

PARTICIPATION AGREEMENT

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- A Subscriber Settlement Terms And Conditions For Electronic Settlements And Payments
- B Definitions
- C [Not used]

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- 1.....Lodgment gap cover

1. INTRODUCTION

- 1.1 This agreement ("**Participation Agreement**") is made between Property Exchange Australia Limited (ACN 140 677 792) ("**PEXA**") and the Representative Subscriber named in the signing schedule ("**Subscriber**").
- 1.2 This Participation Agreement, once executed by both parties, forms a binding contractual arrangement which authorises the Subscriber to use an electronic lodgment network ("**ELN**") provided and operated by PEXA in its capacity as an electronic lodgment network operator ("**ELNO**").
- 1.3 Unless otherwise indicated, the capitalised terms defined in Attachment B of this Participation Agreement have the same meaning throughout this Participation Agreement.

2. TERM

This Participation Agreement begins on the Commencement Date, and continues until terminated in accordance with clause 16 of this Participation Agreement ("**Term**").

PART A - GENERAL

3. DEFINITIONS AND INTERPRETATION

3.1 Definitions

Terms used in this Participation Agreement that are defined in the ECNL, the Participation Rules or the Operating Requirements shall have the meaning given to them in the ECNL, the Participation Rules or the Operating Requirements (as the case may be), unless those terms are defined differently in Attachment B, in which case the definitions as set out in Attachment B shall take precedence.

3.2 Rules for interpreting this Participation Agreement

Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Participation Agreement, except where the context makes it clear that a rule is not intended to apply:

- (a) A reference to:
- (i) 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;
 - (ii) a document (including this Participation Agreement) or agreement, or a provision of a document (including this Participation Agreement) or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (iii) a party to this Participation Agreement or to any other document or agreement includes its servants, agents and contractors, and a successor in title, permitted substitute or a permitted assign of that party;
 - (iv) 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;
 - (v) anything (including a right, obligation or concept) includes each part of it; and

- (vi) notice is to notice in writing (including any visible means of reproduction of words in a tangible or permanently viable form).
- (b) A singular word includes the plural, and vice versa.
- (c) A word which suggests one gender includes the other genders.
- (d) If a word is defined, any other grammatical form of that word or phrase has a corresponding meaning.
- (e) 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.
- (f) A reference to "information" is to information of any kind in any form or medium, whether formal or informal, written or unwritten, for example, computer software or programs, concepts, data, drawings, ideas, knowledge, procedures, source codes or object codes, technology or trade secrets.
- (g) The word "agreement" includes an undertaking or other binding arrangement or understanding, whether or not in writing.
- (h) A reference to "dollars" or "\$" is to an amount in Australian currency.
- (i) A reference to a "clause", "sub-clause", "paragraph" or "sub-paragraph" is a reference to a clause, sub-clause, paragraph or sub-paragraph of this Participation Agreement (as the case may be).

3.3 **Non Business Days**

If the day on or by which a person will do something under this Participation Agreement is not a Business Day the person must do it on or by the next Business Day.

3.4 **The rule about "contra proferentem"**

This Participation Agreement is not to be interpreted against the interests of a party merely because that party proposed the Participation Agreement or some provision of it or because that party relies upon a provision of the Participation Agreement to protect itself.

PART B – OPERATIVE PROVISIONS

4. **SUBSCRIBER'S OBLIGATIONS**

4.1 **Obligations**

The Subscriber agrees:

- (a) to only use the Services in accordance with this Participation Agreement for the purpose of carrying out Conveyancing Transactions;
- (b) prior to making any use of the Services, to complete such formalities as are required to become a registered Subscriber, including meeting the eligibility criteria set out in the Participation Rules;
- (c) to continue to meet the eligibility criteria in the Participation Rules;
- (d) to comply and continue to comply with the Participation Rules;

- (e) where a Sponsor is used by the Subscriber to access the ELN, to authorise the relevant Sponsor to access the ELN on the Subscriber's behalf;
- (f) to do all things reasonably requested by PEXA to the extent necessary to allow PEXA to comply with the Operating Requirements (including, for the avoidance of doubt, providing reasonable assistance to allow PEXA to comply with the recommendations of an Independent Expert in connection with risk management and business continuity as set out in clauses 26.5 and 26.6);
- (g) to comply, and continue to comply, with the Security Policy;
- (h) to provide adequate training to Users to enable effective use of the PEXA System;
- (i) that the parties to a Conveyancing Transaction will need to agree and nominate a Responsible Subscriber inside an Electronic Workspace;
- (j) to comply with, and continue to comply with, its obligations in Attachment C of this Participation Agreement (if applicable); and
- (k) where the Subscriber has provided PEXA with evidence of a certificate or licence confirming its eligibility to act as a Subscriber in accordance with the Participation Rules, and the individual to whom that certificate or licence applies either leaves the Subscriber's organisation or becomes ineligible to hold the relevant certificate or licence, to provide PEXA with evidence of a replacement certificate or licence confirming that it remains eligible to act as a Subscriber under the Participation Rules.

4.2 **Subscriber's profile**

- (a) The Subscriber must appoint at least one Subscriber Manager, and may appoint more than one Subscriber Manager.
- (b) The Subscriber agrees that the Subscriber Manager will be responsible for monitoring the overall use of the ELN by the Subscriber, including (without limitation):
 - (i) allocating roles and authorities for Subscriber Administrators, other Users and/or Signers within the Subscriber's profile within the ELN;
 - (ii) entering into the ELN, updating and maintaining all relevant details pertaining to the Subscriber, including (without limitation) details of:
 - (A) appointment, suspension and removal of Users and Signers;
 - (B) the financial accounts and authorisations held by the Subscriber within the ELN;
 - (C) the contact details for the Subscriber;
 - (D) any relevant settings pertaining to notifications and alerts;
 - (E) management of Digital Certificates; and
 - (F) any other information or authorisations required to manage the Subscriber's use of, or activities within, the ELN;
 - (iii) establishing and maintaining an account from which Charges can be direct debited, where applicable;

- (iv) registering and maintaining an account(s) for source and disbursement purposes, where applicable;
 - (v) ongoing management of signatories on the relevant Source Account, including alignment of signatories after initial registration on the PEXA System and removal of signatories as appropriate for alignment with the Source Account of the relevant financial institution; and
 - (vi) assessing a given Conveyancing Transaction in the circumstances contemplated in sub-paragraph (c)(ii) below.
- (c) The Subscriber agrees that:
- (i) PEXA may restrict, suspend or terminate the use of the Services by a particular User within the Subscriber's profile if PEXA considers it reasonably necessary to do so in order to ensure compliance with the ECNL, the Operating Requirements and/or the Participation Rules; and
 - (ii) if a User is restricted, suspended or terminated by PEXA in accordance with paragraph (i) above, or by the Subscriber Manager under paragraph (ii)(A), the Subscriber will be responsible for assessing each Conveyancing Transaction initiated by such User (but not yet completed) to determine whether, in all the circumstances, the Conveyancing Transaction should proceed to completion.
- (d) The Subscriber acknowledges and agrees that all activities undertaken or carried out by the Subscriber Manager bind the Subscriber, and that the Subscriber will be liable for any acts, defaults or neglects of the Subscriber Manager in using the PEXA System or the Services as if they were the acts, defaults or neglects of the Subscriber.

4.3 **Digital Signature management and responsibility**

The Subscriber is solely responsible for the management and certification of its Digital Signature and, without limiting the foregoing, must ensure:

- (a) validation of the relevant Digital Certificate by the Certification Authority (where such Certification Authority is not PEXA); and
- (b) compliance with any legal requirements or restrictions within the Active Jurisdiction in relation to the application, use, authentication and management of Digital Signatures.

4.4 **When Digital Signatures are irrevocable**

Subject to the Subscriber's right of repudiation under the ECNL, a Digital Signature on an Electronic Workspace Document is final and irrevocable while the Electronic Workspace for the Conveyancing Transaction is Locked.

4.5 **Subscriber's security obligations**

The Subscriber must comply with the Security Policy.

5. **PEXA'S OBLIGATIONS**

5.1 **Provision of the Services**

PEXA must:

- (a) provide the Services for use by the Subscriber, in accordance with the Service Charter and this Participation Agreement;
- (b) not store any:
 - (i) Personal Information; or
 - (ii) Confidential Information of the Subscriber;outside Australia; and
- (c) comply with the Operating Requirements applicable to an ELNO.

5.2 **Notification**

PEXA will disclose to the Subscriber any Complaint or Claim that will or is likely to materially compromise PEXA's ability to perform its obligations under this Participation Agreement.

5.3 **PEXA's security obligations**

- (a) PEXA must effect and maintain adequate security measures (including Logical Security and Physical Security) in connection with the use of the Services by the Subscriber.
- (b) Without limiting paragraph (a) above, PEXA must:
 - (i) take all prudent and reasonable steps to prevent any damage, or unauthorised access or interference, to PEXA's electronic systems, an Electronic Workspace, the ELN, or the Subscriber's electronic systems:
 - (A) by any person employed or engaged by PEXA; or
 - (B) through any systems or access points controlled by PEXA and through which the Subscriber can connect to PEXA or to an Electronic Workspace or the ELN; and
 - (ii) take all prudent and reasonable steps, and have formal administrative, physical and technical safeguards in place, to:
 - (A) provide Logical Security protection (eg firewall protection and intrusion preventions system protection) against any unauthorised intrusions or uncontrolled access to the systems and access points of PEXA, of the Electronic Workspaces and of the ELN (regardless of whether such access occurs by means of the Internet or some other electronic form of communication); and
 - (B) seek to ensure that its electronic systems, Electronic Workspaces and the ELN are properly secured from any unauthorised access or interference (regardless of whether such access or interference occurs by means of the Internet or some other electronic form of communication).
- (c) In the event of a breach, or suspected breach, of sub-paragraph (b), PEXA must immediately notify the Subscriber (to the extent the Subscriber is affected) of that breach or suspected breach and, to the extent permissible, of the security measures taken to deal with the breach and any potential future breaches of a similar type, method or process.

6. **PEXA'S STATUS**

The Subscriber and PEXA are independent contractors without authority to bind the other by contract or otherwise, and nothing in this Participation Agreement is intended to or will be taken to constitute an employer/employee relationship, agency arrangement, partnership or joint venture between the Subscriber and PEXA or any of PEXA's personnel.

7. **FINANCIAL SETTLEMENT TERMS AND CONDITIONS**

The parties will comply with their respective obligations set out in the Settlement Terms and Conditions, as set out in Attachment A.

8. **PAYMENT**

8.1 **Charges payable by Subscriber**

- (a) In consideration for PEXA's supply of the Services, the Subscriber must pay the applicable Charges for each Conveyancing Transaction.
- (b) The Charges payable by the Subscriber for a given Conveyancing Transaction will be:
 - (i) if the Conveyancing Transaction involves a Financial Settlement: as set out in the relevant Settlement Schedule, with such Charges to be automatically paid as disbursements out of the settlement funds, except for manual information re-supply which is treated as a direct debit and invoiced on the evening of that same Business Day; or
 - (c) if the Conveyancing Transaction does not involve a Financial Settlement: as debited by PEXA from the Subscriber's nominated account following successful lodgment of the Lodgment Case and invoiced on the evening of that same Business Day.

