

## 1. PEXA RESIDENTIAL SELLER GUARANTEE

PEXA provides the guarantee described below (**PEXA Residential Seller Guarantee**) in respect of the sale of a residential property that is settled through the PEXA platform. The PEXA Residential Seller Guarantee is provided in order to protect sellers of residential property for an amount up to the cap referred to below in the event of certain types of fraud. Such a seller may elect to invoke the protection on the terms and subject to the conditions below, as an alternative to itself seeking to recover its loss by other means.

## 2. WHEN THE PEXA RESIDENTIAL SELLER GUARANTEE APPLIES

The PEXA Residential Seller Guarantee may be invoked by the seller in relation to a settlement of a sale of a residential property where all of the following steps have occurred:

- (a) The seller of the residential property provided the seller's practitioner with instructions as to the details of the bank account/s (**seller's bank account**) into which the vendor's funds (**seller's funds**) are to be disbursed at settlement.
- (b) The seller's practitioner then accurately entered the details of the seller's bank account (obtained at step (a)) into financial settlement schedule in the PEXA platform.
- (c) After step (b) has occurred, but before the settlement takes place, a person (other than the seller's practitioner) (the **fraudster**) without the knowledge, authority or approval of the seller's practitioner accessed the PEXA platform and changed those details of the seller's bank account in the financial settlement schedule in the PEXA platform with the consequence that the seller's funds would no longer be paid at settlement into the seller's bank account.
- (d) After step (c) has occurred, the seller's practitioner approved the settlement of the transaction by digitally signing the financial settlement schedule by applying their personal digital certificate and PIN.
- (e) Upon settlement, the seller's funds were paid to the bank account entered by the fraudster under step (c) (**fraudster's bank account**), and not in accordance with the seller's instructions entered into PEXA platform under step (b).
- (f) Both the seller and the seller's practitioner have signed and given to PEXA a formal request for payment and notification that the seller's funds have not been paid into the seller's bank account as entered under step (b) (**claim form**). The claim form must be in the form prescribed by PEXA and must be received by PEXA within 3 Business Days or such longer period as PEXA in its absolute discretion will allow after settlement occurring. The claim form is available through the PEXA website.

## 3. GUARANTEE

Where the PEXA Residential Seller Guarantee applies in relation to a settlement of a sale of a residential property by a seller, subject to the terms of the PEXA Residential Seller Guarantee (including the cap and exclusions referred to below), PEXA will pay to the seller the amount calculated under paragraph 6 below by deposit into the bank account entered into the PEXA platform under step 2(b) above and confirmed in the form provided under step 2(f) above.

## 4. TIMING OF PAYMENT BY PEXA AND HOW TO MAKE A CLAIM

PEXA will make the payment within 10 Business Days after step 2(f) above has occurred.

## 5. CAP ON THE AMOUNT THAT CAN BE CLAIMED

The maximum liability of PEXA under the PEXA Residential Seller Guarantee in respect of a single settlement is \$2 million (**cap**). Accordingly, if the amount determined under paragraph 6 would but for this paragraph exceed the cap, the amount payable will be the cap.

## 6. WHAT PEXA WILL PAY

Subject to the cap, the amount that PEXA will pay pursuant to the PEXA Residential Seller Guarantee is:

- (a) the amount paid to the fraudster's bank account which has not been recovered, returned or frozen by the receiving bank at the time the payment is made by PEXA;
- (b) interest on that amount, from the date of settlement until the date of payment by PEXA pursuant to paragraph 4, payable at the published RBA cash rate; and
- (c) where the fraud has resulted in the seller failing to settle on a purchase of another residential property on the due date of that subsequent settlement, any rescission notice fees, penalty interest, reasonable accommodation expenses, reasonable legal costs and additional storage and removalist costs incurred by the seller.

## 7. WHAT PEXA IS AUTHORISED TO DO

By signing and giving to PEXA a claim form under the PEXA Residential Seller Guarantee, the seller authorises PEXA (and PEXA's agents) to:

- (a) deal with investigating authorities and the bank/s that received the payment/s in PEXA's own right;
- (b) deal with investigating authorities and the bank/s that received the payment/s on the seller's behalf;
- (c) conduct all enquiries and investigations in relation to the matter, including seeking all information from the seller's practitioner to satisfy itself that the circumstances in paragraph 2 exist;
- (d) deal with the seller's practitioner in PEXA's own right;
- (e) deal with the seller's practitioner on the seller's behalf;
- (f) make claims, commence proceedings and undertake any other activities to recover the seller's funds, including any claim/s against the fraudster or the seller's practitioner who approved the settlement of the transaction at step 2(d) on the seller's behalf, and any other person which PEXA believes to be liable or complicit in respect of the fraud, and to settle any claims or proceedings as described below; and
- (g) provide any and all information (including the seller's personal information) relating to the incident to investigating authorities (including the police and the relevant banks).

