specific regulatory requirements associated with, any Relevant Clearing Member entering into the LCH Agreements (including for the purpose of granting of security under the Deed of Charge)?

In relation to statutory limitations on capacity, the Corporations Act provides that a company has the legal capacity of an individual both in and outside Australia. The Corporations Act also provides that the internal management of a company may be governed by one or more "replaceable rules" contained in the Corporations Act, by its constitution or a combination of both. A constitution may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers. However, section 125 of the Corporations Act states that the exercise of a power by a company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution.

Under its licence to operate a CS facility in Australia, LCH must require each Relevant Clearing Member to hold an Australian financial services licence, covering the relevant financial services the Relevant Clearing Member provides unless the Relevant Clearing Member is exempt under the Corporations Act from the requirement to hold such a licence in relation to its participation in the CS facility.

A Relevant Clearing Member must notify ASIC under section 912D(2) of the Corporations Act as soon as practicable after it becomes a participant of a licensed CS facility operated by LCH.

2.1.2 Would LCH be deemed to be domiciled, resident or carrying on business in Australia by virtue of providing clearing services to a Relevant Clearing Member? If so, would LCH be required to obtain a licence or be registered before providing clearing services to a Relevant Clearing Member or are there any special local arrangements for the recognition of overseas clearing houses in these circumstances?

(a) CS facility licence

LCH requires a CS facility licence under Part 7.3 of the Corporations Act to provide clearing services to a Relevant Clearing Member. As noted in paragraph 1.2 above, LCH holds such a CS facility licence in respect of the SwapClear Service.

(b) AFS licence regime

The clearing of transactions by LCH would involve the provision by LCH of the financial service of "dealing" in financial products, such as securities or derivatives. Such activity, if carried on as a business in Australia, would require LCH to hold an Australian financial services licence (**AFSL**), unless an exemption applies.

LCH does not require an AFSL in respect of the SwapClear Service as there is an exemption for the provision of a financial service provided by a CS facility licensee which is, or which is provided incidentally to, the operation of a licensed CS facility.

(c) Registration as a foreign company

A foreign company which carries on business in Australia must register as a foreign company under Division 2 of Part 5B.2 of the Corporations Act. LCH is

registered as foreign company in Australia, with registration number ARBN 142 251 045.

2.1.3 What type of documents should be obtained by LCH to evidence that a Relevant Clearing Member and its officers have the capacity and authority to enter into the LCH Agreements? Is LCH required to verify such evidence?

Section 128(1) of the Corporations Act entitles a person dealing with an Australian company to make certain assumptions in relation to dealings with that company.

By virtue of these statutory assumptions, when dealing with an Australian company, LCH may assume that:

- (a) the company's constitution, and any provisions of the Corporations Act that apply to the company as replaceable rules, have been complied with;
- (b) a person who appears, from information on the company which can be publicly obtained from ASIC, to be a director or a company secretary of the company has been duly appointed and has the authority to exercise the powers or perform duties customarily exercised or performed by that kind of officer or agent of a similar company; and
- (c) a document has been duly executed by the company if the document appears to have been executed in accordance with section 127(1) of the Corporations Act (see discussion below).

When dealing with an Australian company, LCH will not be able to rely on these statutory assumptions if, at the time of the transaction, LCH knew or suspected that the assumptions were incorrect.

In light of these assumptions, the capacity of an individual to bind an Australian company is normally evidenced by searching the company's records with ASIC to establish the identity of the company's directors and company secretaries. When dealing with the company, LCH is then entitled to assume that each individual listed as a director or company secretary has been duly appointed and has the authority to exercise the powers or perform the duties customarily exercised or performed by a director or, as the case may be, a company secretary of a similar company. Conducting a search of the company records with ASIC also enables LCH to verify that the Australian company exists and is not in the process of being wound up or in administration.

Section 127(1) of the Corporations Act provides that a company may execute a document without using a common seal if the document is signed by two directors of the company, by a director and a company secretary of the company or, in the case of a proprietary company that has a sole director who is also the sole company secretary, by that director. Section 127(1) does not, however, limit the manner in which an Australian company may execute a document.

In addition to the ASIC search, LCH may consider obtaining the following documents with respect to an Australian company prior to entering into the LCH Agreements:

- (i) Certified copy of the certificate of registration of the company

This document provides evidence that the company is a registered company under the Corporations Act.
- (ii) Certified copy of an extract of the minutes of a meeting of the board of directors

This is not strictly necessary in light of the statutory assumptions available under section 129 of the Corporations Act. However, on the basis that the directors are required to exercise their powers for the corporate benefit of the company, LCH may wish to consider obtaining an extract of the minutes of the meeting of the board of directors which should include a discussion of the benefit to the company of entering into the LCH Agreements.

(iii) Certified copy of each power of attorney (if relevant)

If any of the LCH Agreements are executed by the company under power of attorney, LCH should obtain a certified copy of each relevant power of attorney.

(iv) Certified copy of constitution

The company's constitution may be reviewed in order to establish whether there are any restrictions on the entry into the LCH Agreements or the transactions they contemplate. However as discussed in paragraph 2.1.1 above, the exercise of a power by a company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution.

(v) Legal opinion

LCH may wish to consider obtaining a legal opinion in relation to the capacity and authority of an Australian company to enter into the LCH Agreements. However, LCH may form a view that this is not strictly necessary in light of the statutory assumptions available under section 129 of the Corporations Act.

(vi) PPS Register

While not relevant to the question of capacity and authority, we do note that LCH should perform a search of the PPS Register in respect of its counterparties to identify any security interests registered over personal property granted by those counterparties. The results of the searches may necessitate further inquiries into any security interests registered against its counterparties in favour of other persons.

2.1.4 Are there any formalities to be complied with upon entry into of any of the LCH Agreements and, if so, what is the effect of a failure to comply with these?

LCH should where possible seek to "perfect" its security interests by way of "control" and also lodge financing statements on the PPS Register in relation to those security interests. See the discussion in paragraph 2.2.2 relating to the perfection of the security interests granted in favour of LCH under the Deed of Charge.

Similarly, each Clearing Client should where possible seek to "perfect" its security interests as against the Relevant Clearing Member by way of "control" and also lodge financing statements on the PPS Register in relation to those security interests. See the discussion in paragraph 2.3.9 relating to the perfection of the security interests granted in favour of the Clearing Client under the Security Deed (being a charge from the Relevant Clearing Member to the Clearing Client).

If the relevant secured party does not perfect its security interests either by registration or control then other secured creditors of the relevant counterparty may have a priority interest in the assets charged in favour of the relevant secured party. In addition, if the grantor of the security interest is an Australian company and it was

to become subject to the appointment of an administrator, execute a deed of company arrangement or was to be wound up, the security interest in those assets would vest in the counterparty (and the relevant secured party would be treated as an unsecured creditor of the counterparty).

2.1.5 **Would the courts of Australia uphold the contractual choice of law and jurisdiction set out in Regulation 51?**

Provided that the choice of English law is made in good faith, is not contrary to Australian public policy and is connected with the commercial realities of the transactions contemplated by the LCH Agreements, the choice of English law as the governing law of the LCH Agreements should be upheld by the courts of a Relevant Jurisdiction as a valid choice of law.

In relation to choice of jurisdiction, the courts of a Relevant Jurisdiction will generally give effect to the submission by an Australian company to the jurisdiction of the English courts unless the courts of the Relevant Jurisdiction consider that in the circumstances the English courts represent a clearly inappropriate forum. The courts of a Relevant Jurisdiction may not give effect to a clause purporting to confer exclusive jurisdiction upon the courts of a particular jurisdiction or place if the court of the Relevant Jurisdiction determines that, as a matter of construction, the clause is not an exclusive jurisdiction clause (for instance, because of a lack of mutuality in the operation of the clause).

2.1.6 **Will the courts uphold the judgement of the English courts or an English arbitration award?**

Foreign judgments are enforceable in Australia if registered in accordance with the *Foreign Judgments Act 1991* (Cth) (**Foreign Judgements Act**) or if recognised at common law. The Foreign Judgments Act permits the enforcement of judgments given by courts in countries named in regulations made pursuant to the Foreign Judgments Act. England is such a named country.

Any final and conclusive judgement of an English court in respect of the LCH Agreements, which is for a fixed sum of money, may be enforced in Australia by registration of the judgement under the Foreign Judgments Act, without re-examination of the merits of the case unless:

- the proceedings in the English court involved a denial of the principles of natural justice;
- the judgement is contrary to the public policy of Australia;
- the judgment was obtained by fraud or duress;
- the judgement is a penal or revenue judgement; or
- there has been a prior judgment in another court between the same parties concerning the same issues as are dealt with in the English judgment.

The *International Arbitration Act 1974* (Cth) gives effect to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). A foreign arbitral award to which the New York Convention applies will generally be enforceable in the Australian courts, subject to the conditions contained in the *International Arbitration Act 1974* (Cth). Further, an Australian court may refuse to enforce an award if it finds that:

- the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws enforced in the state or territory in which the court is sitting; or
- to enforce the award would be contrary to public policy.

2.1.7 Are there any "public policy" considerations that the courts may take into account in determining matters related to choice of law and/or the enforcement of foreign judgements?

Yes.

In respect of enforcement of foreign judgments, under section 7(2)(a)(xi) of the Foreign Judgements Act, the court must set aside the registration of a foreign judgement if the enforcement of that foreign judgement "would be contrary to public policy". This may be because the judgement is founded on a law which is not acceptable to Australian public policy or because the foreign judgement was obtained in a manner which was contrary to Australian public policy, for example by duress or undue influence. This section of the Act excludes enforcement of judgements which are immoral or offensive to public policy and incorporates the common law rule that Australian courts will not enforce judgements based on penalties or revenue debts. However, "for the public policy ground to be invoked ... enforcement must offend some principle of Australian public policy so sacrosanct as to require its maintenance at all costs".¹

In respect of choice of law, an Australian court will not give effect to a choice of law made in order to evade the application of a law which would have applied in the absence of such choice if that is a law of the forum. Australian courts may set aside a choice of law which is unfair or oppressive on one of the parties.

2.2 Insolvency, security, set-off and netting

2.2.1 Please identify the different types of Insolvency Proceedings and Reorganisation Measures. Would any of these not be covered by those events entitling LCH to liquidate, transfer or otherwise deal with Contracts as provided for in Rule 3 or Rule 5 of the Default Rules? Are any other events or procedures not envisaged in Rule 3 or Rule 5 of the Default Rules relevant?

(a) Insolvency Proceedings

The three principal insolvency procedures under the Relevant Laws are (a) receivership, (b) voluntary administration, and (c) liquidation. Where the Relevant Clearing Member is an ADI, statutory management under the Banking Act (**ADI Statutory Management**) is also relevant.

(i) Receivership

A receiver (or receiver and manager) can be appointed to property either privately (out of court and pursuant to an agreement) or by an order of the court.

The private appointment of a receiver usually occurs under a mortgage, charge or other form of security interest in an asset. The

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Jenton Overseas Investment Pte Ltd v Townsing (2008) 221 FLR 398 at [6]

security document will set out the right to appoint a receiver and the circumstances in which a receiver may be appointed (e.g. failure to repay principal or interest).

A receiver appointed by a secured creditor is generally specified in the security document to act as agent of the grantor over which he or she is appointed. The receiver has the powers set out in the security instrument together (in the case of property of a corporation as defined in the Corporations Act) with those powers set out in the Corporations Act.

(ii) Voluntary administration

A voluntary administrator can be appointed to a company by:

- the company, if the board of the company has resolved that in the opinion of the directors voting for the resolution the company is insolvent or likely to become insolvent at some future time and that an administrator should be appointed;
- a liquidator or provisional liquidator of the company, provided he or she thinks that the company is insolvent or likely to become insolvent at some future time; or
- a person who is entitled to enforce a security over the whole, or substantially the whole, of the company's property, if the security is enforceable.

The purpose of the administration is to administer the affairs of the insolvent company in a way that:

- maximises the chances of the company, or as much as possible of its business, continuing in existence; or if that is not possible,
- results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

A voluntary administrator acts as the agent of the company. Following appointment, the administrator investigates the company's business, property, affairs and financial circumstances and must form a view about whether it would be in the interests of the company's creditors:

- for the company to execute a deed of company arrangement;
- for the administration to end; or
- for the company to be wound up.

On the appointment of an administrator there is a general moratorium placed on proceedings in a court against the company or in relation to its property, without the leave of the court or the administrator's consent.

There is also a general moratorium on the enforcement of security interests over the property of the company, without the leave of the court or the administrator's consent. An exception to this rule is that a

secured creditor who has a security interest over the whole or substantially the whole of the property of the company is entitled to enforce its security interest during the decision period of 13 business days following either the giving of any required notice to the secured party of the appointment or following the appointment, or otherwise with the written consent of the administrator.

(iii) Liquidation

Liquidation (also called winding up) is a procedure to collect and realise the assets of a company, with the resulting proceeds (after payment of the costs and expenses of the winding up, including the remuneration of the liquidator) distributed to pay its debts and liabilities (with any amount that then remains distributed amongst its members in accordance with their rights and interests or as the constitution provides).

There are various methods pursuant to which a winding up can be commenced and a liquidator appointed to a company. These include:

- a court-ordered winding up;
- a members' voluntary winding up; and
- a creditors' voluntary winding up.

We also note that, if an application has been made to court for the winding up of the company, the court may appoint a liquidator provisionally to the company pending the final determination of the winding up application.

A common basis for an application to court to wind up a company, or for the commencement of a creditors' voluntary liquidation, is where the company is insolvent.

On the appointment of a liquidator (except in the case of a members' voluntary liquidation which is a solvent liquidation), there is a general moratorium on court proceedings against the company or in relation to its property (without the leave of the court).

The liquidator takes control of the company and, in broad terms, in the case of a court-ordered or creditors' voluntary winding up will generally take steps including:

- collect and sell the assets of the company;
- review the company's dealings with creditors to determine whether any transactions could be set aside (e.g. unfair preferences) for the benefit of the creditors;
- assess whether any claim should be made for a breach of duty (e.g. insolvent trading by directors);
- assess the claims of the company's unsecured creditors; and
- distribute the assets of the company to creditors in accordance with the Corporations Act.

(iv) ADI Statutory Management

Under the Banking Act, the Australian Prudential Regulation Authority (**APRA**) may investigate the affairs of an ADI, appoint a person to investigate the affairs of an ADI, take control of the ADI's business or appoint an administrator to take control of the ADI's business if:

- the ADI informs APRA that the ADI considers that it is likely to become unable to meet its obligations or that it is about to suspend payment;
- APRA considers that, in the absence of external support:
 - (a) the ADI may become unable to meet its obligations or the ADI may suspend payment; or
 - (b) it is likely that the ADI will be unable to carry on banking business in Australia consistently with the interests of its depositors or the stability of the financial system in Australia; or
- the ADI becomes unable to meet its obligations or suspends payment.

In addition, certain reforms to the Banking Act introduced in March 2018 (the **2018 Reforms**) clarified the scope of APRA's power to take control of, or appoint an administrator to take control of, the business of an Australian-incorporated subsidiary of an ADI, or of an authorised non-operating holding company (**NOHC**) of an ADI, in certain specified circumstances, which include:

(A) circumstances where:

- a statutory manager has taken control of the ADI; or
- APRA intends to appoint a statutory manager to take control of the ADI, and the statutory preconditions for such an appointment exist,

and APRA considers that either:

- the body provides essential services to the relevant ADI; or
- the proposed action is necessary to facilitate the resolution of the ADI, authorised NOHC, or other related body, as relevant; or

(B) circumstances where:

- an external administrator has been appointed over the body, or APRA considers that in the absence of external support the body would

become unable to meet its obligations or would suspend payment; and

- APRA considers that the proposed action is necessary to facilitate the resolution of the ADI, authorised NOHC, or other related body, as relevant.

The 2018 Reforms also clarified APRA's powers to appoint an administrator to take control of the business of a foreign ADI, as applying only to the Australian business assets and liabilities of the foreign ADI (being assets and liabilities of the foreign ADI in Australia, or any other assets and liabilities of the foreign ADI that are related to its operations in Australia, or otherwise specified pursuant to regulations made under the Banking Act).

When a statutory manager takes control of an ADI's business, the directors of the ADI cease to hold office and the statutory manager has the powers and functions of the members of the board of directors of the ADI (collectively and individually), including the board's powers of delegation.

A statutory manager may also sell or otherwise dispose of the whole or any part of the ADI's business. The sale or disposal may occur on any terms and conditions that the statutory manager considers appropriate.

Whilst a statutory management is in place, a person cannot begin or continue court proceedings against the ADI, unless leave has been granted by the court on the ground that the person would be caused hardship if leave were not granted or APRA has consented to the proceedings beginning or continuing.

Relevantly, the Banking Act also provides that certain matters relating to the exercise of crisis resolution measures in respect of a body, including, among others:

- (a) the conversion or write-off of a capital instrument;
- (b) the making of a recapitalisation direction by APRA;
- (c) an ADI statutory manager undertaking certain recapitalisation actions in respect of the body's share capital; and
- (d) an ADI statutory manager being in control of the body's business,

do not provide grounds for a contractual counterparty to deny an obligation, accelerate a debt, close out a transaction or enforce any security pursuant to a contract entered into with the affected body (including where the proper law of the contract is the law of a foreign country). In addition, a range of further stay provisions are applicable in relation to bodies subject to statutory management which, among other things, restrict:

- (a) the commencement or continuation of any enforcement process in relation to the body's property;
- (b) the disposition of property owned by the body; or
- (c) the enforcement of a security interest in relation to property of the body.

In this advice, we refer to the procedures described in (a)(i), (a)(ii), (a)(iii) and (a)(iv) above as the **Insolvency Proceedings**.

(b) Reorganisation Measure

A scheme of arrangement is the procedure under Part 5.1 of the Corporations Act whereby a company and its creditors (or a class of them) may, with the sanction of the court, become subject to a compromise or arrangement between them.

In this advice, we refer to a scheme of arrangement described above as the **Reorganisation Measure**.

However, we also note that a deed of company arrangement entered into as a result of a voluntary administration can also be used to effect a reorganisation of an insolvent or financially distressed company.

(c) Are any other events or procedures not envisaged in Rule 3 and Rule 5 of the Default Rules relevant?

None.

2.2.2 Would the Deed of Charge be effective in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant Clearing Member? Is there anything that would prevent LCH from enforcing its rights under the Deed of Charge? Would LCH be required to take any particular steps or abide by any particular procedures for the purposes of enforcing against Collateral provided to it by a Relevant Clearing Member under the Deed of Charge?

At the outset, it is important to determine whether any PPSA security interests arise under the Deed of Charge and the Clearing Member Contract. We deal with each of these separately below.

The primary Australian legislation relevant to the analysis of whether any PPSA security interests arise under the Deed of Charge and the Clearing Member Contract and, if so, the effectiveness of any such PPSA security interests in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant Clearing Member, is the PPSA.

A general description of the PPSA is set out in **Annexure A**. A detailed analysis of the provisions of the PPSA that are directly relevant to the issues addressed in this advice is set out in **Annexure B**.

(a) Security interests arising under the Deed of Charge

(i) Security interests under the PPSA

The PPSA applies to security interests in personal property if there is a relevant connection to Australia. Relevant connecting factors include

whether the grantor of the security interest is an Australian entity or whether the personal property is located in Australia – see **Annexure A** for a detailed discussion in this regard.

The PPSA also contains provisions prescribing which law will govern the validity, perfection and the effect of perfection or non-perfection of security interests under the PPSA in proceedings in an Australian court – see **Annexure B** for a detailed discussion in this regard. These provisions do not however affect the law that governs contractual obligations (including any obligations arising under a security agreement). As set out in paragraph 2.1.5 above and provided that the relevant requirements are met, an Australian court is likely to uphold the choice of English law as the governing law of the contractual obligations under the Deed of Charge.

Whether the PPSA will govern the validity, perfection and the effect of perfection or non-perfection of the security interests in the charged property in proceedings in an Australian court will ultimately depend on the nature of the charged property. Under the Deed of Charge, the nature of the charged property can take the form of bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments and all monies, rights or property which may at any time accrue or be offered in respect of the foregoing. Given the nature of the property charged under the Deed of Charge, it is likely, although not entirely certain in all respects, that the PPSA will govern the validity, perfection and the effect of perfection or non-perfection of the security interests in the charged property in proceedings in an Australian court. However the PPSA contains provisions relating to choice of law and conflict of laws in relation to security interests in personal property that will apply in legal proceedings in Australia. These provisions are complex and untested.

In relation to financial property (as defined in the PPSA), sections 240(1) and 240(3) of the PPSA (see **Annexure B**) have the effect that where the grantor is an Australian entity at the time the security interest in financial property (such as an investment instrument) attaches, the validity of that security interest will be governed by Australian law and the PPSA will apply. We note however that the courts of another jurisdiction may apply a different rule. Similarly, in the context of the perfection rules for financial property, where the grantor is an Australian entity at the time the security interest attaches, the perfection, and the effect of perfection or non-perfection of that security interest is governed by Australian law. We again note that the courts of another jurisdiction may apply a different rule. This is relevant because in each case the parties have submitted to the jurisdiction of the English courts and therefore there is no certainty that an English court will hold that the PPSA applies in this regard.

We note that the PPSA sets out certain exclusions relating to interests to which the PPSA does not apply. There are exclusions for both "market netting contracts" in section 8(1)(e) of the PPSA, which provide that:

This Act does not apply to any of the following interests (except as provided by subsection (2) or (3)):

- (e) any right or interest held by a person, or any interest provided for by any transaction, under any of the following (as defined in section 5 of the Payment Systems and Netting Act 1998):

...

- (iii) a market netting contract;

We refer to our discussion at 2.2.2(b) and 2.2.3(b) below, where we conclude, respectively, that LCH provides the SwapClear Service under a Clearing Member Contract which constitutes a market netting contract.

We have considered the above exclusions and, in our view, even though the Deed of Charge secures obligations arising under a market netting contract, the security interests that arise under the Deed of Charge arise under a separate agreement from the respective market netting contract. We think therefore that there is a potential risk that these security interests could be regarded as being not held by a person, or not being an interest provided for by any transaction, under a market netting contract. Whilst we think that there are good arguments to be made against this, out of an abundance of caution, we have recommended that LCH approach these arrangements as potentially giving rise to security interests under the PPSA because of the potentially adverse consequences of not perfecting any such security interests to the extent that it is held that they do arise.

(ii) Enforceability of security interests under the PPSA against grantor and third parties

The PPSA provides that a PPSA security interest in collateral is enforceable:

- against the grantor, only if the security interest has attached to the collateral; and
- against third parties, only if:
 - the security interest has attached to the collateral; and
 - one of the following applies:
 - the secured party has possession of the collateral; or
 - the secured party has perfected the PPSA security interest by control; or
 - a security agreement providing for a PPSA security interest in the collateral has been entered into. The security agreement must be evidenced by writing, signed by the grantor (or accepted in some other manner) and must contain a description of the collateral.

A PPSA security interest will attach to collateral if the grantor has rights in the collateral (or the power to transfer rights in the collateral) and either value is given for the PPSA security interest or

the grantor does an act by which the PPSA security interest arises (for example, by signing a security agreement).

In each case, the requirements for enforceability of the PPSA security interests arising under the Deed of Charge should be satisfied upon due execution of the Deed of Charge.

(iii) Perfection of security interests under the PPSA

There are various ways in which a secured party is able to perfect PPSA security interests under the PPSA that have attached to collateral. The main options available to a secured party are registration, control and possession. The most appropriate method of perfection will depend on the nature of the relevant collateral. See **Annexure A** for a detailed discussion in this regard.

The PPSA security interest held by LCH under the Deed of Charge is likely to be perfected by control in respect of most collateral provided to it by a Relevant Clearing Member. If this is the case then LCH would have a super priority security interest under the PPSA in respect of collateral where it is perfected by control and would not need to register its security interests in relation to this collateral on the PPS Register. However, it is possible that security interests over some collateral may not be capable of perfection by control (such as, for example, cash held in a bank account). If LCH were to take a security interest over collateral which cannot be perfected by control, we would recommend that LCH perfect its security interests by registration.

Given the nature of the collateral, it is difficult to foresee any circumstances where the extinguishment rules in the PPSA would apply in circumstances where LCH has taken all steps it is required to take under the PPSA to perfect its security interest in the property charged under the Deed of Charge. From a priority perspective, there are certain prescribed security interests under section 73 of the PPSA that could have priority over all other security interests in the same collateral. Given the nature of the collateral in this case however, it is difficult to see how such competing security interests could arise.

(iv) Enforcement under the PPSA

Chapter 4 of the PPSA sets out a series of general rules for enforcing PPSA security interests in personal property. These rules do not apply to all PPSA security interests and parties to a security agreement can agree to contract out of some, but not all of, these rules. Generally, these rules regulate how a secured party seizes, disposes of and retains collateral and prescribes certain duties that a secured party is required to comply with if it enforces its PPSA security interests in personal property (such as, for example, the duty to exercise its rights and remedies to enforce honestly and in a commercially reasonable manner). Relevantly, except in limited circumstances, these rules do not apply to a secured party who has a PPS security interest in investment instruments (as defined in the PPSA) or intermediated securities (as defined in the PPSA) that are perfected by possession or control.

(v) Enforcement under the Corporations Act and the Netting Act

When a company is placed in receivership or liquidation under the Corporations Act, there is no moratorium which would prevent a secured creditor from enforcing a security interest against the property of the company (except, in the case of liquidation, through the commencement of proceedings).

When a company is placed into voluntary administration under the Corporations Act, there is a general moratorium (subject to limited exceptions) on the enforcement of security over the property of the company, without the leave of the court or the administrator's consent.