8.2 **Invoicing of PEXA Fee**

PEXA will supply the Subscriber with an invoice (being in no greater sum than that paid in accordance with clause 8.1) for the relevant PEXA Fee for a given Conveyancing Transaction on the evening of the Business Day of the successful completion of the relevant Lodgment and / or Financial Settlement.

8.3 **Invoicing of Land Registry Lodgment Fees**

PEXA will supply the Subscriber with an invoice for the relevant Land Registry Lodgment Fees on the evening of the Business Day of the successful completion of the relevant Conveyancing Transaction as follows:

- (a) for a Conveyancing Transaction involving multiple parties – to the Responsible Subscriber in respect of the Conveyancing Transaction; and
- (b) for a Conveyancing Transaction involving a single Subscriber – to that Subscriber.

8.4 **Other provisions**

- (a) Any Disputes (as defined in clause 24.1 of this Participation Agreement) in relation to the amount of invoices, payment issues or otherwise in relation to Charges will be subject to the process set out in clause 24 of this Participation Agreement.
- (b) If the Subscriber becomes aware that PEXA has overcharged for the Services:

- (i) the Subscriber must promptly notify PEXA of the amount of the overcharge ("**Overcharge Amount**") and the circumstances in which the Subscriber was overcharged;
 - (ii) PEXA must provide the Subscriber with an "adjustment note" pursuant to section 29.75 of the GST Law;
 - (iii) PEXA must promptly refund the Overcharged Amount following appropriate investigation and confirmation of overcharging; and
 - (iv) PEXA must provide a statement showing the Overcharge Amount as refunded.
- (c) If any Taxes are required by Law or regulation to be withheld from any payment for any goods or services provided by PEXA under this Participation Agreement, the Subscriber will deduct those Taxes from the amount payable and remit them to the relevant taxing authority. The Subscriber will provide to PEXA details of any Taxes so remitted in accordance with the taxation law.

9. **GST**

9.1 **Definitions and interpretation**

Terms defined in the GST Law have the same meaning in this clause unless the context otherwise requires.

9.2 **GST pass on**

If GST is or will be payable on a supply made under or in connection with this Participation Agreement, to the extent that the consideration otherwise provided for that supply under this Participation Agreement is not stated to include an amount in respect of GST on the supply:

- (a) the consideration otherwise provided for that supply under this Participation Agreement is increased by the amount of that GST; and
- (b) the recipient must make payment of the increase as and when the consideration otherwise provided for, or relevant part of it, must be paid or provided or, if the consideration has already been paid or provided, within 5 Business Days of receiving a written demand from the supplier.

10. **CONFIDENTIALITY**

10.1 **Meaning of Confidential Information**

- (a) Subject to paragraphs (b) and (c), Confidential Information is:
 - (i) information exchanged in any form via the ELN that:
 - (A) is made available by or on behalf of a party to the other party; or
 - (B) relates to the business, assets or affairs of a party and is obtained by or on behalf of the other party, whether made available or obtained directly or indirectly, or before on or after the date of this Participation Agreement; and
 - (ii) is by its nature confidential or the receiving party knows, or ought to know, is confidential.
- (b) For the avoidance of doubt, and subject to paragraph (c), Confidential Information:

- (i) includes information which is designated by either party as confidential at or before the time the information is made available; and
 - (ii) may include (without limitation) information relating to the personnel, policies, business strategies, customers, products or services, contractual or commercial dealings of either party.
- (c) Confidential Information does not include information that:
- (i) is in or enters the public domain through no fault of the receiving party or any of its officers, employees or agents;
 - (ii) is or was made available to the receiving party by a person (other than the disclosing party) who is not or was not then under an obligation of confidence to the disclosing party in relation to that information;
 - (iii) is or was developed by the receiving party independently of the disclosing party and any of its officers, employees or agents; or
 - (iv) was known by the receiving party prior to its disclosure to that party.

10.2 Use and disclosure of Confidential Information

A party ("**Recipient**") which acquires Confidential Information of another party ("**Discloser**") will not:

- (a) use any of the Confidential Information except to the extent necessary to exercise its rights and perform its obligations under this Participation Agreement (which, for the avoidance of doubt, may include such disclosure to third parties subject to equivalent confidentiality obligations as is necessarily incidental to a Conveyancing Transaction); or
- (b) disclose any of the Confidential Information except in accordance with clauses 10.3 or 10.4 of this Participation Agreement.

10.3 Disclosures to personnel and advisers

The Recipient may disclose Confidential Information to an officer, employee, agent, contractor, or legal, financial or other professional adviser if:

- (a) the disclosure is necessary to enable the Recipient to perform its obligations or to exercise its rights under this Participation Agreement; and
- (b) prior to disclosure, the Recipient informs the person of the Recipient's obligations in relation to the Confidential Information under this Participation Agreement and obtains an undertaking from the person to comply with those obligations.

10.4 Disclosures required by law

- (a) Subject to paragraph (b), the Recipient may disclose Confidential Information that the Recipient is required to disclose:
 - (i) to the extent required by Law or by order of any court or tribunal of competent jurisdiction; or
 - (ii) by any government agency, stock exchange, or other regulatory body or appropriate authority (as identified in the ECNL); or

- (iii) as required by the relevant Registrar or Duty Authority in order to complete a Conveyancing Transaction.
- (b) If the Recipient is required to make a disclosure under paragraph (a)(i) or (a)(ii), the Recipient will:
 - (i) if permitted by Law, notify the Discloser immediately after it anticipates that it may be required to disclose any of the Confidential Information;
 - (ii) consult with and follow any reasonable directions from the Discloser to minimise disclosure; and
 - (iii) if disclosure cannot be avoided:
 - (A) only disclose Confidential Information to the extent necessary to comply; and
 - (B) use reasonable efforts to ensure that any Confidential Information disclosed is kept confidential.
- (c) Notwithstanding any other provision in this clause 10, the requirements of paragraph (b) above do not apply in connection with Confidential Information about either party's Clients.

10.5 **Confidentiality of the Participation Agreement**

For the avoidance of doubt and without limiting the definition of Confidential Information in clause 10.1 of this Participation Agreement, information concerning the terms of this Participation Agreement as applied specifically to the Subscriber in Attachment C (if applicable) is Confidential Information and will not be disclosed by a party other than in accordance with clauses 10.3 or 10.4 of this Participation Agreement.

10.6 **Destruction**

On termination or expiry of this Participation Agreement, and subject to any term of the Participation Agreement to the contrary, a party will, if requested in writing by the other party with sufficient clarity and specificity:

- (a) return to the other party all documents, reports, notes, memoranda, computer media and other materials which record, contain or relate in any way to the Confidential Information of the other party; and
- (b) delete entirely and permanently all of the Confidential Information of the other Party from every computer disk or electronic storage facility of any type owned or used by the first mentioned party, other than:
 - (i) copies of any notes and other records;
 - (ii) files maintained by the Subscriber in relation to its Clients; and
 - (iii) copies made as a result of the Subscriber's computer system's routine, automated back-up processes,

other than copies and other materials that the Recipient is required by Law to retain (including, for clarity, the Operating Requirements)

10.7 **PEXA's use of de-identified data**

For the avoidance of doubt, nothing in this Participation Agreement prohibits PEXA from using de-identified data generated through PEXA's provision of the Services and the Subscriber's use of an Electronic Workspace or the ELN, as PEXA (in its sole discretion) considers appropriate for commercial or any other purposes whatsoever. For the avoidance of doubt, such de-identified data must not identify the Subscriber, its Client or the land the subject of the Conveyancing Transaction.

10.8 **No effect on common law or equitable rights**

For the avoidance of doubt, nothing in this clause 10 affects any common law or equitable right or obligation of confidence applicable to either party.

11. **PRIVACY**

11.1 **PEXA's privacy obligations**

PEXA undertakes to comply with the *Privacy Act 1988* (Cth) and any other applicable Privacy Laws in relation to the handling of Personal Information which comes into its possession or control when providing the Services.

11.2 **Consent to use customer information**

Before providing any Personal Information (including, for the avoidance of doubt, any Personal Information pertaining to the Subscriber or its Users, employees or agents) to PEXA or within an Electronic Workspace, the Subscriber agrees:

- (a) that it must have first procured the consent of the relevant individual to whom the Personal Information relates:
 - (i) to the disclosure of that Personal Information to PEXA and for use in connection with an Electronic Workspace;
 - (ii) to the disclosure of that Personal Information to other participants in the ELN (including through mobile applications provided by PEXA), an Electronic Workspace or in a Conveyancing Transaction the subject of an Electronic Workspace;
 - (iii) to the use and disclosure of that Personal Information by PEXA and the other participants in an Electronic Workspace or in a Conveyancing Transaction the subject of an Electronic Workspace;
 - (iv) to the collection, use, handling and disclosure of their Personal Information, at least to the extent necessary to enable PEXA to provide the Services in accordance with the requirements of this Participation Agreement; and
 - (v) to the disclosure of their Personal Information to a Registrar or Duty Authority; and
- (b) to refer individuals to the PEXA privacy policy, available at <http://www.pexa.com.au/privacy> or such other web address as determined by PEXA from time to time.

11.3 **Overseas disclosure of Personal Information**

- (a) The parties acknowledge that there is a possibility that Personal Information may be disclosed to a recipient outside Australia in the course of PEXA providing, and the Subscriber receiving the benefit of, the Services.

- (b) Subject to paragraph (c), where there is a disclosure by a party of Personal Information to a recipient outside Australia, that party must ensure that the overseas recipient complies with the Australian Privacy Principles (as amended or replaced) and any other Privacy Laws which would apply to the party making the disclosure.
- (c) Notwithstanding paragraph (b) above, where a Subscriber (or another entity acting for or on behalf of a Subscriber) accesses the PEXA System from outside Australia:
 - (i) the Subscriber must comply with the Australian Privacy Principles (as amended or replaced) as if it were bound by them; and
 - (ii) the Subscriber must ensure that it (or the relevant entity acting for or on behalf of the Subscriber) complies with the Australian Privacy Principles (as amended or replaced) and any other Privacy Laws which would apply to PEXA.
- (d) The Subscriber agrees to:
 - (i) expressly inform individuals that their Personal Information (including, for the avoidance of doubt, any Personal Information pertaining to the Subscriber or its employees or agents) may be disclosed by PEXA to a recipient outside Australia and, if practicable, specify the countries in which such recipients are likely to be located; and
 - (ii) procure consent from individuals to such overseas disclosure of their Personal Information (including, for the avoidance of doubt, any Personal Information pertaining to the Subscriber or its employees or agents), having first expressly informed each individual that if he or she consents to such overseas disclosure, neither PEXA nor the Subscriber will be liable for a breach of Privacy Laws by the overseas recipient of the Personal Information.

12. OWNERSHIP OF INTELLECTUAL PROPERTY

12.1 Intellectual Property in the Services

- (a) Subject to clause 12.3(a) of this Participation Agreement, the Subscriber shall not have any ownership rights in any Intellectual Property brought into existence by PEXA in providing the Services, including Services commenced or enhanced after the date of this Participation Agreement.
- (b) Subject to clause 12.3(a), to the extent that the Subscriber at any time acquires any right, title or interest in any Intellectual Property in the Services, the Subscriber, by the Participation Agreement, assigns to PEXA all such rights, title and interest in that Intellectual Property.

