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

LCH LTD

4 APRIL 2023

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SERVICES – SWAPCLEAR SERVICE**

4 APRIL 2023

INSTRUCTIONS

You have asked us to provide the following opinion under the Relevant Laws in connection with the SwapClear Service provided by LCH Limited (**LCH** or **you**).

DEFINITIONS

In this opinion:

- (a) **ADI** means an authorised-deposit taking institution authorised under the Banking Act;
- (b) **AFSL Licensee** means a holder of an Australian financial services licence granted under section 913B of the Corporations Act;
- (c) **APRA** means the Australian Prudential Regulation Authority;
- (d) **ASIC** means the Australian Securities and Investments Commission;
- (e) **Australia** means the Commonwealth of Australia;
- (f) **Australian company** means a company which is either registered or taken to be registered as a company under the Corporations Act;
- (g) **Australian Clearing Member** has the meaning described in this opinion under the heading "Introduction and Scope";
- (h) **Backup Clearing Member Agreement** means 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 D;
- (i) **Banking Act** means the *Banking Act 1959* (Cth);

- (j) **Clearing Member Contract** means the agreement between LCH and a Relevant Clearing Member comprising the Clearing Membership Agreement and LCH's Rulebook;
- (k) **Clearing Membership Agreement** means the agreement between LCH and a Relevant Clearing Member which is substantially in the form of the Clearing Membership Agreement set out in Annexure A;
- (l) **Client Contracts** means the Contracts entered into by a Clearing Member in respect of its Client Clearing Business;
- (m) **Clifford Chance Opinion** means the English law legal opinion provided to LCH by Clifford Chance LLP dated 1 December 2020;
- (n) **Corporations Act** means the *Corporations Act 2001* (Cth);
- (o) **Cross-Border Insolvency Act** means the *Cross-Border Insolvency Act 2008* (Cth);
- (p) **CS facility** means a clearing and settlement facility under Part 7.3 of the Corporations Act;
- (q) **Deed of Charge** means a deed of charge to be entered into between a Relevant Clearing Member and LCH which is substantially in the form of the Deed of Charge set out in Annexure B;
- (r) **English Law** means the laws of England and Wales;
- (s) **External Administration Proceeding** has the meaning as described in section 3.4 this opinion;
- (t) **Foreign Clearing Member** has the meaning as described in this opinion under the heading "Introduction and Scope";
- (u) **Foreign Company** means a body corporate which is incorporated outside of Australia;
- (v) **Foreign Judgments Act** means the *Foreign Judgments Act 1991* (Cth);
- (w) **Insolvency Proceedings** means the procedures described in sections 3.1 and 3.2 of this opinion;
- (x) **law of a Relevant Jurisdiction** means the common law, principles of equity and laws constituted by legislation that is available to the public generally, in force in the Relevant Jurisdiction;
- (y) **LCH Agreements** mean the agreements described in this opinion under the heading "Documents";

- (z) **LCH's Rulebook** means the versions of the General Regulations, Procedures, Default Rules, Clearing House Settlement Finality Regulations and the Product Specific Contract Terms and Eligibility Criteria Manual published on LCH's website as at the date of this opinion;
- (aa) **Model Law** means the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law set out in the Annex to United Nations General Assembly Resolution A/RES52/158 (1997)*;
- (bb) **Netting Act** or **PSNA** means the Payment Systems and Netting Act 1998 (Cth);
- (cc) **Porting Agreement** means 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 "Fund Version" or the "Non-Fund Version" porting agreements set out in Annexure E;
- (dd) **PPSA** means the *Personal Property Securities Act 2009* (Cth);
- (ee) **PPS Register** means the Personal Property Securities Register established under the PPSA;
- (ff) **PPS Security Interest** means a security interest (as defined in the PPSA) that is subject to the PPSA;
- (gg) **Relevant Clearing Member** has the meaning as described in this opinion under the heading "Introduction and Scope";
- (hh) **Relevant Contract** means a "Contract" as defined in the General Regulations between LCH and a Relevant Clearing Member;
- (ii) **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;
- (jj) **Relevant Laws** means the laws of the Relevant Jurisdictions and the federal laws of Australia as they apply in the Relevant Jurisdictions;
- (kk) **Reorganisation Measure** refers to a scheme of arrangement as described in section 3.3 of this opinion below;
- (ll) **Security Deed** means a Security Deed (as defined in LCH's Rulebook) which is substantially in the form of the Security Deed set out in Annexure C;

(mm) subject to the above, terms that are defined in LCH's Rulebook have the meanings given in that document unless the context requires otherwise;

(nn) headings are for convenience only, and do not affect interpretation.

DOCUMENTS

For the purpose of preparing this opinion we have only reviewed the following documents:

- (a) Clearing Membership Agreement;
- (b) LCH's Rulebook;
- (c) Deed of Charge;
- (d) Security Deed;
- (e) Backup Clearing Member Agreement; and
- (f) Porting Agreement ("Fund Version" and "Non-Fund Version").

Those documents are together referred to as the **LCH Agreements**.

INTRODUCTION AND SCOPE

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.

LCH is licensed under Part 7.3 of the Corporations Act to operate a 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.

LCH is registered as a foreign company in Australia, under Division 2 of Part 5B.2 of the Corporations Act, with registration number ARBN 142 251 045.

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

Our opinion is given:

- (a) in relation to Clearing Members each of which is an Australian company that is either:

- (i) an authorised-deposit taking institution (**ADI**) authorised under the *Banking Act 1959* (Cth) (**Banking Act**); or
- (ii) a holder of an Australian financial services licence (**AFS Licensee**),
but that is not:
 - (iii) an insurance company;
 - (iv) a trustee of a trust (including a superannuation trustee and a responsible entity of a managed investment scheme); or
 - (v) a statutory corporation, a government authority or the Crown,each such Clearing Member being referred to as an **Australian Clearing Member**;¹ and
- (b) in relation to Clearing Members each of which is a Foreign Company, but that is not:
 - (i) an insurance company;
 - (ii) a trustee of a trust (including a superannuation trustee and a responsible entity of a managed investment scheme); or
 - (iii) a statutory corporation, a government authority or the Crown,each such Clearing Member being referred to as a **Foreign Clearing Member**.

Australian Clearing Members and Foreign Clearing Members are referred to in this opinion as **Relevant Clearing Members**.

This opinion relates only to the laws of the Relevant Jurisdictions, as interpreted by courts of the Relevant Jurisdictions, at 9.00 am (Sydney time) on the date of this opinion.

We express no opinion on the impact of any revenue laws.

This opinion is given on the basis that it will be construed in accordance with the laws of New South Wales.

Our opinion is as set out below, subject to the assumptions in Schedule 1 and the qualifications in Schedule 2.

¹ We are instructed that all current Australian Clearing Members are Australian-incorporated companies which are ADIs and enter into their respective LCH Agreements in their own right.

OPINION

1. GOVERNING LAW, ENFORCEABILITY, AND JURISDICTION

1.1 Choice of Governing Law And Enforceability Of LCH Agreements

The proper law of a contract is the system of domestic law which determines the validity and effect of the contract,² including the enforceability and extent of the substantive obligations, rights or powers under the contract.³

Each of the LCH Agreements provide that they shall be governed by and construed in accordance with English Law.⁴

The parties to the LCH Agreements may, by such express agreement, select English Law as the legal system by which those contracts will be interpreted and the obligations under those contracts will be determined. That contractual choice of law will be given effect to by courts of the Relevant Jurisdictions provided that the choice of English Law is made in good faith and is not contrary to Australian public policy.⁵

Whilst there are some authorities which have indicated that the choice as to the proper law of a contract must also have a significant connection with, or be connected with the commercial realities of, the transactions contemplated by the contract,⁶ a number of more recent Australian authorities have given effect to a choice of law where the chosen jurisdiction had little or no connection with the

² See Davies, Bell, Brereton and Douglas *Nygh's Conflict of Laws in Australia* (10th ed. 2020) (Nygh) at [19.1], and [19.3]. See also Dicey, Morris and Collins *The Conflict of Laws* (16th ed., 2022) at [32-008].

³ See Brereton, *Halsbury's Laws of Australia 85 Conflict of Laws* at [85,1175], [85,1260]. See also *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* [1984] AC 50 at 61, 65; *Transfield Pty Ltd v Fonside Australia Pty Ltd* [2000] QSC 480 at [18]-[19]; *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC at [48]; *Graham v Friswell T/as Ripcord Skydivers* [2015] NSWSC 504 at [42] to [47]; see also Nygh at [19.72].

⁴ The Clearing Membership Agreement (by clause 13.1); General Regulations (by Regulation 51); Security Deed (by clause 14.4); Backup Clearing Member Agreement (by clause 4); Porting Agreement (by clause 4); and Deed of Charge (by clause 29, save that in relation to clause 10 which applies to any charged property situated in the United States of America, clause 29 provides that in relation to issues arising in relation to clause 10(1) or the use of the deed as a security agreement as provided for in clause 10, the deed shall be governed by and construed in accordance with the applicable laws of the State of New York).

⁵ *Vita Foods Products Inc v Unus Shipping Co Ltd* (in liq) [1939] AC 277 at 290; *Garsec Pty Ltd v His Majesty the Sultan of Brunei* (2008) 250 ALR 682 at [128] per Campbell JA; *Huntingdale Village Pty Ltd (ACN 085 048 531) (Recs and Mgrs Apptd) v Corrs Chambers Westgarth* (2018) 128 ACSR 168 at [182] per Mitchell and Beech JJA, their Honours also noting at [182] that "Cases in which effect is not given to the parties' express choice in identifying the proper law are rare".

⁶ Nygh, at [19.15], notes that there is some authority to the effect that parties can only choose the laws of a jurisdiction that has a substantial connection with the contract (see, for example *Kay's Leasing Corp v Fletcher* (1964) 64 SR (NSW) 195 at 205), or to the effect that the chosen jurisdiction needs to support "the realities of the contract" (see *Queensland Estates Pty Ltd v Collas* [1971] Qd R 75 at 80-1); though it is suggested in Nygh that "such an approach is antithetical to the common law's strong support for autonomy in contractual relations".

"realities of the contract".⁷ In *BHP Petroleum Pty Ltd v Oil Basins Ltd*, in relation to a contract governed by the law of New York, which had no apparent connection with that jurisdiction, Murray J. observed:⁸

"It has not been suggested that any law of the Commonwealth of Australia or the State of Victoria contains any provision which requires that the agreement shall not be interpreted and applied in accordance with the law of the State of New York. Nor has it been suggested that there is anything in the agreement itself which prevents the law of the State of New York governing the contract. It is abundantly clear that on the facts of the case the contract has no connection with the State of New York at all, and has a great deal of connection both in fact and in law with the Commonwealth of Australia and the State of Victoria. It was submitted that for this reason I should be prepared to override the choice of law of the parties and hold that the contract is one governed by the law of Victoria. There are of course instances in which the courts have refused to allow a choice of law by the parties to operate, but these instances are all cases in which the parties have sought by their choice of law to avoid the operation of a fiscal or policy provision of the law which would otherwise apply to the contract: see Golden Acres Ltd v Queensland Estates Pty Ltd [1969] Qd R 378; Queensland Estates Pty Ltd v Collas [1971] Qd R 75. There is no element of this kind in the present case. The normal rule as I understand it is that in the absence of such a circumstance the parties are free to choose the law which shall govern their agreement."

Accordingly, under the laws of the Relevant Jurisdictions, the parties to a contract are generally given a wide discretion to choose the law that governs their contract.⁹ However, courts of the Relevant Jurisdictions will not give effect to a choice of law made in order to evade the application of a law of the Relevant Jurisdictions which would have applied in the absence of such choice.¹⁰ We have assumed that in choosing English Law as the law to govern the LCH Agreements, there is no bad faith involved nor any intention to evade the operation of any law

⁷ For example, *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747, and *Re Bulong Nickel Pty Ltd* [2002] WASC 126 at [39].

⁸ *Ibid.* This decision has been cited in *New Zealand Pelt Export Co Ltd v Trade Indemnity New Zealand Ltd* [2002] VSC 570 at [71] and in *Ship "Sam Hawk" v Reiter Petroleum Inc.* (2016) 246 FCR 337 at [256]. See also Brereton, *Halsbury's Laws of Australia 85 Conflict of Laws* at [85-1180] where view is expressed that the country whose legal system has been selected need not have any factual connection with the parties or the subject matter of the contract.

⁹ See *Ship "Sam Hawk" v Reiter Petroleum Inc.* (2016) 246 FCR 337 at 400; Nygh at [19.21].

¹⁰ See Brereton, *Halsbury's Laws of Australia 85 Conflict of Laws* at [85-1180].

of the Relevant Jurisdictions.¹¹ Moreover, to the extent that it might be considered that a choice of law must be connected with the commercial realities of the transactions contemplated by the LCH Agreement, this requirement would also appear to be satisfied.¹²

In our view, the courts of the Relevant Jurisdictions will:

- (a) give effect to the choice of English Law as the governing law of the LCH Agreements; and
- (b) on the assumption that the LCH Agreements constitute binding obligations between the parties as a matter of English Law,¹³ if required to consider the enforceability of an LCH Agreement, recognise an LCH Agreement as giving rise to binding contractual obligations between the parties to that LCH Agreement,¹⁴

though a court of a Relevant Jurisdiction will apply the Relevant Jurisdiction's procedural laws and mandatory laws which apply regardless of the choice of law.¹⁵

1.2 Submission to the Jurisdiction of the English Courts

The courts of a Relevant Jurisdiction will recognise and will give effect to the submission under clause 13.1 of the Clearing Membership Agreement, clause 51 of the General Regulations¹⁶, clause 4 of the Backup Clearing Member Agreement, clause 5 of the Porting Agreement ("Fund Version") and clause 4 of the Porting Agreement ("Non-Fund Version") to the exclusive jurisdiction of the

¹¹ Whether there is any public policy reason for which a court of the Relevant Jurisdictions may not recognise the choice of English Law in relation to any particular LCH Agreement is a factual matter which would need to be considered having regard to the circumstances pertaining to the particular contract, but as general matter, as at the date of this opinion, we are not aware of any reason why the choice of English Law would violate Australian public policy.

¹² LCH is an English company, and is recognised as a central counterparty and supervised by the Bank of England under the *Financial Services and Markets Act 2000* (see Bank of England, 'Financial market infrastructure supervision', <https://www.bankofengland.co.uk/financial-stability/financial-market-infrastructure-supervision>).

¹³ In this regard, we refer to section 3.1.1 of the Clifford Chance Opinion, which opines as to the binding effect of the LCH Agreements between LCH and any Clearing Member that is an English company.

¹⁴ In relation to clause 10 of the Deed of Charge, as a general matter, it is permissible for a distinct part of an agreement to be governed by a different specified governing law from the governing law specified for the remainder of the agreement: Nygh at [19.2] and Dicey, Morris and Collins *The Law of Conflict* (16th ed. 2022) at [32.044]. On a similar basis (and subject to similar qualifications and assumptions), in our view, the Courts of the Relevant Jurisdictions would recognise this choice of law.

¹⁵ See Nygh at [19.39]ff. See also *Huntington Village v Corrs Chambers Westgarth* (supra) at [123]-[129], [162]-[173]. This typically refers to any statute of a Relevant Jurisdiction which (on its proper construction) applies notwithstanding the choice of governing law. An example is section 15C of the Banking Act, which we discuss below.

¹⁶ We note that we are instructed that Regulation 33 of the General Regulations does not apply to the SwapClear service and is not relevant for this opinion.

English courts.¹⁷ A court in a Relevant Jurisdiction will generally exercise its discretion to stay proceedings commenced in that court in contravention of such provisions, unless the party who seeks to proceed in that court (notwithstanding its agreement) satisfies that court that there are strong grounds for the court to exercise its discretion to permit the party to continue with the proceedings.¹⁸

We note that, while each Relevant Clearing Member submits to the exclusive jurisdiction of the courts of England under Regulation 51(c), LCH retains the liberty to "take proceedings in any other court of competent jurisdiction". English courts have upheld the validity of clauses of this kind, sometimes referred to as "asymmetric jurisdiction" clauses.¹⁹ While we are not aware of any decision of an Australian court similarly affirming the validity of "asymmetric jurisdiction" clauses, in our view,²⁰ recognition of their validity would be consistent with Australian courts' strong disposition toward enforcing the parties' bargain regarding submission to jurisdiction.²¹

The Security Deed in clause 14.5 also contains a submission by each party to exclusive jurisdiction of the English courts for the benefit of the other party, though this is stated to be subject to the right of any party to take any other proceedings in any other court of competent jurisdiction (unless precluded by law). We note that LCH is not a party to the Security Deed. The purpose of this provision of the Security Deed appears to be that each party submits to the exclusive jurisdiction of an English Court in respect of proceedings commenced in an English court against them by the other party, but each party remains free to bring its own proceedings in any other competent court²² unless precluded by law. In our view, the courts of a Relevant Jurisdiction will recognise and give effect to that submission to the jurisdiction of the English courts.²³

¹⁷ The interpretation of the submission to jurisdiction provision will be a matter for the governing law of the contract: see *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419 at [51] per Bell P. This assumes that the clause is interpreted to have this effect under English law.

¹⁸ See Nygh at [7.79]; Brereton *Halsbury's Laws of Australia 85 Conflict of Laws* at [85-515]

¹⁹ *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328. English courts have re-affirmed the position more recently in *Re NN2 Newco Limited* [2019] EWHC 1917 (Ch) at [41], *Gulf International Bank BSC v Aldwood* [2020] 1 All ER (Comm) 334 at [157]-[158], and *Commerzbank Aktiengesellschaft v Pauline Shipping Limited* [2017] 1 WLR 3497.

²⁰ One commentator noting that "[w]hile there have been no Australian or New Zealand cases to consider the point, there is no reason to consider that an Australian or New Zealand court would take a different approach to that of the English courts": David Birch, "Validity of asymmetric jurisdiction agreements in England, Australia and New Zealand" (2016) 5(2) *Journal of Civil Litigation and Practice* 96, 101.

²¹ This approach was recently reaffirmed by the New South Wales Court of Appeal in *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419 at [77]-[79] (Bell P, with whom Bathurst CJ and Leeming JA agreed).

²² That is, a court having jurisdiction over the dispute other than an English court.