An exception to this rule is that a secured creditor who has a security interest over the whole, or substantially the whole, of the property of the company is entitled to enforce its security interest during the decision period of 13 business days following either the giving of any required notice to the secured party of the appointment or following the appointment (or otherwise with the written consent of the administrator).

We note that there is further exception to the moratorium under section 440JA of the Corporations Act which applies during the voluntary administration of a company where the operator of a clearing and settlement facility has a possessory security interest² over property of the company consisting of securities, derivatives, or certain other forms of property. One of the requirements in section 440JA of the Corporations Act is that the secured party be "the operator of a clearing and settlement facility"³ within the meaning of the Corporations Act. LCH would be considered an operator of a clearing and settlement facility with regards to both the SwapClear Service.

Separately section 16 of the Netting Act protects the enforcement of security in relation to market netting contracts.

Section 16(2)(fa) of the Netting Act applies to market netting contracts and provides that, if certain conditions are satisfied, then any security given by the party, in accordance with the contract, in respect of obligations of a party to the contract may be enforced in accordance with the market netting contract. The SwapClear Service is a recognised netting market, and this provision will apply to the SwapClear Service.

Section 16(4) of the Netting Act further clarifies the language in section 16(2)(fa) by providing that a reference in section 16 to things done, or that may be done, *in accordance with a contract* is taken to include things done, or that may be done, *in accordance with any security given in accordance with the contract*. Our view is that the words "in accordance with any security given in accordance with the contract" is intended to refer to any security given under or as

² A possessory security interest for the purposes of the Corporations Act means a security interest that is (a) a PPSA security interest in the property that is perfected by possession or control within the meaning of the PPSA; or (b) a lien or a pledge in relation to the property (Corporations Act s 51D).

³ Corporations Act s 440JA(d)(ii)

contemplated by the market netting contract (for example, because it is a condition to the market netting contract that the security be given) so that any security granted to secure obligations under the market netting contract is subject to these provisions.

Accordingly, in our view, the provisions of section 16(2)(fa) of the Netting Act apply to both:

- (A) security given in the market netting contract itself; and
- (B) security given under a separate contract in support of obligations owed under the market netting contract (for example, under a separate specific security deed),

but, in this instance, would only apply to the Deed of Charge related to the SwapClear Service (the SwapClear Service being part of a netting market).

The Netting Act then goes on to provide in section 16(3) that section 16(2) has effect "despite any other law".

In our view, section 16(2)(fa) of the Netting Act will prevail over section 440B of the Corporations Act (which provides for the general moratorium on the enforcement of security interests described above) by virtue of the operation of section 16(3) of the Netting Act. This means that LCH will, in connection with SwapClear Service, be able to enforce the security under the Deed of Charge in accordance with its terms during the moratorium imposed in a voluntary administration if it is permitted to do so under section 16(2)(fa) of the Netting Act, without the need to rely on the exception in section 440JA of the Corporations Act.

We also note that the moratorium imposed in a voluntary administration merely affects the secured creditor's ability to enforce its rights during the period of the administration. In other words, those rights are only suspended and will resume once the administration has ceased.

(b) Security interest(s) arising under the Clearing Member Contract

As discussed in paragraph 2.2.2(a)(i) above, section 8(1)(e) of the PPSA provides that the PPSA does not apply to any right or interest held by a person, or any interest provided for by any transaction, under a market netting contract.

In our view, a Clearing Member Contract (including the Default Rules) in connection with the SwapClear Service is a "market netting contract" under the Netting Act primarily because:

- (A) the Clearing Member Contract constitutes a contract entered into in accordance with the rules that govern the operation of a "netting market" (as defined in the Netting Act);
- (B) the arrangement under which LCH provides the SwapClear Service is a "netting market" as it is a licensed CS facility as defined in section 761A of the Corporations Act that is approved by the Minister for the purposes of the definition of "netting market" under the Netting Act; and

- (C) the Clearing Member Contract is a contract under which obligations between parties to the contract are netted (see, for example, Rule 8 of the Default Rules).

Therefore, it is our view that the relevant provisions of the Clearing Member Contract in connection with the SwapClear Service constitute a market netting contract so that the exclusion under section 8(1)(e)(iii) of the PPSA will apply with the effect that these arrangements do not require perfection as a security interest under the PPSA.

2.2.3

Would LCH have the right to take the actions provided for under the Default Rules (including exercising rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 but not at this stage considering those actions specifically provided for in the Client Clearing Annex to the Default Rules) in the event that a Relevant Clearing Member was subject to Insolvency Proceedings or Reorganisation Measures? Is it necessary or recommended that LCH should specify that certain Insolvency Proceedings and/or Reorganisation Measures will constitute an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules? If the answer is affirmative, please identify those specific Insolvency Proceedings and/or Reorganisation Measures to which the answer applies and briefly explain your reasoning.

We note at the outset that certain amendments to the Corporations Act taking effect on and from 1 July 2018 (referred to hereafter as the **Ipsa Facto Law**) introduced a regime which may restrict the exercise of contractual rights against a contractual counterparty that is undergoing, or intends to undergo, one of a number of restructuring and insolvency related-processes under Australian law. In this paragraph 2.2.3, we first outline the potential interaction between the Ipsa Facto Law and the Default Rules, and subsequently consider the interaction between the Default Rules for the SwapClear Service, and other Australian laws and regulations.

Under the Ipsa Facto Law, contractual rights arising under contracts, agreements or arrangements entered into on or after 1 July 2018 may not be enforceable against a counterparty, to the extent those rights are triggered by the occurrence of events including:

- (a) the appointment of a voluntary administrator in relation to the counterparty;
- (b) the counterparty becoming subject to, or publicly announcing that it will make an application to become subject to, a Reorganisation Measure (for the purpose of avoiding being wound up in insolvency);
- (c) the appointment of a receiver or other managing controller to the whole (or substantially the whole) of a counterparty's property; or
- (d) as a result of the financial position of the counterparty whilst affected by one of the events described in paragraphs (a) to (c).

The Ipsa Facto Law does not restrict the exercise of contractual rights arising for reasons *other than* a body being subject to one of the aforementioned matters, including by reason of any other kind of contractual default.

Furthermore, there are certain exceptions from the Ipsa Facto Law for specified types of contracts and contractual rights, which are provided for by regulations and a Ministerial declaration introduced pursuant to the Ipsa Facto Law.

In relation to exempt types of contracts specified in the regulations, provided that a right is "contained in" a kind of contract, agreement or arrangement as specified, the restrictions on exercising that right imposed by the Ipso Facto Law will not apply. Regulation 5.3A.50(2) (the **Ipso Facto Regulation**) of the Corporations Regulations 2001 (Cth) (the **Corporations Regulations**) prescribes, among others, the following types of contracts:

[...]

- (z) *a contract, agreement or arrangement that is the operating rules of a clearing and settlement facility;*

Note: The operating rules of a licensed CS facility (within the meaning of Chapter 7 of the Act) are a contract, see subsection 822B(1) of the Act.

- (za) *a contract, agreement or arrangement that confers rights on the operator of a financial market, or the operator of a clearing and settlement facility, in relation to the operation of the market or facility;*

[...]

- (zi) *a contract, agreement or arrangement under which security is given over financial property (within the meaning of the Payment Systems and Netting Act 1998) in respect of eligible obligations (within the meaning of that Act) of a party to a contract covered by paragraph (zh);*

- (zj) *a netting market (within the meaning of the Payment Systems and Netting Act 1998);*

- (zk) *a market netting contract (within the meaning of the Payment Systems and Netting Act 1998);*

- (zl) *a contract, agreement or arrangement under which security is given, in accordance with a market netting contract covered by paragraph (zk), in respect of obligations of a party to the market netting contract;*

In addition, a Ministerial declaration made pursuant to the Ipso Facto Law (the **Ipso Facto Declaration**) declares certain kinds of rights to be exempt from the operation of the Ipso Facto Law, including, relevantly, "a right of set-off or a right of combination of accounts", "a right to net balances or other amounts", and "a right to: (i) assign or otherwise transfer rights or obligations; or (ii) novate rights or obligations".

The aforementioned provisions of the Ipso Facto Law, the Ipso Facto Regulation and the Ipso Facto Declaration have not, as of the date of this opinion, been the subject of judicial consideration in Australia and accordingly, there is no direct guidance as to how an Australian court may approach their application. However, we set out in the following paragraphs what we consider to be the likely way in which the exemptions to the Ipso Facto Law set out above would be applied in relation to the Default Rules.

Firstly, we are of the view that paragraph (z) of the Ipso Facto Regulation would exempt the Default Rules from the operation of the Ipso Facto Law, on the basis that they would likely be considered to form part of the "operating rules" of LCH as defined in the Corporations Act. The phrase "operating rules" in respect of a clearing and settlement facility is defined in section 761A of the Corporations Act as:

any rules (however described) made by the operator of the facility, or contained in the operator's constitution, that deal with:

(i) the activities or conduct of the facility; or

(ii) the activities or conduct of persons in relation to the facility

but does not include any such rules that deal with matters in respect of which licensed CS facilities must have written procedures under regulations made for the purposes of subsection 822A(2).

We are not aware of any Australian court decision which considers the potential exclusion from the definition of "operating rules" of "rules that deal with matters in respect of which licensed CS facilities must have written "procedures". However, in our view, that exclusion is intended only to apply to the procedures of a licensed CS facility. Accordingly, in our view, an Australian court would consider the Default Rules as forming part of the "operating rules" of LCH. It follows that rights "contained in" the Default Rules would be exempt from the restriction the Ipso Facto Law imposes.⁴

Secondly, rights contained in a netting market, or in a market netting contract, are exempt from the Ipso Facto Law, which would encompass the Default Rules as applicable in relation to the SwapClear Service.

Thirdly, the exemptions from the Ipso Facto Law established by the Ipso Facto Declaration for "a right of set-off or a right of combination of accounts", and "a right to net balances or other amounts" would protect set-off under Rule 8 of the Default Rules.

Fourthly, to the extent that LCH seeks to either "assign or otherwise transfer", or to "novate" the rights and obligations of a defaulting Clearing Member pursuant to Rule 6(g) or Rule 6(h) of the Default Rules, the Ipso Facto Declaration would exempt those actions from the restrictions imposed under the Ipso Facto Law.

(a) Exercise of rights under Rules 6 and 8

As discussed above, LCH provides the SwapClear Service under an arrangement which is a "netting market". Section 16(2) of the Netting Act is fundamental to the analysis of LCH's rights under Rules 6 and 8 of the Default Rules in the event of a Relevant Clearing Member becoming subject to an Insolvency Proceeding or a Reorganisation Measure.

Section 16(2) provides that if:

*(a) a party to a market netting contract goes into external administration;
and*

(b) Australian law governs either:

(i) the external administration; or

(ii) the contract;

the following provisions apply:

⁴ On the other hand, paragraph (za) of the Ipso Facto Regulation is not likely to be interpreted by an Australian court as applying to the Default Rules. The Explanatory Memorandum to the Ipso Facto Regulation notes that paragraph (za) is intended to capture "contracts other than the operating rules [...] that are necessary to operate" the CS facility, specifically in order to protect "rights under contracts to supply services that are essential to the operation" of the CS facility. We are of the view that this exemption is not intended to apply to an agreement such as the Default Rules.

- (c) *obligations may be netted or terminated, termination values may be calculated and a net amount become payable in accordance with the contract;*
- (d) *obligations that are, or have been, netted or terminated under the contract are to be disregarded in the external administration;*
- (e) *any net obligation owed by the party under the contract that has not been discharged is provable in the external administration;*
- (f) *any net obligation owed to the party under the contract that has not been discharged may be recovered by the external administrator for the benefit of creditors;*
- (fa) *any security given by the party, in accordance with the contract, in respect of obligations of a party to the contract may be enforced in accordance with the contract;*
- (fb) *rights and obligations of the party may be transferred in accordance with the contract;*
- (fc) *without limiting paragraph (fb):*
 - (i) *property (including property over which security has been given) of the party may be transferred or otherwise dealt with in accordance with the contract; and*
 - (ii) *property (including property over which security has been given) of another person on whose behalf the party is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the contract;*
- (g) *none of the following is to be void or voidable in the external administration:*
 - (i) *the netting or termination of obligations under the contract;*
 - (ii) *a payment by the party to discharge a net obligation under the contract;*
 - (iii) *a payment, or a transfer of property (whether absolutely or by way of security), by the party to meet an obligation under the contract;*
 - (iv) *the enforcement of a security in accordance with the contract;*
 - (v) *a transfer of, or dealing with, rights, obligations or property in accordance with the contract.*
- (h) *paragraphs (c) to (g) apply despite:*
 - (i) *any disposal of rights that may be netted under the contract; or*
 - (ii) *any disposal of rights or property that may be transferred in accordance with the contract; or*

(iii) *the creation of any encumbrance, or any other interest, in relation to those rights or property over which security mentioned in paragraph (fa) is given; or*

(iv) *the operation of any encumbrance, or any other interest, in relation to those rights or that property;*

in contravention of a prohibition in the contract, or in the security mentioned in paragraph (fa).

The Netting Act then goes on to provide in section 16(3) that section 16(2) has effect "despite any other law (including the specified provisions and the specified stay provisions)." The term "specified provisions" is defined in the Netting Act to include, for example, section 11F of the Banking Act (which relates to assets of foreign ADIs) and section 13A(3) of the Banking Act (which relates to priorities for application of assets of an ADI in Australia). The term "specified stay provision" is defined to include a number of the Banking Act provisions that restrict a counterparty's rights to (among other things) close out a transaction pursuant to a contract with a body which is subject to certain crisis resolution measures under the Banking Act.

(i) External administration

The Netting Act defines "external administration" broadly, so as to include a wide range of restructuring and insolvency-related processes under Australian law, including the appointment of a Banking Act statutory manager in respect of an ADI.

We are of the opinion that each of the following proceedings will fall within the definition of "external administration" under the Netting Act (**External Administration Proceedings**) and will be governed by Australian law:

- each of the Insolvency Proceedings referred to in paragraphs 2.2.1(a)(i), (a)(ii), (a)(iii), and (a)(iv) above; and
- the Reorganisation Measure referred to in paragraph 2.2.1(b) above.

Accordingly, if a Relevant Clearing Member becomes subject to any External Administration Proceeding, then sections 16(2)(c) to (g) (both inclusive) of the Netting Act will be available to LCH in respect of the SwapClear Service.

(ii) Actions under Rule 6

Rule 6 of the Default Rules sets out a wide range of actions that LCH may take under Rule 3 of the Default Rules in respect of the defaulting clearing member or otherwise.

Sections 16(2)(fa), (fb), (fc) and (g) of the Netting Act essentially protect security enforcement, transfer of, or dealing with, rights, obligations or property and other matters relating to a market netting contract.

Accordingly, we are of the view that if a Relevant Clearing Member becomes subject to any External Administration Proceeding, then LCH would have the right to take any action under Rule 6 of the Default

Rules provided that such action also falls within the scope of sections 16(2)(fa), (fb), (fc) and (g) of the Netting Act. These include the netting or termination of obligations under the Clearing Member Contract, the enforcement of security under the Clearing Member Contract and the transfer or dealing with rights, obligations or property in accordance with the Clearing Member Contract.

We have also considered specifically the actions contemplated under Rule 6(h) and whether those actions would be protected under section 16(2) of the Netting Act. Our analysis is as follows:

Action under Rule 6(h) Analysis against section 16(2) of the Netting Act	
The steps which may be taken by the Clearing House under Rule 3 in respect of the Defaulter or otherwise are... <i>to take such steps as may be desirable, including...</i>	
<i>(i) crediting or debiting of accounts (including margin accounts);</i>	This action will fall within the scope of the Netting Act only to the extent that the crediting or debiting of accounts is to effect close out netting under the contract or is for the purpose of effecting a transfer.
<i>(ii) entry into new contracts;</i>	This action may not fall within the scope of the Netting Act, as section 16(2) does not contemplate any new contract being entered into (and therefore the basis for our concern that the close-out of open contracts and entering into new contracts as a method of porting may not be protected under the Netting Act).
<i>(iii) transfer of existing contracts;</i>	This action falls under section 16(2)(fb) which provides that rights and obligations of the party which goes into external administration may be transferred in accordance with the contract.
<i>(iv) reversal of contracts;</i>	There is some doubt as to whether reversing a contract falls within the scope of the Netting Act.
<i>(v) termination, closeout and re-establishment of contracts; or</i>	As we note in paragraph 2.3.1, it is unclear whether section 16(2)(fb) of the Netting Act will be effective to protect the termination and close-out of open contracts and entering into of new contracts, as on its face section 16(2)(fb) only protects the "transfer" of rights and obligations. The termination and close-out of open contracts and entering into of new contracts would not appear to constitute a "transfer" of rights and obligations on a literal interpretation of section 16(2)(fb).
<i>(vi) any other step,</i>	This action will fall within the scope of the Netting Act only to the extent that the step is taken for the purpose of effecting a transfer.

Action under Rule 6(h) Analysis against section 16(2) of the Netting Act	
<i>to preserve as far as possible the position of any client of the Clearing Member.</i>	
<i>Where an open contract is transferred or closed-out, terminated, and re-established under Rule 6(g) above, without requiring the consent of the relevant Exchange, to transfer (whether by way of transfer or by way of termination, close-out and reestablishment of positions) to the Clearing Member to whom the open contract is transferred (or with whom the replacement open contract is re-established) such Collateral held by the Clearing House in connection with that account as the Clearing House may deem appropriate.</i>	The transfer of the collateral held by LCH as a result of porting as contemplated in Rule 6(g) is within the scope of section 16(2)(fc), which deals with the transfer of property (such as collateral) provided by a party to a market netting contract (such as the clearing member) or another person (such as a client of the clearing member).

(iii) Process under Rule 8

Rule 8 of the Default Rules sets out the process for LCH to complete in order to determine any net amounts which remain payable between the defaulting clearing member and LCH in respect of each "kind of account" as described in Rule 11(b) of the Default Rules.

We consider that the process under Rule 8 of the Default Rules will be protected by section 16(2)(c) of the Netting Act. Accordingly, if a Relevant Clearing Member becomes subject to any External Administration Proceeding, then LCH would have the right to complete the process under Rule 8 of the Default Rules.

(b) Automatic Early Termination Event

We do not consider that it would be necessary for LCH to specify that the Insolvency Proceedings and/or Reorganisation Measure will constitute an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules. This is because the protections provided to a market netting contract under section 16(2) of the Netting Act will be triggered when a Relevant Clearing Member becomes subject to any External Administration Proceeding, irrespective of whether the termination takes place automatically or at the election of LCH.

We also do not recommend LCH to specify any of the Insolvency Proceedings and/or Reorganisation Measure as an Automatic Early Termination Event in accordance with Rule 3 of the Default Rules. This is because an Insolvency Proceeding or a Reorganisation Measure may occur without the knowledge of LCH. If an Automatic Early Termination Event were to be triggered without LCH's knowledge, then LCH may be disadvantaged by such lack of knowledge (e.g. it may not be in a position to take any action that it may be required to take under the Default Rules).

2.2.4 Is there a "suspect period" prior to Insolvency Proceedings and/or Reorganisation Measures where Contracts with a Relevant Clearing Member could be avoided or challenged and, if so, what are the grounds? What are the risks for LCH in entering into Contracts and in taking Collateral in respect of those Contracts during such a period? Are any special protections or exemptions from the relevant arrangements for avoidance or challenge available under the law of Australia in respect of contracts in financial markets?

(a) Voidable transactions

The Corporations Act permits a liquidator of an Australian company to apply to court for orders that certain transactions are voidable and for other related orders including for the payment of benefits obtained under the transaction, the return of money paid by the insolvent company under the transaction, variation of any agreement (or part of any agreement) or a declaration that any agreement (or part of any agreement) is unenforceable. Below we set out the types of transactions which may be set aside as voidable.

(i) Unfair preferences

Section 588FA of the Corporations Act provides that a transaction (which can include a payment) may be set aside on the application of a liquidator appointed to the company if the transaction constitutes an unfair preference. A transaction may be voidable as an unfair preference if:

- the company and a creditor are parties to the transaction;
- the transaction resulted in the creditor receiving from the company more in respect of an unsecured debt than it would have received if the creditor had to prove for the debt in a winding up of the company;
- at the time of the transaction, or when an act is done for the purpose of giving effect to the transaction, the company was insolvent or became insolvent as a result of the transaction; and
- the transaction was entered into (or an act or omission was done for the purpose of giving effect to the transaction) during the 6 months ending on the "relation back day", or after that date but before the day when the winding up begins. The time is extended to 4 years in relation to a transaction involving a related entity of the company, or to 10 years if the company became a party to the transaction for the purpose, or a purpose including the purpose, of defeating, delaying, or interfering with the rights of any or all of its creditors in the winding up of the company.

For example, in the case of a court ordered winding up, the "relation back" day is generally the day the application to wind up the Australian company was filed. In the case of a creditors' voluntary winding up which precedes a voluntary administration, the "relation back" day will be the date the voluntary administrator was appointed.

The Corporations Act effectively provides a defence to a party to the relevant transaction if the party can establish that:

- it entered into the transaction in good faith;
- at the time of the transaction, it did not have reasonable grounds to suspect either the insolvency of the company or that the company would become insolvent as a result of the transaction and that a reasonable person in the company's circumstances would have had no grounds to suspect insolvency; and
- it provided valuable consideration for the transaction or it changed its position in reliance on the transaction.

We note that a charge or mortgage may be set aside as an unfair preference if it is granted by an Australian company in respect of a previously unsecured debt if the other elements of an unfair preference are also present.

(ii) Uncommercial transactions

Section 588FB of the Corporations Act provides that a transaction of a company may be set aside on the application of a liquidator appointed to the company if the transaction constitutes an uncommercial transaction.

A transaction of a company will constitute an uncommercial transaction if it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction. Regard is to be had to the benefits (if any) to the company of entering into the transaction, the detriment to the company of entering into the transaction, the respective benefits to other parties to the transaction and any other relevant matter.

For the transaction to be voidable the company must have been insolvent when the transaction was entered into (or when an act is done for the purpose of giving effect to the transaction) and the transaction was entered into (or given effect to) during the 2 years ending on the "relation back day". The time is extended to 4 years in relation to a transaction involving a related entity of the company, or to 10 years if the company became a party to the transaction for the purpose, or a purpose including the purpose, of defeating, delaying, or interfering with the rights of any or all of its creditors in the winding up of the company. Similar defences to those that apply to an unfair preference apply to uncommercial transactions.

The uncommercial transaction provisions are unlikely to apply to a reasonable and commercial transaction.

(iii) Unfair loan

Section 588FD provides that a liquidator may set aside a loan as an unfair loan, if:

- the interest on the loan was extortionate when made, or has since become extortionate because of a variation; or
- the charges in relation to the loan were extortionate when the loan was made, or have since become extortionate because of a variation,

even if the interest or charges are no longer extortionate.

In assessing the terms of the loan, regard is to be had to the following matters:

- the risk to which the lender was exposed;
- the value of any security in respect of the loan;
- the term of the loan;
- the schedule for payments of interest and charges and for repayments of principal;
- the amount of the loan; and
- any other relevant matter.

(b) Special protection

Section 5 of the Netting Act defines "voidable" as including a payment that is voidable under Division 2 of Part 5.7B of the Corporations Act (which includes sections 588FA, 588FB and 588FD of the Corporations Act discussed above).

As noted in paragraph 2.2.3(a) above, with regards to the SwapClear Service, section 16(2)(g) of the Netting Act provides that, among other things, the netting or termination of obligations under a market netting contract, a payment by the party to discharge a net obligation under a market netting contract and the enforcement of a security in accordance with the market netting contract will not be void or voidable in an external administration.

Accordingly, to the extent that an action is taken under the Clearing Member Contract in respect of the SwapClear Service (being a market netting contract as discussed in paragraph 2.2.2(b)(i) above) that falls within the scope of Section 16(2)(g) of the Netting Act, such action will be protected from being:

- void; or
- voidable under section 588FA, 588FB and 588FD of the Corporations Act.

2.2.5 Is there relevant netting legislation in Australia that, in the context of Insolvency Proceedings or Reorganisation Measures in respect of a Relevant Clearing Member, might apply as an alternative to the relevant arrangements set out in the Default Rules?

Section 553C of the Corporations Act will be relevant to any rights of set-off, consolidation and combination in Rule 8 of the Default Rules if the Netting Act were not to apply (for whatever reason). That section provides that where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a creditor of the insolvent company:

- an account is to be taken of what is due from the one party to the other party in respect of those mutual dealings;
- the sum due from the one party is to be set off against any sum due from the other party; and
- only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

In order for mutual credits, mutual debts or other mutual dealings to exist, there must be separate claims between the entities, the claims must be made in the same capacity or interest and each party must be beneficially entitled to the claim against the other and personally entitled to the claim of the other, and each claim must be capable of quantification at all relevant times. For example, where a party (the first party) enters into a transaction with a trustee of a trust, set-off is only available to the first party in respect of dealings between it and the trustee in its capacity as trustee of that trust. Mutuality may not exist between parties if one party has assigned, transferred, declared a trust over or created a security interest in favour of a third party in respect of its interest in the relevant claim.

A person is not entitled to claim the benefit of a set-off under section 553C if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

However, as noted in paragraph 2.2.3 above, we consider that section 16(2)(c) of the Netting Act will apply to protect the process under Rule 8 of the Default Rules in respect of Clearing Member Contracts for the SwapClear Service, and therefore we do not consider that section 553C of the Corporations Act would apply to Rule 8 of the Default Rules.

2.2.6 Can a claim for a close-out amount be proved for in Insolvency Proceedings without conversion into the local currency?