12.2 Formalities

The Subscriber will execute all documents and do all acts and things required by PEXA for the purpose of giving effect to clause 12.1 of this Participation Agreement.

12.3 Ownership of Pre-Existing IPR

- (a) Each party acknowledges and agrees that, unless otherwise expressly stated in this Participation Agreement, no Pre-Existing IPR of either party is assigned or otherwise transferred by reason of this Participation Agreement.
- (b) If and to the extent this Participation Agreement provides that any Intellectual Property in the Services vests in the Subscriber, PEXA acknowledges that the Subscriber may require a licence to use PEXA's Pre-Existing IPR to the extent necessary to enable the Subscriber to use the Services for the purpose for which

they are supplied under the Participation Agreement, and accordingly PEXA grants such a licence on the basis that the licence is non-exclusive and non-transferable.

13. **INTELLECTUAL PROPERTY INFRINGEMENTS**

13.1 **Indemnity for infringement**

- (a) PEXA will indemnify the Subscriber against liability or loss under or in connection with any claim made by a third party against the Subscriber regarding its use of the Services or any Intellectual Property in accordance with the Participation Agreement.
- (b) PEXA's obligation to indemnify the Subscriber in sub-clause 13.1 will be reduced to the extent that:
 - (i) the Subscriber fails to comply with its obligations in sub-clause 13.2 below; and / or
 - (ii) the circumstances in sub-clause 13.3 apply.

13.2 **Subscriber obligations**

The Subscriber must:

- (a) notify PEXA in writing as soon as reasonably practicable after it becomes aware of any claim under clause 13.1 of this Participation Agreement;
- (b) on leave being granted by a court, give PEXA the option to conduct the defence of such a claim, including negotiations for settlement or compromise prior to the institution of legal proceedings, provided that the Subscriber may direct PEXA in the conduct of the defence or settlement of any claim to the extent reasonably necessary:
 - (i) to the extent reasonable, to protect the reputation of the Subscriber; and/or
 - (ii) to ensure the Subscriber continuity of the use of the Services in accordance with the Participation Agreement; and/or
 - (iii) to determine the amount of any settlement sum to be granted;
- (c) provide PEXA with reasonable assistance in conducting the defence of such a claim, subject to the Subscriber being reimbursed by PEXA for the costs of providing such assistance;
- (d) permit PEXA to modify, alter or substitute the infringing part of the Services, at its own expense, to render the Services non-infringing; and
- (e) authorise PEXA to negotiate and procure on behalf of the Subscriber a licence or other authority to enable the Subscriber to continue the use of the Services.

13.3 **Exclusions from indemnity**

PEXA will not indemnify the Subscriber to the extent that such infringement, suspected infringement or alleged infringement arises from the Subscriber's use of the Services in a manner or for a purpose not reasonably contemplated by the parties.

14. REPRESENTATIONS AND WARRANTIES

14.1 No responsibility for third party statements

The Subscriber acknowledges that PEXA accepts no responsibility for statements made by third parties in connection with PEXA or the Services. The Subscriber further acknowledges that Sponsors are independent third parties and not agents of PEXA.

14.2 Satisfaction of applicable regulatory requirements

The Subscriber warrants to PEXA that to the best of its knowledge it will satisfy and continue to satisfy all applicable requirements (including regulatory requirements) to utilise the Services and participate in the ELN (including those required to complete Conveyancing Transactions in the Active Jurisdiction/s nominated by the Subscriber).

14.3 SOE Requirements

The Subscriber acknowledges that PEXA can only provide the Services contemplated under this Participation Agreement where the Subscriber has met and continues to meet the SOE Requirements.

14.4 Subscriber's acknowledgements about Conveyancing Transaction information

The Subscriber acknowledges that:

- (a) before Lodgment, PEXA need not examine or check for accuracy or otherwise any information that the Subscriber enters into an Electronic Workspace or provides to PEXA;
- (b) PEXA need not examine or check for accuracy or otherwise any information that any third party provides to PEXA in connection with a Conveyancing Transaction; and
- (c) any data supplied from the Land Registry and information to support Lodgment entered into an Electronic Workspace by the ELN may not include all data in the Titles Register.

14.5 Exclusion of implied conditions and warranties

To the full extent permitted by law, all conditions and warranties which would otherwise be implied in the Participation Agreement (by statute, general law, customs or otherwise) are expressly excluded.

15. LIABILITY

15.1 Liability of PEXA to the Subscriber where PEXA fails to perform the Services

Subject to clauses 15.2, 15.3 and 15.4:

- (a) PEXA will be liable to the Subscriber for any loss or damage that the Subscriber may suffer or sustain arising from a breach by PEXA of its obligations under this Participation Agreement; and
- (b) the amount of any such loss or damage that is recoverable by the Subscriber from PEXA will be calculated in accordance with the general law.

15.2 **No warranty as to accuracy of data**

Except as otherwise provided in the Service Charter, PEXA does not warrant the accuracy or completeness of any data provided to PEXA by any government agency, State or Federal (including, but not limited to, a Land Registry or Duty Authority).

15.3 **Reduction of PEXA's liability**

PEXA's liability to the Subscriber under this clause 15 will be reduced to the extent that:

- (a) the Subscriber's loss is caused or contributed to by:
 - (i) any action taken by PEXA in accordance with its obligations under the Operating Requirements, including Operating Requirement 7.10;
 - (ii) the Subscriber's breach of this Participation Agreement or by the negligence of the Subscriber; or
 - (iii) the act or omission of any government agency, State or Federal (including, but not limited to, a Land Registry or Duty Authority or the Reserve Bank of Australia); or
- (b) the Subscriber did not take reasonable steps to mitigate any potential loss.

15.4 **Subscriber to notify PEXA**

The Subscriber must:

- (a) promptly notify PEXA on becoming aware of an actual, suspected or proposed claim against the Subscriber that will or is reasonably likely to cause a claim to be made against PEXA by any person (including the Subscriber);
- (b) at PEXA's expense, and upon PEXA agreeing to unconditionally indemnify the Subscriber and the Subscriber's client in respect of any such claim, do all things necessary to assign to PEXA the absolute right to conduct the defence of the claim against the Subscriber or enter into settlement discussions with the claimant against the Subscriber; and
- (c) at PEXA's expense, provide PEXA with such assistance as it requires in conducting the defence of the claim or the settlement discussions, but only to the extent that such assistance does not cause a breach of the Subscriber's obligation to maintain privilege or client confidentiality.

16. **SUSPENSION, RESTRICTION AND TERMINATION**

16.1 **Suspension or restriction by PEXA**

- (a) Without limiting the generality of any other provision in this Participation Agreement (including PEXA's termination rights in clause 16.2 below):
 - (i) PEXA will suspend or restrict the Subscriber's use of the Services immediately by notice in writing if PEXA or the Subscriber receive a direction from the Registrar (or Land Registry) pursuant to the ECNL; and
 - (ii) PEXA may, at its discretion, opt to suspend or restrict the Subscriber's use of the Services immediately by notice in writing if:

- (A) the Subscriber is in material breach of the Participation Agreement, the Participation Rules or any Laws relevant to the use of the Services, and such breach:
 - (aa) cannot be remedied by the Subscriber; or
 - (bb) if it can be remedied:
 - (a) the Subscriber fails or refuses to do so within a period of not less than 20 Business Days of notification by PEXA, such notice specifying the nature of the breach and requiring the Subscriber to remedy the breach; and
 - (b) the Subscriber has failed, within a reasonable period of time in all the circumstances, to agree an appropriate remediation strategy with PEXA to rectify the breach;
 - (B) PEXA considers it reasonably necessary to do so to maintain the integrity and security of the ELN;
 - (C) the Subscriber owes unpaid PEXA Fees which are overdue by over 30 calendar days, and/or unpaid Land Registry Fees which are overdue by more than 6 calendar days (in the case of restriction); or
 - (D) the Subscriber owes unpaid PEXA Fees which are overdue by over 45 calendar days, and/or unpaid Land Registry Fees which are overdue by more than 20 calendar days (in the case of suspension).
- (b) Where the Subscriber's use of the Services is restricted pursuant to sub-paragraphs (a)(i) or (a)(ii) above:
- (i) the Subscriber must either:
 - (A) complete any Conveyancing Transactions that are Outstanding Conveyancing Transactions as at the time of the restriction; or
 - (B) Unsign any documents or Settlement Schedules in respect of Conveyancing Transactions that are Outstanding Conveyancing Transactions as at the time of the restriction,

and do anything else in connection with the ELN which they could reasonably be expected to do in order to comply with any terms of the restriction, and to minimise inconvenience to any other person; and
 - (ii) the Subscriber's ability to Digitally Sign Electronic Workspace Documents will be suspended on such conditions as PEXA may advise the Subscriber in writing from time to time.
- (c) Where the Subscriber's use of the Services are suspended pursuant to sub-paragraphs (a)(i) or (a)(ii) above:
- (i) all Conveyancing Transactions that are Outstanding Conveyancing Transactions at the time of the suspension will not proceed; and
 - (ii) the Subscriber's, a User's or a Signer's access to and use of the ELN will be suspended on such conditions as PEXA may advise the Subscriber from time to time.

- (d) PEXA will use its best endeavours to exercise its rights under this clause 16.1 before having recourse to its termination rights under clause 16.2. Notwithstanding the foregoing, and for the avoidance of doubt, nothing in this Participation Agreement requires or obliges PEXA to exercise its suspension or restriction rights under this clause 16.1 as a prerequisite to exercising its termination rights under clause 16.2.

16.2 Termination by PEXA

Without limiting the generality of any other provision in this Participation Agreement, PEXA may terminate the Participation Agreement immediately by notice in writing if:

- (a) the Subscriber is in material breach of the Participation Agreement, the Participation Rules or any applicable Laws, and such breach:
 - (i) cannot be remedied by the Subscriber; or
 - (ii) if it can be remedied:
 - (A) the Subscriber fails or refuses to do so within a period of not less than 20 Business Days of notification by PEXA, such notice specifying the nature of the breach and requiring the Subscriber to remedy the breach; and
 - (B) the Subscriber has failed, within a reasonable period of time in all the circumstances, to agree an appropriate remediation strategy with PEXA to rectify the breach;
- (b) the Subscriber owes unpaid PEXA Fees which are overdue by over 60 calendar days, and/or unpaid Land Registry Fees which are overdue by more than 30 calendar days;
- (c) the Subscriber becomes or resolves to become subject to any form of insolvency administration, and each such triggering event is deemed to be a breach of an essential term of the Participation Agreement;
- (d) PEXA considers it reasonably necessary to do so to maintain the integrity and security of the ELN;
- (e) PEXA is required to do so following a direction by the Registrar or Land Registry (including pursuant to the ECNL);
- (f) PEXA is required to do so otherwise by law; or
- (g) there is a material change to legislation or draft legislation, or to the Participation Rules or Operating Requirements that has a materially adverse commercial effect on PEXA during the term of this Participation Agreement. PEXA may only terminate pursuant to this paragraph (g):
 - (i) after endeavouring, in good faith, to negotiate an appropriate service variation, and for the avoidance of doubt, a decision by PEXA to terminate pursuant to this sub-paragraph may be contested by the Subscriber in accordance with the dispute resolution process set out in clause 24 of this Participation Agreement; and
 - (ii) in accordance with its Transition Plan.