²³ This assumes that the clause is interpreted to have this effect under English law. Under the Security Deed a party to the Security Deed may commence proceedings in any court of competent jurisdiction. In our view, a court in a Relevant Jurisdiction would generally not exercise its discretion to

Under clause 29 of the Deed of Charge there is a submission by the chargor (i.e. a Relevant Clearing Member) to the non-exclusive jurisdiction of the English courts, which a Court in a Relevant Jurisdiction will also recognise and give effect to.²⁴

2. RECOGNITION OF AN ENGLISH JUDGMENT

Foreign judgments are enforceable in Australia if registered in accordance with the Foreign Judgments Act or if recognised at common law.²⁵

The Foreign Judgments Act permits the enforcement of judgments given by courts in countries named in regulations made pursuant to that Act. England is such a named country.²⁶

A person in whose favour a judgment has been given by an English court in respect of the LCH Agreements may, within a period of 6 years from the date of the judgment, apply for its registration and enforcement in Australia under the Foreign Judgments Act, provided the judgment satisfies the requirements for registration under the Foreign Judgments Act. The judgment must be final and conclusive, it must be for a fixed sum of money, and must remain unsatisfied to support an application for recognition. If the requirements for registration of the judgement under the Foreign Judgments Act are met, the court to which the application is made will register the judgment without re-examination of the merits of the case. If the foreign judgment is denominated in a foreign currency, the judgment creditor may seek for it to be registered and then enforced in that currency.²⁷

However, the foreign judgment may not be enforceable, and its registration may be set aside, in various circumstances specified under the Foreign Judgments Act,²⁸ including where:

stay such proceedings brought in that Relevant Jurisdiction (as permitted by the Security Deed) except in accordance with the laws of the Relevant Jurisdiction (e.g. unless the proceedings were commenced in a clearly inappropriate forum).

²⁴ This assumes that the clause is interpreted to have this effect under English law. The courts of the Relevant Jurisdictions will also recognise a contractual submission to the non-exclusive jurisdiction of the courts of England and Wales; see e.g. *Telesco Investments Ltd v UBS AG* [2016] NSWSC 505 at [260]-[280]; *First Property Holdings Pte Ltd v Nyunt* [2019] NSWSC at [65]-[89]; Nygh at [40.18]. The same principles discussed at footnote 17 above will also apply.

²⁵ Outside of the statutory scheme for registration and enforcement of foreign judgments under the Foreign Judgments Act, Australian courts may also recognise a foreign judgment as binding on the parties on the basis of common law principles: see *SK Foods LP v SK Foods Australia Pty Ltd (in liq)* (No. 3) [2013] FCA 526 at [22] to [25]. Because judgments of the courts of England are eligible for the statutory scheme, we will not discuss those principles in this opinion.

²⁶ *Foreign Judgments Regulations 1992* (Cth) (**Foreign Judgments Regulations**), Schedule.

²⁷ Foreign Judgments Act section 6(11).

²⁸ Foreign Judgments Act section 7.

- (a) the person in whom the rights under the judgment are vested, and the applicant for registration, are not the same;
- (b) the debtor did not receive notice of the proceedings in sufficient time to contest the proceedings;
- (c) the judgment was obtained by fraud or has been reversed or set aside or its enforcement would be contrary to public policy (as to which, see further discussion below);
- (d) the court that handed down the judgment had no jurisdiction in the circumstances of the case resulting in the judgment; or
- (e) the matter determined by the judgment was the subject of an earlier final and conclusive judgment by another court having jurisdiction.

If the enforcement of a foreign judgement is "contrary to public policy", any registration of that judgment is liable to be set aside.²⁹ 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. The Foreign Judgments 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".³⁰

Accordingly, if LCH obtained a judgment from the courts of England³¹ that met the above-mentioned requirements of the Foreign Judgments Act, and subject to the existence of any of the circumstances identified above that would provide grounds to refuse registration of the judgment, a court of a Relevant Jurisdiction would register and enforce the English judgment.

3. **INSOLVENCY PROCEEDINGS IN THE RELEVANT JURISDICTIONS**

In this section 3 of our opinion, we identify the forms of insolvency proceedings to which an Australian Clearing Member, LCH, or a Foreign Clearing Member may

²⁹ Foreign Judgments Act section 7(2)(a)(xi).

³⁰ *Jenton Overseas Investment Pte Ltd v Townsing* (2008) 221 FLR 398 at [6]. See also *Xu v Wang* [2019] VSC 269 at [90]-[91].

³¹ Being one of the Supreme Court of the United Kingdom or one of the Senior Courts of England and Wales (which we understand to be the High Court or the Court of Appeal), as specified in the Foreign Judgments Regulations.

become subject under the laws of the Relevant Jurisdictions. We also identify in this section:

- (a) moratoria which may under the laws of the Relevant Jurisdictions preclude enforcement action (such as for example, the commencement or continuation of legal proceedings or the enforcement of security) against an Australian Clearing Member, LCH, or a Foreign Clearing Member, or in relation to their property, where one of these becomes subject to one of the identified forms of insolvency proceeding; and
- (b) restrictions under the laws of the Relevant Jurisdictions on dealings involving the property of an Australian Clearing Member, LCH, or a Foreign Clearing Member, or in relation to their property, where one of these becomes subject to one of the identified forms of insolvency proceeding,

which, in the absence of any overriding protection against such moratoria or restrictions on dealings, may apply under the laws of the Relevant Jurisdictions in relation to the forms of insolvency proceedings described in this section.

Sections 5, 6, 8 and 9 of this opinion describe the extent to which, in our opinion, specific actions that may be taken by LCH pursuant to the terms of the LCH Agreements would, under the laws of the Relevant Jurisdictions, have the benefit of certain statutory protections against moratoria and restrictions on dealings described in this section, in circumstances where either an Australian Clearing Member, LCH, or a Foreign Clearing Member becomes subject to one of the forms of insolvency proceedings described in this section.

3.1 Australian companies

The insolvency proceedings³² to which an Australian Clearing Member may become subject under the laws of the Relevant Jurisdictions are:

(a) Voluntary administration

An Australian company may become subject to voluntary administration pursuant to Part 5.3A of the Corporations Act. The purpose of the administration is to administer the business, property and affairs of an 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

³² On 1 January 2021, a new small business restructuring procedure for eligible Australian companies called "restructuring" came into effect in Australia. The restructuring procedure begins when a restructuring practitioner (as defined in Part 5.3B of the Corporations Act) is appointed to the company, and requires the company's board to first resolve that the company is insolvent or may become insolvent at some future time. However, a company is only eligible for this process if the total liabilities of the company do not exceed A\$ 1 million. We assume that the new restructuring process will not be relevant to any Relevant Clearing Member and have not considered it for the purpose of this opinion.

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 can be appointed to a company by:

- (i) 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;
- (ii) 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
- (iii) a person who is entitled to enforce a security interest in the whole, or substantially the whole, of the company's property, if the security is enforceable.

A voluntary administrator acts as the agent of the company and has control of the company's business, property and affairs. Once an administrator is appointed, any transaction or dealing affecting property of the company is not effective unless entered into by the administrator (on the company's behalf) or with the consent of the administrator or under an order of the court.³³ This will render void any such purported transaction or dealing affecting property of a Relevant Clearing Member who is an Australian company subject to voluntary administration, where either the Relevant Clearing Member purports to enter into such a transaction or dealing, or another person purports to enter into such a transaction or dealing on the Relevant Clearing Member's behalf, at any point in time after the appointment of the administrator.³⁴ However, as discussed in greater detail below (see section 4.2 of this opinion), in our view the Netting Act will protect dealings in the form of Payment Transfer Orders and Securities Transfer Orders (as defined in the Clearing House Settlement Finality Regulations) from being rendered void or voidable in an administration of a Relevant Clearing Member. In addition, section 6.4 of this opinion discusses the extent to which the Netting Act will protect specified actions taken by LCH under the Default Rules against the operation of this restriction, and section 8.2 similarly discusses the extent to which the Netting Act protects specified actions taken by LCH to effect porting of Client Contracts and Account Balances to a Backup Clearing Member, in

³³ Section 437D of the Corporations Act.

³⁴ We note that section 437D of the Corporations Act takes effect as soon as the relevant company is "under administration". Section 435C of the Corporations Act clarifies that the administration of a company begins "when an administrator of the company is appointed", and it does not commence at the start of the day on which the administrator was appointed.

circumstances including where a Relevant Clearing Member becomes subject to voluntary administration.

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:

- (i) for the company to execute a deed of company arrangement;
- (ii) for the administration to end; or
- (iii) for the company to be wound up.

During the administration there is a general moratorium placed on proceedings in a court against the company or in relation to its property (or any execution or court enforcement process in relation to property of the company), without the leave of the court or the administrator's consent.³⁵

There is also a general moratorium on the enforcement of security interests over the property of the company during the administration, without the leave of the court or the administrator's consent.³⁶ 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.³⁷ There is also an exception where the secured party has already enforced its security interest prior to the commencement of the administration,³⁸ though on the application of the administrator the court may restrict the enforcement of the security provided that the secured party's interests will be adequately protected.³⁹

We note that there is further exception to the moratorium, provided for by 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 interest" over property of the company consisting of securities⁴⁰, derivatives⁴¹, or certain other forms of

³⁵ Sections 440D, 440F and 440G of the Corporations Act.

³⁶ Section 440B of the Corporations Act.

³⁷ Section 441A of the Corporations Act.

³⁸ Section 441B of the Corporations Act.

³⁹ Section 441D of the Corporations Act. This does not apply where a "fully" secured creditor enforces its security as permitted by section 441A.

⁴⁰ As defined in section 92(1) of the Corporations Act.

⁴¹ As defined in section 761D of the Corporations Act.

property.⁴² 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" within the meaning of the Corporations Act. LCH would be considered an operator of a clearing and settlement facility with regard to the SwapClear Service. However, we consider that this exception to the moratorium against enforcement of security interests in a voluntary administration will likely not apply to LCH's security interests, on the basis that the collateral charged in favour of LCH is, in our view, unlikely to constitute a "security" as defined in section 92(1) of the Corporations Act so that it would not attract the exemption provided for in section 440JA.⁴³

It is also relevant to note in this context that for section 440JA to apply the relevant collateral must be subject to a "possessory security interest", namely one which is perfected by possession or control. As discussed in section 5.7 of this opinion below, the security interest granted in favour of LCH under the Deed of Charge will not be capable of perfection by possession. For the reasons described in section 5.7 below, we think that whilst it is likely that the security interest granted in favour of LCH under the Deed of Charge would be perfected by control, we do not consider this to be highly likely and suggest that it would be prudent for LCH to assume that this security interest may not be perfected by control.

However, as discussed in greater detail below (see section 5.10 of this opinion below), we note that in our view, the Netting Act will protect the enforcement of security by LCH under the Deed of Charge and the Clearing Member Contract during the moratorium imposed in a voluntary administration of a Relevant Clearing Member.

We also note that, in any event, the moratorium imposed in a voluntary administration only 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 generally resume once the administration has ceased. When a company is placed in receivership or liquidation under the Corporations Act, there is no moratorium which would prevent a secured

⁴² A possessory security interest is defined in section 51D of the Corporations Act to be a PPSA security interest in property that is perfected by possession or control.

⁴³ We discuss the nature of the collateral charged under the Deed of Charge in section 5.2 below. In our view, it is clear that collateral of this nature does not constitute "cash in the form of notes and coins", or a "negotiable instrument". On the assumption that any financial instruments held by LCH as collateral are held in intermediated form (and not held directly from the issuer of those instruments), we think it is unlikely that this would be found to meet the definition of a "security", as defined by subsection 92(1) of the Corporations Act, noting in particular that the definition of the term "security" in subsection 92(1) does not include "legal or equitable rights or interests in" shares or debentures, by contrast to the definition of that term in each of subsections 92(2A) and 92(3) (neither of which apply to Part 5.3A of the Corporations Act, where section 440JA is located). We also consider it unlikely that the collateral charged under the Deed of Charge would be found to constitute a "derivative" as defined in section 761D of the Corporations Act. The same analysis will apply to any security provided to LCH under the terms of the Clearing Member Contract.

creditor from enforcing a security interest against the property of the company (except, in the case of liquidation, through the commencement of proceedings, or where the provisions of the Ipso Facto Law may be applicable, as to which see the discussion in section 6.1 below).

The voluntary administration will normally end when:

- (i) the company and the deed administrator execute a deed of company arrangement (following a resolution of the company's creditors that it execute such a deed);
- (ii) the company's creditors resolve that the administration end; or
- (iii) the company's creditors resolve that the company be wound up.⁴⁴

A deed of company arrangement is an arrangement which is binding on a company and its creditors and complies with the requirements of the Corporations Act.⁴⁵ It must specify the nature and duration of any moratorium for which the deed provides and the extent to which the company is to be released from its debts. A deed of company arrangement does not affect a secured creditor from realising or otherwise dealing with its security interests, except in so far as a secured creditor voted in favour of the deed of company arrangement or the court orders.⁴⁶

(b) Winding Up

Winding up (also called liquidation) 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 company's constitution provides).

An insolvent Australian company may become subject to a winding up and thereby have a liquidator appointed to the company under Parts 5.4, 5.4A, 5.4C or 5.5 of the Corporations Act. The provisions contained in these Parts set out the respective processes for:

- (i) a court-ordered winding up (including a winding up in solvency);
- (ii) a creditors' voluntary winding; and

⁴⁴ Section 435C of the Corporations Act.

⁴⁵ See sections 444A, 44B and 44D of the Corporations Act.

⁴⁶ Sections 444D and 444F(2) of the Corporations Act.

- (iii) a members' voluntary winding up.

If an application has been made to court for the winding up of the company, the court may appoint a liquidator provisionally pending the final determination of the winding up application.⁴⁷

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 commencement of a winding up, except in the case of a members' voluntary liquidation, or on the appointment of a provisional liquidator, there is a general moratorium on court proceedings against the company or in relation to its property or any execution or court enforcement process in relation to property of the company (without the leave of the court).⁴⁸ This does not affect a secured creditor's rights to realise or otherwise deal with its security interest (except than by the commencement of court proceedings to do so).⁴⁹

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

- (i) collect and realise the assets of the company;
- (ii) 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;
- (iii) assess whether any claim should be made for a breach of duty (e.g. insolvent trading by directors);
- (iv) assess the claims of the company's unsecured creditors; and
- (v) distribute the assets of the company to creditors in accordance with the Corporations Act.

⁴⁷ Section 472(2) of the Corporations Act.

⁴⁸ Section 471B of the Corporations Act (in respect of a court-ordered winding up or the appointment of a provisional liquidator). Section 500 of the Corporations Act (in respect of a creditor's voluntary winding-up).

⁴⁹ See e.g. section 471C of the Corporations Act (in respect of a court-ordered winding up or the appointment of a provisional liquidator); cf. *Re Asiatic Electric Co. Pty Ltd* [1970] 2 NSW 612 at 614.

A liquidator appointed in a court-ordered or creditors' voluntary winding up will also have the right to apply to a court for relief in relation to voidable transactions.⁵⁰

After the commencement of a court-ordered winding up,⁵¹ any disposition of property of the company is void unless the court otherwise orders or it is an exempt disposition.⁵² Exempt dispositions include certain dispositions made by a liquidator or provisional liquidator, an administrator, under a deed of company arrangement, or a payment made by an Australian ADI on or before the date of the court order for winding up and in good faith and in the ordinary course of the banking business of the Australian ADI.⁵³

As discussed in greater detail below (see section 4.2 of this opinion), in our view payments effected by debit and credit to relevant accounts and transfers of securities under a Payment Transfer Order or a Securities Transfer Order will be protected from being rendered void or voidable in an administration of a Relevant Clearing Member. In addition, section 6.4 of this opinion discusses the extent to which the Netting Act will protect specified actions taken by LCH under the Default Rules against the operation of this restriction, and section 8.2 similarly discusses the extent to which the Netting Act protects specified actions taken by LCH to effect porting of Client Contracts and Account Balances to a Backup Clearing Member, in circumstances including where a Relevant Clearing Member becomes subject to liquidation.

We note that a liquidator also has a power to disclaim pre-liquidation contracts.⁵⁴ However, unless the contract is unprofitable (or a lease of land) the liquidator must first obtain the leave of the court before doing so.⁵⁵

APRA may apply to the Federal Court of Australia for an order that an ADI be wound up if APRA considers that the ADI is insolvent and could not be

⁵⁰ Section 588FF of the Corporations Act.

⁵¹ The phrase "after the commencement of the winding up" in section 468 of the Corporations Act has been interpreted to mean the day following the day on which the winding up is taken to commence, such that a disposition of property of the company occurring on the day of the commencement of its winding up will not be rendered void under this provision: *In the matter of Skypac Aviation Pty Ltd (in liq)* [2019] NSWSC 291 at [37], cited in Thomson Reuters, *McPherson's Law of Company Liquidation* (at 30 November 2022, paragraph [7.170]).

⁵² Section 468 of the Corporations Act. There is no equivalent provision in the case of a creditors' voluntary winding up, though it has been suggested that dispositions after the commencement of a creditors' voluntary liquidator (other than dispositions effected by the liquidator) should also be regarded as invalid: see *McPherson's Law of Company Liquidation* at [7.270].

⁵³ See section 486(2) of the Corporations Act.

⁵⁴ Section 568 of the Corporations Act. It should be noted that liquidator cannot disclaim only part of a contract: *Enron Australia v TXU Electricity* (2004) 22 ACLC 596; on appeal (2005) 53 ACSR 295. The effect of a disclaimer is to terminate the company's right, title, interests, liabilities and property in respect of the property disclaimed: see section 568D of the Corporations Act.

⁵⁵ Section 568(1A) of the Corporations Act.

restored to solvency within a reasonable period.⁵⁶ The winding up is to be conducted in accordance with the Corporations Act.⁵⁷

Section 7 of this opinion below outlines the Corporations Act provisions dealing with voidable transactions which may apply in the context of an Australian law liquidation of an Australian company or foreign company. We note that, as discussed in section 7.4 below, the Netting Act protects specific actions taken under the Clearing Member Contract in respect of the SwapClear Service in relation to the Corporations Act provisions dealing with voidable transactions.

(c) Receivership

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

The private appointment of a receiver or receiver and manager usually occurs under a mortgage, general security agreement or other form of specific security agreement in respect of all or some of the property of the company. The security document will set out the right to appoint a receiver or receiver and manager and the circumstances in which a receiver or receiver and manager may be appointed (e.g. failure to repay principal or interest).

