LCH.CLEARNET

General Manager
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600
Australia

14 December 2012

Dear sirs,

This paper provides the response of the LCH.Clearnet Group ("LCH.Clearnet") to the Treasury's consultation on "Strengthening APRA's Crisis Management Powers".

LCH.Clearnet is the world's leading clearing house group, serving major international exchanges and platforms, as well as a range of OTC markets. It clears a broad range of asset classes including: interest rate swaps, credit default swaps, foreign exchange derivatives, exchange traded derivatives, bonds and repos, cash equities, and commodities including energy and freight; and works closely with market participants and exchanges to identify and develop clearing services for new asset classes.

We welcome the opportunity to contribute to this consultation with regards to a possible introduction of a statutory management regime for FMIs holding Australian overseas licences and the possibility of carving out FMIs from the scope of the Cross border Insolvency Act, in the event that a statutory management regime is introduced for such entities.

We hope that our comments will provide the Treasury with the necessary support for the development of rules which will balance the need to preserve the stability of the Australian financial system with that to ensure clarity around the recovery and resolution framework of cross-border FMIs. We limit our comments to matters relating to foreign branches of FMIs.

Responses to specific questions in the paper:

7.1.2 Extending the proposals relating to foreign branches to FMIs

Should any reforms raised in Chapter 3 in relation to the appointment of SMs over local branches of foreign ADIs also be adopted in any possible statutory management regime for FMIs?

An extension of the statutory management regime to overseas licence holders should only be considered if there is a material risk that home authorities will take action which is not in the best interests of the Australian financial system or domestic creditors. It is arguable that the likelihood of this is something which should be considered by regulators at the time an overseas licence is granted (which would remove the need for

an extension). The systemic risks posed by making cross-border FMIs subject to multiple recovery and resolution regimes should also be considered. Participants in FMIs should also have confidence in which regime will apply to the resolution of an FMI (and any consequent effects on the distribution of their assets).

- **Should the possible application of any statutory management regime to the domestic operations of an overseas licence holder be restricted to where an external administrator (including the equivalent of an SM) has been appointed over the licence holder in their home jurisdiction?**

Any application of a statutory management regime should only be triggered by similar action being taken by regulators in an FMI's home jurisdiction (or the initiation of any formal insolvency proceedings). Home regulators are best placed to ascertain whether the FMI is in crisis and whether the imposition of a statutory management regime is the best way to address the situation. This would avoid any risk to an FMI which is not in crisis when viewed as a whole and any systemic risk which would arise from that. Whatever the outcome on this point, participants in FMIs need to be clear where responsibility for the assessment of an FMI's viability lies and how competing regimes will interact. If this were not accepted as the appropriate regulatory model, consideration could be given to identifying specific emergency scenarios which could trigger a domestic Australian appointment without an offshore appointment.

- **What should the role of an SM be, where they are appointed only over the domestic operations of an overseas licence holder? In particular, how should their relationship with a 'primary' external administrator in the licensee's home jurisdiction be defined?**

We believe that any role for an SM should be limited to supporting an external administrator or resolution authority rather than running domestic operations independently.

Is such an extension necessary, if cross border insolvency mechanisms are reformed to enable foreign external administrators of FMIs to obtain Court ordered remedies in relation to the licensee's domestic operations?

Provided that domestic regulators are comfortable with the insolvency regime (including any FMI-specific recovery and resolution regime) governing an overseas licence holder then this should be sufficient and an extension of the SM regime should not be necessary.

- **Should the appointment of an SM over the domestic operations of an overseas licensee come to an end when a foreign external administrator obtains recognition and domestic relief under the Cross Border Insolvency Act 2008 (Cross Border Insolvency Act)?**

Yes. The relationship with the appointed FMI resolution authority in other jurisdictions should also be considered (e.g. some form of recognition procedure for foreign resolution authorities).

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7.1.3 Cross-border Insolvency

Should FMIs be carved out from the scope of the Cross-border Insolvency Act?

In line with our responses above, we believe that resolution of an FMI is best achieved by its home regulator/administrator and any carve-out may disrupt the effectiveness of such resolution. This would introduce a lack of certainty for participants and may increase the spread of systemic risk.

- **Should any carve out be modified to give the relevant regulators the option of allowing recognitions and remedies with their consent?**

If a carve-out is considered appropriate, then relevant regulators should be able to consent to recognitions and remedies where they agree that this will achieve the best outcome (taking into account the interests of all participants and issues of systemic risk). As to when that discretion might be exercised, two bases for distinction could be:

- A case where a CCP clears primarily cross border business and the carve out would not apply, and that where the CCP clears primarily domestic Australian business the carve out may apply.

- The three tiers of regulation proposed for CCPs in the proposed reforms of FMIs (see Table 1 of CFR Supplementary Paper to the Review of Financial Market Infrastructure Regulation) – i.e. for a CCP which is systemically important or which has a substantial Australian connection the carve out may apply, but otherwise not.

We hope our comments will prove useful and are ready to engage further with you, should you discuss the matters of this consultation further.

Should you have any questions or issues arising from this response please contact Rory Cunningham, Director of Public Affairs at rory.cunningham@lchclearnet.com.

Yours faithfully,

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Ian Axe
Chief Executive Officer