16.3 Termination by the Subscriber

- (a) The Subscriber may terminate this Participation Agreement immediately by notice in writing if:

- (i) PEXA is in material breach of the Participation Agreement and such breach:
 - (A) cannot be remedied by PEXA; or
 - (B) if it can be remedied:
 - (aa) PEXA fails or refuses to do so within a period of not less than 20 Business Days of notification by the Subscriber, such notice specifying the nature of the breach and requiring PEXA to remedy the breach; and
 - (bb) PEXA has failed, within a reasonable period of time in all the circumstances, to agree an appropriate remediation strategy with the Subscriber to rectify the breach; or
 - (ii) PEXA becomes or resolves to become subject to any form of insolvency administration, and each such triggering event is deemed to be a breach of an essential term of the Participation Agreement.
- (b) The Subscriber may terminate this Participation Agreement for no cause and without penalty by giving 30 Business Days' written notice to PEXA.

16.4 **Effect of termination**

Each party's further rights and obligations under the Participation Agreement will cease immediately on the expiry or termination of the Participation Agreement, provided that the expiry or termination will not affect the accrued rights and obligations of the parties as at the date of expiry or termination.

16.5 **Consequences of termination and/or suspension**

- (a) If notice is given to the Subscriber pursuant to paragraph 16.2 of this Participation Agreement, PEXA may, in addition to terminating the Participation Agreement:
 - (i) retain any Charges paid for Services already provided or rendered; and
 - (ii) pursue any additional or alternative remedies provided by law.
- (b) The Subscriber agrees that:
 - (i) in the event of termination by PEXA of this Participation Agreement, or suspension by PEXA of the Subscriber's ability to use the Services, PEXA may not allow an Outstanding Conveyancing Transaction initiated by the Subscriber to proceed; and
 - (ii) PEXA shall not be responsible for or accept any liability for any cost, loss or damage resulting from a Conveyancing Transaction not being allowed to proceed in the circumstances described in sub-paragraph (i) above, except to the extent that such cost, loss or damage is solely due to PEXA's fraud or gross negligence.

16.6 **PEXA's obligations on termination**

If notice is given to PEXA pursuant to paragraph 16.3 of this Participation Agreement by the Subscriber, PEXA must (subject to PEXA's obligations in the Operating Requirements) promptly return (or, at the Subscriber's option, destroy and certify the destruction of) any of the Subscriber's property in the possession, custody or control of PEXA.

16.7 **Subscriber resignation**

If the Subscriber resigns as a Subscriber, the Subscriber must, prior to its resignation, either:

- (a) do everything reasonably necessary to complete any Outstanding Conveyancing Transactions; or
- (b) withdraw from any Outstanding Conveyancing Transactions,

and do anything else in connection with the ELN which they could reasonably be expected to do in order to minimise inconvenience to any other person.

PART C – GENERAL

17. **INSURANCE**

- (a) PEXA must hold and maintain for the Term the insurances PEXA is required to hold and maintain as an ELNO under the Operating Requirements or by law.
- (b) The Subscriber must, on or before the Commencement Date and thereafter upon reasonable request from PEXA, provide PEXA with documentary evidence (including, where applicable, certificates of currency and any other documentation as reasonably requested by PEXA) of the Subscriber's compliance with the Insurance Rules.

18. **FORCE MAJEURE**

18.1 **No liability for delays**

Neither party will be liable for any delay or failure to perform its obligations pursuant to this Participation Agreement to the extent of that such delay is due to a Force Majeure Event.

18.2 **Suspension of obligations**

If a delay or failure of a party to perform its obligations is caused or anticipated due to a Force Majeure Event, the performance of that party's obligations will be suspended provided that such delay or failure has been notified to the other party and the affected party takes all reasonable steps to minimise the disruption to and resume the performance of its affected obligations.

19. **SUB-CONTRACTING**

- (a) Nothing in this Participation Agreement precludes PEXA from subcontracting the performance of its obligations to a third party.
- (b) PEXA will remain primarily liable for the performance of all its obligations under this Participation Agreement and will in addition be liable for the acts, defaults and neglects of any subcontractor or any employee or agent of the subcontractor appointed by PEXA as if they were the acts, defaults or neglects of PEXA or the employees or agents of PEXA.

20. **PRECEDENCE AND SEVERANCE**

- (a) This Participation Agreement includes the Service Charter, the Pricing Policy, the Security Policy and all schedules and attachments.
- (b) Subject to clause 3.1, where any conflict occurs between the provisions contained in two or more of the documents forming this Participation Agreement, the document lower in the following order of precedence will where possible be read down to resolve

such conflict. If the conflict remains incapable of resolution by reading down, the conflicting provisions will be severed from the document lower in the following order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document:

- (i) Attachment C to this Participation Agreement (if applicable);
- (ii) the body of this Participation Agreement and Attachments A and B;
- (iii) the Service Charter;
- (iv) the Pricing Policy and the Security Policy; and
- (v) Schedule 1 of this Participation Agreement.

21. **ASSIGNMENT AND NOVATION**

21.1 **Assignment**

- (a) The Subscriber must not assign, novate, transfer or otherwise deal with its rights under the Participation Agreement or its subscription to the ELN.
- (b) Subject to PEXA obtaining prior approval from the Registrar, PEXA may assign, novate, transfer or otherwise deal with its rights under this Participation Agreement. The Subscriber must do all things required to give effect to any assignment, novation, transfer or other dealing by PEXA under this clause, including (if required by PEXA) the execution of a deed. For the avoidance of doubt, PEXA is not permitted to assign its rights and status as an ELNO.

22. **VARIATION**

22.1 **Variations with immediate effect to Participation Agreement**

- (a) PEXA may only add to, vary, modify or delete ("**Change**") any term or terms of this Participation Agreement with immediate effect where:
 - (i) the Change is necessary, in PEXA's reasonable opinion, to comply with the ECNL, the Operating Requirements (including any relevant requirements in connection with risk management and with PEXA's Business Continuity and Disaster Recovery Management Program), Participation Rules, a change in any relevant Australian Law or any relevant regulatory change, or to preserve the integrity of the network or the Service; or
 - (ii) the Change is outside PEXA's control.
- (b) Where a Change is as described in paragraphs (a)(i) or (a)(ii) above, PEXA will provide the Subscriber with notice of the Change within a reasonable period before the Change is implemented.

22.2 **Variations with immediate effect to operational documents**

- (a) PEXA may Change any term or terms of the Service Charter, the Security Policy or the Pricing Policy (including, for the avoidance of doubt, the Charges) with immediate effect where:
 - (i) the Change is necessary, in PEXA's reasonable opinion, to comply with the ECNL, the Operating Requirements, Participation Rules or any relevant regulatory change, or to preserve the integrity of the network or the Service;

- (ii) the Change is outside PEXA's control;
 - (iii) the Change is an amendment to the Pricing Policy, except for any amendments to the notice period for changes to the Charges contained within the Pricing Policy (for the avoidance of doubt, this does not apply to any changes in Land Registry Lodgment Fees, over which PEXA has no control);
 - (iv) the Change is an amendment to the Service Charter and results in enhancements to the Services including (but not limited to) new functionality, new service offerings, additional jurisdictions added as Active Jurisdictions, and increased operating hours, but where the Change has no material impact on the Subscriber's obligations under this Participation Agreement;
 - (v) the Change is an amendment to the Security Policy and results in a minor change to the software requirements for utilising the Services, but has no material impact on the Subscriber's obligations under this Participation Agreement; or
 - (vi) the Change is a change to Schedule 1 to this Participation Agreement.
- (b) PEXA must comply with the following notice requirements in relation to the Changes described in clause (a):
- (i) Where a Change is as described in paragraphs (a)(i) or (a)(ii) above, PEXA must undertake best endeavours to provide the Subscriber with notice in writing of the Change before the Change is implemented or, if that is not feasible in PEXA's reasonable opinion, then within a reasonable period of time after the Change is implemented;
 - (ii) where a Change is as described in paragraph (a)(iii) above, PEXA must provide the Subscriber with notice in writing of the Change within a reasonable period of time after the Change is implemented;
 - (iii) where a Change is as described in paragraph (a)(iv) or (a)(vi) above, PEXA must provide the Subscriber with notice in writing of the Change (with notice by email to be deemed sufficient); and
 - (iv) where a Change is as described in paragraph (a)(v) above, PEXA is not required to provide the Subscriber with notice of the Change.

22.3 **Material Changes only to be made following consultation**

- (a) Where a Change is:
- (i) a material reduction in the Services that is due to a reason within PEXA's control;
 - (ii) an amendment to the Security Policy and results in a major change to the software requirements for utilising the Services; or
 - (iii) an amendment to the Subscriber's Attachment C (as applicable),

PEXA must first, in good faith, consult peak industry bodies relevant to Subscribers (including, without limitation, the Australian Bankers' Association, the Law Council of Australia and the Australian Institute of Conveyancers) before implementing the Change.

- (b) For Changes described in paragraph (a) above, PEXA and the Subscriber must agree on a time frame for implementing the Change.

- (c) Where a Change to the Participation Agreement is required as a result of:
 - (i) a change within PEXA's business and operations which has a material impact on the rights and obligations of the parties to this Participation Agreement (including, without limitation, on the liability provisions);
 - (ii) a change in any relevant Australian Law (which does not require immediate compliance and which therefore does not fall within sub-paragraph 22.1(a)(i)); or
 - (iii) a change to the Settlement Terms and Conditions liability provisions;

PEXA must first, in good faith, consult peak industry bodies relevant to Subscribers (including, without limitation, the Australian Bankers' Association, the Law Council of Australia and the Australian Institute of Conveyancers) before implementing the Change.

22.4 **Effect of variation**

- (a) Notwithstanding clause 16.3, where the Subscriber does not, within a reasonable period, agree with or accept:
 - (i) a Change made by PEXA with immediate effect under sub-clauses 22.1 or 22.2, or following consultation under 22.3; or
 - (ii) a time frame for implementing a Change referred to above,either party may terminate this Participation Agreement by notice in writing given to the other party.
- (b) The Subscriber agrees that the provisions of paragraph (a) are reasonable in the circumstances, given PEXA's role as an ELNO with responsibility for managing the ELN and all Subscribers.
- (c) For the avoidance of doubt, in exercising its right to terminate this Participation Agreement under paragraph (a), the Subscriber may nevertheless complete any Conveyancing Transactions which are Outstanding Conveyancing Transactions at the time of termination, and termination does not take effect until all Outstanding Conveyancing Transactions are completed or withdrawn.

23. **TECHNOLOGY AND RELEASE MANAGEMENT**

23.1 **Changes to the ELN**

- (a) The Subscriber acknowledges that the core ELN application as available to all Subscribers (excluding any integration services) will only ever be offered as one version, that the scope and content of the ELN may change from time to time, and access to the ELN and the Services under this Participation Agreement will be to the system which PEXA generally makes available to other users of the ELN. For the avoidance of doubt:
 - (i) nothing in this Participation Agreement prohibits PEXA from making technological changes to the ELN; and
 - (ii) PEXA is not required to provide notice of such changes where such changes do not impact the use of the Services by the Subscriber and other Subscribers.