## 8. SELLER RELEASE

- (a) Where PEXA pays a claim pursuant to the PEXA Residential Seller Guarantee, the seller relinquishes any right or claim to any funds recovered by PEXA whether by action or otherwise and acknowledges PEXA's right to receive and retain all recovered funds up to the amount paid (plus interest and costs as described below). Accordingly, if PEXA recovers an amount, PEXA will be entitled to receive and retain that amount (plus interests and costs) before paying any excess to the seller in accordance with paragraph 8(b) below.
- (b) Any amounts recovered in excess of the sum of the amount paid by PEXA under the PEXA Residential Seller Guarantee plus any interest recovered on that amount plus an amount equal to any costs (including without limitation administrative, recovery agent, funding and legal costs) which PEXA has incurred in taking any recovery action, will be paid to the seller .

## 9. PEXA SUBROGATED TO THE SELLER'S RIGHTS

- (a) Further, by signing and giving to PEXA a claim form under the PEXA Residential Seller Guarantee, the seller acknowledges and confirms PEXA's right to be subrogated to the rights of the seller in respect of the fraud (including the seller's right to recover the amount paid to the fraudster's bank account). Accordingly, PEXA may:
- (i) if it chooses, take steps to recover from any or all of the fraudster, the seller's practitioner who approved the settlement of the transaction at step 2(d) on the seller's behalf, and any other person which PEXA believes to be liable or complicit in respect of the fraud;
  - (ii) take such recovery action, without the seller's consent, using the seller's name, and whether or not the seller has been, or has a right to be, fully compensated for any or all of the loss or damage by PEXA or anybody else; and
  - (iii) if it chooses, compromise or settle the seller's claim on such terms as PEXA sees fit.
- (b) In relation to any amount recovered in a recovery action by PEXA as described above, the seller agrees that PEXA will be entitled to receive and keep the amount PEXA has paid, or is obliged to pay, under the PEXA Residential Seller Guarantee plus any interest recovered on that amount and an amount equal to any costs (including without limitation administrative, recovery agent, funding and legal costs) which PEXA has incurred in taking the recovery action.
- (c) The seller will be obliged to give PEXA all the information and co-operation that PEXA requires to take any recovery action.
- (d) By signing and giving to PEXA a claim form under the PEXA Residential Seller Guarantee, the seller agrees:
- (i) not to do anything which prejudices PEXA in taking any recovery action; and
  - (ii) not to take recovery action except with PEXA's prior written consent and then only in accordance with any conditions which PEXA in its discretion imposes.
- (e) The seller must have proper regard for PEXA's interests in respect of loss covered by the PEXA Residential Seller Guarantee.

## 10. CHANGES TO PAYMENT INSTRUCTIONS

The seller may change their instructions referred to in paragraph 2(a) above. Such a change will not affect the availability of the PEXA Residential Seller Guarantee provided that, after the seller has given the seller's practitioner the new instructions and before the steps referred to in paragraphs 2(c), (d) and (e) above have occurred, the seller's practitioner accurately entered the new details for the seller's bank account into the PEXA platform.

## 11. EXCLUSIONS FROM PEXA RESIDENTIAL SELLER GUARANTEE

The PEXA Residential Seller Guarantee does not apply in respect of any of the following:

- (a) funds to be paid to discharge the seller's mortgage on settlement;
- (b) a mortgagee or any other third party exercising a power of sale;
- (c) payments to be made to the ATO for GST, CGT or in respect of CGT withholding obligations;
- (d) payment directions in steps referred to in paragraphs 2(a) and (b) that nominate the seller's practitioner's trust account or controlled money account;
- (e) payments to the third parties relating to any property outgoings including but not limited to land tax, water authority charges, council rates, emergency services levies and body corporate fees;
- (f) any other loss suffered or incurred by the seller, that is not specified in paragraph 6(c);

- (g) payment of the seller's practitioner's conveyancing/legal fees and disbursements;
- (h) a sale of residential property by a commercial vendor;
- (i) where there has been any fraud by the seller or the seller is otherwise responsible for the payment into the fraudster's bank account; or
- (j) where there has been any dishonest or fraudulent conduct by the seller's practitioner.