In an Australian liquidation, a creditor can submit a proof of debt in a foreign currency. The amount of the claim for the purposes of a proof of debt in the liquidation would then be determined in Australian dollars in accordance with s 554C of the Corporations Act. That section relevantly provides that:

"(2) If the company and the creditor or claimant have, in an instrument created before the relevant date [being the date of liquidation], agreed on a method to be applied for the purpose of converting the company's liability in respect of the debt or claim into Australian currency, the amount of the debt or claim that is admissible to proof is the equivalent in Australian currency of the amount of foreign currency, worked out as at the relevant date and in accordance with the agreed method.

(3) If subsection (2) does not apply, the amount of the debt or claim that is admissible to proof is the equivalent in Australian currency of the amount of foreign currency, worked out by reference to the opening carded on demand airmail buying rate in relation to the foreign currency available at the Commonwealth Bank of Australia on the relevant date."

The regime for proving in a scheme of arrangement or deed of company arrangement will depend on the terms of the particular arrangement.

2.3 Client Clearing

2.3.1 **Please opine on the availability and effectiveness of any law, regulation or statutory provision (having the force of law) in Australia which (if so designated by LCH) would be expected to qualify as an Exempting Client Clearing Rule. Please clarify whether the relevant Exempting Client Clearing Rule would be expected to apply to Relevant Clearing Members of all entity types or to only certain entity types.**

LCH's Rulebook defines an "Exempting Client Clearing Rule" to mean:

in relation to a Clearing Member, any law, regulation or statutory provision (having the force of law) of a Governmental Authority the effect of which, in the determination of the Clearing House in its absolute discretion, is to protect the operation of the Client Clearing Annex of the Default Rules from challenge under the insolvency laws applicable to that Clearing Member

The 2013 Amendment Act amended section 16(2) of the Netting Act by introducing, among others, sections 16(2)(fb) and (fc) which provide, in relation to market netting contracts, that:

- (fb) rights and obligations of the party may be transferred in accordance with the contract;
- (fc) without limiting paragraph (fb):
 - (i) property (including property over which security has been given) of the party may be transferred or otherwise dealt with in accordance with the contract; and
 - (ii) property (including property over which security has been given) of another person on whose behalf the party is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the contract;

The question is whether sections 16(2)(fb) and (fc) of the Netting Act have the effect of protecting the operation of the Client Clearing Annex of the Default Rules as applicable to the SwapClear Service from challenges under the insolvency laws of the Relevant Jurisdictions. While not amounting to an "Exempting Client Clearing Rule", the Security Deed may assist in the return of the positions and collateral to the Clearing Client if the porting of those positions and collateral is subject to challenge.

We note at the outset that sections 16(2)(fb) and (fc) of Netting Act are still relatively recent legislation and we are not aware of any case law supporting how the courts will interpret their operation. It remains to be seen how the courts will interpret what effect these sections will have when applied to particular rules of a central counterparty, such as the Client Clearing Annex of the Default Rules. The views we express regarding the operation of these sections must be construed accordingly.

The primary focus of the Client Clearing Annex of the Default Rules is to address the porting of positions and collateral. It is clear that the *intent* of sections 16(2)(fb) and (fc) of the Netting Act is to protect porting of positions and collateral. The Explanatory Memorandum relating to the *Corporations and Financial Sector Legislation Amendment Bill 2013* noted as follows:

1.19 An alternative method for dealing with a default or insolvency of a participant is, as described above, to port the open transactions (known as 'positions') to which the defaulting or insolvent participant is a counterparty to another, solvent participant. The current provisions in the PSN Act do not protect the actions required in this scenario, and the proposed amendments are designed to ensure that the portability arrangements put in place by CCPs benefit from certain protections under the PSN Act. This will provide the same legal certainty to porting arrangements as is currently provided for netting and discharge of net obligations.

1.20 In the event of a default or insolvency rapid action will be of the essence, and it is a particular concern to ensure that the CCP can act without having to obtain consents from external administrators that would otherwise be required under the insolvency provisions in the Corporations Act. It is therefore necessary to amend the PSN Act to clarify that porting of positions, including associated collateral, in the case of a default or insolvency of a participant is allowed, regardless of provisions in other legislation including the Corporations Act. Both the CCP and the clearing participants would in such a situation be subject to a number of requirements under the Corporations Act which are intended to address the risk of insolvency of a clearing participant.

Section 16(2)(fb) of the Netting Act protects transfers of rights and obligations of a party to a market netting contract (such as a Relevant Clearing Member). Section 16(2)(fc) of the Netting Act deals more specifically with transfers or other dealings with collateral provided by a party to a market netting contract (such as a Relevant Clearing Member) or another person (such as a client of a Relevant Clearing Member).

We believe that sections 16(2)(fb) and (fc) of the Netting Act will likely have the *effect* of protecting the operation of the Client Clearing Annex of the Default Rules from challenges under the insolvency laws of the Relevant Jurisdictions, subject to some reservations that we have in relation to the provisions of paragraphs 6.1 and 8.1 of the Client Clearing Annex contemplating that, under certain circumstances, LCH will be required to either:

- *transfer* open contracts to the Backup Clearing Member (paragraphs 6.1(a) and 8.1(a)); or
- *terminate and close-out* open contracts and *enter into* new contracts on equivalent terms with the Backup Clearing Member (paragraphs 6.1(b) and 8.1(b)).

It is unclear whether section 16(2)(fb) of the Netting Act will be effective to protect the termination and close-out of open contracts and entering into of new contracts under paragraphs 6.1(b) and 8.1(b) of the Client Clearing Annex, as on its face section 16(2)(fb) only protects the "transfer" of rights and obligations. It is unclear whether the termination and close-out of open contracts and entering into of new contracts would not appear to constitute a "transfer" of rights and obligations on a literal interpretation of section 16(2)(fb).

In contrast, the transfer of open contracts under paragraphs 6.1(a) and 8.1(a) of the Client Clearing Annex would constitute a "transfer" of rights and obligations contemplated by section 16(2)(fb) and therefore will be protected by section 16(2)(fb). This is on the basis that the only way of transferring both rights and obligations under a contract under Australian law is by way of novation. Regulation 12(b) of the General Regulations of LCH's Rulebook specifically provides that "*the transfer of an open contract (including, for the avoidance of doubt, Relevant Contracts transferred to a Backup Clearing Member pursuant to the Client Clearing Annex)*" shall be effected by way of "*novation*". Noting that there is no judicial precedent to guide us how section 16(2)(fb) of the Netting Act may be interpreted, we are comfortable that, having regard to both the plain meaning of the Netting Act and the explanatory

memorandum accompanying the amendments to the Netting Act, a transfer by way of novation would constitute a transfer for the purposes of section 16(2)(fb) of the Netting Act.

Accordingly, where porting is effected by way of a transfer by novation (in the manner contemplated by Regulation 12(b) of the General Regulations of the Rulebook), we do not believe that the Security Deed is required because porting effected in that manner would be protected by the Netting Act. The Security Deed therefore constitutes an enhancement to the statutory protection already afforded under the Netting Act.

However, porting can be effected in a number of different ways under the Rulebook and by having the Security Deed in place, it does confer on LCH a measure of flexibility as to how it may wish to proceed to effect a port and, if that method of porting is successfully challenged in an insolvency of the Defaulting Clearing Member, the Security Deed would confer on the client a priority interest in the relevant collateral.

Further to this, we understand from LCH that prior to effecting a porting of the relevant portfolio of contracts (**Portfolio**) by way of transfer:

- LCH will require that the Clearing Client's Back Up Clearing Member enter into a Backup Clearing Member Agreement with LCH pursuant to which the Clearing Member agrees to act as a Backup Clearing Member in relation to that Clearing Client and agrees that, subject to the agreement of that Clearing Client, the relevant Portfolio will be ported from the Defaulting Clearing Member to the Backup Clearing Member; and
- LCH will require the relevant Clearing Client enter into a Porting Agreement with LCH pursuant to which the Clearing Client agrees that, subject to the agreement of the Back Up Clearing Member, the relevant Portfolio will be ported from the Defaulting Clearing Member to the Backup Clearing Member in accordance with the Default Rules.

LCH has also developed a specific Backup Clearing Member Agreement and Porting Agreement to be used in circumstances where the Defaulting Clearing Member or Backup Clearing Member is incorporated in Australia. These documents specify that the porting of the Portfolio to the Backup Clearing Member will be effected by way of a transfer pursuant to paragraphs 6.1(a) or 8.1(a) of the Client Clearing Annex.

2.3.2 If LCH were to: (i) declare a Relevant Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Reorganisation Measures in respect of that clearing member and (ii) seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the Relevant Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?

Whether the actions of LCH prior to the commencement of any Insolvency Proceeding or Reorganisation Measure in respect to a Relevant Clearing Member to port the Contracts entered into on behalf of the Clearing Client (**Client Contracts**) can be challenged relates to enforceability of contractual obligations governed by English law and therefore will be a matter for English law (being the governing law of the contract).

To the extent that an action of LCH prior to the commencement of any Insolvency Proceeding or Reorganisation Measure in respect to a Relevant Clearing Member to port the Account Balance of the Clearing Client relates to novation of contractual rights and obligations that are governed by English law, whether such action can be

challenged will be a matter for English law (being the governing law of the contractual rights and obligations).

2.3.3 If LCH were to: (i) declare a Relevant Clearing Member to be in Default in circumstances other than the commencement of Insolvency Proceedings or Reorganisation Measures in respect of that clearing member; and (ii) seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the Relevant Clearing Member or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?

To the extent that an action of LCH prior to the commencement of any Insolvency Proceeding or Reorganisation Measure in respect to a Relevant Clearing Member to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client relates to:

- enforceability of contractual obligations governed by English law, whether such action can be challenged will be a matter for English law (being the governing law of the contract); or
- assignment of a chose in action, whether such action can be challenged will be a matter to be determined under the proper law of the assignment (which may be the *lex situs* of the chose in action).

2.3.4 If (i) following the commencement of Insolvency Proceedings, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?

To the extent that an action of LCH prior to the commencement of any Insolvency Proceeding or Reorganisation Measure in respect to a Relevant Clearing Member to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client relates to:

- enforceability of contractual obligations governed by English law, whether such action can be challenged will be a matter for English law (being the governing law of the contract); or
- assignment of a chose in action, whether such action can be challenged will be a matter to be determined under the proper law of the assignment (which may be the *lex situs* of the chose in action).

In circumstances where a Relevant Clearing Member is subject to voluntary administration, most transactions or dealings affecting property of the company will be void unless done with the authority or consent of the administrator or entered into under a court order (section 437D of the Corporations Act). Similarly, where a Relevant Clearing Member is being wound up by the court, section 468 of the Corporations Act will render void most dispositions of property other than dispositions by the liquidator.

To the extent that any porting involves the transfer of rights, obligations and property of a Relevant Clearing Member contrary to sections 437D or 468, there is a risk that the transfer could be void. There is also a risk that porting could give rise to a

voidable transaction (such as an unfair preference or an uncommercial transaction) of the kind described at paragraph 2.2.4 above.

In the case of a market netting contract (which we conclude above would include the Clearing Member Contracts in connection with the SwapClear Service), the 2013 Amendment Act amended section 16(2) of the Netting Act by introducing, among others, sections 16(2)(fb) and (fc) which, as discussed in paragraph 2.3.1 above, protect the porting of positions and collateral as provided for in the Netting Act from the consequences of external administration of a member.

2.3.5 If (i) following the commencement of Insolvency Proceedings, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could an insolvency officer appointed to the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?

In respect of the SwapClear Service, our view is that the answer is "no", provided that (a) the rights and obligations of the Relevant Clearing Member that are subject to the return of the Client Clearing Entitlement have been transferred in accordance with the Clearing Member Contract, and (b) the property of the Relevant Clearing Member that is subject to the return of the Client Clearing Entitlement has been transferred or otherwise dealt with in accordance with the Clearing Member Contract.

If: (a) amounts in respect of the Client Clearing Entitlements are returned to the Defaulter for the account of the relevant clients under paragraph 9.1 of the Client Clearing Annex; or (b) amounts in respect of the Aggregate Omnibus Client Clearing Entitlements are returned to the Defaulter for the account of the relevant clients under paragraph 9.3 of the Client Clearing Annex, then we consider that section 16(2)(fc)(i) of the Netting Act should apply to protect the return of such amounts, in respect of the SwapClear Service.

2.3.6 If (i) following the implementation of Reorganisation Measures, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to port the Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member as a result, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Account Balance?

In respect of the SwapClear Service, our view is that the answer is "no", provided that (a) the rights and obligations of the Relevant Clearing Member that are subject to the porting of the Client Contract to the Backup Clearing Member have been transferred in accordance with the Clearing Member Contract and (b) the property of the Relevant Clearing Member that is subject to the porting of the Account Balance to the Backup Clearing Member has been transferred or otherwise dealt with in accordance with the Clearing Member Contract.

2.3.7 If (i) following the commencement of Reorganisation Measures, a Relevant Clearing Member was designated a Defaulter (whether due to the delivery of a Default Notice or (if applicable) the occurrence of an Automatic Early Termination Event); and (ii) LCH were to seek to return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client, could the representative appointed to reorganise/manage the Defaulter or any other person successfully challenge the actions of LCH and claim for the amount of the Client Clearing Entitlement?

In respect of the SwapClear Service, our view is that the answer is "no", provided that (a) the rights and obligations of the Relevant Clearing Member that are subject to the return of the Client Clearing Entitlement have been transferred in accordance with the Clearing Member Contract and (b) the property of the Relevant Clearing Member that is subject to the return of the Client Clearing Entitlement has been transferred or otherwise dealt with in accordance with the Clearing Member Contract.

2.3.8 Would the Security Deed provide an effective security interest under the laws of Australia over the Account Balance or Client Clearing Entitlement in favour of the relevant Clearing Client?

The same principles apply here as with the Deed of Charge. See our detailed comments in paragraph 2.2.2 above in this regard.

Given the nature of the property charged under the Security Deed, it is likely, although not entirely certain in all respects, that the PPSA will govern the validity, perfection and the effect of perfection or non-perfection of the security interests in the charged property in proceedings in an Australian court. Where it is uncertain, we would recommend that LCH approach it on the basis that the PPSA will apply in these circumstances.

The requirements for enforceability of the PPSA security interests arising under the Security Deed should be satisfied upon due execution of the Security Deed.

We also note that section 13A(3) of the Banking Act sets out an order of priority for the application of an ADI's assets in Australia in the event an ADI is not able to meet its obligations, and may be relevant to the enforceability of the security interests granted under the Security Deed if the relevant participant is an ADI and if any of the charged property is located in Australia. The charged property under the Security Deed takes the form of contractual rights to the Account Balance and collateral referable to the relevant Clearing Client. These contractual rights arise under contracts governed by English law and it is therefore likely that these rights are located in England. To the extent however that the charged property is taken to be located in Australia and the grantor of the relevant security interests is an ADI, section 13A(3) of the Banking Act will apply.

2.3.9 Are there any perfection steps which would need to be taken under the laws of Australia in order for the Security Deed to be effective?

The same principles apply here as with the Deed of Charge. See our detailed comments in paragraph 2.2.2 above in this regard.

Given the nature of the collateral charged under the Security Deed, the PPSA security interest held by the Clearing Client under the Security Deed would not appear to be capable of perfection by control. In these circumstances, we recommend that the Clearing Client perfect its security interests by registration.

2.3.10 Is there any risk of a stay on the enforcement of the Security Deed in the event of Insolvency Proceedings or Reorganisation Measures being commenced in respect of a Relevant Clearing Member?

The same principles apply here as with the Deed of Charge. See our detailed comments in paragraph 2.2.2 above in this regard.

2.3.11 Please provide brief details of any other significant legal or regulatory issues which might be expected to arise in connection with the provision by a Relevant Clearing Member of Client Clearing Services and which are not covered by the Questions above.

We note that in paragraph 3 of this letter we include a number of assumptions and qualifications to our opinions. To the extent that one or more of these assumptions was found to be incorrect, or one or more of these qualifications was found to apply, then this could affect our opinion.

3. ASSUMPTIONS AND QUALIFICATIONS

3.1 Assumptions

Apart from other assumptions set out in various parts of this advice, the opinion as set out in this advice are based on the assumptions that:

- (a) the provisions of the LCH Agreements and each Contract between the Parties (**Relevant Contract**) constitute legal, valid and (other than as expressly opined on in this advice) enforceable obligations of the Parties under all relevant laws;
- (b) each Party is duly incorporated and has the capacity, power and authority under all applicable laws to enter into the LCH Agreements and each Relevant Contract and to perform its obligations under the LCH Agreements and each Relevant Contract and that each Party has taken all necessary steps to enter into, execute, deliver, be bound by and perform the LCH Agreements and each Relevant Contract, and that such steps have not been revoked or superseded;
- (c) each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents and has otherwise complied with all applicable laws and regulations required to enable it lawfully to enter into and perform its obligations under the LCH Agreements and each Relevant Contract and to ensure the legality, validity, enforceability and admissibility in evidence of the LCH Agreements and each Relevant Contract in this jurisdiction;
- (d) the LCH Agreements are entered into by the Relevant Clearing Member prior to the formal commencement of any Insolvency Proceeding or Reorganisation Measure in respect of that Relevant Clearing Member;
- (e) LCH is, in relation to the SwapClear Service, at all material times a holder of a CS facility licence under Part 7.3 of the Corporations Act and the LCH Agreements and each Relevant Contract are entered into after LCH becomes holder of the relevant CS facility licence under Part 7.3 of the Corporations Act;
- (f) there are no other agreements, instruments or arrangements between the Parties which modify or supersede the terms of any LCH Agreement and/or any Relevant Contract;
- (g) each Party entered into the LCH Agreements and each Relevant Contract to which it is a party in good faith and the entry by that Party into, and the performance of obligations by that Party under, those LCH Agreements and Relevant Contracts are in its best interests, on arms' length commercial terms and for the purpose of its business;
- (h) LCH will at all material times comply with all relevant obligations in Rule 3 of the Default Rules;

- (i) each Relevant Clearing Member has the capacity, power and authority to create the security constituted by the LCH Agreements and that each Relevant Clearing Member has the capacity, power and authority to enter into and to exercise its rights and to perform its obligations under the LCH Agreements;
- (j) all acts, conditions or things required to be fulfilled, performed or effected in connection with the LCH Agreements or any Relevant Contract under the laws of any jurisdiction other than the Relevant Jurisdictions have been duly fulfilled, performed and effected;
- (k) where any obligation under the LCH Agreements or any Relevant Contract is to be performed in any jurisdiction other than the Relevant Jurisdictions, its performance will not be illegal or unenforceable under the laws of that jurisdiction;
- (l) until such time as the security interests created by the LCH Agreements have been released, the secured property will be held by the relevant secured party in accordance with the terms of the LCH Agreements;
- (m) all transfers of, or dealings with, any right, obligation or property in accordance with the LCH Agreements are effected in accordance with all applicable laws (including the Relevant Laws);
- (n) no Party has engaged or will engage in misleading or deceptive conduct (by act or omission) or is conducting or will conduct its business or any activity contemplated by the LCH Agreements and the Relevant Contracts in any way or for any purpose not evident from the face of the LCH Agreements and the Relevant Contracts which might render any LCH Agreement or any Relevant Contract illegal, void, voidable or otherwise unenforceable or might otherwise render any part of this opinion incorrect;
- (o) the LCH Agreements and each Relevant Contract have not been amended, released or discharged, and no provision in them has been waived; and
- (p) our responses in paragraphs 2.3.8 to 2.3.10 assume that the Relevant Clearing Member and its relevant Clearing Clients have entered into the Security Deed.

We have not investigated whether the assumptions in this advice are correct. The fact that we make the assumptions does not imply that we are not aware of any circumstance that might affect whether they are correct.

None of the assumptions in this advice is limited by reference to any other assumption.

3.2 **Qualifications**

Apart from other qualifications set out in various parts of this advice, we also make the following qualifications:

- (a) a statement that an obligation is "binding" or "enforceable" means that the obligation is of a type and form that courts of the Relevant Jurisdictions will generally enforce. It does not mean that the obligation and the rights of a creditor with respect to it can be enforced, or that the obligation is binding, in all circumstances. For example:
 - (i) equitable remedies, such as injunction and specific performance, are discretionary;
 - (ii) an obligation and the rights of a creditor with respect to it may be affected by laws relating to insolvency (including, without limitation, administration) or other laws that affect creditors' rights generally;

- (iii) an obligation and the rights of a creditor with respect to it may be affected by general law doctrines or statutory relief particularly in relation to matters such as fraud, misrepresentation, mistake, duress, unconscionable conduct, unfair contracts legislation, frustration, estoppel, waiver, lapse of time, penalties, courts retaining their ability to adjudicate, public policy or illegality;
 - (iv) the exercise of rights, powers or remedies under, or in relation to, any security interests under the PPSA (including, without limitation, the application of the proceeds of insurance, property, sale or enforcement) is subject to a number of general law or statutory restrictions, requirements and duties; and
 - (v) the laws of some jurisdictions limit a person's obligation to insure property, or may provide that the grant of a subsequent security interest under the PPSA cannot constitute a breach of an obligation or allow acceleration.
- (b) a court might decline to exercise jurisdiction over a defendant if it considers that it is not the most appropriate forum, or if the subject matter is concurrently before another court;
 - (c) the laws of the Relevant Jurisdictions may require that parties act reasonably or in good faith in their dealings with each other, including, without limitation, in exercising rights, powers or discretions or forming opinions.
 - (d) a provision that states that a calculation, determination or certificate will be conclusive and binding may not apply if the calculation, determination or certificate is fraudulent or manifestly inaccurate, and may not prevent judicial enquiry into the merits of any claim relating to the calculation, determination or certificate;
 - (e) a provision that requires that an amendment, election or waiver be in writing may not preclude an effective amendment, election or waiver made orally or by conduct;
 - (f) a provision that allows an illegal, invalid or unenforceable provision to be severed from a document may not be effective. For example, if the illegal part is so integrally bound up with the rest of the contract that the party who included that part would not have entered into the contract without it, then the part will not be severed, which may result in the whole document being void and unenforceable;
 - (g) an agreement to negotiate, or an agreement to agree, may not be binding;
 - (h) to the extent that a provision of any of the LCH Agreements may require a corporation to procure another corporation to do or refrain from doing any act, if it would be a breach of the duties of the directors of the second mentioned corporation to do or refrain from doing that act, or if it would be illegal or impossible for that corporation to do or refrain from doing that act, that provision may not be enforceable;
 - (i) the specific approval of the Department of Foreign Affairs and Trade (**DFAT**) must be obtained in connection with certain payments and transactions having a prescribed connection with countries, entities and persons designated from time to time by DFAT for the purposes of the *Autonomous Sanctions Regulations 2011* (Cth). Regulations in Australia also prohibit or restrict payments, transactions and dealings with certain countries or named entities or individuals associated with terrorism or otherwise subject to international sanctions;
 - (j) although judgments have been entered in the courts of some Australian jurisdictions for amounts expressed in currencies other than Australian dollars, nevertheless, as there has been no judgment in the High Court of Australia, the question whether a judgment will be entered in the courts of a Relevant Jurisdiction for an amount expressed in a currency other than Australian dollars is not free from doubt; and

- (k) we express no opinion:
- (i) on any provision that requires a person to do or not do something that is not clearly identified in the provision, or on any undertaking in any LCH Agreement to comply with another document or agreement, unless that other document or agreement is itself a LCH Agreement;
 - (ii) on the accuracy or relevance of any representation, warranty or other statement made by any Party.

None of the above qualifications is limited by reference to any other qualification.

4. **BENEFIT**

This opinion letter is given for the exclusive benefit of the addressee. In this opinion we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time. It may not, without prior written consent, be relied on by any other person.

We consent to a copy of this opinion letter being made publically available on the addressee's website and being shown to: (i) actual and prospective clearing members and clearing clients; (ii) relevant regulators; and/or (iii) legal counsel appointed by the addressee or any person listed in (i) above to advise on matters of the laws of other jurisdictions, in each case for information purposes only and solely on the basis that we assume no responsibility to any such parties as a result or otherwise.

Yours faithfully



ASHURST

ANNEXURE A

GENERAL DESCRIPTION OF THE PPSA

1. BACKGROUND TO THE PPSA

- (a) The PPSA applies to security interests over almost all types of property other than land, fixtures and water rights. It applies both to physical assets, and to intangible property such as intellectual property, licences, payment obligations and financial instruments such as shares and debentures.
- (b) Under the PPSA, a security interest is "an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)." The PPSA applies to recognised forms of security such as fixed and floating charges, legal and equitable mortgages, and liens as well as many that have not historically been treated as forms of security, including retention of title arrangements, hire purchase agreements, leases and, potentially, title transfer, transfers of accounts or receivables, conditional debt or flawed asset arrangements (including in respect of the lodgement of cash collateral).
- (c) The PPSA establishes new rules for the creation of effective security interests. Different rules apply to determine:
 - (i) when a security interest will be enforceable against the grantor (known as attachment);
 - (ii) when a security interest will be enforceable against third parties;
 - (iii) what steps can be taken to protect a security interest from being defeated by a competing interest (known as perfection).

2. PERFECTION

- (a) Even if a security interest has attached to collateral and is enforceable against third parties, it will be important in most cases that the security interest also be perfected. If it is not perfected, the secured party will be exposed to the risk that its security interest could rank behind other security interests in a priority dispute, or even be extinguished entirely (for example, if the grantor transfers the collateral to another person). Most security interests, if they are not perfected, will also be at risk of being extinguished if the grantor is wound up or bankrupted.
- (b) A security interest that has attached to collateral can be perfected in up to five different ways, depending on the nature of the collateral.
 - **Registration.** The PPSA establishes a securities register called the Personal Property Securities Register (**PPS Register**). The PPS Register, a key component of the PPSA, is maintained in electronic form, and is readily accessible online. A secured party can perfect its security interest by entering required details in relation to that security interest in the PPS Register. Importantly, a secured party does not need to wait until the security interest has been granted before entering it on the PPS Register.
 - **Possession.** A secured party can perfect its security interest over some types of personal property by taking possession of the collateral. For example, a secured party has possession of a negotiable instrument that is not evidenced by an electronic record if it (or another person on its behalf) has physical possession of the negotiable instrument.