A receiver or receiver and manager 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 or receiver and manager has the powers set out in the security document together (in the case of property of a corporation as defined in the Corporations Act) with those powers set out in the Corporations Act.⁵⁸

Where the receiver or receiver and manager is appointed by court order to property of a company, the receiver will have the powers specified in the court order.⁵⁹

(d) Banking Act Statutory Management

⁵⁶ Section 16AAA(1) of the Banking Act.

⁵⁷ Section 16AAA(4) of the Banking Act.

⁵⁸ Section 420 of the Corporations Act.

⁵⁹ If a court-appointed receiver were appointed to any of the property of a Relevant Clearing Member by a court of the Relevant Jurisdictions it would be necessary to review the relevant order to ascertain over what property the receiver has been appointed and the powers of the receiver to consider the effect of the court orders.

Under the Banking Act,⁶⁰ 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:

- (i) 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;
- (ii) APRA considers that, in the absence of external support:
 - (A) the ADI may become unable to meet its obligations; or
 - (B) the ADI may suspend payment; or
 - (C) 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
- (iii) the ADI becomes unable to meet its obligations or suspends payment; or
- (iv) an external administrator has been appointed to a holding company of the ADI (or a similar appointment has been made in a foreign country in respect of such holding company) and APRA considers that the appointment poses a significant threat to:
 - (A) the operation or soundness of the ADI;
 - (B) the interests of the depositors of the ADI; or
 - (C) the stability of the financial system in Australia.

In addition, APRA may 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, or a subsidiary of a NOHC, in certain specified circumstances,⁶¹ which include:

- (i) circumstances where:
 - (A) a statutory manager has taken control of the ADI; or

⁶⁰ Section 13A of the Banking Act.

⁶¹ Section 13A(1B) to 1(F) of the Banking Act.

- (B) APRA intends to appoint a statutory manager to take control of the ADI, and the statutory preconditions for such an appointment exist; and
- (ii) APRA considers that either:
 - (A) the body provides essential services to the relevant ADI; or
 - (B) the proposed action is necessary to facilitate the resolution of the ADI, authorised NOHC, or other related body, as relevant; or
- (iii) circumstances where:
 - (A) 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; or
 - (B) APRA considers that the proposed action is necessary to maintain its operations or to facilitate the resolution of the ADI, authorised NOHC, or other related body or group of related bodies.

Where APRA takes control of a body corporate's business, or an administrator appointed by APRA to do so is in control of the body corporate's business, APRA or the administrator (as the case may be) is the Banking Act statutory manager of the body corporate.⁶² The Banking Act statutory manager will continue to control the business until:

- (i) APRA considers that it is no longer necessary for it or an administrator to remain in control of the body corporate's business; or
- (ii) APRA has applied for the body corporate to be wound up.⁶³

When a Banking Act statutory manager takes control of a body corporate's business, the directors of the ADI cease to hold office⁶⁴ and the Banking Act 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.⁶⁵

⁶² Section 13A(2) of the Banking Act.

⁶³ Section 13C of the Banking Act.

⁶⁴ Section 15 of the Banking Act.

⁶⁵ Section 14A(1) of the Banking Act.

The appointment of any liquidator, provisional liquidator, receiver, receiver and manager or administrator is terminated when a Banking Act statutory manager takes control of a body corporate's business, and one must not be appointed while a Banking Act statutory manager is in control of the body corporate's business unless APRA approves the appointment.⁶⁶

A Banking Act statutory manager may sell or otherwise dispose of the whole or any part of the body corporate's business.⁶⁷ The sale or disposal may occur on any terms and conditions that the Banking Act statutory manager considers appropriate.⁶⁸ No other person may dispose of property of the body corporate whilst a Banking Act statutory manager is in control of the body corporate's business, unless APRA or the Banking Act statutory manager consents to the disposal.⁶⁹

However, as discussed in greater detail below (see section 4.2 of this opinion), in our view payments effected by debit and credit to relevant accounts and transfers of securities under a Payment Transfer Order or a Securities Transfer Order will be protected from being rendered void or voidable as a result of the operation of this restriction where a Banking Act statutory manager takes control of the business of a Relevant Clearing Member that is an ADI. In addition, section 6.4 of this opinion discusses the extent to which the Netting Act will protect specified actions taken by LCH under the Default Rules against the operation of this restriction, and section 8.2 similarly discusses the extent to which the Netting Act protects specified actions taken by LCH to effect porting of Client Contracts and Account Balances to a Backup Clearing Member, in circumstances including where a Banking Act statutory manager takes control of the business of a Relevant Clearing Member that is an ADI.

Whilst a Banking Act statutory manager is in control of a body corporate's business, a person cannot begin or continue court proceedings against the body corporate⁷⁰ or an enforcement process in relation to property of the body

⁶⁶ Section 15A of the Banking Act.

⁶⁷ For completeness, we also note that, in relation to a Relevant Clearing Member that is an ADI, under the *Financial Sector (Transfer and Restructure) Act 1999* (Cth) (the **FSTR Act**), APRA has the power to effect a transfer of the Relevant Clearing Member's business, either in whole or in part, to another ADI or another body corporate in certain specified circumstances. We note that, while section 36AA of the FSTR Act provides that such a transfer will not permit a contractual counterparty of the relevant ADI to exercise various rights in respect of the contract (including to close out any transaction relating to the contract or enforce any security under the contract), the protection granted to market netting contracts under the Netting Act overrides the effect of this provision. In addition, section 36AB of the FSTR Act exempts from any partial transfer of an ADI's business any assets or liabilities arising under a market netting contract, or any property over which security has been granted in respect of obligations arising under a market netting contract.

⁶⁸ Section 14A(5) of the Banking Act.

⁶⁹ Section 15BB of the Banking Act.

⁷⁰ Section 15B of the Banking Act

corporate⁷¹, 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.

There is also a general moratorium on the enforcement of security interests over the property of the body corporate during the period that a Banking Act statutory manager is in control of the body corporate's business, without the leave of the court, or the statutory manager's, or APRA's, consent.⁷²

However, as discussed in greater detail below (see section 5.10 of this opinion below), in our view, the Netting Act will prevail over this moratorium, in circumstances where a Banking Act statutory manager takes control of the business of a Relevant Clearing Member that is an ADI.

The Banking Act also provides that a Banking Act statutory manager being in control, or being appointed to take control of, the business of the body corporate (or a member of a group of bodies corporate to which it belongs) does not provide grounds for a contractual counterparty to deny any 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).⁷³

However, we note that, as discussed below (see section 6.4 of this opinion below), the Netting Act will protect specific actions taken by LCH in accordance with Rule 6 of the Default Rules which fall within the scope of sections 16(2)(fa), (fb), (fc) and (g) of the Netting Act, including the netting or termination of obligations under the Clearing Member Contract, in circumstances including where a Banking Act statutory manager takes control of the business of a Relevant Clearing Member that is an ADI.

3.2 Foreign companies

The insolvency proceedings to which LCH or a Foreign Clearing Member may become subject under the laws of the Relevant Jurisdictions are as follows.

(a) Winding Up

A Foreign Company which is registered in Australia or which carries on business in the Relevant Jurisdictions may be wound up by the court and a liquidator appointed where (amongst other things) the Foreign Company is

⁷¹ Section 15BA of the Banking Act.

⁷² Section 15BC of the Banking Act applies a moratorium to the same effect as the moratorium which applies during a voluntary administration under 440B of the Corporations Act.

⁷³ Section 15C of the Banking Act. This applies to a contract governed by foreign law.

unable to pay its debts or has ceased to carry on business in Australia.⁷⁴ The same regime applies to the winding up as with a court-ordered winding up of an Australian company, though with such adaptations as are necessary.⁷⁵ This will include the same recovery possibilities as apply to a court-ordered winding up of an Australian company including the ability of the liquidator to bring claims in respect of voidable transactions.⁷⁶ In this regard we note that, as discussed in section 7.4 of this opinion below, the Netting Act protects specific actions taken under the Clearing Member Contract in respect of the SwapClear Service in relation to the Corporations Act provisions dealing with voidable transactions.

APRA also has the power to apply to the Federal Court of Australia for an order that a foreign ADI be wound up in Australia if APRA considers:

- (i) the foreign ADI is unable to meet its liabilities in Australia, or in one or more foreign countries, as and when they become due and payable;
- (ii) an application for the appointment of an external administrator of the foreign ADI, or for a similar procedure in respect of the foreign ADI, has been made in a foreign country; or
- (iii) an external administrator has been appointed to the foreign ADI, or a similar appointment has been made in respect of the foreign ADI, in a foreign country.⁷⁷

Such a winding up of the foreign ADI is to be conducted in accordance with the Corporations Act.⁷⁸

In addition, a registered foreign company which commences to be wound up or is dissolved or deregistered in its place of origin may have a liquidator appointed to it on the application of a liquidator appointed in its place of origin or ASIC.⁷⁹ An ancillary liquidator of this kind may be appointed where the foreign company is registered under the Corporations Act and has commenced to be wound up or is dissolved or deregistered in its place of origin. The liquidator appointed by a court in the Relevant Jurisdictions must, unless the court otherwise orders, recover and realise the property of

⁷⁴ Section 583 of the Corporations Act.

⁷⁵ Ibid.

⁷⁶ *Titchfield Management Ltd v Vaccinoma Inc* (2008) 68 ACSR 448 at [31] – [32] per Barrett J; *Re Seneca Textiles Pty Ltd* [2020] FCA 242 per Stewart J, holding that a winding up of a Part 5.7 body attracts the whole of Chapter 5 save for matters inconsistent with Part 5.7.

⁷⁷ Section 11EA(1) of the Banking Act.

⁷⁸ Section 11EA(3) of the Banking Act.

⁷⁹ Section 601CL(14) of the Corporations Act.

the foreign company and pay over the net amount recovered to the liquidator in the foreign company's place of origin.⁸⁰ It is arguable⁸¹ that a liquidator appointed in respect of an ancillary liquidation similarly has power to bring claims in respect of voidable transactions (for example, unfair preferences).⁸²

(b) Recognition or Assistance to Foreign Insolvency Proceedings

(i) Cross-Border Insolvency Act

Under the Cross-Border Insolvency Act, which applies the Model Law⁸³ to the Relevant Jurisdictions, a foreign representative⁸⁴ can apply to a competent court of the Relevant Jurisdictions for the recognition of a foreign proceeding.⁸⁵ The foreign proceeding may be recognised as a:

- (A) foreign main proceeding if the foreign proceeding is taking place where the foreign company has its centre of main interests;⁸⁶ or
- (B) a foreign non-main proceeding, if the foreign proceeding is taking place other than where the foreign company has its centre of main interests and where the foreign company has an establishment.⁸⁷

⁸⁰ Section 601CL(15) of the Corporations Act. If there is no liquidator in the place or origin, the Australian liquidator must apply to the court for directions about the disposal of the net amount recovered: see section 601CL(16).

⁸¹ Whilst there does not appear to be any case authority that we have been able to locate on this point, we consider this view to be open because section 601CL of the Corporations Act permits a registered foreign company to be wound up in Australia and a liquidator appointed. The voidable transactions provisions permit a "company's liquidator" to apply for orders setting aside a transaction: see section 588FF. For the purpose of Part 5.7 of the Corporations Act, within which section 588FF sits, "company" is defined in section 9 of the Corporations Act as including registered foreign companies.

⁸² In this regard also, we note that, as discussed in section 7.4 of this opinion below, the Netting Act protects specific actions taken under the Clearing Member Contract in respect of the SwapClear Service in relation to the Corporations Act provisions dealing with voidable transactions.

⁸³ The Model Law does not apply to ADIs: paragraph 1 of Article 2 of the Model Law, section 9 of the Cross-Border Insolvency Act.

⁸⁴ A foreign representative is a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding. (Article 2 of the Model Law)

⁸⁵ A "foreign proceeding" is a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. (Article 2 of the Model Law) (We also note that proceedings concerning certain prescribed entities are exempted from the Model Law: see Model Law Article 1, paragraph 2. Section 9 of the Cross-Border Insolvency Act. The designated entities are specified in the *Cross-Border Insolvency Regulations 2008* (Cth), which designates ADIs, general insurers (as defined in the *Insurance Act 1973* (Cth)) and life companies (as defined in the *Life Insurance Act 1995* (Cth): see Schedule 1, Item 1.)

⁸⁶ In the absence of proof to the contrary, the foreign company's centre of main interests is presumed to be where its registered office is located. (Model Law Article 16 paragraph 3)

⁸⁷ An establishment is any place of operations where the foreign company carries on a non-transitory economic activity with human means and goods or services. (Article 2 of the Model Law)

Automatically upon recognition of a foreign main proceeding, the equivalent type of stay or suspension that would apply under Chapter 5 of the Corporations Act (other than Part 5.2 and 5.4A), as the case requires, will apply.⁸⁸

The recognising court will assess which process under Chapter 5 the recognised foreign proceedings most closely resemble, usually a choice between either the liquidation or voluntary administration process, with the applicable stay or suspension provisions for the relevant Chapter 5 process becoming applicable to the foreign company the subject of the recognised foreign proceedings.⁸⁹ In this regard, we refer to the discussion of the moratoria and restrictions applicable in voluntary administration and liquidation in sections 3.1(a) and 3.1(b) of this opinion above, respectively, and note that the Netting Act protections outlined above will apply equally, provided that the court's recognition of the foreign proceedings meets the definition of an "external administration" under the Netting Act (the circumstances where it will do so are discussed in section 3.4 below).

If the foreign proceedings are recognised as foreign main proceedings or foreign non-main proceedings, the court may grant appropriate relief where necessary to protect the assets of the foreign company or the interests of its creditors.⁹⁰ In granting such relief, the court must be satisfied that the interests of creditors, and of other interested parties, such as the debtor are adequately protected.⁹¹

Further, upon recognition of foreign main proceedings or non-main proceedings, the court may entrust the distribution of all or part of the foreign company's assets located in the Relevant Jurisdictions to the foreign representative or another person designed by the court, provided that the court is satisfied that the interests of creditors in the Relevant Jurisdictions are adequately protected.⁹²

The foreign representative, upon recognition of the foreign proceedings, shall have standing to bring proceedings under Part 5.7B of the

⁸⁸ Model Law Article 20. This will not apply if a proceeding under the laws of the Relevant Jurisdictions relating to insolvency is taking place at the time when recognition is sought: Model Law Article 29. The court will, however, have a discretion to provide the same relief as may be provided on recognition of a foreign non-main proceedings. See also section 16 of the Cross-Border Insolvency Act. It should be noted that this regime does not import foreign insolvency law into Australia: *Akers as a joint foreign representative of Saad Investments Company Ltd (in Official Liquidation) v Deputy Commissioner of Taxation* [2014] FCAFC 57 at [56].

⁸⁹ See *Akers as a joint foreign representative of Saad Investments Company Ltd (in Official Liquidation) v Deputy Commissioner of Taxation* (supra) at [55]-[56]; *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404 at [21]-[22]; *Re Senvoin GmbH (No 2)* [2019] FCA 1732 at [20]-[23]

⁹⁰ Model Law Article 21(1).

⁹¹ See Model Law Article 22 paragraph 1.

⁹² Model Law Article 21 paragraph 2.

Corporations Act including in respect of voidable transactions⁹³, subject in the case of a foreign non-main proceedings to the court being satisfied that the action relates to assets that should, under the laws of the Relevant Jurisdictions, be administered in the foreign proceedings.⁹⁴ However, provided that the court's recognition of the foreign proceedings meets the definition of an "external administration" under the Netting Act, the Netting Act protections against the voidable transactions provisions in the Corporations Act, discussed in section 7.4 of this opinion below, will apply.

(ii) *Letter of Request under section 581 of the Corporations Act in relation to External Administration Matters*

Under section 581(3) of the Corporations Act,⁹⁵ where a letter of request from a court of a foreign country requesting aid in an external administration matter is filed with a competent court of the Relevant Jurisdictions, the court may exercise such powers with respect to that matter as it could exercise if the matter had arisen in its own jurisdiction. An "external administration matter" for this purpose includes the winding up outside of Australia, or the insolvency, of a foreign company.⁹⁶ This permits a competent court in the Relevant Jurisdictions to exercise the powers which an Australian court could have exercised if the matter had arisen in Australia.⁹⁷

Where the letter of request in relation to an external administration matter is received from a court in a prescribed country which has jurisdiction in external administration matters, the court must act in aid of and be auxiliary to that foreign court.⁹⁸ Whilst the court must act in aid of, and be auxiliary to, a court in a prescribed country which has jurisdiction in external administration matters, the court still has a discretion as to what aid may

⁹³ However, the effect of the decision in *King (in his capacity as the foreign representative of Zetta Jet Pte Ltd) v Zetta Jet Pte Ltd* [2018] FCA 1979 (at [22]-[23], [35], [40]) is that such claims may only be brought by the foreign representative of a "company" as defined for the purpose of Part 5.7B, which will only include a foreign company registered as a foreign company in Australia or a foreign company which is registerable under the Corporations Act as a foreign company because it carried on business in Australia.

⁹⁴ Model Law Article 23, section 17 of the Cross-Border Insolvency Act.

⁹⁵ It should be noted that if the Model Law (as applied by the Cross-Border Insolvency Act) is inconsistent with a provision in Division 9 of Part 5.6 of the Corporations Act (which includes section 581) the Model Law or the Cross-Border Insolvency Act prevails: see section 22 of the Cross-Border Insolvency Act.

⁹⁶ See the definition of "external administration matter" in section 580 of the Corporations Act.

⁹⁷ See *Re Independent Insurance Co Ltd* [2005] NSWSC 587 at [14] and [15].

⁹⁸ Section 581(2)(a)(iii) of the Corporations Act. The prescribed countries are specified in regulation 5.6.74 of the *Corporations Regulations 2001* (Cth) and include the United Kingdom and the United States of America. A reference to a prescribed country includes a colony, overseas territory or protectorate of the prescribed country.

properly be given and how it might act in an auxiliary manner.⁹⁹ Where the letter of request is received from a court in a country which is not a prescribed country, the court may (i.e. has a discretion) to act in aid of and be auxiliary to that foreign court.¹⁰⁰

Provided that any action taken by the court of the Relevant Jurisdiction in aid of a foreign court meets the definition of an "external administration" under the Netting Act (as discussed in section 3.4 below), then the Netting Act protections discussed below in relation to settlement finality (see section 4.2), the enforcement of security under the Deed of Charge or Clearing Member Contract (see section 5.10), actions taken under the Default Rules (see section 6), and porting (see section 8.2), will apply. Accordingly, any action taken by a court of the Relevant Jurisdictions in aid of a foreign court in relation to an external administration matter will be subject to those protections.