- (b) The Subscriber may be required to modify the systems or access points through which the Subscriber may access the PEXA System, an Electronic Workspace or the ELN to accommodate Major Releases, Minor Releases and Scheduled Maintenance.
- (c) The Subscriber acknowledges and agrees that PEXA shall not be responsible for or accept any liability for any of the Subscriber's costs associated with making the modifications required under sub-clause (b).

24. **DISPUTES**

24.1 **Application**

Any dispute or difference between the parties arising under or in connection with this Participation Agreement, including any dispute or difference as to the formation, validity, existence or termination of the Participation Agreement ("**Dispute**") will be resolved as set out in this clause 24 of this Participation Agreement.

24.2 **Notice of dispute or difference**

- (a) If a Dispute arises a party will commence the process contained in this clause for its resolution by giving notice ("**Dispute Notice**") to the other party. The party sending the Dispute Notice is the Referring Party.
- (b) The Dispute Notice will:
 - (i) be in writing;
 - (ii) state that it is given pursuant to this clause 24.2; and
 - (iii) include or be accompanied by reasonable particulars of the Dispute.

24.3 **Negotiation between parties' representatives**

- (a) Within 5 Business Days (or such other period as is reasonable in the circumstances) of a party issuing a Dispute Notice, both parties will ensure that their respective representatives meet with a view to resolving the Dispute.
- (b) If, and to the extent that, the Dispute is resolved, the parties will immediately detail their agreement in writing. This document will clearly state which parts of the Dispute are resolved, and the agreed basis for its resolution.
- (c) If a written agreement is not produced pursuant to paragraph (b) in relation to all or part of the Dispute within five Business Days after the Dispute Notice has been given (or such other period as is reasonable in the circumstances), the Dispute, or the part of the Dispute in respect of which there is no written agreement produced, is deemed to be unresolved.
- (d) If the Dispute is not resolved, within 5 Business Days (or such other period as is reasonable in the circumstances) of the meeting referred to in paragraph (a), the Subscriber (or a senior manager of the Subscriber as appropriate) and the General Manager (or equivalent) of PEXA will meet to resolve the dispute.
- (e) If the Dispute remains unresolved after a period of 5 Business Days following the meeting described in paragraph (d) above, either party may pursue court proceedings.

24.4 **Alternative dispute resolution and other mechanisms**

Nothing in this clause 24 prevents the parties from:

- (a) pursuing alternative dispute resolution by agreement in relation to a dispute; or
- (b) devising a suitable dispute resolution mechanism in relation to multiple claims brought by third parties arising from:
 - (i) a single incident; or
 - (ii) the same act or omission of one of the parties.

24.5 **Continuance of performance**

Despite the existence of a Dispute each party will continue to perform its obligations under this Participation Agreement in relation to the subject matter of the Dispute. If the Subscriber is receiving other paid services from PEXA (other than standard conveyancing services), the Subscriber must continue to make payment for such other services as required.

24.6 **Summary or urgent relief**

Nothing in this clause will prevent either party from instituting court proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of the Dispute.

25. **NOTICES**

25.1 **How to give a notice**

- (a) A notice, consent or other communication under the Participation Agreement is only effective if it is in writing, signed by or on behalf of the person giving it;
- (b) addressed to the person to whom it is to be given; and
- (c) either:
 - (i) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address; or
 - (ii) sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full;
 - (iii) sent in electronic form (such as email), except in the case of notices in relation to breach of the Participation Agreement, termination of the Participation Agreement, or third party claims of infringement of Intellectual Property (such notices must be delivered or sent in accordance with sub-paragraphs (i) and (ii) above); or
 - (iv) in the case of notices or communications:
 - (A) about enhancements to the PEXA System;
 - (B) about a third party (such as notices relating to Land Registry Lodgment Fees); or
 - (C) that the Subscriber has elected to receive in published form, published in electronic form, including but not limited to broadcast messaging in the PEXA System or on PEXA's website.

25.2 **When a notice is given**

A notice, consent or other communication that complies with this paragraph is regarded as given and received:

- (a) if it is sent by fax or delivered:
 - (i) by 5.00 pm (local time in the place of receipt) on a Business Day – on that day; or
 - (ii) after 5.00 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day – on the next Business Day;
- (b) if it is sent by mail:
 - (i) within Australia – 3 Business Days after posting; or
 - (ii) to or from a place outside Australia – 5 Business Days after posting; and
- (c) if it is published or sent in electronic form – when the publication or email message has become capable of being retrieved by the recipient, and in the case of an email message, the sender has become aware that the email message has been sent to the recipient's address.

25.3 **Authority to issue or receive notices**

The parties agree that the following individuals will be entitled to issue and receive notices on behalf of each respective party:

- (a) for PEXA, the Chief Operating Officer (or such other senior executive holding an equivalent position); and
- (b) for the Subscriber, its nominated representative and where the Subscriber does not make a nomination in writing to PEXA, the nominated representative will be the Subscriber's first nominated Subscriber Manager.

26. **GENERAL**

26.1 **Governing law**

- (a) This Participation Agreement is governed by the laws of the state of Victoria, Australia.
- (b) Each party submits to the non-exclusive jurisdiction of the courts of the state of Victoria, and any court that may hear appeals from any of those courts, for any proceedings between the parties arising under or in connection with this Participation Agreement.

26.2 **Audit**

- (a) PEXA or its suitably qualified independent third party nominee may audit the Subscriber's compliance with this Participation Agreement or the Participation Rules, and the Subscriber will provide PEXA with access to records and premises as reasonably necessary to complete such an audit, provided that:
 - (i) there is a limit of one audit during each 12 month period of the Term, starting from the Commencement Date;
 - (ii) PEXA will bear the full cost of the audit; and

- (iii) the Subscriber's obligation to provide such access will be subject to its confidentiality obligations owed to Clients.
- (b) For clarity, the restriction set out in sub-paragraph (a)(i) above does not apply to any audit that a regulator of PEXA, including without limitation the Registrar, requires it to perform.

26.3 **Record keeping**

The Subscriber acknowledges that to the extent PEXA is required under the Operating Requirements to retain Workspace Data, including Business Activity Logs, documents and Transaction Audit Records, which may include data or other information provided to PEXA by the Subscriber or its customers, it may do so.

26.4 **Co-operation with independent enquiries and certification**

- (a) The Subscriber will make available to PEXA and the relevant Independent Expert or Registrar (or any other person conducting a compliance examination on behalf of the Registrar), all information reasonably required as part of an Independent Certification or a Compliance Examination Procedure.
- (b) PEXA and the relevant Independent Expert or Registrar may retain information obtained under clause (a) of this Participation Agreement to the extent required by:
 - (i) the Registrar in accordance with the Compliance Examination Procedure; or
 - (ii) the Independent Expert to complete Independent Certification.

26.5 **Risk management**

The Subscriber acknowledges that PEXA is required under the Operating Requirements to establish, implement, operate, monitor, review, maintain and keep current a documented Risk Management Framework to enable the identification and mitigation of risks in its operation of the ELN.

26.6 **Business continuity**

The Subscriber acknowledges that PEXA is required under the Operating Requirements to establish, implement, operate, monitor, review, maintain, test and keep current a documented, detailed and comprehensive Business Continuity and Disaster Recovery Management Program.

26.7 **Non-Use of Electronic Workspace**

Where there has been no activity within an Electronic Workspace for 120 days, PEXA may notify the Subscriber by giving the Subscriber at least 14 days' notice that PEXA intends to remove the Electronic Workspace from the ELN.

26.8 **Liability for expenses**

Each party will pay its own expenses incurred in negotiating, executing, stamping and registering this Participation Agreement.

26.9 **Giving effect to this Participation Agreement**

Each party will do anything (including execute any document), and will ensure that any other relevant persons will, do anything (including execute any document), necessary to give full effect to the transactions contemplated by this Participation Agreement.

26.10 **Waiver of rights**

A right may only be waived in writing, signed by the party giving the waiver, and:

- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right or as an estoppel precluding enforcement of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

26.11 **Operation of this Participation Agreement**

- (a) The Participation Agreement (together with the Service Charter, the Pricing Policy, the Security Policy, Attachment C and the Settlement Terms and Conditions and their schedules and attachments) contain the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this document and has no further effect.
- (b) Any right that a party may have under this Participation Agreement is in addition to, and does not replace or limit, any other right which that party may have.
- (c) Any provision of this Participation Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Participation Agreement enforceable, unless this would materially change the intended effect of this Participation Agreement. A provision of this Participation Agreement will not be applicable to the extent that it requires a party to derogate from its obligations in the ECNL, the Operating Requirements or the Participation Rules (as the case may be).

26.12 **Operation of indemnities**

- (a) Each indemnity in this Participation Agreement survives the expiry or termination of this Participation Agreement.
- (b) A party may recover a payment under an indemnity in this Participation Agreement before it makes the payment in respect of which the indemnity is given.

26.13 **Survival of covenants**

Clauses 3 (Definitions and Interpretation), 4.1(d) (to the extent that it relates to compliance with Participation Rule 3(c)), 7 (Settlement Terms and Conditions), 9 (GST), 10 (Confidentiality), 11 (Privacy), 12 (Ownership of Intellectual Property), 13 (Intellectual Property Infringements), 14 (Representations and Warranties), 15 (Liability), 16 (Suspension, Restriction and Termination), 21 (Assignment and Novation), 24 (Disputes), 25 (Notices) and 26 (General) of this Participation Agreement, survive the expiry or termination of this Participation Agreement.

26.14 **Consents**

Where this Participation Agreement contemplates that PEXA may agree or consent to something (however it is described), PEXA may:

- (a) agree or consent, or not agree or consent; or

(b) agree or consent subject to conditions,

unless this Participation Agreement expressly contemplates otherwise.

26.15 Exclusion of contrary legislation

Any legislation (other than the ECNL) that adversely affects an obligation of PEXA, or the exercise by PEXA of a right or remedy, under or relating to the Participation Agreement is excluded to the full extent permitted by law.

26.16 Counterparts

The Participation Agreement may be executed in counterparts by the respective parties, each of which when so executed will be deemed to be an original and all of which taken together will constitute one and the same Participation Agreement, provided that the Participation Agreement will be of no force and effect until the counterparts are exchanged.

26.17 Remedies cumulative

Except as otherwise provided in this Participation Agreement, all rights and remedies available to a party under this Participation Agreement are cumulative and not exclusive of any other rights or remedies at Law.

ATTACHMENT A

SUBSCRIBER SETTLEMENT TERMS AND CONDITIONS FOR ELECTRONIC SETTLEMENTS AND PAYMENTS

1. RESPONSIBILITIES RELATING TO FINANCIAL SETTLEMENT

1.1 Responsibilities of PEXA

When providing the Services under this Participation Agreement, PEXA must comply with the requirements of the Service Charter and is authorised by the Subscriber to act in accordance with those requirements and the authorisations that are given to PEXA as contemplated or provided for under the terms of the Service Charter, including in relation to each Conveyancing Transaction the subject of an Electronic Workspace.