- **Control.** A secured party can perfect its security interest over some types of personal property, relevantly being bank accounts (in the case of a secured party that is a bank, only) and certain other financial instruments, by taking "control" of the collateral in a manner specified in the PPSA.
- **Temporary perfection.** The PPSA provides for a number of situations in which a security interest will be taken to be temporarily perfected without any act by the secured party – for example, where property that is subject to a security interest is brought into Australia, or collateral that is subject to a perfected security interest is disposed of in circumstances where the security interest is not extinguished by the disposal.
- **Deemed perfection in some limited situations.** The PPSA also deems a security interest to be automatically perfected – for example, in some circumstances where collateral under a perfected security interest is disposed of, and the security interest attaches to the proceeds.

3. **PRIORITY**

- (a) The PPSA establishes new rules for resolving priority disputes between security interests over the same collateral. Broadly, the priority rules work as follows:
 - (i) Priority between two or more perfected security interests is determined by the order of their perfection.
 - (ii) A perfected security interest will have priority over an unperfected security interest.
 - (iii) Priority between unperfected security interests is determined by their order of attachment.
- (b) These rules are subject to numerous exceptions. For example, a security interest that is perfected by control will usually have priority over all other security interests, even if they were perfected first. This is likely to be of particular relevance to LCH. The PPSA also introduces a new concept of purchase money security interest (**PMSI**). A PMSI is a security interest taken in certain types of collateral to secure all or part of its purchase price or to secure funding that was used to acquire the collateral. It also includes the interest of a lessor of goods under a PPS lease and the interests of a consignor under a commercial consignment. In most cases, a PMSI will have priority over other security interests even if the other security interests were perfected first (unless the other security interest is perfected by control). Importantly, however, from the perspective of LCH, the rules relating to PMSIs do not apply to an interest in collateral (as original collateral) that is an investment instrument or an intermediated security.

4. **NEW CONFLICT OF LAW RULES**

The PPSA contains a set of rules to determine which laws are to be used to determine the validity, perfection and consequences of perfection (or non-perfection) of a security interest. The applicable laws will depend on factors such as the type of the personal property, and the location of the personal property or the grantor. These rules only determine which jurisdiction's laws are to apply to the security interest itself. Parties are free to choose the law that is to apply to the other contractual obligations in their security agreements.

5. JURISDICTION

Relevantly, the PPSA applies to a security interest in:

- (a) goods or financial property (including investment instruments) if:
 - (i) the location of the goods or property is in Australia; or
 - (ii) the grantor is an Australian entity;
- (b) an intermediated security if:
 - (i) the intermediary in relation to the intermediated security is located in Australia; or
 - (ii) the grantor is an Australian entity; and
- (c) intangible property if (among other things):
 - (i) the grantor is an Australian entity;
 - (ii) the intangible property is an account that is payable in Australia; or
 - (iii) the intangible property is an ADI account.

It follows that generally if a Relevant Clearing Member is an "Australian entity" as defined in the PPSA (being the grantor) or the intermediary or property is situated in Australia, then the PPSA will apply. In our view, the definition of "Australian entity" in the PPSA would include an Australian company and therefore would include each Relevant Clearing Member.

6. TYPES OF COLLATERAL

- (a) The following types of collateral are most likely to be of interest to LCH:
 - (i) cash (including interest in a bank account);
 - (ii) intermediated securities; and
 - (iii) investment instruments.
- (b) Relevantly, an "investment instrument" includes:
 - (i) a share in a body, or a debenture of a body;
 - (ii) a debenture, stock or bond issued or proposed to be issued by a government;
 - (iii) a derivative;
 - (iv) a unit in a share in a body; and
 - (v) a financial product that is traded on certain financial markets.

- (c) An "intermediated security" is the rights of a person in whose name an intermediary maintains a securities account.

An intermediary is:

- "(a) a person (including a central securities depository) who holds an Australian financial services licence (within the meaning of the Corporations Act 2001) permitting the person, in the course of business or other regular activity, to maintain securities accounts:
- (i) on behalf of others; or
 - (ii) on behalf of others as well as on the person's own behalf; or
- (b) a person who operates a clearing and settlement facility under an Australian CS facility licence (within the meaning of the Corporations Act), other than such a person prescribed by regulations made for the purposes of this paragraph; or
- (c) a person (including a central securities depository) who holds a licence issued under the law of a foreign jurisdiction permitting the person, in the course of business or other regular activity, to maintain securities accounts:
- (i) on behalf of others; or
 - (ii) on behalf of others as well as on the person's own behalf."

ANNEXURE B

PERFECTION OPTIONS AND JURISDICTIONAL ISSUES

1. INTRODUCTION AND BACKGROUND

- (a) Paragraph 3 of this annexure describes how LCH and each Clearing Client should perfect their respective security interests under the LCH Agreements.
- (b) Paragraph 4 of this annexure describes certain issues relating to conflict of laws applicable to the LCH Agreements.
- (c) We do not consider options (such as perfection of a security interest by possession) that appear unlikely to be relevant in the context of the LCH Agreements. Our analysis assumes that the secured property comprises money in a bank account (or an account held with LCH), intermediated securities and/or investment instruments (see Annexure A for a description of intermediated securities and investment instruments).

2. EXECUTIVE SUMMARY

We recommend that:

- (a) LCH and each Clearing Client register a single upfront registration on the PPS Register for all security interests granted to them by each Relevant Clearing Member under the LCH Agreements;
- (b) LCH takes steps (to the extent any further steps are necessary) to perfect by control its security interests in intermediated securities and investment instruments. There are a number of ways in which this can be achieved. We can discuss this further if necessary in the context of LCH's operations. One example is that if the securities account to which the intermediated securities are credited is in the name of LCH, this should achieve control for the purposes of the PPSA; and
- (c) LCH continue to provide in the LCH Agreements that the relevant governing law is that of England.

3. PERFECTION OF SECURITY INTERESTS

3.1 Option 1: Control

- (a) As noted in **Annexure A**, for some categories of collateral (relevantly, intermediated securities and investment instruments), a security interest may be perfected by the secured party taking control of the collateral. It is important to note that priority may be affected if the control is not continuous, in other words if the secured party loses control of the collateral for any reason, even temporarily.
- (b) If perfection of a security interest by control is available, then generally, this method of perfection is preferable. Perfection by control confers a form of super-priority over other security interests in the same collateral perfected by other means (including registration).
- (c) From the face of the LCH Agreements, we note that some of the secured property may comprise investment instruments and intermediated securities. The security interests over this secured property is capable of perfection by control. In the circumstances, where possible we recommend that the secured party take steps to perfect its security interests by control, so as to give it a super-priority security

interest in those assets. This is in addition to our recommendation to perfect its security interests by registration discussed at paragraph 3.2 below.

- (d) It is worth noting that, as long as the secured party registers an appropriate financing statement against the Relevant Clearing Member, any security interest that the secured party may have in any collateral covered by the financing statement will be perfected by virtue of the registration of the financing statement.
- (e) While it is true that perfection by control confers a form of super-priority over other security interests in the same collateral perfected by other means (including registration), it is also true that perfection by control in a practical context adds little over and above perfection by registration if:
 - (i) at the time of registration there is no existing financing statement and no transitional security interest covering the same collateral; and
 - (ii) it would not be possible for any competing security interest in the same collateral to be perfected by control.

3.2 **Option 2: Registration**

- (a) The PPSA provides that, subject to certain specified requirements, a security interest may be perfected by registration of a financing statement on the PPS Register. Perfection of security interests by registration will cover any security interests that are not either perfected by control (for example as a result of a failure to comply with the requirements of the PPSA) or that cannot be perfected by control (for example interests in amounts standing to the credit of bank accounts).
- (b) In summary, registration of its security interests provides LCH and each Clearing Client with the following advantages:
 - (i) it is unlikely to be able to perfect by control its security interests in certain collateral, such as cash; and
 - (ii) registration by it of its security interests provides certainty of continuous perfection of those security interests from the time of registration.
- (c) We also note that LCH and each Clearing Client is likely to have the benefit of a limited number of security interests and accordingly perfection by registration should not be a significant administrative burden.

4. **CONFLICT OF LAWS: JURISDICTIONAL ISSUES**

The PPSA contains provisions relating to choice of law and conflict of laws in relation to security interests in personal property that will apply in legal proceedings in Australia.

4.1 **Intermediated securities**

- (a) Unhelpfully, the relevant part of the PPSA does not provide any rules for resolving conflict of laws issues in relation to security interests in intermediated securities. The only potentially relevant provision is section 237(1) of the PPSA, which empowers parties to elect that the law of Australia applies to security interests (including in relation to intermediated securities) if the grantor is an Australian entity. As the LCH Agreements specify that the laws of England and Wales apply, section 237(1) is not relevant to their interpretation. What is more, the courts of England might apply a different rule.

- (b) The *Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary* (**Hague Convention**) specifies the law applicable to certain issues (such as priority disputes in relation to securities) in relation to a disposition of or an interest in securities held with an intermediary (see Article 2(2)). The Hague Convention recognizes that the law of the "Place of the Relevant Intermediary" (**PRIMA**) is the appropriate law to govern issues such as security interests in securities held with an intermediary. However, Australia has not yet adopted the Hague Convention.
- (c) The PPSA does not comprehensively introduce PRIMA but does introduce some elements of it. In particular, the PPSA specifies the circumstances in which the PPSA applies to security interests in personal property. This expressly includes where the intermediary is located (ie, for present purposes, incorporated) in Australia. This does not have the result that an intermediated security is necessarily treated for all purposes as being located in Australia just because the intermediary is located in Australia. However it does mean that where the intermediary is located in Australia then, among other matters, an Australian court would apply the requirements of the PPSA relating to the attachment, enforceability and perfection of a security interest in the relevant intermediated securities.
- (d) Accordingly, where security over an intermediated security is provided in circumstances where PRIMA is Australia, the secured party should perfect its security interest in accordance with the PPSA.

4.2 **Financial property (such as investment instruments)**

- (a) Sections 240(1) and 240(3) of the PPSA have the effect that where the grantor is an Australian entity at the time the security interest in financial property (such as an investment instrument) attaches, the validity of that security interest will be governed by Australian law and the PPSA will apply. We note that the courts of another jurisdiction may apply a different rule.
- (b) Similarly, in the context of the perfection rules for financial property, where the grantor is an Australian entity at the time the security interest attaches, the perfection, and the effect of perfection or non-perfection of that security interest is governed by Australian law. We again note that the courts of another jurisdiction may apply a different rule.

CLEARING MEMBERSHIP AGREEMENT

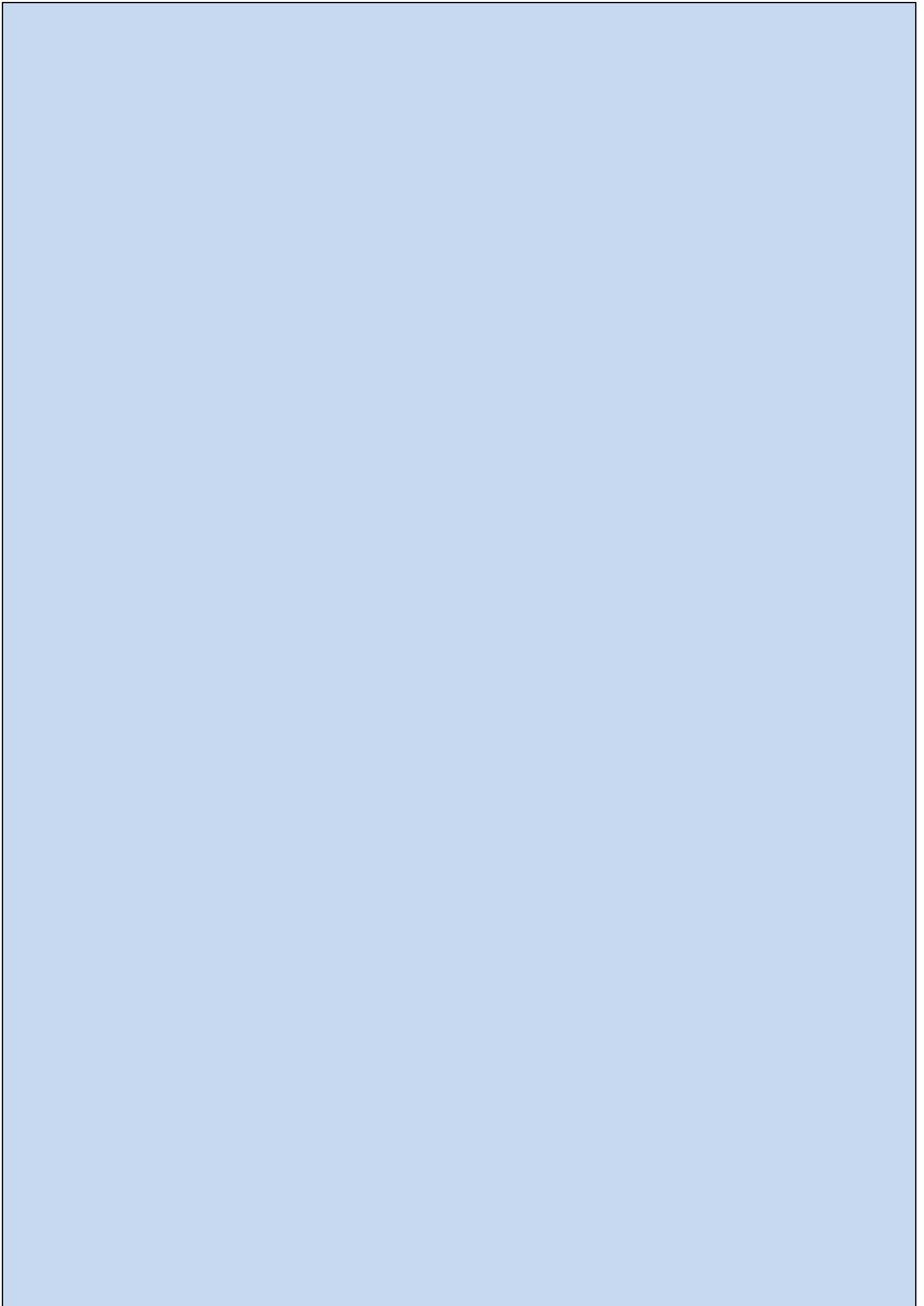
DATED

LCH.CLEARNET LIMITED

and

("the Firm")

Address of the Firm



THIS AGREEMENT is made on the date stated above

BETWEEN the Firm and LCH.CLEARNET LIMITED ("the Clearing House"), whose registered office is at Aldgate House, 33 Aldgate High Street, London, EC3N 1EA.

WHEREAS:

- A The Clearing House is experienced in carrying on the business of a clearing house and undertakes with each Clearing Member the performance of contracts registered in its name in accordance with the Rulebook;
- B The Clearing House has been appointed by certain Exchanges to provide central counterparty and other services in accordance with the terms and conditions of the Rulebook and certain agreements entered into between the Clearing House and such Exchanges;
- C The Clearing House also provides central counterparty and other services to participants in certain over-the-counter ("OTC") markets in accordance with the terms of this Agreement and the Rulebook;
- D The Firm desires to be admitted as a Clearing Member of the Clearing House to clear certain categories of Contract agreed by The Clearing House with the Firm and, the Clearing House having determined on the basis inter alia of the information supplied to it by the Firm that the Firm satisfies for the time being the relevant Criteria for Admission, the Clearing House agrees to admit the Firm as a Clearing Member subject to the terms and conditions of this Agreement.

NOW IT IS HEREBY AGREED as follows:-

1 INTERPRETATION AND SCOPE OF AGREEMENT

1.1. Unless otherwise expressly stated, in this Agreement:

- (a) "Cash Cover" means cover for margin (within the meaning of that term in the "Definitions" section of the Rulebook) provided in the form of a cash deposit with the Clearing House;
- (b) "Clearing Member" means a Person who has been admitted to membership of the Clearing House and whose membership has not terminated;
- (c) "Contract" means a contract or transaction eligible for registration in the Firm's name by the Clearing House in accordance with the Rulebook;
- (d) "Contribution" and "Contribution to the Default Fund" mean the sums of cash deposited by the Firm as cover in respect of the Firm's obligation to indemnify the Clearing House as provided by clause 9 of this Agreement and the Default Rules;
- (e) "Criteria for Admission" means criteria set out in one or more documents published from time to time by the Clearing House, being criteria to be satisfied by an applicant for admission as a Clearing Member in respect of the Designated Contracts which the applicant wishes to clear with the Clearing House;
- (f) "Default Fund" means the fund established under the Default Rules of the Clearing House to which the Clearing Member is required to contribute by virtue of clause 9 of this Agreement;

(g) [DELETED]

(h) "Default Notice" means a notice issued by the Clearing House in accordance with the Default Rules in respect of a Clearing Member who is or is likely to become unable to meet its obligations in respect of one or more Contracts;

(i) "Default Rules" means that part of the Rulebook having effect in accordance with Part IV of the Financial Services and Market Act 2000 (Recognition Requirements for Investment Exchange and Clearing Houses) Regulations 2001 to provide for action to be taken in respect of a Clearing Member subject to a Default Notice;

(j) "Designated Contract" has the meaning given to it in clause 2.1;

(k) "Exchange" means an organisation responsible for administering a market with which the Clearing House has an agreement for the provision of central counterparty and other services to Clearing Members;

(l) "Exchange Contract" means any contract which an Exchange has adopted and authorised Exchange Members to trade in under its Exchange Rules and in respect of which the Clearing House has agreed to provide central counterparty and other services;

(m) "Exchange Member" means any person (by whatever name called) being a member of, or participant in, a Market pursuant to Exchange Rules;

(n) "Exchange Rules" means any of the regulations, rules and administrative procedures or contractual arrangements for the time being and from time to time governing the operation of a Market administered by an Exchange and includes, without prejudice to the generality of the foregoing, any regulations made by the directors of an Exchange or by any committee established under the Rules, and, save where the context otherwise requires, includes Exchange Contracts, and the Rulebook;

(o) "Rulebook" means the Clearing House's General Regulations, Default Rules, Settlement Finality Regulations and Procedures and such other rules of the Clearing House as published and amended from time to time;

(p) "Market" means a futures, options, forward, stock or other market, administered by an Exchange, or an OTC market, in respect of which the Clearing House has agreed with such Exchange or, in respect of an OTC market, with one or more participants in that market, to provide central counterparty and related services on the terms of the Rulebook and in the case of an Exchange, pursuant to the terms of any agreement entered into with the Exchange;

(q) "Person" includes any firm, company, corporation, body, association or partnership (whether or not having separate legal personality) or any combination of the foregoing;

(r) "Procedures" means that part of the Rulebook by that name;

(s) "Registered Contract" means a contract registered in the Firm's name by the Clearing House in accordance with the Rulebook;

1.2. (a) References to "the parties" are references to the parties hereto, and "party" shall be construed accordingly;

(b) References herein to a clause are to a clause hereof and clause headings are for ease of reference only;

(c) Unless the context otherwise requires, words (including defined terms) denoting the singular shall include the plural and vice versa;

(d) References to writing include typing, printing, lithography, photography, facsimile transmission and other modes of representing or reproducing words in a visible form; and

(e) References herein to statutes, statutory instruments, the Rulebook, or provisions thereof are to those statutes, statutory instruments, Rulebook or provisions thereof as amended, modified or replaced from time to time.

1.3 This Agreement, the terms of any other agreement to which the Clearing House and the Clearing Member are party which relates to the provision of central counterparty and other services by the Clearing House, the terms of, and applicable to, each and every Registered Contract, the Rulebook and all amendments to any of the foregoing shall together constitute a single agreement between the Clearing House and the Clearing Member and both parties acknowledge that all Registered Contracts are entered into in reliance upon the fact that all such items constitute a single agreement between the parties.

1.4 A person who is not a party to this Agreement shall have no rights under or in respect of this Agreement.

2 CLEARING MEMBERSHIP

2.1. The Firm is hereby admitted as a Clearing Member on the terms set out in this Agreement. The Firm shall be eligible to clear such categories of Contract (each a "Designated Contract") as the Clearing House shall from time to time notify to the Firm.

2.2. The Firm warrants that the information supplied by the Firm to the Clearing House in connection with the enquiry conducted by the Clearing House to determine whether the Firm satisfies for the time being the Criteria for Admission was and is at the date of this Agreement true and accurate in all material respects.

2.3. The Firm will ensure that it will at all times satisfy the Criteria for Admission. If at any time it has reason to believe that it no longer satisfies or may cease to satisfy any of such criteria the Firm shall immediately notify the Clearing House of the circumstances.

2.4. The Firm shall give written notice forthwith to the Clearing House of the occurrence of any of the following of which it is aware:-

(a) the presentation of a petition or passing of any resolution for the bankruptcy or winding-up of, or for an administration order in respect of, the Firm or of a subsidiary or holding company of the Firm;

(b) the appointment of a receiver, administrative receiver, administrator or trustee of the estate of the Firm;

(c) the making of a composition or arrangement with creditors of the Firm or any order or proposal in connection therewith;

(d) where the Firm is a partnership, an application to dissolve the partnership, the presentation of a petition to wind up the partnership, or any other event which has the effect of dissolving the partnership;

(e) where the Firm is a registered company, the dissolution of the Firm or the striking-off of the Firm's name from the register of companies;

(f) any step analogous to those mentioned in paragraphs (a) to (e) of this clause 2.4 is taken in respect of such persons as are referred to in those respective paragraphs in any jurisdiction;

(g) the granting, withdrawal or refusal of an application for, or the revocation of any licence or authorisation to carry on investment, banking or insurance business in any country;

(h) the granting, withdrawal or refusal of an application for, or the revocation of, a license or authorisation by the Financial Conduct Authority, the Prudential Regulation Authority or membership of any self-regulating organisation, recognised or overseas investment exchange or clearing house (other than the Clearing House) under the Financial Services and Markets Act 2000 or any other body or authority which exercises a regulatory or supervisory function under the laws of the United Kingdom or any other state;

(i) the appointment of inspectors by a statutory or other regulatory authority to investigate the affairs of the Firm (other than an inspection of a purely routine and regular nature);

(j) the imposition of any disciplinary measures or sanctions (or similar measures) on the Firm in relation to its investment or other business by any Exchange, regulatory or supervisory authority;

(k) the entering of any judgment against the Firm under Section 150 of the Financial Services and Markets Act 2000;

(l) the conviction of the Firm for any offence under legislation relating to banking or other financial services, building societies, companies, credit unions, consumer credit, friendly societies, insolvency, insurance and industrial and provident societies or for any offence involving fraud or other dishonesty;

(m) the conviction of the Firm, or any subsidiary or holding company of the Firm for any offence relating to money laundering, or the entering of judgment or the making of any order against the Firm in any civil action or matter relating to money laundering;

(n) any enforcement proceedings taken or order made in connection with any judgement (other than an arbitration award or judgement in respect of the same) against the Firm; and

(o) any arrangement entered into by the Firm with any other Clearing Member relating to the provision of central counterparty and associated services by the Clearing House of Contracts or transactions entered into by the Firm after the effective date of termination of this Agreement.

2.5. The Firm shall give written notice forthwith to the Clearing House of any person becoming or ceasing to be a director of or a partner in the Firm or of the occurrence of any of the following in relation to a director of or a partner in the Firm, if aware of the same:-

(a) the occurrence of any event specified in clause 2.4 (insofar as it is capable of materially affecting him); or

(b) any disqualification order under the Company Directors Disqualification Act 1986 or equivalent order in overseas jurisdictions.

2.6. The Firm shall give written notice forthwith to the Clearing House of any change in its name, the address of its principal place of business, registered office or UK office.

2.7. The Firm shall give written notice to the Clearing House forthwith upon its becoming aware that any person is to become or cease to be, or has become or ceased to be, a controller of the Firm, and shall in relation to any person becoming a controller of the Firm state:-

(a) the controller's name, principal business and address;

(b) the date of the change or proposed change.

In this clause and in clause 2.9 "controller" means a person entitled to exercise or control the exercise of 20 per cent or more of the voting power in the Firm.

2.8. The Firm shall give written notice forthwith to the Clearing House of any change in its business which affects the Firm's ability to perform its obligations under this Agreement.

2.9. Where the Clearing House receives notification pursuant to any of clauses 2.3 to 2.8, or the Clearing House reasonably suspects that the Firm may no longer satisfy some or all of the Criteria for Admission or the criteria for clearing a Designated Contract, the Clearing House shall be entitled in its absolute discretion to call for information of whatsoever nature in order to determine whether the Firm continues to satisfy the Criteria for Admission or the criteria for clearing a Designated Contract. Without prejudice to the foregoing, the Clearing House may at any time call for information relating to the affairs (including the ownership) of any controller of the Firm or any person who is to become a controller of the Firm. The Firm shall forthwith on demand supply to the Clearing House information called for under this clause and shall ensure that such information is true and accurate in all respects.

2.10. The Firm undertakes to abide by the Rulebook and undertakes at all times to comply with other provisions of Exchange Rules so far as they apply to the Firm.

2.11. The Firm undertakes that at all times, to the extent the Firm is required under any applicable law to be authorised, licensed or approved in relation to activities undertaken by it, it shall be so authorised, licensed or approved.