(iii) *Inherent Jurisdiction to assist foreign insolvency proceedings*

A superior court in the Relevant Jurisdictions may have the power in the exercise of its inherent jurisdiction, and as a matter of comity, to provide some degree of recognition and assistance in relation to a foreign insolvency proceeding to recognise the appointment of the foreign insolvency administrator to a foreign company and their power to deal with assets of the foreign company in the Relevant Jurisdiction.¹⁰¹

As with actions taken in aid of a foreign court pursuant to a letter of request, where a court of the Relevant Jurisdictions acts in aid of a foreign court through the exercise of its inherent jurisdiction, the Netting Act protections discussed below in relation to settlement finality (see section 4.2), the enforcement of security under the Deed of Charge or Clearing Member Contract (see section 5.10), actions taken under the Default Rules (see section 6), and porting (see section 8.2), will apply (provided that any such action by the court meets the definition of an "external administration" under the Netting Act, as discussed in section 3.4 below).

(c) **Banking Act Statutory Management in relation to a Foreign ADI**

APRA has the power to take control of, or appoint an administrator to take control of the business of a foreign ADI, limited to the Australian business

⁹⁹ See *Legend International Holdings Inc (in liq) v Indian Farmers Fertiliser Co-Op Ltd* [2016] VSCA 40 at [31] and [32].

¹⁰⁰ Section 581(2)(b) of the Corporations Act.

¹⁰¹ See *Re Chow Cho Poon (Private) Ltd* [2011] NSWSC 300 at [76] to [79], though usually where a statutory basis exists for the relief sought (e.g. under the Cross-Border Insolvency Act) there is no need to consider the possible application of the inherent jurisdiction; and the discussion in *McPherson's Law of Company Liquidation* at [17.360]

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).¹⁰² In those circumstances, the matters discussed in section 3.1(d) above (including the protections under the Netting Act outlined in that section) will apply equally.

3.3 Reorganisation Measures¹⁰³

A scheme of arrangement is a statutory procedure under Part 5.1 of the Corporations Act whereby a Part 5.1 body (which includes an Australian company or a Foreign Company which is registered under the Corporations Act or carries on business in Australia) and its creditors¹⁰⁴ (or a class of them) may, if approved by the requisite majorities¹⁰⁵ of such creditors and with the approval of the court, become subject to a compromise or arrangement between them binding on all of the creditors or the relevant class of creditors. If approved by the Court and the Court's orders are lodged with ASIC, the compromise or arrangement becomes binding on the creditors or members, or class of them.¹⁰⁶ Courts in the Relevant Jurisdictions have accepted that, as a matter of the laws of the Relevant Jurisdictions, the scheme of arrangement procedure under Part 5.1 of the Corporations Act allows for the variation or discharge of contractual rights and obligations arising under agreements governed by foreign law.¹⁰⁷ However, we note that the recognition of the effect of a scheme of arrangement under Part 5.1 of the Corporations Act in a foreign jurisdiction (for example, England) would be a matter for the law of that foreign jurisdiction.¹⁰⁸ We also note that the Netting Act protections discussed elsewhere in this opinion in respect of settlement finality

¹⁰² Section 11E of the Banking Act.

¹⁰³ We 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, but we have referred to that under Insolvency Proceedings above.

¹⁰⁴ The term "creditors" is not defined in the Corporations Act for the purpose of section 411. The Courts have found that it includes all persons with debts or claims provable in the liquidation of the company (see *Re Glendale Land Development Ltd (in liq)* [1982] 2 NSWLR 563) both secured and unsecured creditors, persons with claims to unliquidated damages which are prima facie maintainable (*Petrochemical Industries Ltd (in liq) v Dempster Nominees Pty Ltd* (1994) 15 ACSR 468) and contingent creditors (*Re Boart Longyear Ltd* [2017] NSWSC 567 at [29], upheld on appeal *First Pacific Advisors LLC v Boart Longyear Ltd* [2017] NSWCA 116).

¹⁰⁵ A majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy: section 411(4) of the Corporations Act.

¹⁰⁶ Section 411(4) and (10) of the Corporations Act.

¹⁰⁷ See *Re Bulong Nickel Pty Ltd* (2002) 26 WAR 466; [2002] WASC 226 at [15]; see also *In the matter of BIS Finance Pty Limited*; *In the matter of Artsonig Pty Limited* [2017] NSWSC 1713 at [37].

¹⁰⁸ Though it should be noted that, outside of the Relevant Jurisdictions, an Australian scheme of arrangement may not be regarded as affecting the discharge of debts or contractual rights governed by foreign law unless the relevant foreign law provided to that effect; see e.g. *New Zealand Loan and Mercantile Agency v Morrison* [1893] AC 349; *Re HIH Casualty & General Insurance Ltd* [2005] NSWSC 240 at [123] per Barrett J.

(see section 4.2), the enforcement of security under the Deed of Charge or Clearing Member Contract (see section 5.10), actions taken under the Default Rules (see section 6), and porting (see section 8.2), will apply in circumstances where a Relevant Clearing Member or LCH becomes subject to a Reorganisation Measure.

3.4 "External administration" under the Netting Act

As stated in this opinion below, the Netting Act protects the taking of various specified kinds of actions in accordance with the terms of a "market netting contract" (as defined in the Netting Act) from any restrictions that might otherwise apply under Australian law to those kinds of actions, where a party to that market netting contract becomes subject to an "external administration" (as also defined in the Netting Act).¹⁰⁹ We note, in addition, that those protections will only apply where Australian law governs either the external administration, or the market netting contract.¹¹⁰

As discussed in greater detail below (see section 5.1 of this opinion), in our view, a Clearing Member Contract in connection with the SwapClear Service is a "market netting contract" under the Netting Act. Therefore, the protections provided under the Netting Act in relation to the taking of specified kinds of actions in accordance with a Clearing Member Contract will be applicable when a party to the Clearing Member Contract becomes subject to an Insolvency Proceeding or a Reorganisation Measure, provided that the relevant Insolvency Proceeding or Reorganisation Measure satisfies the Netting Act's definition of "external administration", and is governed by Australian law.

We are of the view that each of the Insolvency Proceedings to which a Relevant Clearing Member may become subject under the laws of the Relevant Jurisdictions, and which are described in section 3.1 of this opinion above, will satisfy the Netting Act's definition of an "external administration", and would be governed by Australian law.

In respect of the Insolvency Proceedings to which LCH or a Foreign Clearing Member may become subject under the laws of the Relevant Jurisdictions, and which are described in section 3.2 of this opinion above, whether or not such Insolvency Proceedings satisfy the Netting Act's definition of an "external administration" will depend on the specific type of Insolvency Proceeding in question and in some cases, the specific circumstances of a given Insolvency Proceeding. Our view in respect of each of those Insolvency Proceedings is as follows:

¹⁰⁹ Section 16(2) of the Netting Act.

¹¹⁰ Section 16(2)(b) of the Netting Act.

- (a) in respect of a winding up of a Foreign Clearing Member or LCH, discussed in section 3.2 of this opinion above, we are of the view that such a winding up will constitute an "external administration" under the Netting Act, and would be governed by Australian law;
- (b) in respect of the recognition of foreign proceedings under the Cross-Border Insolvency Act, we are of the view that this will constitute an "external administration" within the meaning of the Netting Act where, pursuant to orders made upon recognition of the foreign proceedings, "someone takes control of the [Foreign Company's] property for the benefit of the [Foreign Company's] creditors because the [Foreign Company] is, or is likely to become, insolvent". This may occur where, for example, a court of the Relevant Jurisdictions makes an order under Article 21(1)(e) of the Model Law, "[e]ntrusting the administration or realization of all or part of the debtor's assets located in [Australia] to the foreign representative or another person designated by the court". We note that orders of this kind are commonly made upon recognition of foreign proceedings by a court of the Relevant Jurisdictions in accordance with the Cross Border Insolvency Act,¹¹¹ but might not be made in every instance of such recognition.¹¹² Where orders of this kind are made by a court of the Relevant Jurisdictions, we consider that the Foreign Company which is the subject of those orders is likely to be regarded be subject to "external administration" within the meaning of the Netting Act, and that such "external administration" would be governed by Australian law.¹¹³
- (c) In respect of circumstances where a court of the Relevant Jurisdictions provides assistance to a foreign court in relation to an "external administration matter" pursuant to a letter of request, or in the exercise of its inherent jurisdiction to provide assistance in respect of a foreign insolvency proceeding, whether that assistance amounts to "external administration" within the meaning of the Netting Act will depend on the specific terms of the court orders through which that assistance is provided. We are of the view that where, as a result of such orders, "someone takes control of the [Foreign Company's] property for the benefit of the [Foreign

¹¹¹ See for example: *Pink v MF Global UK Limited (In Special Administration)* [2012] FCA 260; *Akers as a joint foreign representative of Saad Investments Company Ltd (in Official Liquidation) v Deputy Commissioner of Taxation* (supra); *Wild (Foreign Representative) v Coin Co International PLC (Administrators Appointed)* [2015] FCA 354; *Wood v Astra Resources Ltd* [2016] FCA 1192; *Hayes v Pumpkin Patch Originals Ltd (administrators appointed)(in receivership)* [2016] FCA 1353; *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404; *Frege in his Capacity as Foreign Representative of Greensill Bank AG v Greensill Bank AG (No. 2)* [2021] FCA 510.

¹¹² As a practical matter, where the relevant company has assets in Australia, it would be usual for the foreign representative to seek an order that the administration of those assets be entrusted to the foreign representative or a local agent: for example, see the cases referred to above.

¹¹³ We note that there has been no Australian case law (of which we are aware) which considers this issue and which provide guidance as to when such a proceeding would relevantly amount to an external administration as defined in the Netting Act.

Company's] creditors because the [Foreign Company] is, or is likely to become, insolvent", that should satisfy the definition of an "external administration" under the Netting Act, and that such "external administration" would be governed by Australian law.

- (d) In respect of circumstances where a Banking Act statutory manager takes control of the business of a Clearing Member which is a foreign ADI in accordance with the Banking Act, this will constitute an "external administration" within the meaning of the Netting Act, and such "external administration" will be governed by Australian law.¹¹⁴

In addition, we are of the view that a Reorganisation Measure, to which any of a Relevant Clearing Member, LCH, or a Foreign Clearing Member may become subject, and which is described in section 3.3 of this opinion above, will also satisfy the Netting Act's definition of an "external administration", and would be governed by Australian law.

Any Insolvency Proceeding that meets the definition of an "external administration" under the Netting Act, and a Reorganisation Measure, will hereafter be referred to as an **External Administration Proceeding**.

4. SETTLEMENT FINALITY

In this section of our opinion we comment on the validity and enforceability of the Clearing House Settlement Finality Regulations under Australian law, including in circumstances where either a Relevant Clearing Member or LCH becomes subject to insolvency proceedings governed by Australian law.

4.1 Recognition of LCH's Settlement Finality Regulations under Australian law

We note that the Clearing House Settlement Finality Regulations¹¹⁵ specify the agreed time at which various forms of Payment Transfer Orders and Securities Transfer Orders (in each case, as defined in the Clearing House Settlement Finality Regulations):

- (a) take effect and enter into the Clearing House System (as defined in the Clearing House Settlement Finality Regulations); and
- (b) may no longer be revoked.

¹¹⁴ We refer to paragraph (d) of the definition of "external administration" in s 5 of the Netting Act.

¹¹⁵ The Clearing House Settlement Finality Regulations are part of LCH's Rulebook. Clause 2.10 of the Clearing Membership Agreement states that the Clearing Member undertakes to abide by LCH's Rulebook.

In addition, we note that the Clearing House Settlement Finality Regulations prohibit revocation of any Payment Transfer Order or Securities Transfer Order after the specified time at which those transactions become irrevocable.

We understand these to be requirements imposed by the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (the **UK Settlement Finality Regulations**), as a condition for the relief provided by that statutory instrument against the operation of certain rules of the insolvency laws applicable in England and Wales.¹¹⁶

On the assumption that the Clearing House Settlement Finality Regulations give rise to valid and binding contractual rights, obligations, and powers as between LCH and each Clearing Member, as a matter of English Law,¹¹⁷ we consider that a court of a Relevant Jurisdiction would recognise those contractual rights, obligations, and powers.¹¹⁸

4.2 **Insolvency Proceedings and Reorganisation Measures—Protection under the Netting Act**

As discussed in paragraph (c) below, the protections contained in the Netting Act in respect of market netting contracts do apply to dealings and transfers undertaken in accordance with the Clearing Member Contract, and accordingly protect such dealings and transfers in relation to the matters referred to in paragraphs (a) and (b) below.

(a) **Revocation of Authority**

Under the laws of the Relevant Jurisdictions, an instruction or authority given by or on behalf of the Relevant Clearing Member or LCH may be revoked automatically by operation of law upon the winding up¹¹⁹ (and also, in the case of a Relevant Clearing Member, arguably the appointment of a voluntary administrator or a Banking Act statutory manager) of the party giving the direction or revoked by an administrator, liquidator or Banking Act statutory manager unless it amounts to:

¹¹⁶ See UK Settlement Finality Regulations, section 5. We note the effect of the Clearing House Settlement Finality Regulations in this regard is commented on in the Clifford Chance Opinion: see paragraph 3.4.1.

¹¹⁷ We note this assumption is supported by the Clifford Chance Opinion: see paragraph 3.1.1.

¹¹⁸ This is on the same basis and subject to the same assumptions and qualifications as stated in section 1.1 above in relation to the LCH Agreement, including any mandatory laws of the Relevant Jurisdictions.

¹¹⁹ *Dunecar Pty Ltd (in liq) v Colbron* (2001) 40 ACSR 342 at [4] indicates that a winding up order made by a court will be regarded as taking effect at the first moment of the day on which it is made, and that accordingly, the court-appointed liquidator is to be treated as the sole agent of the company for that entire day (to the exclusion of the directors). However, where a winding up (or other external administration) does not commence as a result of a court order (e.g. a creditors' voluntary liquidation or voluntary administration), it should ordinarily be regarded as having commenced at the time of day at which the appointment was made: cf *Re Blackburn Industries Pty Ltd* (1979) 4 ACLR 753 at 764.

- (i) 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) as effective notwithstanding the administration, winding up or statutory management; or
- (ii) a prior effective assignment of a relevant right or dealing with the property of the company.

(b) Void or voidable transactions

If a Relevant Clearing Member becomes subject to voluntary administration, most transactions or dealings affecting property of that Relevant Clearing Member will be void unless done with the authority or consent of the administrator or entered into under a court order.¹²⁰

Similarly, unless the court otherwise orders, where a Relevant Clearing Member or LCH is being wound up by a court of the Relevant Jurisdictions, section 468 of the Corporations Act¹²¹ renders void most dispositions of property of the entity being wound up that occur after the commencement of the winding up other than dispositions made by the liquidator.¹²²

The Banking Act also contains a provision to the effect that no other person may dispose of property of a body corporate whilst a Banking Act statutory manager is in control of the body corporate's business, unless APRA or the Banking Act statutory manager consents to the disposal.¹²³

(c) Protection under the Netting Act

As discussed in greater detail below (see section 5.1 of this opinion), in our view, a Clearing Member Contract in connection with the SwapClear Service is a "market netting contract" under the Netting Act.¹²⁴ Hence, section 16(2) of the

¹²⁰ Corporations Act section 437D. As noted above (see footnote 34) this feature of voluntary administration takes effect at the point in time at which the relevant company is "under administration", and the voluntary administration of a company begins "when an administrator of the company is appointed" (see section 435C of the Corporations Act), rather than at the start of the day on which the administrator was appointed.

¹²¹ As also noted above (see footnote 51 above) there is first instance authority to the effect that section 468 of the Corporations Act only renders void dispositions of property that take place on the day following the day on which the winding up is taken to commence, such that a disposition of property of the company occurring on the day of the commencement of its winding up will not be rendered void under this provision.

¹²² 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.

¹²³ Section 15BB of the Banking Act.

¹²⁴ We assume that the Clearing House Settlement Finality Regulations form part of the Clearing Member Contract under English Law. This is also the plain reading of the Clearing Membership Agreement: see clause 1.3 and the definition of "Rulebook".

Netting Act¹²⁵ will apply where an Australian Clearing Member, who is a party to a Clearing Member Contract in connection with the SwapClear Service, becomes subject to one of the forms of Insolvency Proceedings identified in section 3.1 of this opinion above.¹²⁶ Those protections will also apply where a Foreign Clearing Member or LCH becomes subject to one of the Insolvency Proceedings referred to in section 3.2 above, subject to the requirement that such Insolvency Proceedings constitute "external administration" under the Netting Act, as discussed in section 3.4 above. Relevantly, in this circumstance, under the Netting Act:

- (a) rights¹²⁷ and property¹²⁸ of the party that has gone into external administration may be transferred in accordance with the contract; and
- (b) a payment or transfer of property by the party to meet an obligation under the contract or a transfer of, or dealing with, rights or obligations or property in accordance with the contract is not to be void or voidable¹²⁹ in the external administration.¹³⁰

Accordingly, in our view, payments effected by debit and credit to relevant accounts and transfers of securities under a Payment Transfer Order or a Securities Transfer Order will, under section 16(2) of the Netting Act, be protected from being rendered void or voidable as a result of:

- (a) an administration of an Australian Clearing Member;
- (b) a liquidation under the Corporations Act of an Australian Clearing Member or a Foreign Clearing Member or LCH;
- (c) the appointment of a Banking Act statutory manager over the business of an Australian Clearing Member, or a Foreign Clearing Member; or
- (d) one of the Insolvency Proceedings referred to in section 3.2 above, whether in respect of LCH or a Foreign Clearing Member (provided such

¹²⁵ We note that the Netting Act also contains certain other protections that are in some respects similar to those contained in the UK Settlement Finality Regulations, but only in respect of approved RTGS systems: see Netting Act, Part 2. The SwapClear Service is not an approved RTGS system: see <<https://www.rba.gov.au/payments-and-infrastructure/financial-market-infrastructure/approvals-under-the-payment-systems-and-nettings-act-1998/>>.