1.2 Responsibilities of the Subscriber in respect of Source Funds

(a) When completing a Settlement Schedule, as a Participating Subscriber, the Subscriber must:

(i) identify and list all Source Funds (if any) that are to be made available for the Scheduled Settlement:

(A) directly from the Panel Master, where the Subscriber acts as Panel Member and the Panel Master has authorised the Subscriber to nominate it as a Source FI in accordance with section 2.1.3 of the Service Charter; and/or

(B) in the Source Account of that Subscriber;

(C) from a settlement in a Preceding Electronic Workspace; and/or

(D) in the PEXA Source Account; and

(ii) provide all account details that are required to be completed by that Subscriber in the relevant Line Items; and

(iii) Verify the information in each Line Item that it has completed in the Settlement Schedule in relation to Source Funds to be provided by that Subscriber and do so in the manner required by PEXA.

NOTE: Destination Amounts can only be paid to an Australian bank account. The Payment Integrated Financial Institution is entitled to rely solely on account numbers and BSB details when processing transaction instructions received from PEXA regardless of whether any account name details are included in the Payment Instruction File or otherwise known to the Payment Integrated Financial Institution.

(b) Where the Subscriber has Verified in a Completed Settlement Schedule that identified Source Funds are cleared and available for a Scheduled Settlement, the Subscriber must continue to ensure that those Source Funds remain available for payment out of the Subscriber Trust Account of that Subscriber until:

(i) the relevant Source Funds are transferred out of the Subscriber Trust Account on the instructions of the Subscriber; or

(ii) the cancellation of the Scheduled Settlement, unless those Source Funds have been Verified by the Subscriber as being cleared and available for use or application in a new Scheduled Settlement,

whichever is the first to occur.

1.3 Responsibility of the Subscriber for the accuracy of all information it enters in a Settlement Schedule

- (a) PEXA will not be responsible for the accuracy of any information that has been entered into a Settlement Schedule by a Participating Subscriber, whether in a Line Item or otherwise.
- (b) Where the Subscriber completes any information in a Line Item, the Subscriber remains responsible to PEXA for the continuing accuracy of all of the information in that Line Item, which must remain accurate and correct at the time that the Electronic Workspace is Locked in readiness for a settlement of the relevant Conveyancing Transaction.
- (c) By confirming a Line Item that it has completed in the Settlement Schedule, the Subscriber represents to PEXA that:
 - (i) the Source Funds (if any) that have been listed or described by that Subscriber within the relevant Line Item are cleared funds that will be fully and readily available in the listed Source Account (or where applicable, from the nominated Panel Master as Source FI where the Subscriber is acting as Panel Member), for application in the settlement of the Conveyancing Transaction the subject of the Settlement Schedule;
 - (ii) each Destination Amount, if any, that has been listed or described by that Subscriber within a Line Item is the correct amount that is required or intended to be included by that Subscriber in the Final Settlement Schedule as a Destination Amount and is otherwise the correct amount to be paid from the available Source Funds; and
 - (iii) the account details, if any, that have been provided or described within a Line Item by that Subscriber in respect of a relevant account are complete and correct in every particular.
- (d) If, for any reason, the Subscriber has incorrectly entered or Verified information in a Line Item, it will be the responsibility of that Subscriber to follow up or seek to deal with any excess or incorrect payment that may result from the incorrect entry or confirmation. In that event, the Subscriber may request assistance from other Participating Subscribers and to the extent reasonable from PEXA under sub-clause 5.3 of these Settlement Terms and Conditions. Subscribers are responsible for the accuracy and continuing accuracy of information in Line Items and may be liable to other Subscribers or third parties for loss or damage suffered in connection with Misapplied or Unapplied Funds.
- (e) Where the Subscriber Digitally Signs a Completed Settlement Schedule and where:
 - (i) a Line Item of that Settlement Schedule sets out an amount of Source Funds that is to be sourced from a Subscriber Trust Account of that Subscriber; and
 - (ii) an Authorisation has been given by or on behalf of that Subscriber in respect of those Source Funds,

the Subscriber is and will be treated as instructing PEXA, on behalf of the Payment Integrated Financial Institution that provides and operates that Subscriber Trust Account, to arrange for those Source Funds to be deducted from the Subscriber Trust Account and applied towards the payment of the Destination Amounts listed in the Final Settlement Schedule.

- (f) Where:
- (i) a Subscriber Digitally Signs a Completed Settlement Schedule; and
 - (ii) a Line Item of that Settlement Schedule sets out an amount of Source Funds that are to be sourced from the PEXA Source Account on behalf of a Client,
- the Subscriber is and will be treated as instructing PEXA, in its capacity as trustee of the PEXA Settlement Money Trust, to arrange for those Source Funds to be deducted from the PEXA Source Account and applied towards the payment of the Destination Amounts listed in the Final Settlement Schedule. The Subscriber must only permit such an instruction to be given to PEXA where it is authorised to do so by its Client.
- (g) Where a change is made to an amount or to any account details in a Line Item that has been Digitally Signed by the Subscriber then, after making that change, the Subscriber must Digitally Sign the Line Item that is the subject of that change.

2. **DUTY VERIFICATION**

- (a) PEXA is not, and will not be, responsible for the accuracy of any information entered by any Subscriber in a separate Duty Line Item or for its accuracy.
- (b) The Subscriber acknowledges that, in respect of any Conveyancing Transaction, the contractual and liability arrangements between the applicable Subscriber and the Duty Authority, including the provision of any inputs from the applicable Subscriber, remain separate from and unaffected by these Settlement Terms and Conditions and by the matters set out in the Service Charter.

3. **SIGNING OF DOCUMENTS**

A Subscriber can only repudiate a Digital Signature to a document in the circumstances set out in the ECNL. If, however, any information in a mandatory field of a document in the Electronic Workspace is altered, amended or corrected after it has been Digitally Signed by a Subscriber and before the Electronic Workspace is Locked, the document will be treated within the PEXA System as Unsigned.

4. **AUTHORISATIONS AND REQUESTS TO PEXA**

4.1 **Confirmations and Authorisations**

The Subscriber agrees and acknowledges that PEXA is able to rely on each matter that is Verified or Authorised by the Subscriber within the Settlement Schedule. PEXA will initiate Financial Settlement in accordance with the details contained in that Final Settlement Schedule.

4.2 **Time of Settlement Completion**

The Subscriber acknowledges that the netted value will be taken to have been exchanged between the relevant ESA Holder(s) within RITS once the RBA has successfully processed the ESA Settlement Instruction. This will be the point at which a Financial Settlement is to be treated as having been contractually completed and relevant funds will be taken to have been received by the intended final payee(s) nominated in the Final Settlement Schedule.

5. **ASSISTANCE WITH PAYMENT ERRORS**

5.1 **Assistance with Misapplied Funds**

Without limiting the other responsibilities of the Subscriber, where the Subscriber is notified by another Participating Subscriber, or by PEXA, that an excess or incorrect payment has been made or received in connection with a Scheduled Settlement, the Representative Subscriber, where it receives such a notice, must take such action as is reasonable in the circumstances to assist with the rectification or limitation of any notified mistake that has occurred, but only:

- (a) to the extent that there is an appropriate and reasonable step to be taken by the Subscriber, as determined in its sole and absolute discretion; and
- (b) where that Subscriber has the right or power to take the particular step or action.

5.2 **Assistance with Unapplied Funds**

- (a) PEXA will notify the Subscriber if funds associated with a Line Item created by the Subscriber could not be credited by the relevant financial institution to the account details specified by the Subscriber.
- (b) The Subscriber will take reasonable steps (including procuring amended or corrected account details from a third party) to provide corrected or amended details of the account that was listed (or that was intended to be listed) in the relevant Line Item by that Subscriber in the form required by PEXA.
- (c) PEXA will pass those corrected or amended account details to the financial institution as soon as they are received from the Subscriber.

5.3 **Responsibilities of Subscribers**

- (a) Where the Subscriber has provided incorrect account details in a Line Item in the Final Settlement Schedule, the Subscriber will pay the reasonable costs incurred by a relevant financial institution or other Participating Subscriber in assisting to recover, or attempting to recover, an amount that was incorrectly paid in consequence of the error of the Subscriber in providing the incorrect details in the Line Item.
- (b) For the avoidance of doubt, where the Subscriber has provided incorrect account details in a Line Item in the Final Settlement Schedule, the Subscriber remains responsible for correcting the mistaken payment irrespective of activities undertaken in sub-clauses 5.1 or 5.2 above.

ATTACHMENT B

DEFINITIONS

"Active Jurisdiction" means the jurisdiction or jurisdictions available to complete Conveyancing Transactions on the ELN as set out in the Service Charter. For a specific Conveyancing Transaction, it is the jurisdiction corresponding to the location of the land the subject of the Conveyancing Transaction.

"Authorisation/Authorised" means an approval, by means of the Digital Signature of the Representative Subscriber, or of their appropriately appointed and authorised signatory, that is an approval and authorisation provided by the signatory within the PEXA System (and in conjunction with a Settlement Schedule) to authorise a required payment of Source Funds that is to be made from the Subscriber Trust Account of the Representative Subscriber.

"Business Activity Logs" means a comprehensive record or log of all activity or events occurring in or associated with an Electronic Workspace or the ELN including:

- (a) all messages and data received from Subscribers and other parties via the ELN;
- (b) all messages and data sent to Subscribers and other parties via the ELN; and
- (c) all alerts and notifications issued via the ELN.

"Business Continuity and Disaster Recovery Plan" has the meaning given in the Operating Requirements and, for the purposes of this Participation Agreement, refers to PEXA's "Business Continuity and Disaster Recovery" document suite, as amended by PEXA from time to time.

"Business Day" means:

- (a) in relation to Conveyancing Transactions not involving Financial Settlement, a day on which the Land Registry is open for business and accepting Lodgments in the Active Jurisdiction;
- (b) in relation to Conveyancing Transactions involving Financial Settlement, a day on which the Land Registry is open for business and accepting Lodgments in the Active Jurisdiction, and on which RITS is available to process transactions; and
- (c) for all other purposes under this Participation Agreement, a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Victoria, Australia.

"Charges" means the PEXA Fees as set out in the Pricing Schedule and the Land Registry Lodgment Fees. Any fees and charges for additional services will be agreed between the parties.

"Claim" means any claim, cause of action, proceeding, suit or demand made against the person concerned however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

"Client" means a Person who has, or Persons who have, appointed a Representative Subscriber pursuant to a Client Authorisation.

"Commencement Date" means the date of this Participation Agreement.

"Complaint" means a complaint that is not frivolous or vexatious, and that PEXA reasonably considers may be substantiated.

"Completed Settlement Schedule" means a Settlement Schedule prepared within an Electronic Workspace:

- (a) that contains all of the information required to be included in the Settlement Schedule for a Scheduled Settlement, and which has been Digitally Signed and Verified by each of the relevant Participating Subscribers; and
- (b) where PEXA has confirmed within the Settlement Schedule that any Source Funds expected to be paid into the PEXA Source Account for application in the proposed Conveyancing Transaction held in that account are cleared and available.

"Confidential Information" has the meaning given by clause 10.1 of this Participation Agreement.

"Destination Amount" means, as the case requires, an amount listed in a Settlement Schedule as an amount that is to be paid to an Australian bank account from the Source Funds listed in the relevant Settlement Schedule.

"Duty Line Item" is a line item in the Settlement Schedule completed by a Participating Subscriber that details an amount of stamp duty to be paid to the listed Duty Authority from a Destination Amount.