## 12. GUARANTEE APPLIES TO SETTLEMENTS ON OR AFTER 29 JUNE 2018

The PEXA Residential Seller Guarantee applies in respect of the sale of residential properties settled through the PEXA platform on or after 29 June 2018.

## 13. REVISIONS TO AND WITHDRAWAL OF THE PEXA RESIDENTIAL SELLER GUARANTEE

PEXA reserves the right to review and revise the terms of the PEXA Residential Seller Guarantee from time to time. PEXA may change any term of the PEXA Residential Seller Guarantee by giving notice to all PEXA member practitioners and on its website with:

- a) immediate effect where the change does not reduce the availability of the PEXA Residential Seller Guarantee or introduce additional exclusions;
- b) 30 days' notice where the change reduces the availability of the PEXA Residential Seller Guarantee or introduces any additional exclusion; or
- c) 3 months' notice to bring an end to the PEXA Residential Seller Guarantee.

## 14. GUARANTEE DOES NOT DIMINISH THE SELLER'S PRACTITIONER'S RESPONSIBILITIES

The PEXA Residential Seller Guarantee is intended to protect sellers of residential property. It is not intended to diminish the responsibility of a seller's practitioner to:

- (a) confirm settlement details (including the seller's bank account details) in a secure manner with their client;
- (b) carefully check that all of the settlement details recorded in the PEXA platform are accurate at the time they approve those details by signing the financial settlement schedule by applying their personal digital certificate and PIN before settlement. Each time those settlement details are changed, for whatever reason, the practitioner will need to approve the amended details by applying their personal digital certificate and PIN, and it is the responsibility of the practitioner to carefully check those details each time they approve them; and
- (c) comply with the Participation Agreement entered between the seller's practitioner and PEXA, including the obligations in the Security Policy.

## 15. DEFINITIONS AND INTERPRETATION

- (a) In this document:

**Business Day** means a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Melbourne.

**Client Authorisation Form** means the form in the latest published version of the Model Participation Rules (available at [www.arnecc.gov.au](http://www.arnecc.gov.au)).

**commercial vendor** means a vendor who:

- (i) is registered or is required to be registered for GST and claims the sale is GST exempt where the sale is part of a going concern; or
- (ii) is liable for GST on the sale.

**financial settlement schedule** means the electronic settlement schedule created in the PEXA platform.

**residential property** means real property that is used, or is intended to be used, for residential purposes but does not include real property that is used primarily for the purposes of industry, commerce or primary production.

**seller's practitioner** means a law practice or conveyancing practice that has entered into a Client Authorisation Form with the seller and represents the seller in the PEXA platform and includes any principal, employee, agent, contractor of the practice, or any individual authorised by the practice to access and use the PEXA platform on behalf of the practice.

**settlement** means the exchange of funds between financial institutions in accordance with the instructions of the parties entered into the PEXA Workspace.

**vendor's funds** means the amount of funds entered into the financial settlement schedule in the category "vendor's funds" and represents the funds that are due to the seller after deducting other payments including property outgoings and the mortgagee on title's payout figure(s).

**RBA cash rate** means the Reserve Bank of Australia's operational target for the implementation of monetary policy, as published on the website of the Reserve Bank of Australia at 9am (Melbourne time) on the date of settlement [see: <https://www.rba.gov.au/statistics/cash-rate/>]

- (b) headings are for convenience only, and do not affect interpretation;
- (c) the following rules also apply in interpreting the PEXA Residential Seller Guarantee, except where the context makes it clear that a rule is not intended to apply:
  - (i) a reference to:
    - (A) a legislative provision or legislation (including subordinate legislation) is to that provision or legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
    - (B) a document (including this document) or agreement, or a provision of a document (including this document) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
    - (C) a party to this document or to any other document or agreement includes a successor in title, permitted substitute or a permitted assign of that party;
    - (D) a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
    - (E) anything (including a right, obligation or concept) includes each part of it;
  - (ii) a singular word includes the plural, and vice versa;
  - (iii) a word which suggests one gender includes the other genders;
  - (iv) if a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning; and
  - (v) if an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.

## 16. GOVERNING LAW

The PEXA Residential Seller Guarantee and any dispute arising out of or in connection with it is governed by the laws of the State of Victoria.