2.12. The Firm agrees that in respect of any Contract for which central counterparty services are to be provided to the Firm by the Clearing House in accordance with the Rulebook, including, but not limited to, any contract made by the Firm under Exchange Rules on the floor of a Market (or through a Market's automated trading system) or otherwise, whether with a member of that Market or with a client or with any other person, and including any Contract entered into in an OTC market, the Firm shall contract as principal and not as agent.

2.13. The Firm shall furnish financial information to the Clearing House in accordance with the requirements of the Rulebook or such other requirements as the Clearing House may from time to time prescribe.

2.14. The Firm undertakes that, in its terms of business with its clients (being clients in respect of whom the Firm is subject to any regulations made pursuant to rules and/or legislation applicable to the Firm with respect to the safeguarding or segregation of clients' money):

(a) where it is subject to Exchange Rules, it will at all times include a stipulation that contracts made under Exchange Rules with or for them shall be subject to Exchange Rules (including the Rulebook); and

(b) that money of such clients in the possession of the Clearing House may be dealt with by the Clearing House in accordance with the Rulebook without exception.

2.15. Without prejudice to clause 2.14 the Firm undertakes that its dealings with all its clients or counterparties shall be arranged so as to comply with the requirement that the Firm deals with the Clearing House as principal, and that all sums deposited

with the Clearing House by way of Cash Cover (including the Firm's Contribution to the Default Fund) shall be deposited unencumbered and by the Firm acting as sole principal and as legal and beneficial owner.

2.16. The Firm undertakes not to assign, charge or subject to any other form of security, whether purporting to rank in priority over, *pari passu* with or subsequent to the rights of the Clearing House, any Cash Cover provided to the Clearing House, including its entitlement to repayment of its Contribution to the Default Fund or any part of it. Any purported charge, assignment or encumbrance (whether by way of security or otherwise) of Cash Cover provided to the Clearing House shall be void. The Firm shall not otherwise encumber (or seek to encumber) any Cash Cover provided to the Clearing House.

3 REMUNERATION

3.1. The Clearing House shall be entitled to charge the Firm such fees, charges, levies and other dues, on such events, and calculated in accordance with such scales and methods, as are for the time prescribed by the Clearing House and, where relevant, for Exchange Contracts, after consultation with the relevant Exchange.

3.2. The Clearing House shall give the Firm not less than fourteen days' notice of any increase in such fees, charges, levies or other dues.

4 FACILITIES PROVIDED BY THE CLEARING HOUSE

4.1. Provision of Central Counterparty Services

(a) Details of all Contracts to be registered by the Clearing House in the name of the Firm and in respect of which central counterparty services are to be provided shall be provided to the Clearing House in accordance with the Rulebook and any other agreement entered into between the Clearing House and the Firm.

(b) Provided that a Contract meets the criteria for registration of that Contract in the name of the Firm and is a Designated Contract, and subject to the Rulebook, the Clearing House shall enter into a Registered Contract with the Firm in respect thereof. Each such Contract shall be registered in accordance with the Rulebook and the Clearing House shall perform its obligations in respect of all Registered Contracts in accordance with this Agreement and the Rulebook.

4.2. Maintenance of Records

The Clearing House agrees that for a period of ten years after termination of a Registered Contract it shall maintain records thereof. The Clearing House may make a reasonable charge to the Firm for the production of any such records more than three months after registration.

4.3. Information

The Clearing House will provide to the Firm such information at such times as is provided for by the Rulebook.

4.4. Accounts

The Clearing House agrees to establish and maintain one or more accounts for the Firm in accordance with the Rulebook. Accounts will be opened and kept by the Clearing House in such manner as will not prevent the Firm from complying with requirements of any regulations made pursuant to rules and/or legislation applicable to the Firm with

respect to the safeguarding or segregation of clients' money and the rules of such regulatory organisation as the Firm may be subject to in respect of their cleared business.

5 DEFAULT

In the event of the Firm appearing to the Clearing House to be unable, or to be likely to become unable, to meet any obligation in respect of one or more Registered Contracts, or failing to observe any other financial or contractual obligation under the Rulebook, the Clearing House shall be entitled to take all or any of the steps set out in that regard in the Rulebook, including (but not limited to) the liquidation of all or any of the Registered Contracts.

6 DISCLOSURE OF INFORMATION

The Firm agrees that the Clearing House shall have authority to disclose any information of whatsoever nature concerning the Firm to such persons as is provided for by the Rulebook.

7 PARTNERSHIP

If the Firm is a partnership, the liability of each partner in the Firm hereunder and under any Registered Contract shall be joint and several and, notwithstanding an event which would by operation of law give rise to the dissolution of the partnership, or entitle a partner to seek an order to dissolve the partnership, including, but not limited to, the event of the death, bankruptcy, winding-up or dissolution of any such partner, the respective obligations of the Clearing House and all other partners shall remain in full force and effect. If the Firm is a partnership, the Firm undertakes that if any new partner joins the Firm, the Firm shall procure that such new partner becomes jointly and severally liable alongside existing partners in respect of obligations of the Firm to the Clearing House outstanding at the date of such new partner's accession to the Firm.

8 TERM

- 8.1. Subject to clause 8.3 either party (provided, in the case of the Firm, that the Clearing House has not issued a Default Notice in respect of the Firm) may terminate this Agreement by giving to the other party notice in writing, such notice to specify the effective date of termination ("the termination date") which shall be a business day not less than three months after the date of the notice, and this Agreement shall, subject to clause 8.2(b), terminate on the termination date. By the close of business on the termination date the Firm shall ensure that all Registered Contracts in the Firm's name have been closed-out or transferred so that there are no open Registered Contracts to which the firm is party at the end of the termination date.
- 8.2. If, under clause 8.1, the Firm has not closed out or transferred all Registered Contracts by the set termination date the Clearing House shall, at its sole discretion, be entitled to:
 - (a) liquidate any such Registered Contracts in accordance with the Rulebook; and
 - (b) require that the Firm remains a member of the Clearing House until such time as there are no Registered Contracts in existence to which the Firm is a party and the effective date of termination of this Agreement shall be postponed until such time.
- 8.3. If the Firm is in breach of or in default under any term of this Agreement or the Rulebook, or if the Clearing House has issued a Default Notice in respect of the Firm, or if the Clearing House reasonably determines that the Firm no longer satisfies the Criteria for Admission as a Clearing Member, the Clearing House may in its absolute discretion terminate this Agreement in writing either summarily or by notice as follows.

Any termination by notice under this clause 8.3 may take effect (subject as follows) on the expiry of 30 days or such longer period as may be specified in the notice. A notice given by the Clearing House under this clause may at the Clearing House's discretion allow the Firm a specified period in which to remedy the breach or default or to satisfy the Criteria for Admission as the case may be, and may specify what is to be done to that end, and may provide that if the same is done to the satisfaction of the Clearing House within that period the termination of this Agreement shall not take effect; and if this Agreement has terminated after the Clearing House has allowed the Firm such a period for remedy or satisfaction, the Clearing House shall then notify the Firm of the fact of termination. The Clearing House may, if the Clearing House has issued a Default Notice in respect of the Firm immediately, and in any other case after the effective date of termination, take such other action as it deems expedient in its absolute discretion to protect itself or any other Clearing Member including, without limitation, the liquidation of Registered Contracts but without prejudice to its own rights in respect of such contracts.

- 8.4. Upon the termination of this Agreement for whatever reason the Firm shall unless otherwise agreed cease to be a Clearing Member.

9 DEFAULT FUND

- 9.1. In this clause the term "Excess Loss" bears the meaning ascribed to it in the Rulebook.
- 9.2. The Firm, as primary obligor and not surety, hereby indemnifies the Clearing House in respect of any Excess Loss, and undertakes to deposit cash with the Clearing House as collateral for its obligations in respect of such indemnity, in accordance in each case with the Default Rules.
- 9.3. The Firm shall, in accordance with the Default Rules, continue to be liable to indemnify the Clearing House in respect of any Excess Loss arising upon any default occurring before the effective date of termination of this Agreement. Subject thereto, the indemnity hereby given shall cease to have effect on the effective date of termination of this Agreement, unless a Default Notice is issued by the Clearing House in respect of the Firm, in which case the indemnity hereby given shall cease to have effect after the date three months after the date of issue of such Default Notice.
- 9.4. Save as provided expressly by the Default Rules, the Firm shall not be entitled to exercise any right of subrogation in respect of any sum applied in satisfaction of its obligations to the Clearing House under this clause 9.

10 FORCE MAJEURE

Neither party shall be liable for any failure in performance of this Agreement if such failure arises out of causes beyond its control. Such causes may include, but are not limited to, acts of God or the public enemy, acts of civil or military authority, fire, flood, labour dispute (but excluding strikes, lock-outs and labour disputes involving the employees of the party intending to rely on this clause or its sub-contractors), unavailability or restriction of computer or data processing facilities or of energy supplies, communications systems failure, failure of a common depository, clearing system or settlement system, riot or war.

11 THE RULEBOOK

In the event of conflict between the Rulebook and the provisions of this Agreement the Rulebook shall prevail.

12 NOTICES

12.1. Any notice or communication to be made under or in connection with this Agreement shall be made in writing addressed to the party to whom such notice or communication is to be given; save that a notice or communication of an urgent nature shall be given or made orally and as soon as reasonably practicable thereafter confirmed in writing in conformity hereto. A notice may be delivered personally or sent by post to the address of that party stated in this Agreement, or to such other address as may have been notified by that party in accordance herewith.

12.2. Where a notice is sent by the Clearing House by post it shall be deemed delivered 24 hours after being deposited in the post first-class postage prepaid in an envelope addressed to the party to whom it is to be given in conformity to clause 12.1, or in the case of international mail, on the fourth business day thereafter. In all other cases notices shall be deemed delivered when actually received.

13 LAW

13.1. This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to hear and determine any action or dispute which may arise herefrom. The Clearing House and the Firm each irrevocably submits to such jurisdiction and to waive any objection which it might otherwise have to such courts being a convenient and appropriate forum.

13.2. The Firm irrevocably waives, with respect to itself and its revenues and assets all immunity on the grounds of sovereignty or other similar grounds from suit, jurisdiction of any court, relief by way of injunction, order for specific performance or for recovery of property, attachment of its assets (whether before or after judgement) and execution or enforcement of any judgement to which it or its revenues or assets might otherwise be entitled in any proceedings in the courts of any jurisdiction and irrevocably agrees that it will not claim any such immunity in any proceedings.

14 SERVICE OF PROCESS

Without prejudice to any other mode of service, and subject to its right to change its agent for the purposes of this Clause on 30 days' written notice to the Clearing House, the Firm (other than where it is incorporated in England and Wales or otherwise has an office in England and Wales) appoints, as its agent for service of process relating to any proceedings before the courts of England and Wales in connection with the Firm the person in London as notified to the Clearing House in writing with the application for admission.

IN WITNESS whereof the parties hereto have caused this Agreement to be signed by their duly authorised representatives the day and year first before written.

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for THE FIRM

(Signature)

(Print Name and Title)

for **LCH.CLEARNET LIMITED**

(Signature)

(Print Name and Title)

for **LCH.CLEARNET LIMITED**

LCH.CLEARNET LIMITED

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LCLTD/TRAIN/CMA-05/05(0.1)

A company whether incorporated in England and Wales or an overseas company.

CHARGE BY CLEARING MEMBER

CHARGE SECURING OWN OBLIGATIONS

Date of Execution:
(to be completed by LCH Limited) _____

Date of Delivery:
(to be completed by LCH Limited) _____

Name and Address of Chargor: _____

Clearing Membership Agreement Date: _____

Chargor's Account: _____

THIS DEED made on the date above-stated **BETWEEN THE ABOVE-NAMED CHARGOR** ("the Chargor") and **LCH LIMITED** ("the Clearing House")

WITNESSES as follows :

1. **Interpretation**

- (1) Any reference herein to:
 - (a) any statute or to any provisions of any statute shall be construed as a reference to any statutory modification or re-enactment thereof and to any regulations or orders made thereunder and from time to time in force; and
 - (b) an agreement or instrument shall be to that agreement or instrument as amended from time to time.
- (2) A reference herein to collateral or cash being "provided" includes the act of (i) transferring, (ii) delivering, or (iii) crediting to an account or effecting, directly or indirectly, any of the foregoing.
- (3) The Clause headings shall not affect the construction hereof.

1A. **The Secured Obligations**

- (1) The Chargor shall pay to the Clearing House all monies (including settlement costs, interest and other charges) which now are or at any time hereafter may be or become due or owing by the Chargor to the Clearing House on the account identified above (or, but only if no account is identified, on all accounts of the Chargor with the Clearing House) and discharge all other liabilities of the Chargor (whether actual or contingent, now existing or hereafter incurred) to the Clearing House on the said account (or, if no account is identified, on all accounts of the Chargor with the Clearing House) in each case when due in accordance with the Clearing Membership Agreement and the Clearing House's Rulebook referred to therein (the Clearing Membership Agreement and the Clearing House's Rulebook as from time to time amended, renewed or supplemented being hereinafter referred to as "**the Agreement**") or, if the Agreement does not specify a time for such payment or discharge, promptly following demand by the Clearing House.
- (2) In the event that the Chargor fails to comply with sub-paragraph (1) above, the Chargor shall pay interest accruing from the date of demand on the monies so demanded and on the amount of all other liabilities at the rate provided for in the Agreement or, in the event of no such rate having been agreed, at a rate determined by the Clearing House (the rate so agreed or determined to apply

after as well as before any judgment), such interest to be paid upon demand of the Clearing House in accordance with its usual practices and to be compounded with principal and accrued interest in the event of its not being duly and punctually paid.

- (3) The monies, other liabilities, interest and other charges referred to in sub-paragraph (1) of this Clause, the interest referred to in sub-paragraph (2) of this Clause and all other monies and liabilities payable or to be discharged by the Chargor under or pursuant to any other provision of this Deed are hereinafter collectively referred to as "**the Secured Obligations**".

1B. **Holding of Collateral**

- (1) The Chargor shall, in accordance with the Procedures, transfer collateral to the Clearing House. Where such collateral takes the form of Securities, the Clearing House shall hold such Securities for the Chargor, subject to the terms of (and including the security constituted by) this Deed.
- (2) From time to time, in accordance with the Procedures and in the context of a transfer of one or more contracts and related cover from one member of the Clearing House to the Chargor at the request of a client of that other member or the Chargor, the Clearing House shall designate that certain Securities which it previously held for a third party are instead held by the Clearing House for the Chargor and form part of the collateral provided by the Chargor in satisfaction of its requirements under the Procedures. Upon such designation, the Clearing House shall hold such Securities for the Chargor, subject to the terms of this Deed.
- (3) The Clearing House will identify in its own books that any Securities referred to in sub-paragraphs (1) or (2) above are held by it for the account of and (as between the Chargor and the Clearing House) belong to the Chargor (subject to the terms of this Deed) and shall be recorded in the Securities Account (as defined below) which shall be subject to the security constituted by this Deed. Where the Clearing House holds any such Securities in an account (including an omnibus account) at any Clearance System or with any Custodian Bank with any other Securities, the Clearing House will take all actions within its control to ensure that such Securities are recorded in accounts with the Clearance System or Custodian Bank (as applicable) in which the Clearing House's own assets are not recorded.
- (4) All Distributions in the form of cash received by the Clearing House on any Securities which are held by the Clearing House for the account of the Chargor in accordance with sub-paragraphs (1) or (2) above and any cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a

title transfer basis) shall be received by the Clearing House for its own account and paid into one or more accounts in the Clearing House's name, with a corresponding and equal credit arising on and being recorded in the Cash Account (as defined below) whereupon such Distributions and other cash so provided to the Clearing House as recorded in the Cash Account shall be held by the Clearing House for the account of the Chargor and shall be subject to the security constituted by this Deed and designated as such in the Clearing House's books and records.

- (5) The Clearing House may hold any Securities pursuant to this Clause 1B (*Holding of Collateral*) in one or more omnibus accounts with a Custodian Bank or Clearance System, as the case may be, together with other Securities which it holds for other third parties which have granted a charge over such assets in favour of the Clearing House in a form substantially the same as this Deed but no other Securities. The Clearing House shall ensure that any such omnibus account with a Clearance System or Custodian Bank is clearly identified as an account relating to Securities held by the Clearing House on behalf of third parties.
- (6) The Clearing House undertakes to the Chargor that it will at all times ensure that, pursuant to the terms governing any account with any Clearance System or Custodian Bank in which any Securities are held for the Chargor, any claim or security interest which that Clearance System or Custodian Bank may have against or over such Securities shall be limited to any unpaid fees owed by the Clearing House to such Clearance System or Custodian Bank in respect of such account.

2. **Charge**

- (1) The Chargor acting in due capacity (as defined in sub-paragraph (3) below) (and to the intent that the security so constituted shall be a security in favour of the Clearing House extending to all beneficial interests in the assets hereby charged and to any proceeds of sale or other realisation thereof or of any part thereof including any redemption monies paid or payable in respect thereof) hereby separately assigns, charges and pledges by way of first fixed security and by way of continuing security to the Clearing House, until discharged by the Clearing House in accordance with this Deed, for the payment to the Clearing House and the discharge of all the Secured Obligations, the Charged Property.
- (2) It shall be implied in respect of sub-paragraph (1) above that the Chargor is charging the Charged Property free from all charges and encumbrances (whether monetary or not) and from all other rights exercisable by third parties (including liabilities imposed and rights conferred by or under any enactment) except for any charge or lien routinely arising in favour of a Custodian Bank or Clearance System and applying to assets held by the Clearing House with that Custodian Bank or Clearance System and any third party's beneficial interest in

the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property.

(3) In this Deed:

"acting in due capacity" in relation to the Chargor means that each of the dispositions of property hereby effected by the Chargor is made with full title guarantee in accordance with the Law of Property (Miscellaneous Provisions) Act 1994 except as expressly permitted or contemplated under this Deed;

"Cash Account" means any account maintained by the Clearing House on its books for the account of the Chargor in which an amount equal to any cash Distributions or cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis) are recorded;

"Charged Property" means at any time all present and future rights, title and interest of the Chargor in and to:

- (i) all Securities from time to time recorded in and represented by the Securities Account and held by the Clearing House for the account of the Chargor in accordance with Clause 1B;
- (ii) all Distributions including without limitation Distributions in the form of cash;
- (iii) all cash provided to the Clearing House in connection with transactions relating to Securities recorded in the Securities Account (excluding, for the avoidance of doubt, any cash provided directly by the Chargor to the Clearing House as collateral on a title transfer basis);
- (iv) the Securities Account; and
- (v) the Cash Account;

"Chargor Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Chargor maintains any cash account or securities account;

"Clearance System" shall be construed as a reference to any system from time to time used or constituted for the clearing, collective safe custody or central deposit of securities, and any depository for any of the foregoing;

"Clearing Membership Agreement" means in relation to the Chargor the Clearing Membership Agreement between the Chargor and the Clearing House

having the date specified on the first page of this Deed, as such agreement may be amended and or replaced from time to time;

"Custodian Bank" means a bank or custodian or any nominee company or trust company which is a subsidiary of such a bank or custodian with which the Clearing House maintains any cash account or securities account;

"Default Notice" has the meaning given to it in the Default Rules;

"Default Rules" has the meaning given to such term in the Clearing Membership Agreement;

"Deed" means this charge made between the Chargor and the Clearing House on the date above-stated, as the same may be amended, supplemented or restated from time to time;

"Distributions" means all rights, benefits and proceeds including, without limitation:

- (a) any dividends or interest, annual payments or other distributions; and
- (b) any proceeds of redemption, substitution, exchange, bonus or preference, under option rights or otherwise,

in each case attaching to or arising from or in respect of any Securities forming part of the Charged Property;

"Procedures" means the one or more documents containing the working practices and administrative requirements of the Clearing House for the purposes of implementing the Clearing House's Rulebook and Default Rules from time to time in force, or procedures for application for and regulation of clearing membership of the Clearing House;

"Receiver" means a receiver, receiver and manager or an administrative receiver as the Clearing House may specify at any time in the relevant appointment made under this Deed, which term will include any appointee made under a joint and/or several appointment by the Clearing House;

"Securities" shall be construed as a reference to bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments, including Distributions in the form of Securities (and without limitation, shall include any of the foregoing not constituted, evidenced or represented by a certificate or other document but by any entry in the books or other records of the issuer, a trustee or other fiduciary thereof, or a Clearance System); and

"Securities Account" means any account maintained by the Clearing House

on its books for the account of the Chargor in which Securities are recorded.

3. **Release**

- (1) Upon the Clearing House being satisfied that the Secured Obligations have been irrevocably paid or discharged in full, the Clearing House shall, at the request and cost of the Chargor, release or discharge (as appropriate) all the Charged Property from the security created by this Deed provided that, without prejudice to any remedy which the Chargor may have if the Clearing House fails to comply with its obligations under this Clause, such actions shall be without recourse to, and without any representations or warranties by, the Clearing House or any of its nominees
- (2) The Chargor may, in the circumstances specified in sections 1.1.2 and 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), request that part or all of the Charged Property, or the proceeds thereof, be returned or repaid to, or to the order of, the Chargor. Where, pursuant to such a request, the Clearing House returns or repays any of the Charged Property, or the proceeds thereof, pursuant to sections 1.1.2 or 1.1.3 of the Procedures Section 4 (*Margin and Collateral*), such Charged Property shall be released or discharged (as appropriate) from the security interest created over such Charged Property and the proceeds thereof pursuant to Clause 2(1) with effect from the time such Charged Property, or the proceeds thereof, are transferred by the Clearing House to, or to the order of, the Chargor in accordance with the Procedures.

4. **Income**

Prior to a Default (as defined in Clause 11(1) below), the Clearing House consents to the payment or transfer of any and all Distributions received by the Clearing House in respect of any Charged Property to the Chargor (and upon such payment or transfer, the Distributions shall be released from the security constituted by this Deed) provided that, in the Clearing House's reasonable view, the Clearing House would still have sufficient security, following such payment or transfer, to secure the Secured Obligations.

5. **Voting rights, calls and other obligations in respect of the Securities**

- (1) The Chargor must pay all calls and other payments due and payable in respect of any Securities and must comply with all requests (including requests for information by any listing or other authority), obligations and conditions relating to the Securities. In any case of default by the Chargor in this respect the Clearing House may if it thinks fit make any such payments on behalf of the Chargor (but shall be under no obligation to do so) in which event any sums so paid shall be reimbursed by the Chargor on demand by the Clearing House and until reimbursed shall bear interest in accordance with Clause 1A(2) above.

- (2) The Chargor shall not exercise or be entitled to exercise any voting rights, powers and other rights in respect of the Securities which are held by the Clearing House for the account of the Chargor pursuant to this Deed.

6. **Reinstatement**

If any discharge, release or arrangement is made by the Clearing House in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation, administration or otherwise, without limitation, then the liability of the Chargor and the security created by this Deed will continue or be reinstated as if the discharge, release or arrangement had not occurred.

7. **Warranties and Undertakings**

The Chargor hereby represents and warrants to the Clearing House and undertakes on an ongoing basis that:

- (i) the Chargor is duly incorporated or organised and validly existing under the laws of its jurisdiction of organisation or incorporation;
- (ii) the Chargor and each of its subsidiaries has the power to own its assets and carry on its business as it is being conducted;
- (iii) subject to any legal or equitable interest which any common depository, Clearance System or Custodian Bank may have in any Securities and to any third party's beneficial interest in the Charged Property which ranks behind the rights of the Clearing House in respect of the Charged Property, the Chargor is and will at all times during the subsistence of the security and security interest hereby constituted, be the sole and lawful owner of, and be entitled to the entire beneficial interest in, the Charged Property free from mortgages or charges (other than as a result of the security created under this Deed, any charge or lien arising in favour of any Clearance System or Custodian Bank and any charge in favour of the Chargor) or other encumbrances and no other person (save as aforesaid) has any rights or interests therein;
- (iv) save as contemplated by Clause 3(2), the Chargor has not sold or agreed to sell or otherwise disposed of or agreed to dispose of, and will not at any time during the subsistence of the security hereby constituted sell or agree to sell or otherwise dispose of or agree to dispose of, the benefit of all or any rights, titles and interest in and to the Charged Property or any part thereof;
- (v) the Chargor has and will at all material times have the necessary power to enable the Chargor to enter into and perform the obligations expressed to be assumed by the Chargor under this Deed;

- (vi) this Deed constitutes legal, valid, binding and enforceable obligations of the Chargor and is a security over, and confers a first security interest in, the Charged Property and every part thereof, effective in accordance with its terms (subject to applicable bankruptcy, resolution, reorganisation, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law));
- (vii) all necessary authorisations and filings to enable or entitle the Chargor to enter into this Deed have been obtained and are in full force and effect and will remain in such force and effect at all times during the subsistence of the security hereby constituted;
- (viii) the execution of this Deed does not violate any agreement to which the Chargor is a party or breach any obligation to which the Chargor is subject and does not conflict with any law or regulation applicable to it (if such conflict would adversely affect the Clearing House's rights under this Deed) or its constitutional documents;
- (ix) it has been and shall at all times remain expressly agreed between the Chargor and each of the Chargor's clients or other persons who are for the time being (or would be, but for the provisions of this Deed) entitled to the entire beneficial interest in all or any parts of the Charged Property that, in relation to any assets from time to time held by the Chargor or delivered to the Chargor for the account of any such client or other person which at any time form part of the Charged Property, the Chargor may, free of any interest of any such client or other person therein which is adverse to the Clearing House, charge or otherwise constitute security over such assets in favour of the Clearing House on such terms as the Clearing House may from time to time prescribe and, in particular but without limitation, on terms that the Clearing House may enforce and retain such charge or other security in satisfaction of or pending discharge of all or any obligations of the Chargor to the Clearing House;
- (x) in no case is the Chargor or the Chargor's client or other person who is for the time being the lawful owner of or person entitled to the entire beneficial interest in any part of the Charged Property, nor will the Chargor, client or other such person be, in breach of any trust or other fiduciary duty in placing or authorising the placing of any Charged Property (or rights, benefits or proceeds forming part of the Charged Property) under this Deed;
- (xi) no corporate actions, legal proceedings or other procedure or steps have been taken in relation to, or notice given in respect of, a composition, compromise, assignment or arrangement with any creditor of the Chargor or in relation to the suspension of payments or moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of, or the appointment of an administrator

to, the Chargor (other than any which will be dismissed, discharged, stayed or restrained within 15 days of their instigation) and no such step is intended by the Chargor (save for the purposes of any solvent re-organisation or reconstruction which has previously been approved by the Clearing House); and

- (xii) the Chargor undertakes to abide by the Procedures as in effect from time to time.