"Duty Verification" means verification that stamp duty information in the Electronic Workspace is consistent with stamp duty information held by the Duty Authority for the relevant Conveyancing Transaction.

"Electronic Conveyancing National Law" or **"ECNL"** means the Electronic Conveyancing National Law set out in the appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW) (**EC NSW**), as adopted or implemented in an Active Jurisdiction from time to time by a law of the Active Jurisdiction that:

- (a) applies the EC NSW, either with or without modifications, as a law of the Active Jurisdiction; or
- (b) is a corresponding law, either with or without modifications.

"ESA" or **"Exchange Settlement Account"** means, as applicable:

- (a) an exchange settlement account held with the RBA; and/or
- (b) an exchange settlement cash account kept in RITS by the RBA.

"ESA Holder" means the holder of an Exchange Settlement Account with the RBA that has agreed to use the ESA for themselves and/or as Financial Settlement Agent for the purposes of Financial Settlements in Conveyancing Transactions.

"ESA Settlement Instruction" means an instruction, in accordance with the Final Settlement Schedule(s) issued by PEXA, given to the RBA reporting the relevant dealings in respect of the Final Settlement Schedule to RITS or requesting that those dealings be settled across the ESA(s) of the relevant ESA Holders (inclusive of where the ESA Holder acts as a Financial Settlement Agent).

"Existing Material" means material (including documents, reports, products, equipment, information, data and software) which was in existence prior to the Commencement Date.

"Final Settlement Schedule" means the Settlement Schedule that is Digitally Signed by all Participating Subscribers in an Electronic Workspace at the time of Electronic Workspace Locking.

"Final Title Activity Check" means the Title Activity Check automatically scheduled to occur one hour prior to the originally Scheduled Settlement.

"Financial Settlement" means the exchange of funds between the ESA(s) of the relevant Financial Institutions or their Financial Settlement Agent(s) facilitated by the PEXA System as part of settlement of a Conveyancing Transaction.

"Financial Settlement Agent" means an ESA Holder making its ESA available for use by another Financial Institution in a Conveyancing Transaction.

"Force Majeure Event" means an act of God, fire, storm, flood, earthquake, explosion, accident, acts of the public enemy, terrorist acts, war, rebellion, insurrection, sabotage, epidemic, pandemic, quarantine restriction, transportation embargo, network power or telecommunications failure beyond the control of the affected party or strikes by employees of a third person. A strike by employees of a party or employees of a subcontractor of a party (or both) is not a Force Majeure Event unless the strike is part of an industry-wide campaign which does not arise out of a dispute between that party or subcontractor and one or more of its employees (proof of which will fall on the party claiming that the strike is a Force Majeure Event). An event is not a Force Majeure Event to the extent that the affected party is reasonably able to prevent, overcome or mitigate it by exercising reasonable care, including through implementation of business continuity or disaster recovery measures.

"Funds Reservation" means a reservation placed on the ESA(s) of the relevant Financial Institution(s) or their Financial Settlement Agent(s) for the net value of funds required for a Conveyancing Transaction.

"GST" means:

- (a) the same as in the GST Law; and
- (b) any other goods and services tax, or any tax applying to this transaction in a similar way.

"GST Law" means the same as GST law in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

"Intellectual Property" means all present and future rights conferred by statute, common law or equity in or in relation to any copyright, trade marks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions, confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields, whether or not registrable, registered or patentable.

"Interim Sequential Settlement Disbursement Account" means an account nominated by the relevant Subscriber, being a registered source account of that Subscriber, to receive funds in the event that the Trailing Electronic Workspace fails to settle but the Preceding Electronic Workspace settles successfully, where those Electronic Workspaces are Linked for Sequential Settlement.

"Land Title Reference" means the relevant Land Registry's unique identifier(s) for the property.

"Law" means any principle in common law or equity and any requirement under any legislation and any statutory rule, instrument, regulation, code of practice, ordinance or by law, present or future.

"Line Item" means a field of information (or a combination of fields of information) to be entered in a Settlement Schedule by any Participating Subscriber in relation to a Conveyancing Transaction.

"Link/ed" means where two or more Electronic Workspaces are associated in PEXA for the purposes of Sequential Lodgment, Sequential Settlement, Simultaneous Lodgment or Simultaneous Settlement.

"Lock/ed" means, in respect of an Electronic Workspace, the locking by PEXA of an Electronic Workspace at the point in time of reaching the Scheduled Settlement and the Electronic Workspace being in Ready Status.

"Logical Security" means software based controls required to protect the confidentiality, integrity and availability of a party's computer systems.

"Major Release" means large areas of new functionality, enhancements or fixes within the PEXA System (system interface changes may occur).

"Minor Release" means small enhancements and fixes (system interface changes may occur).

"Misapplied Funds" means funds that have been received in an unrelated or unintended account instead of the account of the intended beneficiary.

"National Public Holiday" means a day that is a public holiday in all Australian states and territories.

"Operating Requirements" means the operating requirements determined by the Registrar pursuant to section 22 of the ECNL in the Active Jurisdiction (as amended from time to time).

"Panel Master" means a financial institution who chooses one or more Representative Subscribers to act as a Panel Member and to whom a given invitation to an Electronic Workspace will be routed.

"Panel Member" means a Representative Subscriber appointed by a financial institution for the purposes of receiving one or more invitations to an Electronic Workspace(s) and acting for the financial institution in a given Conveyancing Transaction.

"Participation Rules" means the participation rules determined by the Registrar pursuant to section 23 of the ECNL in the Active Jurisdiction (as amended from time to time).

"Payment Instruction File" means an electronic file issued by PEXA and given to a Payment Integrated Financial Institution, instructing that a payment be made in accordance with the requirements of the payment instructions for source or destination funding contained within the Final Settlement Schedule.

"Payment Integrated Financial Institution" means a Financial Institution that is integrated with the PEXA System for the purpose of exchanging payment instructions for Financial Settlement of Conveyancing Transactions.

"PEXA Fees" means the fees described as "PEXA fees" or "PEXA Transaction Service Fees" in the Pricing Policy and Pricing Schedule.

"PEXA Settlement Money Trust" means the trust of that name that has been created by PEXA by a Deed Poll dated 4 September 2014 and being a trust that will allow persons that are not Subscribers to contribute money to the trust's bank account for use and application in the settlement of a Conveyancing Transaction specified by the person paying the relevant money to that bank account.

"PEXA Source Account" means a trust account maintained by PEXA with an authorised deposit taking institution within the meaning of the *Banking Act 1959* (Cth), being an account

that is used by PEXA to receive and hold Source Funds that are paid to that account for use in a forthcoming settlement of a Conveyancing Transaction.

"PEXA System" means the platform used by PEXA to deliver e-conveyancing capability for Subscribers and includes (among other things) being an Electronic Lodgment Network within the meaning of the ECNL.

"Physical Security" means facilities, equipment and personnel required to protect a party's computer systems and premises.

"Pre-Existing IPR" means a party's Intellectual Property rights existing prior to the Commencement Date or subsequently brought into existence other than in the course of providing the Services (including those subsisting in any Existing Material).

"Preceding Electronic Workspace" means the first workspace to settle in a Sequential Lodgment or Sequential Settlement. For example, if there are three workspaces involved, the first workspace is the Preceding Electronic Workspace of the second workspace, and the second workspace is the Preceding Electronic Workspace of the third workspace.

"Pricing Policy" means the document available at www.pexa.com.au/pricing-policy.

"Pricing Schedule" means the schedule of pricing information available at www.pexa.com.au/pricing-schedule, as amended by PEXA in accordance with clause 22 of this Participation Agreement.

"RBA" means the Reserve Bank of Australia.

"Ready Status" means, in an Electronic Workspace, having all tasks and activities completed by the relevant Participating Subscribers and includes:

- (a) all documents and instructions;
- (b) balanced Settlement Schedule; and
- (c) applicable Line Items,

being completed and Digitally Signed.

"Rebooking Cut Off Time" means 4 pm AEST or AEDT, as applicable.

"Representative Subscriber" means a Subscriber who is acting on behalf of a Client when accessing or using the PEXA System.

"Restrict" means having the ability to Digitally Sign within an Electronic Workspace removed. A Subscriber can still access the PEXA System.

"RITS" means the Reserve Bank Information and Transfer System operated by the Reserve Bank of Australia.

"RTGS" means Real Time Gross Settlement payment method.

"Scheduled Maintenance" will include known defect fixes, incident fixes, problem fixes, preventative maintenance and urgent enhancements driven from external change requests.

"Scheduled Settlement" means the date and time scheduled in the Electronic Workspace for the settlement of that Conveyancing Transaction.

"Security Policy" means the document available at www.pexa.com.au/security-policy.

"Sequential Lodgment" means the Linking of Electronic Workspaces for Lodgment scheduled to occur on the successful completion of the Preceding Electronic Workspace and on the conditions set out in the Service Charter.

"Sequential Settlement" means the Linking of Electronic Workspaces with Financial Settlement scheduled to occur on the successful completion of the preceding Electronic Workspace and on the conditions set out in the Service Charter.

"Service Charter" means the specifications for the Services as set out in www.pexa.com.au/service-charter, as amended by PEXA in accordance with clause 22 of this Participation Agreement.

"Services" means the services which are to be provided by PEXA to the Subscriber under the Service Charter and as agreed under this Participation Agreement.

"Settlement Account" means an account held at a Payment Integrated Financial Institution that has been registered with PEXA for source funding or disbursement (or both) that belongs to a Subscriber who is an authorised deposit taking institution within the meaning of the *Banking Act 1959* (Cth), using that Payment Integrated Financial Institution's ESA.

"Settlement Completion" means, in respect of a Scheduled Settlement, the time when Financial Settlement is successfully completed.

"Settlement Held Status" means, in an Electronic Workspace, there is a technical error and includes where PEXA is unable to establish communications with a Revenue Office for Duty Verification.

"Settlement Schedule" means, in relation to a Conveyancing Transaction, the electronic settlement schedule prepared within an Electronic Workspace for that Conveyancing Transaction.

"Settlement Terms and Conditions" means the Settlement Terms and Conditions for Electronic Settlements and Payments set out in Attachment A.

"Simultaneous Lodgment" means the linking of Electronic Workspaces for Lodgment scheduled to occur at the same time and on the conditions set out in the Service Charter.

"Simultaneous Settlement" means the linking of Electronic Workspaces with Financial Settlement scheduled to occur at the same time and on the conditions set out in the Service Charter.

"SOE Requirements" means the standard operating environment requirements as set out at www.pexa.com.au/soe, or as otherwise advised or amended by PEXA from time to time.

"Source Account" means an account that has been registered with PEXA as:

- (a) a registered source account that belongs to a Subscriber; or
- (b) a registered Subscriber Trust Account.

"Source FI" means a Subscriber that is an ESA Holder, or that has an arrangement with a Financial Settlement Agent, and is providing (or is intending to provide) Source Funds as part of the settlement of the Conveyancing Transaction.

"Source Funds" means an amount(s) that is nominated in a Settlement Schedule as an amount to be paid towards the Destination Amount(s) for that Scheduled Settlement.

"Sponsor" means an entity which is in the business of providing information (including search solutions and services) to customers, and case management and practice management solutions to customers, via its electronic platform.