¹²⁶ Section 16(2) would apply upon the commencement of any insolvency procedure which is governed by Australian law and constitutes an "external administration" as defined in the Netting Act.

¹²⁷ Section 16(2)(fb) of the Netting Act.

¹²⁸ Section 16(2)(fc) of the Netting Act.

¹²⁹ 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, 588FD and 588FDB 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).

¹³⁰ Section 16(2)(fg) of the Netting Act.

Insolvency Proceedings constitute "external administration" under the Netting Act, as discussed in section 3.4 above).

Whether a Reorganisation Measure (defined to mean a scheme of arrangement under Chapter 5 of the Corporations Act) could affect a Payment Transfer Order or Securities Transfer Order 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 or LCH, 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,¹³¹ which in our view would refer to a scheme of arrangement.

5. VALIDITY AND ENFORCEABILITY OF LCH'S SECURITY INTERESTS

The Deed of Charge and the Clearing Member Contract are governed by English Law. As set out above, in our view a court in the Relevant Jurisdictions will give effect to the choice of English Law as the governing law of the contractual obligations under the Deed of Charge and Clearing Member Contract and will interpret those contracts according to English Law which will determine the nature of the rights and obligations under those contracts, including whether rights in the nature of security are granted under those contracts.¹³²

At the outset, it is necessary to consider whether the PPSA applies to any security interests that arise under the Deed of Charge and the Clearing Member Contract. This involves firstly considering whether the property over which LCH has been granted security is excluded from the PPSA (because it is an interest held under or provided for by a market netting contract) and secondly (if not excluded) considering whether the PPSA applies in relation to the security and, if so, what governing law applies to the security as determined under the conflict of law provisions of the PPSA. We deal with each of these matters separately below.¹³³

¹³¹ 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.

¹³² Except in relation to any securities in the United States of America to which under clause 29 of the Deed of Charge, the law of New York applies.

¹³³ We also note that the courts of another jurisdiction may apply a different rule in relation to the validity or perfection of security interests. This is relevant because in each case the parties have submitted to the jurisdiction of the English courts and therefore an English court will presumably (at least in the first instance) apply the law of that jurisdiction to assess which conflict of laws principles apply and may not decide that the PPSA applies in this regard.

5.1 Exclusion of security interests from the operation of the PPSA

Section 12 of the PPSA defines a "security interest" broadly as 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).¹³⁴

The PPSA also defines "personal property" broadly to mean property other than land or a right, entitlement or authority granted under a law of the Australian Commonwealth, a State or Territory that is declared not to be personal property for the purpose of the PPSA.¹³⁵ The term "property" is not defined in the PPSA, with the effect that its meaning will be determined in accordance with the general law. On this basis, "property" will be interpreted to include cash (including an interest in a bank account), receivables, shares or debentures issued by a body, debentures, stock or bonds issued by a government, derivatives, negotiable instruments and other intangible property.

However, the PPSA specifies a number of excluded interests to which the PPSA does not apply.¹³⁶ In particular, 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".¹³⁷

In our view, a Clearing Member Contract in connection with the SwapClear Service is a "market netting contract" as defined in section 5 of the Netting Act 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 and is approved by the Minister for the purposes of the definition of "netting market" under the Netting Act¹³⁸; and

¹³⁴ Section 12(3) of the PPSA extends the definition of a "security interest" to certain "deemed security interests", including the interest of a transferee under a transfer of certain accounts or chattel paper, whether or not the transaction concerned, in substance, secures payment or performance of an obligation. None of these deemed security interests appear to be relevant.

¹³⁵ Section 10 of the PPSA, definition of personal property.

¹³⁶ Section 8 of the PPSA.

¹³⁷ Section 8(1)(e) of the PPSA, which excludes any rights or interest held by a person, or any interest provided for by any transaction, under a market netting contract as defined in section 5 of the Netting Act.

¹³⁸ See letter of approval of LCH's SwapClear clearing and settlement facility as a "netting market" under the Netting Act given by Mr Bernie Ripoll, Parliamentary Secretary to the Treasurer, on or about 1 July 2013.

- (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).¹³⁹

Therefore, in our view, the Clearing Member Contract in relation to the SwapClear Service will constitute a market netting contract so that the exclusion under section 8(1)(e)(iii) of the PPSA will apply so that "any right or interest held by a person, or any interest provided for by any transaction", under a Clearing Member Contract is excluded from the application of the PPSA.¹⁴⁰ Accordingly, the PPSA does not apply to any security interests under the Clearing Member Contract itself. This would include any cash margin provided by a Relevant Clearing Member under the Clearing Member Contract – which, we note, is provided on a "transfer of title" basis in any event.

A Deed of Charge which is given in accordance with a Clearing Member Contract in connection with the SwapClear Service provides security for obligations arising under a market netting contract.¹⁴¹

There is a question of interpretation of section 8(1)(e)(iii) of the PPSA as to whether a right or interest under the Deed of Charge is relevantly "*a right or interest held by [LCH], or ... interest provided for by any transaction, under a ... market netting contract*" (in this case the relevant Clearing Member Contract including the General Regulations). The Replacement Explanatory Memorandum to the Personal Properties Securities Bill 2009 stated at paragraph 1.14 that "*other important exclusions*" (i.e. interests to which the PPSA would not apply) would include "*approved netting, close-out netting and market netting arrangements under the Payments Systems and Netting Act 1998*". The second reading speech to the Personal Property Securities Bill 2009 highlighted¹⁴² that:

"All kinds of personal property will be covered by the bill, subject to some very limited exceptions such as fixtures and water rights.

These kinds of property have been excluded as there are existing schemes in place to deal with security interests in those areas."

We think that there is a reasonable argument that any security interests granted to LCH under the Deed of Charge should fall within the exclusion given the grant

¹³⁹ Further, a Clearing Member Contract does not constitute (nor does it constitute a part of) an approved netting arrangement as defined in the Netting Act and nor is there any declaration by the regulations that the Clearing Member Contract is not to be a market netting contract for the purposes of the Netting Act (see the definition of market netting contract in the Netting Act).

¹⁴⁰ Which also has the consequence that any security interest which may arise under a Clearing Member Contract does not require to be perfected under the PPSA.

¹⁴¹ For this purpose, we assume, as a matter of English law, that the Deed of Charge is a separate contract from the related Clearing Member Contract (i.e. the market netting contract).

¹⁴² Parliamentary Debates, House of Representatives, 24 June 2009 (Robert McClelland, Attorney-General) at 6963.

of a security interest over collateral provided by the Clearing Member to LCH is an integral part of the market netting contract. This also seems to be consistent with the apparent purpose of an exclusion of "market netting arrangements" from the ambit of the PPSA.¹⁴³ However, there is also a view that the exclusion should be interpreted narrowly, so as only to apply to security which is utilised in the netting conducted under the market netting contract and which does not secure other obligations which may not be netted.¹⁴⁴

The exclusion in section 8(1)(e) of the PPSA has not yet been the subject of any judicial consideration. On that basis, as there is a risk that these interests could be regarded as not falling within the exclusion, we do think that the prudent approach is to assume that the exclusion under section 8(1)(e)(iii) of the PPSA does not apply to any security interests arising under a Deed of Charge.

Accordingly, it is relevant to consider the position on the basis that the security interests arising under the Deed of Charge are not excluded from the PPSA.

5.2 Security interests arising under the Deed of Charge (if they are not excluded under section 8(1)(e)(iii) of the PPSA)

Under the laws of the Relevant Jurisdictions, the PPSA sets out a two-step process for determining the law that applies to the validity and perfection (and the effect of perfection or non-perfection) of security interests over personal property.

First, section 6 of the PPSA sets out a "nexus test", specifying the circumstances in which the PPSA applies in relation to certain security interests in personal property because a specified connection with Australia exists.¹⁴⁵ Relevant connecting factors include whether the grantor of the security interest is an Australian entity or, in the case of some collateral types, whether the relevant personal property is located in Australia. If the PPSA does not apply, and if a court of a Relevant Jurisdiction were required to determine the validity and enforceability of LCH's security, it would then be necessary for it to consider what law would apply under general conflict of laws principles.

¹⁴³ As described in the Replacement Explanatory Memorandum at 1.14. In *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 141 ALR 618 at 634 it was observed that the modern approach to statutory interpretation insists that the context be considered in the first instance when approaching the question of the interpretation of the statutory text. The Court starts with the consideration of the ordinary and grammatical meaning of the words taking into account both context and legislative purpose: see *R v A2* [2019] HCA 35 at [32]-[37]; [124]; *Pauga v Chief Executive of Queensland Corrective Services (No 6)* [2022] FCA 1096 at [22]. Cf. also the observations made in the *Final Report* at 4.5.3.1-2 regarding section 8(1)(e) of the PPSA.

¹⁴⁴ We note that a narrower view has been expressed in relation to the exclusion under section 8(1)(e)(ii) in relation to close-out netting contracts: see McCracken, Stumbles and Tolhurst, *Title Transfer Collateral Arrangements and the Personal Property Security Act (2009) (Cth): Paper III Exclusions and Consequences* (2015) JCL 44 at 52-55.

¹⁴⁵ Section 6 of the PPSA.

Second, if the PPSA applies, then Part 7.2 of the PPSA (comprising sections 234 to 241) sets out some rules that will apply in legal proceedings in Australia in relation to particular classes of collateral so as to determine whether the relevant governing law for a security interest is Australian law (including the PPSA's own substantive rules) or the law of another jurisdiction.¹⁴⁶

To consider whether the PPSA applies under section 6 and then, if so, which governing law rules apply under Part 7.2 of the PPSA, it is necessary to identify the collateral class or classes under the PPSA which relate to the secured property.

The Deed of Charge contains a broad description of the charged property which can take the form of bonds, debentures, notes, stock, shares, bills, certificates of deposit and other securities and instruments,¹⁴⁷ all distributions in the form of securities or cash (including dividends, interest or annual payments) attaching to or arising in respect of such property, the chargor's rights and interest in and to any securities account of the chargor maintained by LCH on its book and all cash provided to LCH in respect of transactions relating to securities recorded in that securities account and the chargor's rights and interest in and to any cash account of the chargor maintained by LCH on its books into which distributions or cash relating to dealings with securities recorded in the securities account are recorded.¹⁴⁸

However, we understand that LCH only receives debt securities issued by government issuers or certain government agencies as collateral to meet margin obligations, and such collateral is transferred to LCH to be held by LCH for the Relevant Clearing Member subject to the Deed of Charge.¹⁴⁹ We assume that as a matter of English law, a Clearing Member's rights that comprise the charged property consist of contractual rights against LCH together with a pro-rata

¹⁴⁶ Under section 234 of the PPSA in proceedings in an Australian court, the law of the jurisdiction specified in Part 7.2 of the PPSA in relation to a security interest governs the validity, perfection and effect of perfection or non-perfection of the security interest. However, Part 7.2 does not specify a governing law in all cases, such as in the case of intermediated securities.

¹⁴⁷ Including where any of these items is 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: see the definitions of Securities and Clearance System in clause 2(3) of the Deed of Charge.

¹⁴⁸ See the definitions of Charged Property, Securities, Distributions, Securities Account and Cash Account in clause 2(3) of the Deed of Charge. Note that, for the avoidance of doubt, any cash directly provided by the chargor to LCH as collateral on a title transfer basis is excluded from the definition of Charged Property.

¹⁴⁹ See details and a list of acceptable securities on the LCH website at <https://www.lch.com/collateral-management/ltd-collateral-management/ltd-acceptable-collateral/ltd-acceptable-securities>. See also Regulation 20(s)(ii) of the General Regulations which provides that whenever non-cash Collateral is transferred by a Clearing Member to the Clearing house, it is held by the Clearing House for the Clearing Member on and subject to the terms of the relevant Deed of Charge between the Clearing House and the Clearing Member.

beneficial interest in the securities or cash recorded in the Clearing Member's accounts.

The types of collateral (as categorised by the PPSA) over which a security interest may be granted to LCH under the Deed of Charge accordingly appear to be:

- (a) intermediated securities; and
- (b) intangible property.

5.3 Collateral categories under the PPSA

An "intermediated security" under the PPSA refers to the rights of a person in whose name an intermediary maintains a securities account.¹⁵⁰

LCH is an intermediary as defined in the PPSA¹⁵¹ because it operates a clearing and settlement facility under an Australian CS facility licence.

Where LCH maintains "a record of holdings and transfers of interests in financial products" in the name of Clearing Members (defined in the PPSA as a "securities account"), the rights of Clearing Members in respect of such securities accounts will be intermediated securities for the purposes of the PPSA.

The relevant securities account is the account maintained by LCH on its books for the account of the relevant Clearing Member which records the collateral (i.e. securities transferred to LCH) which is attributable to the particular Clearing Member (or a Clearing Client of the particular Clearing Member).¹⁵² Whilst the PPSA does not define what are the relevant "rights" of the person in whose name

¹⁵⁰ Section 15(1) of the PPSA.

¹⁵¹ An intermediary is defined by section 15(2) of the PPSA as follows:

"(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."

¹⁵² See section 15(7) of the PPSA. See clauses 20(r) and (s) of the General Regulations. The account (being the Securities Account as defined in the Deed of Charge) relates to interests in "financial products", which relevantly are defined in section 9 of the PPSA to mean bonds or any other financial instrument or asset or an interest in such property. It is noted that this does not extend to the cash account. We think this will likely be regarded as a securities account as defined in section 15(7)(b) of the PPSA.

the securities account is kept, this is generally understood to be the person's contractual rights against the intermediary in respect of the securities account and a beneficial interest in the securities held by the intermediary.¹⁵³ Hence, where a Clearing Member charges the interest, title and rights to its securities account and the securities from time to time recorded and represented in the account, this is likely to be regarded under the PPSA as a security interest in intermediated securities.¹⁵⁴

In relation to security over the chargor's rights and interest in and to any cash account of the chargor maintained by LCH on its books into which distributions or cash relating to dealings with securities recorded in the securities account are recorded, this will likely be regarded as a security over "intangible property"¹⁵⁵ under the PPSA.¹⁵⁶

5.4 Does the PPSA apply?

We now consider whether, having regard to the above described categories of collateral, the PPSA applies to LCH's security under the Deed of Charge in those collateral classes.

Under section 6 of the PPSA, the PPSA applies to a security interest:

- (a) if the grantor is an Australian entity;
- (b) in an intermediated security, if the relevant intermediary is located in Australia; or
- (c) in intangible property, if relevantly (among other things):

¹⁵³ See the discussion in the *Final Report* at 5.3.4.1.1. See also Duggan *Australian Personal Property Securities Law* (3rd ed., 2021) at [2.25] to [2.27].

¹⁵⁴ We assume that all securities subject to the Deed of Charge are transferred to and held by LCH in its name and none are directly held by the Clearing Member.

¹⁵⁵ Section 10 of the PPSA defines intangible property as personal property which is not "financial property", "goods" or an "intermediated security". In turn "financial property" is defined to be "chattel paper", "currency", a "document of title", an "investment instrument" or a "negotiable instrument" (as defined in section 10). Currency is defined in section 10 to mean currency authorised as a medium of exchange by the law of Australia or any other country.

¹⁵⁶ The other possibilities are an "investment instrument", as it includes a "debenture" (as defined in the Corporations Act) of a body or an "account". As the relevant cash or cash account is not deposited with or lent to LCH by the Relevant Clearing Member (in the situation described in the Deed of Charge definition of "charged property"), it should not be regarded as a debenture within the definition of that term in section 9 of the Corporations Act. As to "account", this is defined in section 10 of the PPSA as a monetary obligation that arises from disposing of property, or granting a right or providing services, in the ordinary course of a business of granting rights or providing services of that kind. In *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2018] WASCA 163 the Court of Appeal took a broad view of this term (see paras [196] to [199]), such that an obligation to repay an amount wrongfully demanded under performance securities in respect of a building contract was an "account". However, it does not seem to us that LCH's security interest over the cash account (or cash entitlements arising from distributions in relation to debt securities) would be regarded as a security interest over an "account" as any obligation to repay the cash amount arises from it no longer being required as collateral rather than from the provision of clearing services. Accordingly we have not considered these categories further for the purpose of this opinion.

- (i) the intangible property is an account that is payable in Australia; or
- (ii) the intangible property is an ADI account.

An Australian entity is defined to include a company or registerable Australian body within the meaning of the Corporations Act.¹⁵⁷

It follows that in respect of a security interest in each collateral class specified above, where granted by an Australian Clearing Member, under the laws of the Relevant Jurisdictions, the PPSA (including, relevantly, the PPSA's conflict of law provisions) will "apply" to that security interest.

In relation to security interests granted by Foreign Clearing Members:

- (a) the PPSA will not apply in relation to any security interests in intermediated securities granted by Foreign Clearing Members, as LCH is incorporated in England (not in Australia);¹⁵⁸ and
- (b) the PPSA will only relevantly apply in relation to intangible property if the property is an account that is "payable in Australia".¹⁵⁹ It does not seem to us that any relevant collateral would be categorised as an "account" within the meaning of the PPSA, and in any event, we would not expect that any such account would be "payable in Australia".¹⁶⁰ On this basis, the PPSA would not apply in relation to such intangible property.

5.5 Which system of laws governs the validity, perfection and the effect of perfection or non-perfection according to the laws of the Relevant Jurisdictions?

In relation to each category of security interest where the PPSA applies, the position under Part 7.2 is as follows:

¹⁵⁷ However, this does not include a foreign company: see the definition of "Australian body" in section 10 of the PPSA. See also the definition of "registrable Australian body" in s 9 of the Corporations Act.

¹⁵⁸ Section 235(3) of the PPSA states that a body corporate is located in the jurisdiction in which the body corporate is incorporated.

¹⁵⁹ The PPSA does not provide any guidance on how this phrase is to be interpreted, and nor has this been considered by any of the Courts. It seems, however, that this is intended to refer to where the account is payable in Australia in accordance with its terms.

¹⁶⁰ This will be a matter for interpretation of the Clearing Member Contract under English Law.