8. **Negative Pledge**

- (1) The Chargor hereby undertakes with the Clearing House that at no time during the subsistence of the security hereby constituted will the Chargor, otherwise than:

- (i) in favour of the Clearing House; or

- (iii) with the prior written consent of the Clearing House and in accordance with and subject to any conditions which the Clearing House may attach to such consent,

create, grant, extend or, except in relation to any charge or lien in favour of any Clearance System or Custodian Bank, permit to subsist any mortgage or other fixed security or any floating charge or other security interest on, over or in the Charged Property or any part thereof. The foregoing prohibition shall apply not only to mortgages, other fixed securities, floating charges and security interests which rank or purport to rank in point of security in priority to the security hereby constituted but also to any mortgages, securities, floating charges or security interests which rank or purport to rank *pari passu* therewith or thereafter.

- (2) Sub-paragraph (1) above does not, during the subsistence of the security hereby constituted, operate to prevent the Chargor from continuing to hold a security interest in the Charged Property previously created in favour of the Chargor, *provided always* that the interest in favour of the Chargor shall rank after the security created by this Deed.

9. **Preservation of Charged Property**

- (1) Until the security hereby constituted shall have been discharged, the Chargor shall ensure, unless required by law or regulation to restrict any transfer (in which case the Chargor shall immediately notify the Clearing House of such restrictions), that all of the Charged Property is and at all times remains free from any restriction on transfer.

- (2) The Chargor shall not, to the extent that the same is within the control of the Chargor, permit or agree to any variation of the rights attaching to or conferred

by the Charged Property or any part thereof without the prior consent of the Clearing House in writing.

- (3) The Clearing House shall not have any right of use or re-hypothecation right, in respect of the Charged Property, whether under Regulation 16 of the Financial Collateral Arrangements (No.2) Regulations 2003, the New York Uniform Commercial Code or any applicable Federal law of the United States or otherwise, *provided that* this provision shall not affect the powers of the Clearing House under Clauses 12 (*Power of Sale*) and 13 (*Right of Appropriation*) or any other rights to enforce the security interest herein created against the Charged Property.

10. **Further Assurance**

- (1) In the case of any part of the Charged Property situated in the United States of America, it is acknowledged and agreed by the Chargor that this Deed shall also constitute a security agreement for the purpose of creating a security interest in the Charged Property under applicable provisions of the Uniform Commercial Code or other applicable laws or regulations of the State of New York. For purposes hereof, "**Charged Property situated in the United States of America**" means: (i) in the case of any securities account and/or securities entitlements or other rights or assets or investment property credited to a securities account as financial assets, a securities account maintained with a securities intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; (ii) in the case of any deposit account and/or any amounts credited to a deposit account, a deposit account maintained with a bank whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC; and (iii) in the case of any commodity account or any commodity contract credited to a commodity account such commodity account is maintained with a commodity intermediary whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC . In furtherance of the foregoing and without limiting the generality of Clause 2 (*Charge*) above, in order to secure the payment, performance and observance of the Secured Obligations, the Chargor hereby grants to the Clearing House a continuing security interest in, right of set-off against, and an assignment to the Clearing House of all of the Charged Property situated in the United States of America and all rights thereto, in each case whether now owned or existing or hereafter acquired or arising and which shall include, without limitation, all of the Chargor's interests in any deposit accounts, investment property and securities entitlements (as such terms are defined in the Uniform Commercial Code of the State of New York; the "**NY UCC**"), together with all proceeds (as defined in the NY UCC) and products of all or any of the property described above.
- (2) The Chargor undertakes promptly to execute and do (at the cost and expense of the Chargor) all such deeds, documents, acts and things as may be

necessary or desirable in order for the Clearing House to enjoy a fully perfected security interest in the whole of the Charged Property, including without limitation the deposit of the Charged Property with a Clearance System or Custodian Bank (as applicable) and the perfection of pledges or transfers under such laws, of whatever nation or territory, as may govern the pledging or transfer of the Charged Property or part thereof or other mode of perfection of this Deed and the security interest expressed to be created hereby. Without limiting the foregoing, the Chargor agrees with and covenants to the Clearing House that with respect to all Charged Property situated in the United States of America consisting of investment property, money, instruments, securities, securities entitlements, other financial assets and commodity contracts (as defined in the NY UCC), such Charged Property shall be held, maintained or deposited, as applicable, in a securities account or commodity account (in the case of commodity contracts) (such that, in each case, the Clearing House shall become the entitlement holder thereof, as defined in the NY UCC) or a deposit account (as defined in the NY UCC), in the case of Charged Property that may be credited to a Deposit Account, in the name of the Clearing House, or, if permitted by the Procedures, may be maintained and held in the Chargor's name at a Chargor Custodian Bank (whose jurisdiction is New York or any other State of the United States for purposes of the NY UCC) which shall have executed and delivered to the Clearing House an agreement whereby such Chargor Custodian Bank agrees that it will comply with entitlement orders of the Clearing House without further consent by the Chargor. Notwithstanding anything to the contrary herein, in respect of any Charged Property situated in the United States of America, the Clearing House shall comply with all non-waivable requirements of the NY UCC with respect to how the secured party must deal with collateral under its control or in its possession.

11. **Enforcement of Security**

(1) On and at any time:

- (i) if a Default Notice is served on the Chargor in accordance with Rule 3 of the Default Rules; or
- (ii) if the Chargor requests the Clearing House to exercise any of its powers under this Deed,

(each such event a "**Default**"), the security created by or pursuant to this Deed is immediately enforceable and the Clearing House may, without notice to the Chargor or prior authorisation from any court, in its absolute discretion:

- (a) enforce all or any part of the security created by this Deed (at the times, in the manner and on the terms it thinks fit) and take possession of (provided that the Clearing House will not be liable, by reason of entering into possession of any Charged Property, to account as

mortgagee in possession or for any loss on realisation or for any default or omission for which a mortgagee in possession may be liable unless such loss, default or omission is caused by the Clearing House's gross negligence or wilful misconduct) and hold, sell, or otherwise dispose of all or any part of the Charged Property (at the time, in the manner and on the terms it thinks fit); and

- (b) whether or not it has appointed a Receiver, exercise all or any of the powers, authorisations and discretions conferred by the Law of Property Act 1925 (as varied or extended by this Deed) on chargees and by this Deed on any Receiver or otherwise conferred by law on chargees or Receivers.
- (2) The power of sale and other powers conferred by section 101 of the Law of Property Act 1925 on mortgagees, as varied and extended by this Deed, shall arise (and the Secured Obligations shall be deemed due and payable for that purpose) on the date of this Deed and shall be exercisable in accordance with Clause 11(1).

12. **Power of Sale**

- (1) If a Default has occurred, the Clearing House shall have and be entitled without prior notice to the Chargor to exercise the power to sell or otherwise dispose of, for any consideration (whether payable immediately or by instalments) as the Clearing House shall think fit, the whole or any part of the Charged Property and may (without prejudice to any right which it may have under any other provision hereof) treat such part of the Charged Property as consists of money as if it were the proceeds of such a sale or other disposal. The Clearing House shall be entitled to apply the proceeds of such sale or other disposal in paying the costs of such sale or other disposal and (subject to the rights or claims of any person entitled in priority to the Clearing House) in or towards the discharge of the Secured Obligations, the balance (if any) to be paid to the Chargor or other persons entitled thereto. Such power of sale or other disposal shall operate as a variation and extension of the statutory power of sale under section 101 of the Law of Property Act 1925.
- (2) The restriction contained in section 103 of the Law of Property Act 1925 on the exercise of the statutory power of sale shall not apply to any exercise by the Clearing House of its power of sale or other disposal. In favour of a purchaser a certificate in writing by an officer or agent of the Clearing House that either or both of such powers has arisen and is exercisable shall be conclusive evidence of that fact.
- (3) Upon any such default or failure as aforesaid the Clearing House shall also have with respect to any part of the Charged Property situated in the United States of America all of the rights and remedies of a secured party under the NY UCC or any other applicable law of the State of New York and all rights provided

herein or in any other applicable security, loan or other agreement, all of which rights and remedies shall to the full extent permitted by law be cumulative.

13. **Right of Appropriation**

- (1) To the extent that any of the Charged Property constitutes "financial collateral" and this Deed and the obligations of the Chargor hereunder constitute a "security financial collateral arrangement" (in each case as defined in, and for the purposes of, the Financial Collateral Arrangements (No. 2) Regulations 2003 (SI 2003 No. 3226), as amended, (the "**Regulations**") the Clearing House shall have the right (at any time following the occurrence of a Default) to appropriate all or any part of such financial collateral in or towards discharge of the Secured Obligations and may exercise such right to appropriate upon giving written notice to the Chargor. For this purpose, the parties agree that the value of such financial collateral so appropriated shall be determined as follows:
- (a) if the financial collateral is listed or traded on a recognised exchange or by reference to a public index, its value will be taken as the value at which it could have been sold on the exchange or which is given in the public index on the date of appropriation; and
 - (b) in any other case, the value of the financial collateral will be such amount as the Clearing House reasonably determines having taken into account advice obtained by it from an independent investment or accountancy firm of national standing selected by it.
- (2) The parties agree that the method of valuation provided for in this Deed shall constitute a commercially reasonable method of valuation for the purposes of the Regulations.

14. **Immediate Recourse**

The Chargor waives any right it may have of first requiring the Clearing House to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Deed. This waiver applies irrespective of any law or any provision of this Deed to the contrary.

15. **Consolidation of Securities**

Subsection (1) of section 93 of the Law of Property Act 1925 shall not apply to this Deed.

16. **Effectiveness of Security**

- (1) This Deed shall be in addition to and shall be independent of every other security which the Clearing House may at any time hold for any of the Secured Obligations. No prior security held by the Clearing House over the whole or any

part of the Charged Property shall merge into the security hereby constituted.

- (2) This Deed shall remain in full force and effect as a continuing security unless and until the Clearing House discharges it.
- (3) Nothing contained in this Deed is intended to, or shall operate so as to, prejudice or affect any bill, note, guarantee, mortgage, pledge, charge or other security of any kind whatsoever which the Clearing House may have for the Secured Obligations of any of them or any right, remedy or privilege of the Clearing House thereunder.

17. **Avoidance of Payments**

If the Clearing House considers that any payment or discharge of the Secured Obligations is capable of being avoided or reduced by virtue of any bankruptcy, insolvency, liquidation or similar laws then such payment or discharge shall not be considered to have been made for the purposes of determining whether the Secured Obligations have been irrevocably paid or discharged in full.

18. **Power of Attorney**

The Chargor hereby irrevocably appoints the Clearing House to be the Chargor's attorney and in the Chargor's name and on the Chargor's behalf and as the act and deed of the Chargor to sign, seal, execute, deliver, perfect and do all deeds, instruments, mortgages, acts and things as may be, or as the Clearing House may consider to be, requisite for carrying out any obligation imposed on the Chargor under Clause 10 (*Further Assurance*) above, or for enabling the Clearing House to exercise its power of sale or other disposal referred to in Clause 12 (*Power of Sale*) above or for carrying out any such sale or other disposal made under such power into effect, or exercising any of the rights and powers referred to in Clause 9 (*Preservation of Charged Property*) above, including without limitation the appointment of any person as a proxy of the Chargor. The Chargor hereby undertakes to ratify and confirm all things done and documents executed by the Clearing House in the exercise of the power of attorney conferred by this Clause.

19. **Receivers and Administrators**

- (1) At any time after having been requested to do so by the Chargor or after this Deed becomes enforceable in accordance with Clause 11 (*Enforcement of Security*) above the Clearing House may by deed or otherwise (acting through an authorised officer of the Clearing House), without prior notice to the Chargor:
 - (a) appoint one or more persons to be a Receiver of the whole or any part of the Charged Property;
 - (b) appoint one or more Receivers of separate parts of the Charged

Property respectively;

- (c) remove (so far as it is lawfully able) any Receiver so appointed; and
 - (d) appoint another person(s) as an additional or replacement Receiver(s).
- (2) Each person appointed to be a Receiver pursuant to sub-paragraph (1) above will be:
- (a) entitled to act individually or together with any other person appointed or substituted as Receiver;
 - (b) for all purposes deemed to be the agent of the Chargor which shall be solely responsible for his acts, defaults and liabilities and for the payment of his remuneration and no Receiver shall at any time act as agent for the Clearing House; and
 - (c) entitled to remuneration for his services at a rate to be fixed by the Clearing House from time to time (without being limited to the maximum rate specified by law including the Law of Property Act 1925).
- (3) The powers of appointment of a Receiver shall be in addition to all statutory and other powers of appointment of the Clearing House under the Law of Property Act 1925 (as extended by this Deed) or otherwise and such powers shall remain exercisable from time to time by the Clearing House in respect of any part of the Charged Property.
- (4) Every Receiver shall (subject to any restrictions in the instrument appointing him but notwithstanding any winding-up or dissolution of the Chargor) have and be entitled to exercise, in relation to the Charged Property in respect of which he was appointed, and as varied and extended by the provisions of this Deed (in the name of or on behalf of the Chargor or in his own name and, in each case, at the cost of the Chargor):
- (a) all the powers conferred by the Law of Property Act 1925 on mortgagors and on mortgagees in possession and on receivers appointed under that Act;
 - (b) all the powers of an administrative receiver set out in Schedule 1 to the Insolvency Act 1986 (whether or not the Receiver is an administrative receiver);
 - (c) all the powers and rights of an absolute owner and power to do or omit to do anything which the Chargor itself could do or omit to do;
 - (d) the power to delegate (either generally or specifically) the powers,

authorities and discretions conferred on it by this Deed (including the power of attorney) on such terms and conditions as it shall see fit. Such delegation shall not preclude either the subsequent exercise or any subsequent delegation or any revocation of such power, authority or discretion by the Receiver itself; and

- (e) the power to do all things (including bringing or defending proceedings in the name or on behalf of the Chargor) which seem to the Receiver to be incidental or conducive to:
 - (i) any of the functions, powers, authorities or discretions conferred on or vested in him;
 - (ii) the exercise of any rights, powers and remedies of the Clearing House provided by or pursuant to this Deed or by law (including realisation of all or any part of the Charged Property); or
 - (iii) bringing to his hands any assets of the Chargor forming part of, or which when got in would be, Charged Property.

- (5) The receipt of the Clearing House or any Receiver shall be a conclusive discharge to a purchaser and, in making any sale or disposal of any of the Charged Property or making any acquisition, the Clearing House or any Receiver may do so for such consideration, in such manner and on such terms as it thinks fit.
- (6) No purchaser or other person dealing with the Clearing House or any Receiver shall be bound to inquire whether the right of the Clearing House or such Receiver to exercise any of its powers has arisen or become exercisable or be concerned with any propriety or regularity on the part of the Clearing House or such Receiver in such dealings.
- (7) Any liberty or power which may be exercised or any determination which may be made under this Deed by the Clearing House or any Receiver may be exercised or made in its absolute and unfettered discretion without any obligation to give reasons.

20. **No liability**

Neither the Clearing House nor any receiver appointed pursuant to this Deed shall be liable by reason of: (a) taking any action permitted by this Deed; or (b) any neglect or default in connection with the Charged Property; or (c) the taking possession or realisation of all or any part of the Charged Property, except in the case of gross negligence or wilful default upon its part.

21. **Remedies, Time or Indulgence**

- (1) The rights, powers and remedies provided by this Deed are cumulative and are not, nor are they to be construed as, exclusive of any right of set-off or other rights, powers and remedies provided by law.
- (2) The obligations of the Chargor under this Deed shall not be affected by any act, omission or circumstance which, but for this provision, might operate to release or otherwise exonerate the Chargor from its obligations under this Deed or affect such obligations including (without limitation and whether or not known to the Chargor or the Clearing House):
 - (a) any unenforceability, illegality, invalidity or non-provability of any obligation of the Chargor or any other person; or
 - (b) any incapacity or lack of power, authority or legal personality or dissolution or change in the members or status of the Chargor or any other person.
- (3) No failure on the part of the Clearing House to exercise, or delay on its part in exercising, any of the rights, powers and remedies provided by this Deed or by law (collectively "**the Clearing House's Rights**") shall operate as a waiver thereof, nor shall any single or partial waiver of any of the Clearing House's Rights preclude any further or other exercise of that or any other of the Clearing House's Rights.
- (4) The Clearing House may in its discretion grant time or other indulgence or make any other arrangement, variation or release with any person not party hereto (irrespective of whether such person is liable with the Chargor) in respect of the Secured Obligations or in any way affecting or concerning them or any of them or in respect of any security for the Secured Obligations or any of them, without in any such case prejudicing, affecting or impairing the security hereby constituted, or any of the Clearing House's Rights or the exercise of the same, or any indebtedness or other liability of the Chargor to the Clearing House.

22. **Costs, Charges and Expenses**

All costs, charges and expenses of the Clearing House incurred in the exercise of any of the Clearing House's Rights, or in connection with the execution of or otherwise in relation to this Deed or in connection with the perfection or enforcement of all security hereby constituted shall be reimbursed to the Clearing House by the Chargor on demand on a full indemnity basis together with interest from the date of the same having been incurred to the date of payment at the rate referred to in Clause 1A(2) above.

23. **Accounts**

All monies received, recovered or realised by the Clearing House under this Deed (including the proceeds of any conversion of currency) may in the discretion of the Clearing House be credited to any suspense or impersonal account and may be held in such account for so long as the Clearing House shall think fit (with interest accruing thereon at such rate, if any, as the Clearing House may deem fit) pending their application from time to time (as the Clearing House shall be entitled to do in its discretion) in or towards the discharge of any of the Secured Obligations.

24. **Currency**

- (1) For the purpose of or pending the discharge of any of the Secured Obligations the Clearing House may convert any monies received, recovered or realised or subject to application by the Clearing House under this Deed (including the proceeds of any previous conversion under this Clause) from their existing currency of denomination into such other currency of denomination as the Clearing House may think fit, and any such conversion shall be effected at such commercial spot selling rate of exchange then prevailing for such other currency against the existing currency as the Clearing House may in its discretion determine.
- (2) References herein to any currency extend to any funds of that currency and for the avoidance of doubt funds of one currency may be converted into different funds of the same currency.

25. **Notices**

- (1) Any notice or demand (including any Default Notice) requiring to be served on the Chargor by the Clearing House hereunder may be served on any of the officers of the Chargor personally, or by letter addressed to the Chargor or to any of its officers and left at its registered office or any one of its principal places of business, or by posting the same by letter addressed in any such manner as aforesaid to such registered office or any such principal place of business.
- (2) Any notice or demand (including any Default Notice) sent by post in accordance with sub-paragraph (1) of this Clause shall be deemed to have been served on the Chargor at 10 a.m. Greenwich Mean Time on the business day next following the date of posting. In proving such service by post it shall be sufficient to show that the letter containing the notice or demand (including any Default Notice) was properly addressed and posted and such proof of service shall be effective notwithstanding that the letter was in fact not delivered or was returned undelivered.

26. **Provisions Severable**

Each of the provisions contained in this Deed shall be severable and distinct from one another and if at any time any one or more of such provisions is or becomes invalid, illegal or unenforceable, the validity, legality and enforceability of each of the remaining provisions of this Deed shall not in any way be affected, prejudiced or impaired thereby.

27. **Clearing House's Discretions**

Any liberty or power which may be exercised or any determination which may be made hereunder by the Clearing House may (save where stated to the contrary) be exercised or made in the absolute and unfettered discretion of the Clearing House which shall not be under any obligation to give reasons thereof.

28. **Third Party Rights**

A person who is not a party to this Deed has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Deed.

29. **Law and Jurisdiction**

This Deed, and any non-contractual obligations arising herefrom, shall be governed by and construed in accordance with English law, and the Chargor hereby irrevocably submits to the non-exclusive jurisdiction of the English courts; provided that with respect to issues arising as a result of the provisions of Clause 10(1) above or the use of this Deed as a security agreement as provided therein, this Deed shall be governed by and construed in accordance with applicable laws of the State of New York.

The Chargor

Executed as a **DEED** by

The Chargor

[CHARGOR NAME]

.....
Signature of Director

.....
Name of Director

.....
Date

.....
Signature of Director/Secretary

.....
Name of Director/Secretary

.....
Date

The Clearing House

LCH Limited

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

.....
Signature of Authorised Signatory

.....
Name of Authorised Signatory

.....
Title of Authorised Signatory

.....
Date

Dated _____

and

LCH LIMITED

**CHARGE BY CLEARING MEMBER
SECURING OWN OBLIGATIONS**

**C L I F F O R D
C H A N C E**

CLIFFORD CHANCE LLP

SECURITY DEED

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THIS SECURITY DEED is dated [*Insert Date*] and made by way of deed poll by [CLEARING MEMBER] in its capacity as chargor (the "**Chargor**").

WHEREAS:

- (A) In order to facilitate the clearing of certain transactions with LCH.Clearnet Limited (the "**Clearing House**"), the Chargor has entered into one or more agreements with one or more of its clients and may enter into further agreements with such clients and/or one or more agreements with further clients, in each case that govern the terms upon which the Chargor will act as Clearing Member in respect of Client Clearing Business of that client (each such agreement, together with any related collateral, security or margining agreement, a "**Clearing Agreement**").
- (B) The Chargor is executing this Security Deed in order to maximise the ability to move positions corresponding to transactions under the Clearing Agreements to Backup Clearing Members upon the occurrence of an Enforcement Event or to provide for certain receivables to be delivered from the Clearing House to the Clients directly.

It is agreed as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions:

Capitalised terms used but not defined in this Security Deed including in the Recitals shall have the meaning given to them in the LCH Rules. In addition, the following expressions shall have the following meanings:

"**Associated LCH Transactions**" means, in respect of a Client, the Contracts entered into by the Chargor with the Clearing House on behalf of such Client.

"**Charge**" means the security interest created or expressed to be created by this Security Deed.

"**Charged Assets**" means the assets subject, or expressed to be subject, to the Charge or any part of those assets.

"**Clearing Agreement**" has the meaning ascribed to such term in Recital (A) to this Security Deed.

"**Clearing Default**" means the Chargor becoming a defaulter for the purposes of Rule 4 of the LCH Default Rules.

"**Clearing House**" has the meaning ascribed to such term in Recital (A) to this Security Deed.

"**Client**" means each of the clients listed in Schedule 2 to this Security Deed being, in each case, a Clearing Client who is party to a Clearing Agreement. For the avoidance of doubt, an individual Clearing Client may be party to more than one Clearing Agreement with the Chargor (due to such Clearing Client (i) receiving Client Clearing Services from the Chargor in respect of more than one Service and/or (ii) being a Clearing Client in respect of whom the Chargor has opened more than one Client

Account relating to a Relevant Client Clearing Business), and in each such capacity the relevant Clearing Client will constitute a separate "Client" for the purposes of this Security Deed and will be separately identified in Schedule 2 to this Security Deed.

"Enforcement Event" means the occurrence of a Clearing Default in relation to the Chargor in accordance with the LCH Rules.

"Insolvency Act" means the Insolvency Act 1986.

"LCH Rules" means the rules, regulations, procedures or agreements (including the LCH General Regulations and the LCH Default Rules), applicable to the Chargor and/or Associated LCH Transactions, in each case as published by the Clearing House and as the same may be amended from time to time.

"Liabilities" means all present and future obligations, moneys, debts and liabilities due, owing or incurred by the Chargor to a Client under or in connection with the Transaction Documents.

"LPA" means the Law of Property Act 1925.

"Relevant Account Property" means, in respect of a Client, the Account Balance and the Associated LCH Transactions relating to such Client, as determined by the Clearing House in accordance with the LCH Rules following an Enforcement Event.

"Relevant Clearing Agreement" means, in relation to a Client, the Clearing Agreement to which such Client is a party.

"Relevant Client Clearing Return" means, in respect of a Client, the Client Clearing Entitlement and the Associated LCH Transactions relating to such Client, as determined by the Clearing House in accordance with the LCH Rules following an Enforcement Event.

"Security" means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.

"Transaction Documents" means this Security Deed and the Relevant Clearing Agreement.

1.2 Construction:

1.2.1 Unless a contrary indication appears, any reference in this Security Deed to:

- (a) **"assets"** includes present and future properties, revenues and rights of every description;
- (b) the **"Chargor"**, a **"Client"** or any **"party"** shall be construed so as to include its successors in title and permitted transferees;
- (c) an agreement, confirmation or instrument is to a reference to that agreement or instrument as amended, novated, supplemented, extended,

restated (however fundamentally and whether or not more onerous) or replaced;

- (d) a "**person**" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
- (e) a "**regulation**" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
- (f) the singular includes the plural and vice versa; and
- (g) a provision of law is a reference to that provision as amended or re-enacted.

1.2.2 Clause and Schedule headings are for ease of reference only.

2. **UNDERTAKING TO PAY**

The Chargor undertakes to pay each of its Liabilities when due in accordance with its terms.