"Subscriber Manager" means an individual or individuals appointed by the Subscriber under clause 4.2(a).

"Subscriber Profile" means the Subscriber's profile on the PEXA System and includes Subscriber information, registered account details and User permissions

"Subscriber Trust Account" means an account with a financial institution that is a Subscriber:

- (a) that is a trust account held for, and operated by, a Representative Subscriber that is not a financial institution;
- (b) that is a trust account that the Representative Subscriber uses (or proposes to use) to receive or hold Source Funds, or Destination Amounts, on behalf of a person that is not a Participating Subscriber in the relevant Conveyancing Transaction; and
- (c) that is a trust account in respect of which the Representative Subscriber has met the requirements of PEXA.

"Taxes" means all taxes, charges, duties, levies, fees and other government imposts levied, assessed or collected, including any related fine or penalty (excluding GST).

"Tax Invoice" has the meaning given in the GST Law.

"Trailing Electronic Workspace" means the second or subsequent Electronic Workspace that is, or is to be, the subject of a Scheduled Settlement that is part of Sequential Lodgment or Sequential Settlement.

"Trust Account Form" means the form that is to be exchanged between the Representative Subscriber, PEXA and the Financial Institution in line with the process set out in the Service Charter.

"Unapplied Funds" means funds which are unable to be credited to the account nominated by a Subscriber within the Settlement Schedule.

"Unsign" means where a document or a Settlement Schedule has been Digitally Signed but where, under a provision of this Participation Agreement (including the Service Charter), the document or Settlement Schedule (or any part of the document or Settlement Schedule) will be treated as not having been Digitally Signed.

"Verify/Verified" means, in relation to a Line Item, confirming the relevant details within the specific Line Item are accurate and, in the case of Source Funds, that they are cleared and available, and will continue to be available, at the Scheduled Settlement.

ATTACHMENT C

[Not used]

SCHEDULE 1

1. APPLICATION OF SCHEDULE

- (a) This schedule applies from 12 October 2015 and remains applicable until withdrawn by PEXA.
- (b) Clause 22 of the Participation Agreement does not apply to this Schedule. This schedule may be varied or withdrawn by PEXA at any time upon 7 days' prior notice to the Subscriber.
- (c) If this schedule is withdrawn in accordance with clause 1(b), it will continue to apply in respect of claims notified to PEXA before the expiration of the notice period.

2. ADDITIONAL DEFINITIONS

In this schedule:

Covered Dealing means:

- (a) mortgage with financial settlement (single title);
- (b) mortgage with financial settlement (multiple titles);
- (c) Lender caveat with financial settlement (single title);
- (d) Lender caveat with financial settlement (multiple titles);
- (e) transfer (single title); and
- (f) transfer (multiple titles),

Presented for lodgment via the PEXA System.

Related Lodgments or Submissions means lodgments or submissions made to the relevant land titles authority by third parties which:

- (a) relate to the same Land or related Land;
- (b) are lodged or submitted on or about the same time;
- (c) are lodged or submitted by the same or associated parties; and
- (d) assert the same or a similar right or interest in the relevant Land.

3. ADDITIONAL PEXA RESPONSIBILITY

3.1 PEXA assumes additional responsibility

Subject to clauses 4 and 5, in addition to PEXA's liability to the Subscriber described in clause 15 of the Participation Agreement, PEXA assumes responsibility for loss suffered by a Subscriber's client in the circumstances set out in clause 3.2.

3.2 **Circumstances under which PEXA assumes responsibilities**

- (a) If between the last successful Title Activity Check and lodgement of a Covered Dealing, a third party lodges any instrument or notice which prevents the Covered Dealing being registered or which does not prevent registration of the Covered Dealing but the instrument or notice is lodged before the Covered Dealing and takes priority, PEXA will be responsible for:
 - (i) the difference between the value of the Land unaffected by the substance of the instrument or notice and the value of the Land affected by the substance of the instrument or notice;
 - (ii) at PEXA's option, defending the validity or priority of the Covered Dealing on behalf of the Subscriber's client. PEXA may elect to settle any litigation at any time in its discretion;
 - (iii) if clause 6 applies, the legal fees or expenses incurred in defending the validity or priority of the Covered Dealing including compensation for the payment of a settlement amount, but in any event only to the extent PEXA considers the amounts were necessarily and reasonably incurred;
 - (iv) amounts paid by the Subscriber's client to a third party to:
 - (A) remove or release an intervening lodgement, notice, submission or registration; or
 - (B) establish the priority of the Covered Dealing; and
 - (v) compensating the Subscriber's client for rental accommodation expenses, removal or relocation expenses and other related expenses, fees or charges incurred by the Subscriber's client, up to a maximum of \$5,000.00.

3.3 **Limitation of PEXA's responsibility**

In any event, PEXA's responsibility under this Schedule will be capped at:

- (a) except in the case of Related Lodgements or Submissions, \$10 million per Covered Dealing (including any amount paid under 3.2 (a) (v)) or Conveyancing Transaction;
- (b) \$10 million for Related Lodgments or Submissions; and
- (c) \$50 million for all Subscribers per annum.

3.4 **Notice of amounts paid under this Schedule**

When amounts paid to all Subscribers under this Schedule have reached:

- (a) \$25 million;
- (b) \$35 million; and
- (c) \$45 million

PEXA will publish a notice on its website informing Subscribers that the relevant amount has been reached.

4. **EXCLUSIONS**

PEXA is not responsible under this Schedule for:

- (a) any consequential loss, including, without limitation, increases in the fair market value of Land or loss of use of the Land;
- (b) any loss suffered by the Subscriber's client for amounts payable to a lender;
- (c) any dealings, encumbrances, limitations, notifications, memorials and interests affecting the Land which are registered or recorded on the title to the Land at the time of the last successful Title Activity Check;
- (d) the existence of laws restricting, regulating, prohibiting or relating to the use or enjoyment of the Land or any violation or breach of those laws;
- (e) the exercise of any governmental power or the forfeiture of the Land or mortgage as the result of governmental action, except to the extent any notice of or the exercise of such power was not registered in the relevant Titles Register prior to the last successful Title Activity Check and prevents the registration of the relevant Covered Dealing;
- (f) rights and interests reserved under a crown grant or crown lease or the law authorising the issue of the crown grant or crown lease;
- (g) any fraud (including, without limitation, real estate or identity fraud) by any party which adversely affects the validity, enforceability, registration and/or the priority of the Covered Dealing including but not limited to fraud by the Subscriber, staff, lenders or any client;
- (h) any alleged defect, lien, charge or encumbrance that PEXA arranges to have removed or any other matter or thing giving rise to a claim under this schedule that PEXA has cured in a reasonably diligent manner by any method including litigation;
- (i) any claim in respect of which PEXA has decided to undertake proceedings to determine the validity, priority or enforceability of the Covered Dealing or to determine other matters relating to the responsibility of PEXA under this schedule, where such litigation, including any appeals, in relation to a claim conducted by PEXA or any third party authorised by PEXA have not yet been finally determined by a court of competent jurisdiction or abandoned by PEXA or any third party authorised by PEXA;
- (j) any liability voluntarily assumed by the Subscriber or the Subscriber's client in negotiating or settling any claim or litigation without PEXA's prior written consent;
- (k) any amount by which the Subscriber's or the Subscriber's client's acts or omissions increase PEXA's liability or reduce PEXA's ability to recover amounts from third parties;
- (l) anything the Subscriber or the Subscriber's client have done to adversely affect any right of recovery the Subscriber's client may have or the Subscriber's non-compliance with the Subscriber's obligations under this schedule which affects PEXA's ability to mitigate the Subscriber's client's loss; or
- (m) any amount or liability where the Subscriber's client is a mortgagee that is an Australian Credit Licensee or an ADI or an entity that is a mortgagee that secures lending by an Australian Credit Licensee or ADI.

5. **CONDITIONS OF RESPONSIBILITY**

PEXA's responsibility under this Schedule is subject to the conditions in this clause 5.

5.1 **Use and disclosure of Personal Information**

In addition to clause 11 of the Participation Agreement, the Subscriber consents to the collection, use, handling and disclosure of their Personal Information and their client's Personal Information, to third parties to the extent necessary to enable PEXA to assume additional responsibility in accordance with the requirements of this schedule.

5.2 **Final Title Activity Check**

The Final Title Activity Check must have been successful, failing which, there must have been a successful Title Activity Check within two business days before Scheduled Settlement.

5.3 **Subscriber to notify PEXA**

The Subscriber must:

- (a) immediately notify PEXA on becoming aware of an actual, suspected or proposed claim that will or is reasonably likely to cause a claim to be made against PEXA by any person (including the Subscriber or the Subscriber's client) under this schedule. The notification should include details of:
 - (i) the Workspace ID;
 - (ii) the client's name;
 - (iii) the relevant TAC;
 - (iv) the amount of loss suffered by the client or likely to be suffered;
 - (v) the method used to compute that amount; and
 - (vi) any relevant correspondence or other information entered into with the relevant Land Registry;
- (b) at PEXA's expense, and upon PEXA agreeing to accept responsibility in accordance with this Schedule, do all things necessary to assign to PEXA the absolute right to conduct the defence of the claim against the Subscriber or the Subscriber's client or enter into settlement discussions with the claimant against the Subscriber or the Subscriber's client;
- (c) at PEXA's expense, provide PEXA with such assistance as it requires in conducting the defence of the claim or the settlement discussions; and
- (d) advise PEXA in writing immediately after the Subscriber becomes aware of:
 - (vii) legal proceedings, whether commenced or threatened, in relation to PEXA's responsibility to the Subscriber's client under this schedule;
 - (viii) any information or claim which is or may be adverse to a Covered Dealing; or
 - (ix) any information or circumstance that might entitle the Subscriber's client to make a claim under this schedule.

5.4 **Preventing further claims**

Following an event which may result in a claim, the Subscriber and the Subscriber's client must take all reasonable precautions to prevent further damages or claims.

5.5 **Production of records**

PEXA may require the Subscriber or the Subscriber's client to provide PEXA with copies of records that relate to the client's claim including a copy of the Subscriber's client file relating to the Conveyancing Transaction. PEXA may make copies of those records and retrieve any that are stored electronically. PEXA may also require the Subscriber's client, officers or personnel to answer questions under oath.

5.6 **Consequence of failure to comply with conditions**

- (a) PEXA has no obligation under this Schedule if the conditions set out in clauses 5.1 and 5.2 are not met; and
- (b) PEXA's obligation to the Subscriber or the Subscriber's client under this Schedule may be reduced in part or in whole if the Subscriber fails to comply with the conditions set out in this clause 5.3, 5.4 and 5.5 including failing to promptly notify PEXA and that failure adversely affects PEXA's ability to dispute or defend any claim or to commence any claim against other persons in a timely manner.

6. **DEFENDING YOUR OWN CLAIM**

- (a) Should the Subscriber's client elect to defend the validity or priority of the Covered Dealing on the client's own behalf, PEXA must first provide written approval of the proposed defence and costs to be incurred.
- (b) PEXA may provide any approval under section 6 (a) subject to reasonable conditions, imposed by PEXA in its discretion.
- (c) Such conditions may include the amount of costs to be incurred, the selection of counsel, the extent of agreed responsibility and a reduced liability cap in the circumstances.