(a) **Intermediated securities**

Part 7.2 of the PPSA does not set out any rules in relation to the governing law of security interests in intermediated securities.¹⁶¹ This could mean¹⁶² either that the general conflict of law principles of the Relevant Jurisdictions will apply,¹⁶³ or alternatively that the validity and perfection requirements of the PPSA are to be applied to all security interests in intermediated securities granted by an Australian entity or to an intermediary which is located in Australia. We consider each option below.

Under the general law of the Relevant Jurisdictions, to determine the validity and priority of a security interest¹⁶⁴ regard should first be had to the proper law of the contract giving rise to the security interest (in this case English Law) to determine the nature of the rights and obligations created by that contract,¹⁶⁵ and then regard had to the law of the place where the collateral is located for any requirements for the creation of a proprietary interest in the collateral such as by way of security. It also appears to be the better view that a question as to the priority of the security interest would also be determined by the location of the secured property (i.e. the *lex situs*).¹⁶⁶

In the case of securities held indirectly through an intermediary/custodian and/or sub-custodians and depositories, where the arrangement comprises a beneficial co-ownership interest in a pool of assets, there is no definitive

¹⁶¹ The reason for this is not addressed in the Replacement Explanatory Memorandum to the Personal Properties Securities Bill 2009. It has been suggested that this occurred because Australia had not yet decided, at the time of drafting the Act, whether it would accede to the Hague Securities Convention, and because it was thought to be premature to include choice of law rules for intermediated securities in the Act until that decision had been taken: see *Final Report* at 9.1.4.1, which noted that the absence of a choice of law rule for intermediated security interests is unsatisfactory and observed "this means that the full rigour of the Act will apply to all such security interests, as there is no rule in Part 7.2 that could bring any of those security interests back out of the Act". The Report recommended the PPSA be amended so that the validity, perfection and the effect of perfection or non-perfection be determined by the law of the place where the intermediary maintains the securities account.

¹⁶² We note that the only potentially relevant provision is section 237(1) of the PPSA, which applies to intermediated security interests and permits 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 apply, section 237(1) is not relevant.

¹⁶³ There is one qualification to this provided for by section 77(1) and (3) of the PPSA which provides that if the law of the jurisdiction which governs perfection (and the effect of perfection or non-perfection) does not provide for the public registration or recording of the priority interest or a notice relating to the priority interest, then in proceedings in an Australian court a security interest which is perfected by registration under the PPSA before another security interest in the intermediated security interest attached, the registered interest will have priority if, when the other interest arises, the grantor is located in Australia and the secured party does not have possession or control of the secured property.

¹⁶⁴ See e.g. the discussion in Sykes and Pryles, *Australian Private International Law* 3rd ed. (1991) at 708; Nygh's 10th ed. (2019) at [33.66], [33.74] – [33.78].

¹⁶⁵ It is also noted that under section 234(2) of the PPSA, Part 7.2 does not affect the law that governs the contractual obligations (including any obligations arising under a security agreement).

¹⁶⁶ See the commentary in Nygh's 10th ed. (2019) at [33.66] and [33.78] as a summary of the general law position.

legal position under the law of the Relevant Jurisdictions for determining the location of the interest.

Although not free from doubt (and given there is no case law authority in the Relevant Jurisdictions as to whether a court of the Relevant Jurisdictions would apply the general law and, if so, which clarifies which approach is correct), in our view a court of the Relevant Jurisdictions is most likely to apply the law of the place of the relevant intermediary (the "PRIMA" approach).¹⁶⁷ This approach applies the law of the place where the intermediary is located and where the customer's account is situated. This is consistent with the view that the location of a chose in action (being the Relevant Clearing Members rights against LCH in respect of the securities account) is where it is properly recoverable.¹⁶⁸ We think in this case it is likely that the law applicable to determining proprietary issues in relation to indirectly held intermediated securities in these circumstances would be English Law, being the law of the place where LCH, the intermediary, is located, and where we understand the relevant securities accounts are maintained by LCH (and where the rights against LCH comprising the intermediated securities would be properly recoverable).¹⁶⁹

However, it is possible that a court in the Relevant Jurisdictions may apply the validity and perfection requirements of the PPSA to all security interests in intermediated securities granted by an Australian entity.¹⁷⁰ We consider that it would be prudent (assuming that the exclusion under section 8(1)(e) does not apply) to treat the arrangements as if the PPSA governs a security interest in intermediated securities if one of the connecting factors set out in section 6 is satisfied (unless a governing law rule in the PPSA itself directs the use of non-PPSA law).

¹⁶⁷ In this regard we note that 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)). However, Australia has not yet adopted the Hague Convention.

¹⁶⁸ See Dicey, Morris and Collins at [23-025]; *Assetinsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* (2006) 225 CLR 331 at 352; Nygh at [32.32] and [32.33], and at footnote 94 thereto, at which reference is made to the decision in *Harry Exploration & Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm), where the relevant debt was located in the jurisdiction where it was recoverable in accordance with the dispute resolution clause in the applicable contract. Here, Regulation 51 requires any recovery action in respect of collateral provided under the Rulebook to be brought in England. See also Moshinsky, "Securities Held Through A Securities Custodian – Conflict of Law Issues" (1998) 13(8) *JIBFL Special Supplement/September* 1998 18-21; cf. also Dicey, Morris and Collins at [23-040] in relation to the approach to an interest in immobilised securities.

¹⁶⁹ The rights of an account holder may comprise a beneficial interest in the rights of LCH in respect of its custodians who hold the relevant securities and also contractual rights against the intermediary (including, for example, to demand that securities be withdrawn from the securities account). The precise nature of the rights of the holder of the account and the obligations of LCH in respect of indirectly held interests in securities under the Clearing Member Contract will presumably be determined according to the proper law of the Clearing Member Contract, being English Law. See also footnote 168 above.

¹⁷⁰ See also footnote 161 above, and the *Final Report* at 9.1.4.1.

On this basis, a court in a Relevant Jurisdiction would apply the PPSA to the security interests granted by an Australian Clearing Member to LCH under the Deed of Charge over its rights in relation to the securities account and the underlying assets (other than cash) credited to the Australian Clearing Member's account. We discuss this further below.

In relation to Foreign Clearing Members, we consider it likely that under the laws of the Relevant Jurisdictions, the validity, perfection and priority of the security interests in intermediated securities would be determined by the application of the law of the place of the intermediary where the securities account is maintained, in this case England.

(b) Intangible property (such as an interest in a cash account)

Under the PPSA, the validity, perfection and the effect of perfection or non-perfection of a security interest in intangible property are governed by the laws of the jurisdiction in which the grantor is located when the security interest attaches to the collateral.¹⁷¹ Hence, in the case of Australian Clearing Members, the PPSA will apply.

There is an exception in the case of a security interest in an ADI account, which provides that the security interest is governed by the laws of the jurisdiction that governs the ADI account.¹⁷²

5.6 Enforceability of the security interests under the PPSA against the grantor and third parties

Where the PPSA governs the validity of a security interest, the PPSA provides that a PPSA security interest in collateral is enforceable:

- (a) against the grantor, only if the security interest has attached to the collateral;¹⁷³ and
- (b) against third parties, only if:¹⁷⁴
 - (i) the security interest has attached to the collateral; and
 - (ii) one of the following applies:
 - (A) the secured party has possession of the collateral; or

¹⁷¹ Section 239(1) and (2) of the PPSA.

¹⁷² Section 239(4) of the PPSA. There is an exception where the parties to the security agreement agree in writing that the security interest in the ADI account is governed by the laws of another jurisdiction, provided that the ADI consents to this in writing and applying that law is not manifestly contrary to public policy: see section 239(5) of the PPSA.

¹⁷³ Section 19(1) of the PPSA.

¹⁷⁴ Section 20(1) of the PPSA.

- (B) the secured party has perfected the PPSA security interest by control; or
- (C) 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.¹⁷⁵

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).¹⁷⁶

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 and the charged property being transferred or provided to LCH.¹⁷⁷

5.7 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.¹⁷⁸ 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.

Where 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 in accordance with the PPSA. 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,¹⁷⁹ or even be extinguished entirely (for example, if the grantor transfers the collateral to another person).¹⁸⁰ Most security interests, if they are not perfected, will also be at risk of being extinguished if the grantor is wound up or an administrator is appointed to the grantor or the grantor executes a deed of company arrangement.¹⁸¹

¹⁷⁵ Section 20(2) of the PPSA.

¹⁷⁶ Section 19(2) of the PPSA.

¹⁷⁷ Assuming that the grantor has rights (e.g. as owner) in the property.

¹⁷⁸ Section 21 of the PPSA.

¹⁷⁹ See e.g. section 55(3) of the PPSA

¹⁸⁰ See e.g. section 43 of the PPSA.

¹⁸¹ See sections 267 and 267A of the PPSA and also section 588FL of the Corporations Act.

A security interest that has attached to collateral and is enforceable against third-parties can be perfected in up to five different ways, depending on the nature of the collateral:

- (a) 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 and making an effective registration.¹⁸² Importantly, a secured party does not need to wait until the security interest has been granted before entering it on the PPS Register.
- (b) Possession: A secured party can perfect its security interest over some types of personal property by taking possession of the collateral.¹⁸³ 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.¹⁸⁴
- (c) Control: A secured party can perfect its security interest over some types of personal property by having control over the collateral.¹⁸⁵ This includes certain financial instruments, including an intermediated security interest, an investment instrument and a negotiable instrument that is not evidenced by a certificate, by taking "control" of the collateral in a manner specified in the PPSA. The PPSA sets out rules that prescribe how a secured party can "control" each type of "controllable" financial asset. We comment below on the "control" tests for the relevant types of collateral.
- (d) 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.
- (e) Deemed perfection (in some limited situations and for limited periods): The PPSA also in some situations deems a security interest is deemed to be automatically perfected – for example, in some circumstances where

¹⁸² Section 21(2)(a) of the PPSA.

¹⁸³ Sections 21(2)(b) and 24 of the PPSA.

¹⁸⁴ Section 24(4) of the PPSA.

¹⁸⁵ Section 21(2)(c) of the PPSA.

collateral under a perfected security interest is disposed of, and the security interest attaches to the proceeds.

If a PPSA security interest is held by LCH under the Deed of Charge, it is likely to be perfected by control in respect of most collateral provided to it by a Relevant Clearing Member. This is because the security interests will likely be regarded as security interests in intermediated securities for the reasons outlined above.

Under section 26(2) of the PPSA, a secured party has control of an intermediated security if there is an agreement in force between:

- (i) the grantor, the secured party and the intermediary; or
- (ii) the grantor and the intermediary; or
- (iii) the grantor and the secured party,

to the effect that:

- (iv) the intermediary must not comply with instructions given by the grantor without seeking the consent of the secured party; or
- (v) the intermediary must comply with instructions given by the secured party without seeking the consent of the grantor.

It must be noted that, due to its drafting, it is not entirely clear whether section 26(2) can apply where the secured party is also the intermediary, as is the case under the relevant Deed of Charge and Clearing Member Contract. This is because the section refers to the intermediary "seeking the consent of the secured party" and complying with "instructions given by the secured party". If the secured party and the intermediary are the same entity, it could be argued that the section cannot apply as it would be nonsensical for an agreement to provide that the intermediary must comply with instructions given by itself or require the intermediary to seek its own consent. The relevant provisions appear to contemplate that the intermediary and the secured party will be different entities, and it is not clear whether a court would interpret the provision flexibly, so that it can apply where the intermediary and the secured party are the same entity. However, there does not appear to be any good reason why an intermediary cannot also be a secured party in respect of the securities held by it as intermediary and which it can control. For this reason, we think it is likely, but not highly likely, that LCH would be able to perfect its security interest by control under section 26(2).¹⁸⁶ We note also that, while the Deed of Charge is an English

¹⁸⁶ We note that the *Final Report of the Review of the Personal Properties Securities Act 2009* (27 February 2015) considered this point at paragraph at 5.3.4.4:

"5.3.4.4 **What if the intermediary is itself the secured party?**

law-governed document, the meaning and legal effect of which will be a matter for English law, on a plain reading the Deed of Charge provides that LCH (in this case, being both secured party and intermediary) will, in specified circumstances, be entitled to take specified actions in respect of the charged collateral without seeking the consent of the Relevant Clearing Member.¹⁸⁷ If a court were to interpret section 26(2) of the PPSA flexibly in the manner outlined above, and provided that as a matter of English law, the legal effect of the Deed of Charge is consistent with the plain reading indicated above, in our view the court would also likely find that the Deed of Charge provides that "the intermediary must comply with instructions given by the secured party [ie, its own wishes] without seeking the consent of the grantor", being one of the effects described in section 26(2).

Section 26(4) provides that a secured party has control of an intermediated security "if the securities account is maintained in the secured party's name". As noted above, the securities account maintained by LCH which records the Relevant Clearing Member's holdings of securities should be considered to be the "securities account" for the purposes of the PPSA. As that account is maintained

5.3.4.4.1 *The issue*

It is common for a custodian of financial assets to include a requirement in its trading terms for its customer to grant it a security interest (often called a lien) over all the assets that the customer holds through the custodian. This security interest is often expressed to be over the benefit of the customer's accounts with the custodian.

The ways in which a security interest can be perfected by control over an intermediated security are set out in s 26. Those methods of perfection all appear to assume that the secured party is a different person to the intermediary. As one of the submissions pointed out, this makes it unclear whether the intermediary itself can perfect by control if it is also the secured party, and appears to suggest that it may only be able to perfect by registration.⁴⁵

I see no good reason why an intermediary should be any less able than other secured parties to perfect a security interest by control over intermediated securities that are held with it. Article 8 of the UCC and the Canadian Securities Transfer Acts do allow an intermediary to perfect by control, and even go on to deem that perfection to be automatic (similar to the position that an ADI enjoys when it has security over an ADI account with it – see Section 5.3.7.1 below).

For these reasons, Consultation Paper 2 proposed that it be made clear that the intermediary itself is also able to perfect by control.

5.3.4.4.2 *Discussion of stakeholder feedback*

Respondents were more confident with this question. All agreed that the intermediary itself should also be able to perfect by control.

One respondent made the good point that it may not be appropriate to provide that only one secured party at a time can perfect by control if this change is made, as that would otherwise effectively preclude the possibility that anyone other than the intermediary itself could perfect by control.⁴⁶ While I had flagged that option as a possible recommendation in Consultation Paper 2, I no longer propose to pursue it, for this reason.

5.3.4.4.3 *Recommendation*

Recommendation 66: *That the Act be amended to make it clear that an intermediary can perfect a security interest by control over intermediated securities held with it."*

¹⁸⁷ On a plain reading, this seems to be implicit in provisions such as clauses 11(1), 12(1), and 13 of the Deed of Charge, where the intermediary and the secured party are the same entity.

by LCH in the name of the Clearing Member, LCH will not be able to rely on section 26(4) to perfect its security interest by control.

The final method for perfecting by control is set out in section 26(3A) and requires there to be an agreement in force under which the secured party is able to initiate or control the sending of electronic messages or other electronic communications by which the intermediated security could be transferred or otherwise dealt with. While the manner in which LCH can deal in the underlying securities may involve electronic messaging, it is likely that this test for control would be limited to electronic shareholding arrangements such as our CHESS system. As the intermediated securities in this case are the Relevant Clearing Member's rights against LCH in respect of the securities account, in order to satisfy the requirements of section 26(3A), it would be necessary to identify an agreement in force under which LCH (or a person who has agreed to act on instructions of LCH) is able to initiate or control the sending of electronic messages or other electronic communications by which those rights of the Relevant Clearing Member could be transferred or otherwise dealt with. In this regard, it does not appear that the Clearing Member Contract or the Deed of Charge contain provisions having that effect (and a distinction must be made between this and any rights that LCH may have to instruct a transfer of the securities held in its name, which are recorded in the securities account as held on behalf of the Relevant Clearing Member). In our view, it is not highly likely that LCH will have control of the intermediated securities under this section either.

If it is the case that LCH is perfected by control in respect of intermediated security interests, then LCH would have a "super priority" security interest under the PPSA in respect of collateral where it is perfected by control¹⁸⁸ and would not need to register its security interests in relation to this collateral on the PPS Register.¹⁸⁹

However, the only clearly available option (where the PPSA applies to perfection of LCH's security interests under the Deed of Charge) will be to perfect by registration. Further, if a Clearing Member's rights in relation to the securities account are not intermediated securities, then (as discussed above) they are instead likely to be classified as intangible property. It is not possible under the PPSA to perfect a security interest in intangible property (other than ADI accounts, which will not be the case for cash held by LCH as it is not an ADI) by control. In that event, LCH would need to perfect its security interest (where the PPSA applies to perfection) by registering it on the PPS register. Hence, where LCH takes a security interest over collateral which cannot clearly be perfected by

¹⁸⁸ Section 57 of the PPSA.

¹⁸⁹ Given it is perfected by control; see section 21(1)(b)(iii) and (2)(c)(ii) of the PPSA.

control, we would recommend that LCH perfect its security interests by registration.

5.8 Priority under the PPSA

The PPSA establishes rules for resolving priority disputes between security interests over the same collateral (where it governs the effect of perfection or non-perfection of those security interests). Broadly, the priority rules work as follows¹⁹⁰:

- (a) Priority between two or more perfected security interests is determined by the order of their perfection;
- (b) A perfected security interest will have priority over an unperfected security interest;
- (c) Priority between unperfected security interests is determined by their order of attachment.

These rules are subject to a number of 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.¹⁹¹ This will be applicable to security interests granted to LCH (where the PPSA applies) which are perfected by control by LCH. Given that, as noted above, any security interest granted in favour of LCH in relation to certain types of collateral may not necessarily be capable of perfection by control in all respects and, where this is the case, may instead require registration in order to be perfected, we note that any security interest registered at an earlier point in time will take priority over any security interest registered by LCH. Accordingly, LCH should undertake a search of the PPS Register in respect of a prospective Australian Clearing Member prior to admitting that prospective member.

The PPSA also introduces a concept of a purchase money security interest (PMSI).¹⁹² 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

¹⁹⁰ Section 55 of the PPSA.

¹⁹¹ Section 57 of the PPSA.

¹⁹² Section 14 of the PPSA.

collateral) that is an investment instrument, an intermediated security, a monetary obligation or a negotiable instrument.¹⁹³

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.