3. **SECURITY**

The Chargor, with full title guarantee and as security for the payment of all Liabilities, charges absolutely in favour of each Client all its present and future right, title and interest in and to the Relevant Client Clearing Return and the Relevant Account Property.

4. **MULTIPLE DEEDS**

This Security Deed shall be treated as if it were a separate deed in favour of each of the Clients listed in Schedule 2 to this Security Deed, as if the Chargor had executed a separate deed in favour of each such Client so that this Security Deed confers rights severally in favour of each Client.

5. **RESTRICTIONS AND FURTHER ASSURANCE**

5.1 **Security**

The Chargor agrees that it shall not create or permit to subsist any Security over any Charged Assets except for the Charge.

5.2 **Distribution of Charged Property**

The Chargor hereby acknowledges and agrees that, following the occurrence of a Clearing Default, the Clearing House shall act in accordance with the LCH Rules and any other laws and regulations applicable to it in determining how the Charged Assets

are to be distributed and that such action by the Clearing House shall be without prejudice to any protections afforded to it pursuant to the LCH Rules and any such other laws and regulations.

5.3 Margining

The Chargor agrees that, prior to the operation of Clause 12.1, it shall provide margin in respect of any Associated LCH Transactions to the Clearing House on an Individual Segregated Account basis or an Omnibus Segregated Account basis (as may be agreed between the Chargor and the relevant Client) in accordance with the LCH Rules.

6. PAYMENTS

6.1 No Enforcement Event

Subject as otherwise provided in this Security Deed, and for so long as no Enforcement Event has occurred, the Chargor shall be entitled to receive and retain all payments or transfers made to it in respect of the relevant Client Account in accordance with the LCH Rules. For the avoidance of doubt, the Chargor shall not be entitled to deal with the Charged Assets at any time while the Charge is in effect.

6.2 Post Enforcement Event

Following the occurrence of an Enforcement Event, the Client shall be entitled to receive directly from the Clearing House all Charged Assets and payments or transfers made in respect of a Charged Asset.

7. ENFORCEMENT AND REMEDIES

7.1 Enforcement Event

The Security created on the date hereof shall only be enforceable, and the powers conferred by Section 101 of the LPA as varied and extended by this Security Deed shall only be exercisable, following the occurrence of an Enforcement Event.

7.2 Power of Sale

The statutory power of sale and the other statutory powers conferred on mortgagees by Section 101 of the LPA as varied and extended by this Security Deed shall arise on the date of this Security Deed.

7.3 Section 103 LPA

Section 103 of the LPA shall not apply to this Security Deed.

8. PROVISIONS RELATING TO CLIENT

8.1 Client's Rights

At any time after the occurrence of an Enforcement Event, the Client shall have the rights set out in the Schedule hereto.

8.2 **Application of Proceeds**

Subject to Clause 12.1, all amounts or assets received or recovered by the Client in the exercise of its rights under this Security Deed shall be applied in the following order: (i) in or towards the payment of the Liabilities in such order as the Client thinks fit, but in any case acting in good faith and in a commercially reasonable manner, and (ii) in payment of any surplus to the Chargor.

8.3 **Power of Attorney**

The Chargor by way of security irrevocably appoints the Client as its attorney (with full power of substitution), on its behalf and in its name or otherwise, in such manner as the attorney thinks fit, but in any case acting in good faith and in a commercially reasonable manner, to exercise (following the occurrence of an Enforcement Event only) any of the rights conferred on the Client in relation to the Charged Assets or under the LPA or the Insolvency Act. The Chargor ratifies and confirms and agrees to ratify and confirm whatever any such attorney shall do in the exercise or purported exercise of the power of attorney granted by it in this Clause 8.3.

9. **AMENDMENTS TO THE SECURITY DEED**

The Chargor may from time to time amend or revoke the terms of this Security Deed without the Client's consent, provided, however, that the Chargor undertakes:

- 9.1 not to amend or revoke this Security Deed without the prior written consent of the Clearing House; and
- 9.2 to amend this Security Deed from time to time in order to reflect such changes as may be prescribed by the Clearing House to the "Security Deed" (as defined in the LCH Rules, and upon which this Security Deed is based) from time to time in accordance with the LCH Rules.

10. **ADDITIONAL CLIENTS**

The Chargor may, after the date of this Security Deed, grant a charge on the terms of this Security Deed to one or more additional clients. On each occasion when the Chargor wishes to exercise this right, it will execute a further security deed substantially in the form set out in Schedule 3 to this Security Deed (an "**Additional Security Deed**") and will deliver to the Clearing House a copy of such Additional Security Deed, including an annex which sets out the details of the relevant client(s). For the avoidance of doubt, an Additional Security Deed may be given in respect of one or more clients.

11. **SAVING PROVISIONS**

11.1 **Continuing Security**

Subject to Clause 12, the Charge is continuing security and will extend to the ultimate balance of the Liabilities, regardless of any intermediate payment or discharge in whole or in part.

11.2 Reinstatement

If any discharge, release or arrangement (whether in respect of the obligations of the Chargor or any security for those obligations or otherwise) is made by the Client in whole or in part on the basis of any payment, security or other disposition which is avoided or must be restored in insolvency, liquidation or otherwise, without limitation, then the liability of the Chargor and the Charge shall continue or be reinstated as if the discharge, release or arrangement had not occurred.

11.3 Waiver of Defences

Neither the obligations of the Chargor under this Security Deed nor the Charge will be affected by an act, omission, matter or thing which, but for this Clause 9, would reduce, release or prejudice any of its obligations under any Transaction Document or the Charge (without limitation and whether or not known to the Chargor or the Client) including:

- 11.3.1 any time, waiver or consent granted to, or composition with, the Chargor or other person;
- 11.3.2 the release of the Chargor or any other person under the terms of any composition or arrangement with any creditor of any affiliate;
- 11.3.3 the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, the Chargor or other person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;
- 11.3.4 any amendment, novation, supplement, extension, restatement (however fundamental and whether or not more onerous) or replacement of any Transaction Document or any other document or security; or
- 11.3.5 any insolvency or similar proceedings.

11.4 Immediate Recourse

The Chargor waives any right it may have of first requiring the Client (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or claim payment from any person before claiming from the Chargor under this Security Deed. This waiver applies irrespective of any law or any provision of a Transaction Document to the contrary.

11.5 Additional Security

The Charge is in addition to and is not in any way prejudiced by any other guarantees or security now or subsequently held by the Client.

12. DISCHARGE OF SECURITY

12.1 Final Redemption

Immediately upon there no longer being any Liabilities remaining (or, if earlier, immediately upon it no longer being possible for an Enforcement Event to occur), the Client shall be deemed to have immediately released, reassigned or discharged (as appropriate) the Charged Assets from the Charge and therefore:

12.1.1 the Chargor may retain for its own account; and

12.1.2 the Client shall therefore promptly pay or transfer to the Chargor,

any amounts or other assets received by such party from the Clearing House in respect of the Charged Assets. For the avoidance of doubt, it is acknowledged that the Chargor's rights under this Clause 12 shall constitute an equity of redemption (and therefore a proprietary interest to the extent of such equity of redemption) in the Charged Assets and any amounts or other assets the subject of such rights shall be returned by the Client to the Chargor.

12.2 Consolidation

Section 93 of the LPA shall not apply to the Charge.

13. MISCELLANEOUS PROVISIONS

13.1 Payments

All payments by the Chargor under this Security Deed (including damages for its breach) shall be made to such account, with such financial institution and in such other manner as the Client may direct.

13.2 Remedies and Waivers

No failure to exercise, nor any delay in exercising, on the part of the Client any right or remedy under this Security Deed shall operate as a waiver, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in this Security Deed are cumulative and not exclusive of any rights or remedies provided by law.

13.3 Amendments and Waivers

The Chargor undertakes that it shall not amend any term of this Security Deed without the prior written consent of the Clearing House.

13.4 Partial Invalidity

If, at any time, any provision of this Security Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or

enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

13.5 **Governing Law**

This Security Deed and any non-contractual obligations arising out of or in connection with it are governed by English law.

13.6 **Jurisdiction**

In relation to any proceedings, each party to this Security Deed irrevocably submits to the exclusive jurisdiction of the courts of England and waives any objection to proceedings in such courts on the grounds of venue or on the grounds that the proceedings have been brought in an inconvenient forum. Each such submission is made for the benefit of the other party and shall not affect the right of any party to take proceedings in any other court of competent jurisdiction nor shall the taking of proceedings in any court of competent jurisdiction preclude any party from taking proceedings in any other court of competent jurisdiction (whether concurrently or not) unless precluded by law.

13.7 **[Agent for Service of Process; Chargor**

The Chargor hereby irrevocably appoints [Name of Agent] of [Address in England] to receive service of process on its behalf as its authorised agent for service of process in England. If for any reason such agent ceases to be such agent for service of process, the Chargor shall forthwith appoint a new agent for service of process in England. Nothing in this Security Deed shall affect the right to serve process in any other matter permitted by law.]

This Security Deed has been delivered on the date stated at the beginning of this Security Deed.

[CHARGOR]

[INSERT APPROPRIATE SIGNATURE BLOCK]

SCHEDULE 1 RIGHTS OF CLIENT

Following the occurrence of an Enforcement Event, the Client shall have the right, either in its own name or in the name of the Chargor or otherwise and in such manner and upon such terms and conditions as the Client thinks fit, but in any case, acting in good faith and in a commercially reasonable manner, and either alone or jointly with any other person:

1. **Take possession:** to take possession of, get in and collect the Charged Assets and to require payment to it of revenues deriving therefrom;
2. **Deal with Charged Assets:** to sell, transfer, assign, exchange or otherwise dispose of or realise the Charged Assets to any person either by public offer or auction, tender or private contract and for a consideration of any kind (which may be payable or delivered in one amount or by instalments spread over a period or deferred);
3. **Borrow money:** to borrow or raise money either unsecured or on the security of the Charged Assets (either in priority to the Charge or otherwise);
4. **Rights of ownership:** to manage and use the Charged Assets and to exercise and do (or permit the Chargor or any nominee of it to exercise and do) all such rights and things as the Client would be capable of exercising or doing if it were the absolute beneficial owner of the Charged Assets;
5. **Claims:** to settle, adjust, refer to arbitration, compromise and arrange any claims, accounts, disputes, questions and demands with or by any person relating to the Charged Assets;
6. **Legal actions:** to bring, prosecute, enforce, defend and abandon actions, suits and proceedings in relation to the Charged Assets;
7. **Redemption of Security:** to redeem any Security (whether or not having priority to the Charge) over the Charged Assets and to settle the accounts of any person with an interest in the Charged Assets; and
8. **Other powers:** to do anything else it may think fit for the realisation of the Charged Assets or incidental to the exercise of any of the rights conferred on the Client under or by virtue of any Transaction Document, the LPA or the Insolvency Act.

**SCHEDULE 2
CLIENTS**

CLIENT LEGAL NAME

**SCHEDULE 3
ADDITIONAL SECURITY DEED**

THIS SECURITY DEED is dated [*Insert Date*] and made by way of deed poll by [CLEARING MEMBER] in its capacity as chargor (the "**Chargor**").

WHEREAS:

- (A) In order to facilitate the clearing of certain transactions with LCH.Clearnet Limited (the "**Clearing House**"), the Chargor has entered into one or more agreements with one or more clients (each such agreement, a "**Clearing Agreement**").
- (B) The Chargor has previously entered by deed poll into a security deed dated [•] in favour of certain of its clearing clients (such security deed as amended from time to time, after as well as before the date of this Security Deed, the "**Original Security Deed**").
- (C) The Chargor is executing this Security Deed in order to maximise the ability of one or more additional Client(s) to move positions corresponding to transactions under the Clearing Agreements to Backup Clearing Members upon the occurrence of an Enforcement Event or to provide for certain receivables to be delivered from the Clearing House to the Clients directly.

It is agreed as follows:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions:

- (a) For the purposes of this Security Deed, the following defined terms shall have the following meanings:

"**Client**" means each of the additional client(s) listed in the Annex to this Security Deed. For the avoidance of doubt, an individual Clearing Client may be party to more than one Clearing Agreement with the Chargor (due to such Clearing Client (i) receiving Client Clearing Services from the Chargor in respect or more than one Service and/or (ii) being a Clearing Client in respect of whom the Chargor has opened more than one Client Account relating to a Relevant Client Clearing Business), and in each such capacity the relevant Clearing Client will constitute a separate "Client" for the purposes of this Security Deed (save where the relevant Clearing Client in the relevant capacity is already a client for the purposes of the Original Security Deed or a another security deed entered into prior to the date of this Security Deed on substantially the same terms as this Security Deed) and will be separately identified in the Annex to this Security Deed.

- (b) Capitalised terms used but not defined in this Security Deed including in the Recitals shall have the meaning given to them in the Original Security Deed.

1.2 Construction:

- (a) Unless a contrary indication appears, any reference in this Security Deed to:

- (i) "**assets**" includes present and future properties, revenues and rights of every description;
 - (ii) the "**Chargor**", a "**Client**" or any "**party**" shall be construed so as to include its successors in title and permitted transferees;
 - (iii) an agreement, confirmation or instrument is to a reference to that agreement or instrument as amended, novated, supplemented, extended, restated (however fundamentally and whether or not more onerous) or replaced;
 - (iv) a "**person**" includes any individual, firm, company, corporation, government, state or agency of a state or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
 - (v) a "**regulation**" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organisation;
 - (vi) the singular includes the plural and vice versa; and
 - (vii) a provision of law is a reference to that provision as amended or re-enacted.
- (b) Clause and Schedule headings are for ease of reference only.

2. **OPERATIVE PROVISIONS**

This Security Deed is entered into on the same terms as the Original Security Deed, and each Client listed in the Annex to this Security Deed shall have the same rights and protections (subject to the same conditions and qualifications) as a "Client" under the Original Security Deed.

3. **MULTIPLE DEEDS**

The Chargor agrees that, where there is more than one Client listed in the Annex to this Security Deed, this Security Deed shall be treated as if it were a separate deed in favour of each such Client, as if the Chargor had executed a separate deed in favour of each such Client.

This Security Deed has been delivered on the date stated at the beginning of this Security Deed.

[CHARGOR]

[INSERT APPROPRIATE SIGNATURE BLOCK]

**ANNEX
CLIENTS**

CLIENT LEGAL NAME

BACKUP CLEARING MEMBER AGREEMENT ("AGREEMENT")**DEFINITIONS**

"Backup Clearing Member" means the entity identified in Schedule 1.

"Backup Client Account" means, in respect of a Clearing Client and a Portfolio, the Client Account: (i) that the Backup Clearing Member has opened with LCH within the Service; (ii) to which the Backup Clearing Member wishes LCH to port such Portfolio in accordance with LCH's Default Rules; and (iii) that is identified in Schedule 2 under the heading "Backup Client Account".

"Clearing Client" means each of the entities identified in Schedule 2 under the heading "Clearing Client(s)".

"Defaulter's Client Account" means, in respect of a Clearing Client and a Portfolio, the Client Account: (i) that the Defaulting Clearing Member has opened with LCH within the Service; (ii) to which such Portfolio is registered; and (iii) that is identified in Schedule 2 under the heading "Defaulter's Client Account".

"Defaulting Clearing Member" means the entity identified in Schedule 1.

"LCH" means LCH Limited.

"Portfolio" means, in respect of a Clearing Client and a Defaulter's Client Account, the portfolio of Contracts registered to such Defaulter's Client Account and entered into between the Defaulting Clearing Member and LCH, in respect of such Clearing Client.

"Porting" has the meaning set out in clause 1 of this Agreement.

"Schedule" means a schedule of this Agreement.

"Service" means the LCH service identified in Schedule 1.

Capitalised terms not defined in this Agreement shall have the meaning assigned to them in LCH's rulebook, which is located at www.lch.com/rules-regulations/rulebooks/ltd.

AGREEMENT

1. The Backup Clearing Member agrees, in respect of a Portfolio relating to a Clearing Client, that such Portfolio will, subject to:
 - 1.1 the agreement of such Clearing Client; and
 - 1.2 where applicable, the agreement of any other relevant Clearing Client to the porting of the Portfolio relating to it as required under the Default Rules,

be ported, in accordance with the Default Rules, from the Defaulting Clearing Member to the Backup Clearing Member and the Backup Client Account to which the Backup Clearing Member and the Clearing Client wish to port the Portfolio, where the porting of such Portfolio will occur at a time and date determined by LCH in its sole discretion (“Porting”).
2. The Backup Clearing Member and LCH agree that, if Porting occurs, then the method by which it will occur is that set out in paragraph 6.1(a) or 8.1(a) of schedule 1 (*Client Clearing Annex*) of the Default Rules (as applicable), rather than the method set out in paragraph 6.1(b) or 8.1(b) of schedule 1 (*Client Clearing Annex*) of the Default Rules.
3. The Backup Clearing Member’s agreement in this Agreement is irrevocable.
4. This Agreement, and any dispute or claim arising out of, or in connection with, it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the law of England and Wales. The Backup Clearing Member and LCH irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

Signed for and on behalf of the Backup Clearing Member by:

Authorised Signatory:

Print Name and Job Title:

Date:

Contact Number:

Signed for and on behalf of LCH Limited by:

Authorised Signatory:

Print Name and Job Title:

Date:

Contact Number:

AUSTRALIAN BACKUP CLEARING MEMBER OR AUSTRALIAN DEFAULTER

SCHEDULE 1

Backup Clearing Member Name	
Backup Clearing Member Mnemonic	

Defaulting Clearing Member Name	
Defaulting Clearing Member Mnemonic	

Service	
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SCHEDULE 2

Client Parent	Clearing Client(s)	Backup Client Account Id	Backup Client Account	Defaulter's Client Account Id	Defaulter's Client Account

Instructions

AUSTRALIAN BACKUP CLEARING MEMBER OR AUSTRALIAN DEFAULTER

1. *This version of the Agreement should be used where **either**:*

(a) the Defaulting Clearing Member is an entity incorporated in Australia; or

(b) the Backup Clearing Member is an entity incorporated in Australia.

2. *Please provide evidence to LCH that the authorised signatory, who has signed this Agreement for the Backup Clearing Member, is authorised to do so and to bind the Backup Clearing Member.*

AGREEMENT OF CLEARING CLIENT TO DEFAULT PORTING ("PORTING AGREEMENT")**DEFINITIONS**

"Backup Clearing Member" means the entity identified in Schedule 1.

"Backup Client Account" means the Client Account: (i) that the Backup Clearing Member has opened with LCH within the Service; (ii) to which the Clearing Client wishes LCH to port the Portfolio in accordance with LCH's Default Rules; and (iii) that is identified in Schedule 2.

"Clearing Client" means the entity identified in Schedule 2.

"Defaulter's Client Account" means the Client Account: (i) that the Defaulting Clearing Member has opened with LCH within the Service; (ii) to which the Portfolio is registered; and (iii) that is identified in Schedule 2.

"Defaulting Clearing Member" means the entity identified in Schedule 1.

"LCH" means LCH Limited.

"Portfolio" means the portfolio of Contracts registered to the Defaulter's Client Account and entered into between the Defaulting Clearing Member and LCH, in respect of the Clearing Client.

"Porting" has the meaning set out in clause 1.1 of this Porting Agreement.

"Relevant Portion" means, in respect of a Custodial Segregated Account, the portion of the Account Balance for such Custodial Segregated Account that is not Client Collateral.

"Schedule" means a schedule of this Agreement.

"Service" means the LCH service identified in Schedule 1.

Capitalised terms not defined in this Porting Agreement shall have the meaning assigned to them in LCH's rulebook, which is located at www.lch.com/rules-regulations/rulebooks/ltd.

AGREEMENT

1. The Clearing Client:
 - 1.1 agrees that the Portfolio will, subject to
 - 1.1.1 the agreement of the Backup Clearing Member, and
 - 1.1.2 where applicable, the agreement of any other relevant client to the porting of the Contracts that the Defaulting Clearing Member has entered into in respect of such client, as required under the Default Rules,

be ported, in accordance with the Default Rules, from the Defaulting Clearing Member to the Backup Clearing Member and the Backup Client Account, where the porting of such Portfolio will occur at a time and date determined by LCH in its sole discretion (“Porting”); and
 - 1.2 instructs
 - 1.2.1 in respect of a Defaulter’s Client Account that is not a Custodial Segregated Account, the transfer of the Account Balance attributable to the Clearing Client and such Defaulter’s Client Account to the Backup Clearing Member, in respect of the Backup Client Account, and
 - 1.2.2 in respect of a Defaulter’s Client Account that is a Custodial Segregated Account, the transfer of the Relevant Portion of the Account Balance attributable to the Clearing Client and such Defaulter’s Client Account to the Backup Clearing Member, in respect of the Backup Client Account.
2. The Clearing Client and LCH agree that, if Porting occurs, then the method by which it will occur is that set out in paragraph 6.1(a) or 8.1(a) of schedule 1 (*Client Clearing Annex*) of the Default Rules (as applicable), rather than the method set out in paragraph 6.1(b) or 8.1(b) of schedule 1 (*Client Clearing Annex*) of the Default Rules.
3. The Clearing Client’s agreement and instruction in this Porting Agreement is irrevocable.
4. This Porting Agreement, and any dispute or claim arising out of, or in connection with, it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the law of England and Wales. The Clearing Client and LCH irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Porting Agreement or its subject matter or formation (including non-contractual disputes or claims).

Signed for and on behalf of the Clearing Client by:

Authorised Signatory:

Print Name and Job Title:

Date:

Contact Number:

Signed for and on behalf of LCH Limited by:

Authorised Signatory:

Print Name and Job Title:

Date:

Contact Number:

SCHEDULE 1

Backup Clearing Member Name	
Backup Clearing Member Mnemonic	

Defaulting Clearing Member Name	
Defaulting Clearing Member Mnemonic	

Service	
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SCHEDULE 2

Client Parent	Clearing Client	Backup Client Account Id	Backup Client Account	Defaulter's Client Account Id	Defaulter's Client Account

Instructions:

AUSTRALIAN BACKUP CLEARING MEMBER OR AUSTRALIAN DEFAULTER (NON-FUND VERSION)

1. *This version of the Porting Agreement should be used where **either**:*
 - (a) the Defaulting Clearing Member is an entity incorporated in Australia; or*
 - (b) the Backup Clearing Member is an entity incorporated in Australia.*
2. *The Clearing Client must complete a separate Porting Agreement for each portfolio of Contracts, registered to a particular Client Account, that it wishes to port to a Backup Clearing Member.*
3. *Please provide evidence to LCH that the authorised signatory, who has signed this Porting Agreement for the Clearing Client, is authorised to do so and to bind the Clearing Client.*

AGREEMENT OF THE MANAGER ON BEHALF OF ITS CLEARING CLIENTS TO DEFAULT PORTING
("PORTING AGREEMENT")

DEFINITIONS

"Backup Clearing Member" means the entity identified in Schedule 1.

"Backup Client Account" means, in respect of a Clearing Client and a Portfolio, the Client Account: (i) that the Backup Clearing Member has opened with LCH within the Service; (ii) to which such Clearing Client wishes LCH to port such Portfolio in accordance with LCH's Default Rules; and (iii) that is identified in Schedule 2 under the heading "Backup Client Account".

"Clearing Client" means each of the entities identified in Schedule 2 under the heading "Clearing Client(s)".

"Defaulter's Client Account" means, in respect of a Clearing Client and a Portfolio, the Client Account: (i) that the Defaulting Clearing Member has opened with LCH within the Service; (ii) to which such Portfolio is registered; and (iii) that is identified in Schedule 2 under the heading "Defaulter's Client Account".

"Defaulting Clearing Member" means the entity identified in Schedule 1.

"LCH" means LCH Limited.

"Manager" means the entity identified in Schedule 1.

"Portfolio" means, in respect of a Clearing Client and a Defaulter's Client Account, the portfolio of Contracts registered to such Defaulter's Client Account and entered into between the Defaulting Clearing Member and LCH, in respect of such Clearing Client.

"Porting" has the meaning set out in clause 1.1 of this Porting Agreement.

"Relevant Portion" means, in respect of a Custodial Segregated Account, the portion of the Account Balance for such Custodial Segregated Account that is not Client Collateral.

"Schedule" means a schedule of this Agreement.

"Service" means the LCH service identified in Schedule 1.

Capitalised terms not defined in this Porting Agreement shall have the meaning assigned to them in LCH's rulebook, which is located at www.lch.com/rules-regulations/rulebooks/ltd.

AGREEMENT

1. Each Clearing Client:
 - 1.1 agrees, in respect of a Portfolio relating to it, that such Portfolio will, subject to
 - 1.1.1 the agreement of the Backup Clearing Member, and
 - 1.1.2 where applicable, the agreement of any other relevant Clearing Client to the porting of the Portfolio relating to it as required under the Default Rules,

be ported, in accordance with the Default Rules, from the Defaulting Clearing Member to the Backup Clearing Member and the Backup Client Account to which the Backup Clearing Member and the Clearing Client wish to port the Portfolio, where the porting of such Portfolio will occur at a time and date determined by LCH in its sole discretion ("**Porting**"); and
 - 1.2 instructs
 - 1.2.1 in respect of a Portfolio relating to it and a Defaulter's Client Account that is not a Custodial Segregated Account, the transfer of the Account Balance attributable to the Clearing Client and such Portfolio to the Backup Clearing Member, in respect of the Backup Client Account to which the Backup Clearing Member and the Clearing Client wish to port the Portfolio, and
 - 1.2.2 in respect of a Portfolio relating to it and a Defaulter's Client Account that is a Custodial Segregated Account, the transfer of the Relevant Portion of the Account Balance attributable to the Clearing Client and such Portfolio to the Backup Clearing Member, in respect of the Backup Client Account to which the Backup Clearing Member and the Clearing Client wish to port the Portfolio.
2. Each Clearing Client and LCH agree that, if Porting occurs, then the method by which it will occur is that set out in paragraph 6.1(a) or 8.1(a) of schedule 1 (*Client Clearing Annex*) of the Default Rules (as applicable), rather than the method set out in paragraph 6.1(b) or 8.1(b) of schedule 1 (*Client Clearing Annex*) of the Default Rules.
3. Each Clearing Client's agreement and instructions in this Porting Agreement are irrevocable.
4. The Manager represents and warrants that, as at the date on which it executes this Porting Agreement, it:
 - 4.1 has been appointed to act as agent; and
 - 4.2 has full power and authority to execute this Porting Agreement and to deliver this Porting Agreement to LCH,in each case, for and on behalf of each Clearing Client.
5. This Porting Agreement, and any dispute or claim arising out of, or in connection with, it or its subject matter or formation (including non-contractual disputes or claims) shall be

governed by, and construed in accordance with, the law of England and Wales. Each Clearing Client, the Manager and LCH irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Porting Agreement or its subject matter or formation (including non-contractual disputes or claims).