5.9 Enforcement under the PPSA

Chapter 4 of the PPSA sets out a series of general rules in relation to enforcing PPSA security interests in personal property. Generally, these rules regulate how a secured party may seize, dispose of or retain collateral and prescribe 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). These rules do not apply to all PPSA security interests and parties to a security agreement can agree to contract out of some,¹⁹⁴ but not all of, these rules. 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.¹⁹⁵ Importantly, section 110 of the PPSA makes it clear that the PPSA (in specifying certain statutory ways in which a PPS security interest may be enforced) does not derogate in any way from the rights and remedies that (amongst others) a secured party has under the relevant security agreement in relation to a default by a debtor. Hence, the provisions in Chapter 4 of the PPSA will not restrict the exercise by LCH of its rights under the terms of the Deed of Charge on the default by a Relevant Clearing Member, including the enforcement of the Deed of Charge in accordance with its terms.

5.10 Enforcement of Security, External administration and the Netting Act Protections

Section 16 of the PSNA protects the enforcement of security in relation to market netting contracts against any moratoriums on the enforcement of security that might otherwise apply under Australian law as a result of the grantor becoming subject to an external administration.

¹⁹³ Section 14(2) of the PPSA.

¹⁹⁴ Section 115 of the PPSA.

¹⁹⁵ Section 109(3) of the PPSA.

As the LCH Agreements are governed by English law,¹⁹⁶ section 16(2) of the Netting Act will apply where a party to the market netting contract goes into external administration and Australian law governs the external administration.¹⁹⁷

When section 16(2)(fa) of the PSNA applies, any security given by the party (which has gone into external administration) in accordance with the market netting contract, in respect of obligations of a party to the contract, may be enforced in accordance with the market netting contract,¹⁹⁸ or in accordance with the security given in accordance with the contract.¹⁹⁹

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 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.²⁰⁰

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

¹⁹⁶ Hence section 16(1) of the Netting Act will be inapplicable.

¹⁹⁷ As discussed in section 3.4 of this opinion above, this will be so in respect of an Australian Clearing Member where that Australian Clearing Member becomes subject to any of the Insolvency Proceedings described in section 3.1 above or a Reorganisation Measure, and in respect of a Foreign Clearing Member, where that Foreign Clearing Member becomes subject to any of the Insolvency Proceedings described in section 3.2 above, but only in the circumstances specified in section 3.4 above, or becomes subject to a Reorganisation Measure.

¹⁹⁸ The SwapClear Service is a netting market, and this provision will apply to the SwapClear Service and to a Clearing Member Contract in relation to the SwapClear Service.

¹⁹⁹ Section 16(4) of the Netting Act provides 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.

²⁰⁰ The Explanatory Memorandum to the Corporations and Financial Sector Legislation Amendment Bill 2013 (which introduced section 16(2)(fa) to the Netting Act) makes it clear that this includes where the detailed terms governing the provision of security are not contained in the market netting contract itself but rather in a separate security agreement: see paragraph 1.75.

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 the SwapClear Service, be able to enforce the security under the Deed of Charge and the Clearing Member Contract in accordance with its terms during the moratorium imposed in a voluntary administration of an Australian company (where that moratorium is applicable to the enforcement of the security) under section 16(2)(fa) of the Netting Act. Similarly, section 16(2)(fa) of the Netting Act will prevail over any moratorium on enforcement of a secured party's rights against the property of an ADI arising as a result of the appointment of a statutory manager to that ADI under the Banking Act.²⁰¹

Where LCH seeks to enforce security granted to it under the Deed of Charge or the Clearing Member Contract by a Foreign Clearing Member, section 16(2)(fa) of the Netting Act in our view should similarly prevail over any stay that arises under any of the Insolvency Proceedings identified in section 3.2 of this opinion above, provided the circumstances are such that the Insolvency Proceeding in question satisfies the definition of "external administration" under the Netting Act, as discussed in section 3.4 of our opinion.

In addition, to the extent that the PPSA applies to the security interests that arise under the Deed of Charge in relation to the SwapClear Service, we are of the view that where the grantor has become subject to an external administration to which Australian law applies, LCH would be entitled to enforce the Deed of Charge in accordance with its terms notwithstanding any restriction or provision contained in the PPSA.²⁰²

6. DEFAULT RULES (INCLUDING EXERCISING RIGHTS TO DEAL WITH CONTRACTS UNDER RULE 6 AND RIGHTS OF SET-OFF UNDER RULE 8) AND INSOLVENCY PROCEEDINGS OR REORGANISATION MEASURES

We consider below actions provided for under the Default Rules, in particular, the exercise of rights to deal with Contracts under Rule 6 and rights of set-off under Rule 8 in the event that a Relevant Clearing Member becomes subject to Insolvency Proceedings or a Reorganisation Measure.

We first address the potential interaction between the Default Rules and certain "ipso facto" provisions contained in the Corporations Act, and then subsequently consider the interaction between the Default Rules for the SwapClear Service, and the protections provided by the Netting Act.

²⁰¹ See Banking Act sections 15BA-15BC.

²⁰² Section 256 of the PPSA provides that if there is any inconsistency between the PPSA and the Netting Act, the Netting Act prevails. We consider this includes the PPSA rules as to priority and vesting.

6.1 Ipso Facto Provisions

We note at the outset that the Corporations Act contains provisions (the "**Ipso Facto Law**") 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.

Under the Ipso Facto Law, contractual rights arising under contracts, agreements or arrangements entered into on or after 1 July 2018²⁰³ 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 a counterparty;²⁰⁴
- (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);²⁰⁵
- (c) the appointment of a receiver (or receiver and manager) or other managing controller to the whole (or substantially the whole) of a counterparty's property;²⁰⁶ 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).²⁰⁷

The Ipso Facto Law does not restrict the exercise of contractual rights arising for reasons other than a body being subject to one of the triggering events referred to above, including by reason of any other kind of default in the performance of a contractual obligation (such as non-payment).

²⁰³ Section 17 of the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth) provides that the "ipso facto" protections only apply to contracts, agreements or arrangements entered into at or after 1 July 2018.

²⁰⁴ See sections 451E, 451F, 451G, and 451GA of the Corporations Act. A voluntary administrator can only be appointed to an Australian company. It should be noted that where the period of the stay will continue if the administration ends because of a resolution to winding up the company or an order is made to wind up the company until the liquidation is complete: see section 451E(2)(c).

²⁰⁵ See sections 415D, 415E, 415F and 415FA of the Corporations Act. A Reorganisation Procedure, namely a scheme of arrangement can only be proposed under section 411 of the Corporations Act in respect of a Part 5.1 body, which is an Australian company or a registerable body that is registered under Division 1 or 2 of Part 5.2B of the Corporations Act.

²⁰⁶ See sections 434J, 434K, 434L and 343LA of the Corporations Act. This will apply where a corporation has a managing controller as defined in the Corporations Act appointed to the whole or substantially the whole of the corporation's property.

²⁰⁷ In addition, the Ipso Facto Law prevents the exercise of contractual rights against an entity where those rights become exercisable for a reason that is "in substance" contrary to the Ipso Facto Law. We note also that regulations promulgated pursuant to the Corporations Act may prescribe further reasons, relating to one of the matters specified in the Ipso Facto Law, which cannot provide grounds for the exercise of a contractual right. However, we are not aware of any such further reasons having been prescribed.

Furthermore, there are certain exceptions from the Ipso Facto Law for specified types of contracts and contractual rights, which are provided for by regulations and a Ministerial declaration introduced pursuant to the Ipso Facto Law.²⁰⁸ The restrictions on exercising a right imposed by the Ipso Facto Law will not apply in relation to rights "contained in" the following exempt kinds of contracts specified in Corporations Regulation 5.3A.50 (z),(za) and (zi) to (zl) inclusive (the **Ipso Facto Regulations**):

"(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;

(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, the 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".²⁰⁹

The abovementioned provisions of the Ipso Facto Law, the Ipso Facto Regulations 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 case authority guidance as to how an Australian court may approach their application. However, we set out in the following paragraphs what we

²⁰⁸ See *Corporations Regulations 2001* (Cth) regs 5.1.50, 5.2.50 and 5.3A.50 and the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth).

²⁰⁹ See Declaration 5(4) (e), (f) and (h), together with Declarations 5(1), (2) and (3) of the *Corporations (Stay on Enforcing Certain Rights) Declaration 2018* (Cth).

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:

- (a) *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.²¹⁰

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.

²¹⁰ We note that section 822A(2) is not applicable to LCH in any event, as LCH is a foreign CS facility licensee: see section 822A(3) of the Corporations Act.

6.2 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 External Administration Proceeding.

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:

(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 Act²¹¹ and section 13A(3) of the

²¹¹ Which provides for the assets of a foreign ADI (which suspends payment or becomes unable to meet its obligations) to be available to meet its liabilities in Australia in priority to all of its other liabilities.

Banking Act²¹². 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.²¹³

6.3 External administration

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. Accordingly, to the extent that any specific action that LCH may seek to undertake under the terms of the Default Rules in relation to a Relevant Clearing Member who becomes subject to an External Administration Proceeding falls within the terms of sections 16(2)(c) to (g) of the Netting Act, those actions will be protected from the operation of the moratoria and restrictions described in section 3 of this opinion above. In the following section 6.4 of this opinion, we discuss the extent to which, in our view, specific actions that LCH may seek to undertake under the terms of the Default Rules are likely to fall within the terms of sections 16(2)(c) to (g) of the Netting Act, and thereby obtain the benefit of the protections provided by that legislation.

6.4 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 with a view to:

- (a) discharging all the Clearing Member's rights and liabilities under all Contracts to which it is party or upon which it may be liable; and
- (b) completing the process set out in Rule 8.

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 which falls within the scope of sections 16(2)(fa), (fb), (fc) and (g) of the Netting Act unaffected by the External Administration Proceeding. These include the netting or termination of obligations under the Clearing Member Contract, the enforcement of security granted in

²¹² Which provides for the assets of an ADI (which suspends payment or becomes unable to meet its obligations) to be available to meet its liabilities in Australia in priority to all of its other liabilities.

²¹³ E.g. section 15C(2) of the Banking Act.

accordance with 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 netting under the contract or is for the purpose of effecting a transfer, or a dealing with property in accordance with the contract. |
| <i>(ii) entry into new contracts;</i> | The entry into new contracts between LCH and a non-Defaulting Clearing Member does not require the protections of the Netting Act. To the extent this rule may contemplate entering in a new contract with the Defaulting Clearing Member, this 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). |

| Action under Rule 6(h) | Analysis against section 16(2) of 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, though if this refers merely to a termination of a contract that would fall within the Netting Act. |
| <i>(v) termination, closeout and re-establishment of contracts; or</i> | 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. |
| <i>to preserve as far as possible the position of any client of the Clearing Member.</i> | |

| Action under Rule 6(h) | Analysis against section 16(2) of the Netting Act |
|---|---|
| <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). |

We note that the efficacy of LCH's rights to effect the porting of Client Contracts and Account Balances to a Backup Clearing Member if LCH declares a Relevant Clearing Member to be in Default is addressed further below in Section 8.

6.5 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.

7. VOIDABLE TRANSACTIONS IN RELATION TO A LIQUIDATION UNDER AUSTRALIAN LAW

We consider below the circumstances in which a transaction with a Relevant Clearing Member entered into prior to a winding up under the laws of the Relevant Jurisdictions of the kinds described in sections 3.1(b) and 3.2(a) of this opinion above can be challenged as a voidable transaction.

The Corporations Act permits a liquidator of a company²¹⁴ 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.²¹⁵ Below we set out the types of transactions which may be set aside as voidable.

7.1 Unfair preferences

Section 588FA of the Corporations Act provides that a transaction (which can include a payment) constitutes an unfair preference if:

- (a) the company and a creditor are parties to the transaction; and
- (b) 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;

An unfair preference may be set aside on the application of a liquidator appointed to the company as a voidable transaction²¹⁶ if:

- (a) 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
- (b) 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

²¹⁴ This includes registered Australian companies, foreign companies that are registered under the Corporations Act, and foreign companies that are not registered under the Corporations Act but are conducting business in Australia: see the definitions of "company" and "Part 5.7 body" in section 9 of the Corporations Act.

²¹⁵ Section 588FF of the Corporations Act.

²¹⁶ Section 588FE of the Corporations Act.

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 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:

- (a) it entered into the transaction in good faith;
- (b) 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
- (c) 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 a company in respect of a previously unsecured debt if the other elements of an unfair preference are also present.

7.2 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.

7.3 **Creditor-defeating disposition**

The Corporations Act was amended on 18 February 2020 to include a new voidable transaction known as a creditor-defeating disposition.

Section 588FDB provides that a disposition of property of a company is a creditor-defeating disposition if:

- (a) at the time of the relevant agreement or time of disposition (if there was no relevant agreement), the property was disposed of for consideration that was below the property's market value or the best price that was reasonable obtainable for it in the circumstances at that time (whichever amount is lower); and
- (b) the disposition had the effect of preventing the property from being available to the company's creditors in a winding up, or hindering or significantly delaying the process of making the property available for the company's creditors in a winding up.

For the creditor-defeating disposition 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 must be entered into (or given effect to) within the 12 months ending on the "relation back day", or after that day but on or before the day when the winding up of the company began. A creditor-defeating disposition will also be voidable where the company enters "external administration" (as defined in Schedule 2 of the Corporations Act, and relevantly including winding up and administration) less than 12 months after the transaction was entered into and the company entered "external administration" as a direct or indirect result of such transaction.

Similar defences to those that apply to an unfair preference apply to creditor-defeating dispositions, other than where such creditor-defeating disposition is voidable solely because the company enters external administration less than 12 months after the transaction was entered into and the company entered external administration as a direct or indirect result of such transaction. Further, a creditor-defeating disposition will not be voidable where it was entered into under a scheme of arrangement, under a deed of company arrangement, by an administrator, or by a liquidator or provisional liquidator.

7.4 Protection under the Netting Act in relation to Voidable Transactions

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 588FDB of the Corporations Act discussed above).

As noted 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 above) that falls within the scope of section 16(2)(g) of the Netting Act, such action will be protected from being:

- (a) void; or
- (b) voidable under sections 588FA, 588FB, and 588FDB of the Corporations Act.

8. CLIENT CLEARING AND PORTING

If LCH declares a Relevant Clearing Member to be in Default, it may seek to:

- (a) port the Client Contracts and Account Balance referable to a Clearing Client to a Backup Clearing Member;
- (b) return the Client Clearing Entitlement to the relevant Clearing Client or to the Defaulting Clearing Member for the account of such client.

The porting of Client Contracts may be effected either by:

- (a) a close-out of the relevant Client Contracts between LCH and the defaulting Relevant Clearing Member followed by the replication of such contracts (by the opening of new contracts) between LCH and the Backup Clearing Member; or
- (b) a transfer of the relevant Client Contracts from the defaulting Relevant Clearing Member to the Backup Clearing Member.

8.1 Porting prior to the commencement of External Administration Proceedings

As set out above, in our view, on the assumption that the LCH Agreements constitute binding obligations between the parties as a matter of English Law, if a court of the Relevant Jurisdiction were required to consider the enforceability of an LCH Agreement, and in particular the provisions which relate to the porting of Client Contracts and Account Balance of a Clearing Client to a Backup Clearing Member, the relevant court would recognise the LCH Agreements as constituting binding contractual obligations between the parties to the LCH Agreements.²¹⁷ The variation or termination of a contract is also generally determined by the governing law of the contract.²¹⁸

Where the action of LCH to port the Account Balance of the Clearing Client relates to the novation of contractual rights and obligations that are governed by English law, whether such action is effective will also be determined by English law (being the governing law of the contractual rights and obligations).²¹⁹

Where LCH seeks to return a Client Clearing Entitlement to the relevant Clearing Client or to the Defaulter for the account of such client:

- (a) The enforceability of contractual obligations governed by English law, will be a matter for English law (being the governing law of the contract); or
- (b) Where this involves the assignment of a chose in action, the effectiveness (or intrinsic validity) of the assignment will be determined under the proper law of the assignment which is most likely to be determined by the proper law of the contract under which the assignment was effected (in this case English Law) (being the governing law of the LCH Agreements and which is also likely to be the location of the relevant chose in action).²²⁰

8.2 Porting after the commencement of External Administration Proceedings

As noted in section 4.2 of this opinion above, 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

²¹⁷ This is on the same basis and subject to the same assumptions and qualifications as stated in section 1.1 above.

²¹⁸ See Brereton, *Halsbury's Laws of Australia 85 Conflict of Laws* at [85-1295]; *Nygh* at [19.39].

²¹⁹ As a novation will involve the termination of the existing contract (which is governed by English Law) and the making of a new contract (also to be governed by English Law): see *Cheshire & Fifoot Law of Contract* (11th Australian ed. 2017) at [8.45]-[8.46].

²²⁰ The proper law of the assignment is most likely determined by reference to the proper law of the contract under which the assignment was effected: but an assignment must still conform with any requirements to pass title in the chose in action to the assignee according to the law of the place where the chose in action is located: see *The Ocean Marine Insurance Co Ltd v CSR Ltd* [2012] NSWSC 1229 at [83]-[84], [91] per Stevenson J referring to Davies, Bell and Brereton, *Nygh's Conflict of Laws in Australia, 8th ed* (2010). See also *Nygh* 10th ed (2019) at [33.63], [33.66]. For the same reasons which we specified above in footnote 168 we think it is likely that the relevant contractual obligation on LCH to return a Client Clearing Entitlement will be regarded as located in England.

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 after the commencement of the winding up. To the extent that any porting step involves the transfer of rights, obligations and property of a Relevant Clearing Member when sections 437D or 468 apply, there is a risk that, under the Laws of the Relevant Jurisdictions, the transfer could be avoided.

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 any challenges under the insolvency laws of the Relevant Jurisdictions in relation to External Administration Proceedings.²²¹ The Security Deed may also 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, in relation to sections 16(2)(fb) and (fc) of Netting Act, we are not aware of any case law which provides any guidance as to how the courts will interpret their operation 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 in this opinion must be read in this context accordingly.

As we have noted above, sections 16(2)(fb) and (fc) of the Netting Act 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.*

²²¹ We have also discussed above the operation of the Ipso Facto Law of the Relevant Jurisdictions and concluded that that legislation does not apply to the exercise of rights under a Clearing Member Contract.

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 (which introduced these provisions) stated 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 consider that sections 16(2)(fb) and (fc) of the Netting Act will 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 in respect of External Administration Proceedings subject to some reservations that we have in relation to the provisions of paragraphs 6.1(b) and 8.1(b) of the Client Clearing Annex contemplating that, under certain circumstances, LCH may terminate and

close-out open contracts and enter into new contracts on equivalent terms with the Backup Clearing Member.

In this regard, it is not clear that section 16(2)(fb) of the Netting Act would operate to protect the termination and close-out of open contracts (by entering into a reversing contract in the name of the defaulting Relevant Clearing Member) and entering into 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. Nor is it clear whether the termination and close-out of open contracts and entering into new contracts would constitute a "transfer" of rights and obligations on a literal interpretation of section 16(2)(fb).²²²

In contrast, the transfer of open contracts under paragraphs 6.1(a) and 8.1(a) of the Client Clearing Annex would in our view 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 as to how section 16(2)(fb) of the Netting Act may be interpreted, we consider 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 should constitute a transfer of rights and obligations for the purposes of section 16(2)(fb) of the Netting Act and attract the protection of that provision.

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 (and the relevant Clearing Clients) 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

²²² We do not see that an external administration of a Defaulting Clearing Member would of itself preclude LCH entering into a new contract with the Backup Clearing Member. However, to the extent that, in order to be in a position to do that, it is necessary for LCH to close out the existing contract with the Defaulting Clearing Member by entering into a new reversing contract with the Defaulting Clearing Member, that action may not have the benefit of the protections provided by the Netting Act, as outlined above.

an insolvency of the Defaulting Clearing Member, the Security Deed could confer on the client a priority interest in the relevant collateral.

Further to this, we understand from LCH that where porting of the relevant portfolio of contracts (**Portfolio**) is to be effected by way of transfer pursuant to paragraphs 6.1(a) and 8.1(a) of the Client Clearing Annex, it will (prior to the transfer):

- (a) 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
- (b) 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.

In this regard, LCH has a specific form of 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. As we have concluded above, sections 16(2)(fb) and (fc) protect the porting of positions and collateral by way of transfer in accordance with paragraph 6.1(a) or 8.1(a) of the Client Clearing Annex from the consequences of an External Administration Proceeding of a Relevant Clearing Member.

In respect of the SwapClear Service, 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, that should be not affected by the commencement of External Administration Proceedings.

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)(ii) of the Netting Act should apply to protect the return of such amounts, in respect of the SwapClear Service.²²³

8.3 Enforceability of the Security Deed granted by a Relevant Clearing Member over the Account Balance and Client Clearing Entitlement in favour of the relevant Clearing Client under the laws of the Relevant Jurisdictions

The Security Deed is entered into by a Relevant Clearing Member in favour of its Clearing Clients in relation to Client Clearing Services,²²⁴ over all of the Relevant Clearing Member's present and future right title and interest in and to the Relevant Client Clearing Return and the Relevant Account Property.²²⁵

For present purposes, for reasons we have described above, we will proceed on the basis that the effect of section 8(1)(e)(iii) of the PPSA is not to exclude the security interest granted pursuant to the Security Deed from the PPSA.

Given the nature of the property charged under the Security Deed, and having regard to the matters outlined in sections 5.2 to 5.5 of this opinion above, it is likely that the PPSA will govern the validity, perfection and the effect of perfection or non-perfection of the security interests granted by an Australian Clearing Member in the charged property in proceedings in an Australian court. This is because the Australian Clearing Member's rights to the Client Clearing Entitlement and the Account Balance the subject of the Security Deed would likely be regarded as intangible property and/or intermediated securities under the PPSA, which applies (under section 6) where the grantor is an Australian entity. Accordingly, we would recommend that LCH approach the question on the basis that the PPSA will apply in these circumstances.

In respect of a Foreign Clearing Member, having regard to the matters outlined in sections 5.2 to 5.5 of this opinion above, it is likely that English Law will govern

²²³ We note that section 16(2)(fc)(ii) of the Netting Act requires that the person whose property is proposed to be transferred or otherwise dealt with (being, in respect of the Client Clearing Entitlement, the relevant Clearing Clients of the Defaulter) provide their prior written consent to the transfer or dealing. Paragraph 9.1 of the Client Clearing Annex contemplates that a transfer of the Client Clearing Collateral to the Defaulter would be made upon instruction from the relevant Clearing Client in an exercise of its rights under the relevant Security Deed. This is consistent with the return of the Client Clearing Entitlement being an alternative to porting. Any such instruction would in our view amount to sufficient consent for the purposes of section 16(2)(fc)(ii) of the Netting Act. Similarly, we anticipate that a transfer under paragraph 9.3 of the Client Clearing Annex would only be made on the instructions of the relevant Clearing Clients (once identified), which would amount to effective consent for the purposes of the provision.

²²⁴ See General Regulation 11(d).

²²⁵ See clause 3 of the Security Deed. These are defined in the Security Deed to refer to the Client Clearing Entitlement and the Account Balance relating to each respective Client (listed in Schedule 2 to the Security Deed), in each case as determined by LCH following an Enforcement Event. The terms "Client Clearing Entitlement" and "Account Balance" are defined, respectively, in the Client Clearing Annex to the Default Rules, and the General Regulations. An Enforcement Event is a Clearing Default in relation to the Relevant Clearing Member under the LCH Rulebook applicable to the clearing member.

the validity, perfection, and the effect of perfection or non-perfection of the security interests granted by the Foreign Clearing Member under the Security Deed.

We think it is likely that the security will attach when collateral is first provided by the Australian Clearing Member to LCH for the relevant Clearing Client which could, on an Enforcement Event in respect of the Relevant Clearing Member, give rise to a Client Clearing Entitlement and the Account Balance. The requirements for enforceability of the PPSA security interests granted by Australian Clearing Members arising under the Security Deed should be satisfied upon due execution of the Security Deed.²²⁶ 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 be capable of perfection, or be perfected, by control.²²⁷ In these circumstances, the Clearing Client must perfect its security interests by registration.²²⁸

We also note that, in relation to Relevant Clearing Members which are ADIs, 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 priority 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.²²⁹ The charged property under the Security Deed takes the form of rights to the Account Balance and collateral referable to the relevant Clearing Client. These rights arise under contracts governed by English law and it is likely that these rights are located in England.²³⁰ If, contrary to our view, a court of the Relevant Jurisdictions finds 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.

In relation to Relevant Clearing Members who become subject to the appointment of a voluntary administrator or a Banking Act statutory manager (or where foreign proceedings are recognised under the Cross Border Insolvency Act in circumstances where such recognition gives rise to a moratorium equivalent to that which would apply upon the appointment of a voluntary administrator), as we

²²⁶ Section 19 of the PPSA.

²²⁷ It is not possible to perfect a security interest in intangible property by control (except an interest in an ADI account granted to an ADI).

²²⁸ See the discussion as to the priority of security interests under the PPSA above.

²²⁹ Section 13A(3) has been viewed as giving depositors a statutory priority over secured creditors: see R I Barrett, "Insolvent Winding up of Banks" (1990) 64 ALJ 523 and also cf. *Re HIH Casualty and General Insurance Ltd and Others* (2005) 53 ACSR 12 at 41.

²³⁰ This is on the basis that the choses in action are properly recoverable in England where LCH has its principal office and where we understand that accounts are maintained. See Dicey at [23R-023]; cf. *Assetinsure Pty Ltd v New Cap Reinsurance Corp Ltd (in liq)* supra at 352. See also the discussion at footnote 168 above.

have outlined above, there are moratoria which may affect the enforcement of security during those insolvency processes.

9. ENFORCEABILITY OF CLEARING MEMBER CONTRACT IN THE EVENT OF LCH'S INSOLVENCY

As previously noted (see the section of this opinion titled "Introduction and Scope", above), LCH is registered as a foreign company in Australia under Division 2 of Part 5B.2 of the Corporations Act. Accordingly, LCH may become subject to each of the Australian law Insolvency Proceedings identified in relation to foreign companies above, except for the appointment of a statutory manager to a foreign ADI (given LCH is not, to our knowledge, registered as a foreign ADI as at the date of this opinion²³¹). In addition, LCH may become subject to a Reorganisation Measure as identified above.

In this section of our opinion, we comment on the applicability of the protections provided under the Netting Act to actions taken under Clearing Member Contracts in circumstances where LCH becomes subject to such Insolvency Proceedings or a Reorganisation Measure.

If LCH becomes subject to a foreign law-governed insolvency process (for example, a winding up under English Law) that does not also result in it becoming subject to an External Administration Proceeding, the protections contained in the Netting Act for specified actions taken pursuant to market netting contracts will not apply. This is because, in circumstances where a party to a market netting contract becomes subject to "external administration", and where Australian law does not govern the market netting contract, Australian law must govern the external administration in order for those protections to apply. In those circumstances, the effect of the particular foreign law-governed insolvency process on the rights, obligations, and powers of the parties to the market netting contract in question would generally be determined by foreign law (including, where relevant, the recognition under English Law of any foreign law-governed insolvency proceedings outside of England).

9.1 Insolvency Proceedings governed by Australian law

The rights, obligations, and powers of LCH under Clearing Member Contracts in circumstances where LCH becomes subject to the forms of Insolvency Proceedings applicable to it will continue to be determined by the terms of the Clearing Member Contracts (as we have outlined above).

²³¹ See Australian Prudential Regulation Authority, 'Register of authorised deposit-taking institutions' <<https://www.apra.gov.au/register-of-authorised-deposit-taking-institutions>>.

Where LCH becomes subject to an External Administration Proceeding, we consider that section 16(2) of the Netting Act would protect the right of a Relevant Clearing Member to engage the netting mechanism set out in regulation 45 of the General Regulations. Also, LCH would, of course, still have the benefit of its accrued contractual rights in accordance with the terms of the LCH Agreements.

9.2 Reorganisation Measure

In circumstances where LCH becomes subject to a Reorganisation Measure, as a matter of the laws of the Relevant Jurisdictions, its rights, obligations, and powers under Clearing Member Contracts with Relevant Clearing Members could be amended, modified, altered, or compromised, if that is provided for under the terms of a Reorganisation Measure as approved by LCH's creditors and the relevant court. However, the protections of the Netting Act should also apply whilst LCH is subject to a Reorganisation Measure in respect of netting under clause 45 of the General Regulations.²³²

BENEFIT

This opinion letter is given for the exclusive and sole 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 used or relied on by any other person for any other purpose.

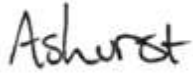
This opinion is confidential. It may not be disclosed to any government agency or other person, quoted in any public document or otherwise referred to without our written consent, except that it may be disclosed on a no-reliance basis:

- (a) to the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission, and the RBA may on a non-reliance basis also refer to this opinion in any assessment of LCH against the applicable financial stability standards determined under section 827D of the Corporations Act which may be published by the RBA;
- (b) as required by law (including, without limitation, the rules of a recognised stock exchange) or to any regulator having jurisdiction over your affairs;
- (c) to any person who in the ordinary course has access to your papers and records on the basis that the person makes no further disclosure; or

²³² Whilst subject to a Reorganisation Measure LCH will be relevantly subject to an "external administration" as defined in section 5 of the Netting Act.

- (d) as required in connection with any actual or contemplated legal proceedings relating to an LCH Agreement or this opinion.

Yours faithfully

A handwritten signature in black ink that reads "Ashurst". The signature is written in a cursive, slightly stylized font.

SCHEDULE 1

ASSUMPTIONS

1. GENERAL ASSUMPTIONS

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

- (a) the provisions of the LCH Agreements and each Relevant Contract constitute legal, valid and (other than as expressly opined on in this advice) enforceable obligations of each party to those agreements under English Law and the laws of all other jurisdictions, other than the Relevant Jurisdictions;
- (b) each of LCH and each Relevant Clearing Member 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 of LCH and each Relevant Clearing Member 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 to an LCH Agreement and a Relevant Contract 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 all relevant jurisdictions;
- (d) the LCH Agreements are entered into by the Relevant Clearing Member and LCH prior to the formal commencement of any Insolvency Proceeding or Reorganisation Measure in respect of that Relevant Clearing Member or LCH, and each was solvent when and immediately after it entered into each LCH Agreement to which it is a party, and will remain solvent until each of its PPSA Security Interests is perfected;
- (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 to an LCH Agreement which modify or supersede the terms of any LCH Agreement;
- (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) except as otherwise stated in this opinion, 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 to a LCH Agreement or a Relevant Contract has engaged in or will engage in misleading or deceptive conduct (by act or omission) unconscionable conduct 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 in respect of any party to them; and
- (p) each Relevant Clearing Member has, or at the relevant time will have, sufficient rights in the property expressed to be subject to a security interest granted by it for the security interest to attach to the property.

We have not investigated whether the assumptions in this advice are correct. However, the partners primarily responsible for the preparation of this opinion (being Jonathan Gordon, Brenton Key, and Tony Ryan) are not actually aware that any of the assumptions are incorrect.

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

SCHEDULE 2

QUALIFICATIONS

1. GENERAL 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 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 other than where we specifically opine in this opinion that an obligation is "binding" or "enforceable" notwithstanding any law relating to insolvency or other laws that affect creditors' rights (such as in relation to the operation of the Netting Act);
 - (iii) an obligation and the rights of a creditor 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, the LCH Agreements (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, except as expressly stated in this opinion;
- (b) a court might decline to exercise jurisdiction if it considers that it is not the most appropriate forum, or if the subject matter is concurrently before another court;

- (c) a choice of laws in an LCH Agreement in relation to non-contractual claims will not be enforceable in accordance with its terms in the courts of a Relevant Jurisdiction to the extent that the non-contractual claim arises in respect of a matter which falls within the jurisdiction of a court of the Relevant Jurisdiction;
- (d) 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.
- (e) 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;
- (f) 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;
- (g) 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;
- (h) an agreement to negotiate, or an agreement to agree, may not be binding;
- (i) to the extent that a provision of any of the LCH Agreements or a Relevant Contract 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;
- (j) 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;

- (k) laws in connection with sanctions, terrorism or money laundering may restrict or prohibit payments, transactions and dealings in certain cases;
- (l) 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;
- (m) a PPSA Security Interest may vest in the grantor if it is not perfected before any event described in section 267(1) of the PPSA occurs (eg an order is made, or a resolution is passed, for the winding up of the grantor), or if it is perfected by registration but the registration is not effected within the time required by section 588FL of the Corporations Act; and
- (n) 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; or
 - (iii) on the laws of any jurisdiction other than the Relevant Jurisdictions.

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

CLEARING MEMBERSHIP AGREEMENT

DATED

LCH LIMITED

and
("the Firm")

Address of the Firm

THIS AGREEMENT is made on the date stated above

BETWEEN the Firm and LCH LIMITED ("the Clearing House"), whose registered office is at The London Stock Exchange, 10 Paternoster Square, London, EC4M 7LS.

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 LIMITED**

(Signature)

(Print Name and Title)

for **LCH LIMITED**

LCH LIMITED

The London Stock Exchange Group, 10 Paternoster
Square, London EC4M 7LS

Tel: +44 (0)20 7426 7000 Fax: +44 (0)20 7426 7001

Internet: <http://www.lch.com>

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);

- (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**

SECURITY DEED

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THIS SECURITY DEED is dated [*Insert Date of Execution*] 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 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.

"Authorisation Date" means the date falling 6 months after 25 October 2013, unless the Clearing House notifies the Chargor that the Authorisation Date will be a date (the "**New Authorisation Date**") other than the then current Authorisation Date, in which case the Authorisation Date will be such New Authorisation Date. For the avoidance of doubt multiple notifications may be made and the New Authorisation Date specified in the last such notification will be the Authorisation Date.

"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 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 and will be separately identified (including with details of the relevant Service and details of the LCH identifier for the relevant Client Account) in Schedule 2 to this Security Deed.

"Effective Date" means the Authorisation Date or the date of this Security Deed, whichever is later.

"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 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 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

With effect from the Effective Date, 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 13.1, 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 Effective Date 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 Effective 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 13.1, 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. NOTIFICATION OF NEW AUTHORISATION DATE

- 9.1 The Chargor agrees that the Clearing House may notify the Chargor of a New Authorisation Date by publishing a notification on the Clearing House's website.
- 9.2 The Chargor agrees that notice of a New Authorisation Date will be deemed to have been delivered to the Chargor upon the publication of a notice of such New Authorisation Date on the Clearing House's website.

10. 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:

- 10.1 not to amend or revoke this Security Deed without the prior written consent of the Clearing House; and
- 10.2 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.

11. 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.

12. SAVING PROVISIONS

12.1 Continuing Security

Subject to Clause 13, 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.

12.2 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.

12.3 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 12.3, 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:

- 12.3.1 any time, waiver or consent granted to, or composition with, the Chargor or other person;
- 12.3.2 the release of the Chargor or any other person under the terms of any composition or arrangement with any creditor of any affiliate;
- 12.3.3 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;
- 12.3.4 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
- 12.3.5 any insolvency or similar proceedings.

12.4 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.

12.5 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.

13. DISCHARGE OF SECURITY

13.1 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:

- 13.1.1 the Chargor may retain for its own account; and

13.1.2 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 13 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.

13.2 Consolidation

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

14. MISCELLANEOUS PROVISIONS

14.1 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.

14.2 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.

14.3 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.

14.4 Governing Law

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

14.5 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.

14.6 [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

[illegible]

SCHEDULE 3 ADDITIONAL SECURITY DEED

THIS SECURITY DEED is dated [*Insert Date of Execution*] 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 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 (including with details of the relevant Service and details of the LCH identifier for the relevant Client Account) in the Annex to this Security Deed.

"**Effective Date**" means the Authorisation Date or the date of this Security Deed, whichever is later;

- (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

With effect from the Effective Date, 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

[illegible]

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:

SCHEDULE 1

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| Backup Clearing Member Name | |
| Backup Clearing Member Mnemonic | |

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| Defaulting Clearing Member Name | |
| Defaulting Clearing Member Mnemonic | |

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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 |
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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 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

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| Backup Clearing Member Name | |
| Backup Clearing Member Mnemonic | |

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| Defaulting Clearing Member Name | |
| Defaulting Clearing Member Mnemonic | |

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| 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 |
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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.

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

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| Backup Clearing Member Name | |
| Backup Clearing Member Mnemonic | |

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| Defaulting Clearing Member Name | |
| Defaulting Clearing Member Mnemonic | |

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| 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 |
|---------------|-----------------|--------------------------|-----------------------|-------------------------------|----------------------------|
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Instructions:

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.