Signed for and on behalf of the Manager, as agent for and on behalf of each Clearing Client (severally and not jointly), and in its personal capacity with respect to clause 4 and 5 of this Porting Agreement, by:

Authorised Signatory:

Print Name and Job Title:

Date:

Contact Number:

Signed for and on behalf of LCH Limited by:

Authorised Signatory:

Print Name and Job Title:

Date:

Contact Number:

SCHEDULE 1

Backup Clearing Member Name	
Backup Clearing Member Mnemonic	

Defaulting Clearing Member Name	
Defaulting Clearing Member Mnemonic	

Manager	
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Service	
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SCHEDULE 2

Client Parent	Clearing Client(s)	Backup Client Account Id	Backup Client Account	Defaulter's Client Account Id	Defaulter's Client Account

Instructions:

AUSTRALIAN BACKUP CLEARING MEMBER OR AUSTRALIAN DEFAULTER (FUND VERSION)

1. *This version of the Porting Agreement should be used where **either**:*

(a) the Defaulting Clearing Member is an entity incorporated in Australia; or

(b) the Backup Clearing Member is an entity incorporated in Australia.

2. *Please provide evidence to LCH that:*

(a) the authorised signatory, who has signed this Porting Agreement for the Manager, is authorised to do so and to bind the Manager; and

(b) the Manager is authorised to act as agent for each Clearing Client and to enter into this Porting Agreement for each such Clearing Client.

Our ref: JG\1000 054 026
Partner: Jonathan Gordon
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14 January 2020

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Dear Sirs

Australian Law Legal Opinion given in connection with provision by LCH Limited of Clearing and Client Clearing Services – Settlement finality questions - ForexClear and RepoClear

You have asked us to provide advice in respect of the Relevant Laws in response to certain questions raised by LCH Limited (**LCH** or **you**) in the legal questionnaire document provided to us by you on 5 September 2019 relating to settlement finality (**Instructions**).

The relevant questions are set out in full in section 2 of this advice, together with the corresponding responses.

This advice should be read together with our advice dated 16 July 2019 in relation to the Unlicensed Services, being the ForexClear system and RepoClear system.

Terms not otherwise defined in this advice shall have the meaning ascribed to such terms in our advice dated 16 July 2019 and the LCH Agreements.

1. INTRODUCTION AND SCOPE OF ADVICE

- 1.1 LCH is a London-based clearing house which provides, on a global basis, clearing services in respect of a range of different asset classes and serving major international exchanges and platforms, as well as over-the-counter markets.
- 1.2 LCH is licensed under Part 7.3 of the *Corporations Act 2001* (Cth) (**Corporations Act**) to operate a clearing and settlement facility (**CS facility**) in Australia. Under its licence conditions, LCH is only authorised to operate the SwapClear facility in respect of interest rate derivatives and inflation rate derivatives entered into over-the-counter (**SwapClear Service**) in Australia.
- 1.3 LCH's licence does not, as at the date of this advice, authorise LCH to operate any other CS facility in Australia. It does not, therefore, extend to the operation in Australia of:
- (a) the ForexClear system that processes and clears eligible foreign exchange transaction; or
 - (b) the RepoClear system that processes and clears eligible repo transactions, repo trades or bond trades,
- (together, the **Unlicensed Services**).

This advice is given in respect of the Unlicensed Services only and not in respect of any other LCH services.

- 1.4 Our advice is given in respect of Clearing Members each of which is an Australian company (as defined below) that is either:
- (a) an authorised-deposit taking institution (**ADI**) authorised under the *Banking Act 1959* (Cth) (**Banking Act**); or
 - (b) a holder of an Australian financial services licence (**AFS Licensee**),
- but that is not:
- (c) an insurance company;
 - (d) a trustee of a trust (including a superannuation trustee and a responsible entity of a managed investment scheme); or
 - (e) a statutory corporation, a government authority or the Crown.

Each such Clearing Member is referred to as a **Relevant Clearing Member**.

- 1.5 For the purposes of preparing our advice we have only reviewed the Settlement Finality Regulations (last updated 21 March 2019) (**Finality Regulations**) and the Instructions.
- 1.6 Our advice is given in respect of the specific questions raised by LCH as set out in Section 2.
- 1.7 This advice is given on the basis that LCH is not at any time itself insolvent for the purposes of any insolvency law and is not subject to any Insolvency Proceeding or Reorganisation Measure.
- 1.8 This advice relates only to the Relevant Laws in force at 9.00 am (Sydney time) on the date of this advice. We express no opinion on the laws of any other jurisdiction. This advice is given on the basis that it will be construed in accordance with the Relevant Laws.
- 1.9 We are not expressing any opinion as to any matters of fact.
- 1.10 We express no opinion on taxation or stamp duty matters, other than to note that stamp duty under the Relevant Laws may be payable on a document and a document may not be enforceable or admissible in evidence unless any stamp duty that is payable on it has been paid.

2. **ADVICE ON SETTLEMENT FINALITY**

On the basis of the matters in section 1 and the assumptions in paragraph 3.1 and subject to the qualifications in paragraph 3.2, we make the following statements of opinion. These statements of opinion are summary conclusions on specific questions which you have raised.

- 2.1 **Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect the finality of settlement of a Payment Transfer Order, including the corresponding transfer of funds, from the Relevant Clearing Member to LCH through a Settlement Services Provider or PPS Bank (or both)? If so, please clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.**

In an insolvency context, Australian law will still apply in the case of an Australian liquidation or administration of an Australian company. The extent to which this is recognised in England (either directly or through recognition of the Australian proceedings) is a matter for English law.

(a) Revocation of authority

As a general matter, to the extent that a Payment Transfer Order operates as a direction or authority given by LCH or a Relevant Clearing Member to a third party, if Australian law came to determine the question, LCH or the Relevant Clearing Member may be able to revoke that direction or authority in the absence of separate contractual arrangements involving the third party, notwithstanding that may constitute a breach of the Finality Regulations. In this regard, we note the prohibition of revocation of Transfer Orders set out in clause 3 of the Finality Regulations.

Under Australian law, subject to what we say below about the effect of close-out netting contracts, reliance on an instruction or authority given by or on behalf of the Relevant Clearing Member may also be revoked automatically by operation of law upon the winding up or dissolution (and also arguably the appointment of a voluntary administrator) of the party giving the direction unless it amounts to:

- an irrevocable power given for consideration to protect an interest of the donee of the power, which is recognised as irrevocable at common law (or under statute); or
- to an effective assignment of a relevant right.

(b) Void or voidable transaction

If a Relevant Clearing Member becomes subject to administration, most transactions or dealings affecting property of the company will be void unless done with the authority or consent of the administrator or entered into under a court order.¹ Similarly, unless the court otherwise orders, where a Relevant Clearing Member is being wound up by the court, section 468 of the Corporations Act renders void most dispositions of property other than dispositions by the liquidator. Therefore, while a Relevant Clearing Member is subject to administration or is being wound up by the court, LCH may not be able to give effect to a Payment Transfer Order to the extent it involves dealing with the property of the Relevant Clearing Member, unless it complies with sections 437D or 468 (as the case may be) or a protection under the Netting Act applies as discussed below.

Although there is no equivalent provision to section 468 that applies during voluntary winding up, there may be an argument that dispositions other than by or with the consent of the liquidator would nonetheless be void on the basis that such dispositions are contrary to the *pari passu* principle, or on the basis that winding up deprives the company of the beneficial interest in its property and puts it beyond the power of anyone to deal with its assets other than in accordance with the Corporations Act.

In addition to the general provisions against void dispositions mentioned above, our advice dated 16 July 2019 identified certain voidable transaction provisions that may apply after the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member.²

(c) Protection under Netting Act

The Netting Act does, however, protect certain transactions that are in a close-out netting contract from being void or voidable where the Insolvency Proceeding is governed by Australian law. For completeness, we note (as stated in our 16 July 2019 advice) that the

¹ Corporations Act s 437D.

² See section 2.2.4 of our advice dated 16 July 2019.

Unlicensed Services are not provided under an arrangement that is a netting market so as to give the benefits of section 16(2) of the Netting Act.

The protections given by section 14(2) of the Netting Act will apply where, among other things, a person is party to a close-out netting contract. Pursuant to section 5 of the Netting Act, a "close-out netting contract" is a contract under which, if a particular event happens:

- (a) particular obligations of the parties terminate or may be terminated; and
- (b) the termination values of the obligations are calculated or may be calculated; and
- (c) the termination values are netted, or may be netted, so that only a net cash amount (whether in Australian currency or some other currency) is payable,³

(the **Close-Out Netting Contract Definition**).

We believe that courts of the Relevant Jurisdiction will approach the question of whether a Clearing Member Contract in respect of an Unlicensed Service satisfies the requirements of a close-out netting contract in the Netting Act by considering how the contract would be construed under English law and will apply Australian law to determine whether such contract will satisfy the requirements of the Close-Out Netting Contract Definition.

Whilst we cannot opine on the construction of a Clearing Member Contract being a matter for English law, on a plain reading of that contract, terms of the Finality Regulations appear to be incorporated into that contract.⁴ Further, we are of the view that, on a plain reading of the Default Rules (that form part of a Clearing Member Contract), and on the assumption that their proper construction under English law is consistent with such a reading, they would be deemed to satisfy the requirements of the Close-Out Netting Contract Definition. Our reasoning for this view is set out in more detail in section 2.2.3 of our advice dated 16 July 2019.

So in the circumstances where the Relevant Clearing Member is a party to a close-out netting contract and an Insolvency Proceeding (which in this case would be governed by Australian law) occurred in respect of it, section 14(2) of the Netting Act would apply. Pursuant to section 14(2)(g), neither of the following is to be void or voidable in the Insolvency Proceeding:

- (a) the netting or termination of obligations under the contract; or
- (b) a payment by the party to discharge a net obligation under the contract.

Section 5 of the Netting Act defines "voidable" as including a payment that is voidable under Division 2 of Part 5.7B of the Corporations Act (including sections 588FA, 588FB and 588FD of the Corporations Act), and in any other case—void as against the external administrator (which includes a liquidator) or voidable under the law governing the external administration (which would include the federal laws of Australia).

Accordingly, subject to the circumstances where section 14(2)(g) will not apply as referred to below, where a Payment Transfer Order is given because of a netting or termination obligation or a payment to discharge a net obligation then, in our view, the corresponding transfer of funds will likely be protected pursuant to section 14(2)(g) from being:

- void; or

³ A close-out netting contract also includes a contract declared by the relevant regulations to be a close-out netting contract for the purposes of the Netting Act.

⁴ See clause 1.3 of the template Clearing Membership Agreement.

- voidable under section 588FA, 588FB and 588FD of the Corporations Act.

Where a Payment Transfer Order is given otherwise than because of a netting or termination obligation or a payment to discharge a net obligation, it seems that the protection provided by section 14(2)(g) of the Netting Act would not apply.

Our advice dated 16 July 2019 in section 2.2.3 also sets out other situations where the protections given by section 14(2)(g) of the Netting Act would not apply.

2.2 Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect the finality of settlement of a Securities Transfer Order, including the corresponding transfer of securities, from the Relevant Clearing Member to LCH through a Securities System Operator? If so, please clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.

The analysis regarding the finality of settlement of a Securities Transfer Order is substantially the same as for the finality of settlement of a Payment Transfer Order as set out in paragraph 2.1 above, in the sense that our conclusions would apply equally in the case of a Securities Transfer Order.

2.3 Are there any circumstances (such as the commencement of Reorganisation Measures) which might give rise to a loss of finality protections before the commencement of Insolvency Proceedings? If so, please clarify from which point in time and in which circumstances finality protections would be lost.

Whether a Reorganisation Measure (defined to mean a scheme of arrangement under Chapter 5 of the Corporations Act) could give rise to a loss of finality protections will depend on the nature of the particular scheme and factual circumstances at the time. However, should a Reorganisation Measure occur in respect of a Relevant Clearing Member, the protections given by the Netting Act should still apply as the definition of external administration in the Netting Act includes reference to a body corporate that has entered into a compromise or arrangement with another person the administration of which has not been concluded,⁵ which in our view would refer to a scheme of arrangement.

Of course, there may be other events or factual matters which could potentially affect finality protections such as, for example, misrepresentation or wrongful conduct. If there are any particular matters you would like us to consider please let us know.

3. ASSUMPTIONS AND QUALIFICATIONS

3.1 Assumptions

In addition to the other assumptions set out in various parts of this advice, the opinion as set out in this advice is also based on the assumptions set out in our advice dated 16 July 2019.

None of the assumptions in this advice are limited by reference to any other assumption.

3.2 Qualifications

In addition to the other qualifications set out in various parts of this advice, we make the qualifications set out in our advice dated 16 July 2019.

None of the qualifications in this advice are limited by reference to any other qualification.

⁵ See the definition of "external administration" set out in section 5 of the Netting Act which includes a "Chapter 5 body corporate" defined in the Corporations Act as including a body corporate that has entered into a compromise or arrangement with another person the administration of which has not been concluded.

4. **BENEFIT**

This opinion letter is given for the exclusive benefit of the addressee. In this opinion we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time. It may not, without our prior written consent, be relied on by any other person.

Yours faithfully

A handwritten signature in black ink that reads "Ashurst". The letters are cursive and connected.

Ashurst

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Dear Sirs

Australian Law Legal Opinion given in connection with provision by LCH Limited of Clearing and Client Clearing Services – Settlement finality questions - SwapClear Service

You have asked us to provide advice in respect of the Relevant Laws in response to certain questions raised by LCH Limited (**LCH** or **you**) in the legal questionnaire document provided to us by you on 5 September 2019 relating to settlement finality (**Instructions**).

The relevant questions are set out in full in section 2 of this advice, together with the corresponding responses.

This advice should be read together with our advice dated 16 July 2019 in relation to the SwapClear Service.

Terms not otherwise defined in this advice shall have the meaning ascribed to such terms in our advice dated 16 July 2019 and the LCH Agreements.

1. INTRODUCTION AND SCOPE OF ADVICE

1.1 LCH is a London-based clearing house which provides, on a global basis, clearing services in respect of a range of different asset classes and serving major international exchanges and platforms, as well as over-the-counter markets.

1.2 LCH is licensed under Part 7.3 of the *Corporations Act 2001* (Cth) (**Corporations Act**) to operate a clearing and settlement facility (**CS facility**) in Australia. Under its licence conditions, LCH is only authorised to operate the SwapClear facility in respect of interest rate derivatives and inflation rate derivatives entered into over-the-counter (**SwapClear Service**) in Australia.

This advice is given in respect of the SwapClear Service only and not in respect of any other LCH services.

1.3 Our advice is given in respect of Clearing Members each of which is an Australian company (as defined below) that is either:

(a) an authorised-deposit taking institution (**ADI**) authorised under the *Banking Act 1959* (Cth) (**Banking Act**); or

(b) a holder of an Australian financial services licence (**AFS Licensee**),

but that is not:

- (c) an insurance company;
- (d) a trustee of a trust (including a superannuation trustee and a responsible entity of a managed investment scheme); or
- (e) a statutory corporation, a government authority or the Crown.

Each such Clearing Member is referred to as a **Relevant Clearing Member**.

- 1.4 For the purposes of preparing our advice we have only reviewed the Settlement Finality Regulations (last updated 21 March 2019) (**Finality Regulations**) and the Instructions.
- 1.5 Our advice is given in respect of the specific questions raised by LCH as set out in Section 2.
- 1.6 This advice is given on the basis that LCH is not at any time itself insolvent for the purposes of any insolvency law and is not subject to any Insolvency Proceeding or Reorganisation Measure.
- 1.7 This advice relates only to the Relevant Laws in force at 9.00 am (Sydney time) on the date of this advice. We express no opinion on the laws of any other jurisdiction. This advice is given on the basis that it will be construed in accordance with the Relevant Laws.
- 1.8 We are not expressing any opinion as to any matters of fact.
- 1.9 We express no opinion on taxation or stamp duty matters, other than to note that stamp duty under the Relevant Laws may be payable on a document and a document may not be enforceable or admissible in evidence unless any stamp duty that is payable on it has been paid.

2. **ADVICE ON SETTLEMENT FINALITY**

On the basis of the matters in section 1 and the assumptions in paragraph 3.1 and subject to the qualifications in paragraph 3.2, we make the following statements of opinion. These statements of opinion are summary conclusions on specific questions which you have raised.

- 2.1 **Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect the finality of settlement of a Payment Transfer Order, including the corresponding transfer of funds, from the Relevant Clearing Member to LCH through a Settlement Services Provider or PPS Bank (or both)? If so, please clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.**

In an insolvency context, Australian law will still apply in the case of an Australian liquidation or administration of an Australian company. The extent to which this is recognised in England (either directly or through recognition of the Australian proceedings) is a matter for English law.

(a) Revocation of authority

As a general matter, to the extent that a Payment Transfer Order operates as a direction or authority given by LCH or a Relevant Clearing Member to a third party, if Australian law came to determine the question, LCH or the Relevant Clearing Member may be able to revoke that direction or authority in the absence of separate contractual arrangements involving the third party, notwithstanding that may constitute a breach of the Finality Regulations. In this regard, we note the prohibition of revocation of Transfer Orders set out in clause 3 of the Finality Regulations.

Under Australian law, subject to what we say below about the effect of market netting contracts, reliance on an instruction or authority given by or on behalf of the Relevant Clearing Member may also be revoked automatically by operation of law upon the winding up or dissolution (and also arguably the appointment of a voluntary administrator) of the party giving the direction unless it amounts to:

- an irrevocable power given for consideration to protect an interest of the donee of the power, which is recognised as irrevocable at common law (or under statute); or
- to an effective assignment of a relevant right.

(b) Void or voidable transaction

If a Relevant Clearing Member becomes subject to administration, most transactions or dealings affecting property of the company will be void unless done with the authority or consent of the administrator or entered into under a court order.¹ Similarly, unless the court otherwise orders, where a Relevant Clearing Member is being wound up by the court, section 468 of the Corporations Act renders void most dispositions of property other than dispositions by the liquidator. Therefore, while a Relevant Clearing Member is subject to administration or is being wound up by the court, LCH may not be able to give effect to a Payment Transfer Order to the extent it involves dealing with the property of the Relevant Clearing Member, unless it complies with sections 437D or 468 (as the case may be) or a protection applies as discussed below.

Although there is no equivalent provision to section 468 that applies during voluntary winding up, there may be an argument that dispositions other than by or with the consent of the liquidator would nonetheless be void on the basis that such dispositions are contrary to the *pari passu* principle, or on the basis that winding up deprives the company of the beneficial interest in its property and puts it beyond the power of anyone to deal with its assets other than in accordance with the Corporations Act.

In addition to the general provisions against void dispositions mentioned above, our advice dated 16 July 2019 identified certain voidable transaction provisions that may apply after the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member.²

(c) Protection under Netting Act

The Netting Act does, however, protect certain transactions contained in a market netting contract from being void or voidable and provides other protections to those transactions where the Insolvency Proceeding is governed by Australian law.

We have previously identified that,³ in our view, a Clearing Member Contract in connection with the SwapClear Service is a "market netting contract" under the Netting Act. Whilst we cannot opine on the meaning of a contract governed by English law, on a plain reading the terms of the Clearing Member Contract appear to incorporate the terms of the Finality Regulations,⁴ thereby potentially extending the benefit of the protections in the Netting Act to those terms.

The protections given by section 16(2) of the Netting Act will apply where a party to a market netting contract goes into external administration and Australian law governs the external administration. Hence, that section would apply should a Relevant Clearing

¹ Corporations Act s 437D.

² See section 2.2.4 of our advice dated 16 July 2019.

³ See our advice dated 16 July 2019 at section 2.2.2(b).

⁴ See clause 1.3 of the template Clearing Membership Agreement.

Member,⁵ who is a party to a Clearing Member Contract in connection with the SwapClear Service, enter external administration.⁶

The protections provided by section 16(2) of the Netting Act are broad and include the following:

- obligations may be netted or terminated, termination values may be calculated and a net amount become payable in accordance with the contract;
- obligations that are, or have been, netted or terminated under the contract are to be disregarded in the external administration;
- any net obligation owed by the party under the contract that has not been discharged is provable in the external administration;
- any net obligation owed to the party under the contract that has not been discharged may be recovered by the external administrator for the benefit of creditors;
- any security given by the party, in accordance with the contract, in respect of obligations of a party to the contract may be enforced in accordance with the contract (**Relevant Security**);
- rights and obligations of the party may be transferred in accordance with the contract;
- property (including property over which security has been given) of the party may be transferred or otherwise dealt with in accordance with the contract; and
- property (including property over which security has been given) of another person on whose behalf the party is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the contract.

In addition, section 16(2)(g) provides that the following are not void or voidable in the external administration:

- the netting or termination of obligations under the contract;
- a payment by the party to discharge a net obligation under the contract;
- a payment, or a transfer of property (whether absolutely or by way of security), by the party to meet an obligation under the contract;
- the enforcement of a security in accordance with the contract; and
- a transfer of, or dealing with, rights, obligations or property in accordance with the contract.

Section 5 of the Netting Act defines "voidable" as including a payment that is voidable under Division 2 of Part 5.7B of the Corporations Act (including sections 588FA, 588FB and 588FD of the Corporations Act), and in any other case—void as against the external administrator (which includes a liquidator) or voidable under the law governing the external administration (which would include the federal laws of Australia).

It is expressly stated in section 16(2)(h) that the above protections apply despite:

⁵ We note that for the purpose of this advice a Relevant Clearing Member would be an Australian entity.

⁶ Pursuant to the definition of "external administration" in the Netting Act, section 16(2) would apply upon the commencement of any Insolvency Procedure.

- any disposal of rights that may be netted under the contract;
- any disposal of rights or property that may be transferred in accordance with the contract;
- the creation of any encumbrance, or any other interest, in relation to those rights or property over which the Relevant Security is given; or
- the operation of any encumbrance, or any other interest, in relation to those rights or that property,

in contravention of a prohibition in the contract, or in the Relevant Security.

Accordingly, in our view, to the extent that a Payment Transfer Order falls within the scope of section 16(2) of the Netting Act it will be protected from being:

- void; or
- voidable under section 588FA, 588FB and 588FD of the Corporations Act.

2.2 Would the commencement of Insolvency Proceedings in respect of a Relevant Clearing Member affect the finality of settlement of a Securities Transfer Order, including the corresponding transfer of securities, from the Relevant Clearing Member to LCH through a Securities System Operator? If so, please clarify from which point in time and in which circumstances finality protections in respect of such settlement would be lost.

The analysis regarding the finality of settlement of a Securities Transfer Order is substantially the same as for the finality of settlement of a Payment Transfer Order as set out in paragraph 2.1 above, in the sense that our conclusions would apply equally in the case of a Securities Transfer Order.

2.3 Are there any circumstances (such as the commencement of Reorganisation Measures) which might give rise to a loss of finality protections before the commencement of Insolvency Proceedings? If so, please clarify from which point in time and in which circumstances finality protections would be lost.

Whether a Reorganisation Measure (defined to mean a scheme of arrangement under Chapter 5 of the Corporations Act) could give rise to a loss of finality protections will depend on the nature of the particular scheme and factual circumstances at the time. However, should a Reorganisation Measure occur in respect of a Relevant Clearing Member, the protections given by the Netting Act should still apply as the definition of external administration in the Netting Act includes reference to a body corporate that has entered into a compromise or arrangement with another person the administration of which has not been concluded,⁷ which in our view would refer to a scheme of arrangement.

Of course, there may be other events or factual matters which could potentially affect finality protections such as, for example, misrepresentation or wrongful conduct. If there are any particular matters you would like us to consider please let us know.

⁷ See the definition of "external administration" set out in section 5 of the Netting Act which includes a "Chapter 5 body corporate" defined in the Corporations Act as including a body corporate that has entered into a compromise or arrangement with another person the administration of which has not been concluded.

3. **ASSUMPTIONS AND QUALIFICATIONS**

3.1 **Assumptions**

In addition to the other assumptions set out in various parts of this advice, the opinion as set out in this advice is also based on the assumptions set out in our advice dated 16 July 2019.

None of the assumptions in this advice are limited by reference to any other assumption.

3.2 **Qualifications**

In addition to the other qualifications set out in various parts of this advice, we make the qualifications set out in our advice dated 16 July 2019.

None of the qualifications in this advice are limited by reference to any other qualification.

4. **BENEFIT**

This opinion letter is given for the exclusive benefit of the addressee. In this opinion we do not assume any obligation to notify or inform you of any developments subsequent to its date that might render its content untrue or inaccurate in whole or in part at such time. It may not, without our prior written consent, be relied on by any other person.

Yours faithfully



Ashurst