



# Participation Agreement

Property Exchange Australia Limited  
ACN 140 677 792

and

[name]  
ACN

# PARTICIPATION AGREEMENT

## CONTENTS

CLAUSE	PAGE
1. INTRODUCTION .....	1
2. TERM .....	2
PART A – GENERAL .....	2
3. DEFINITIONS AND INTERPRETATION .....	2
3.1 Definitions .....	2
3.2 Rules for interpreting this Participation Agreement.....	2
3.3 Non Business Days.....	3
3.4 The rule about "contra proferentem" .....	3
PART B – OPERATIVE PROVISIONS .....	3
4. FINANCIAL INSTITUTION'S OBLIGATIONS .....	3
4.1 Obligations .....	3
4.2 Exchange Settlement Accounts.....	4
4.3 Financial Institution's profile.....	4
4.4 Financial Institution's security obligations .....	6
4.5 Member Code of Conduct.....	6
5. DIGITAL SIGNATURE MANAGEMENT AND RESPONSIBILITY .....	6
5.1 Responsibilities.....	6
5.2 Where PEXA is not the Certification Authority .....	7
5.3 When Digital Signatures are irrevocable .....	7
5.4 Preservation of PEXA's obligations.....	7
6. PEXA'S OBLIGATIONS .....	7
6.1 Provision of the Services.....	7
6.2 Personnel .....	8
6.3 AML/CTF.....	8
6.4 Notification .....	9
6.5 Regular review and reporting .....	9
6.6 Financial Institution Data .....	9
6.7 Accurate recording and storage of data .....	10
6.8 Security.....	10
6.9 APRA Prudential Standards and SOCI Act compliance .....	12
6.10 Financial Institution acknowledgements.....	12
6.11 Consultation regarding audit terms of reference .....	12
6.12 IP Whitelisting Service.....	12
6.13 Modern Slavery and Anti-Corruption Laws.....	13
7. PROVISION OF INFORMATION .....	13
7.1 Requests for information by FIs .....	13
7.2 Costs of production by PEXA .....	14
7.3 Requests for information by PEXA .....	14
7.4 Costs of production by Financial Institution .....	15
7.5 Record-keeping .....	15
7.6 Regulator-related requests.....	15
7.7 Post Incident Review .....	16
8. PEXA'S STATUS .....	16

8.1	Independent contractors.....	16
8.2	Limited agency .....	16
9.	FINANCIAL SETTLEMENT TERMS AND CONDITIONS .....	18
10.	PAYMENT .....	18
10.1	Charges payable by Financial Institution .....	18
10.2	Land Registry Lodgement Fees .....	18
10.3	Invoicing and payment terms .....	19
10.4	Other provisions .....	19
11.	GST .....	19
11.1	Definitions and interpretation .....	19
11.2	GST pass on.....	19
12.	CONFIDENTIALITY .....	20
12.1	Meaning of Confidential Information.....	20
12.2	Use and disclosure of Confidential Information .....	20
12.3	Disclosures to personnel and advisers .....	21
12.4	Disclosures required by Law .....	21
12.5	Confidentiality of this Participation Agreement.....	22
12.6	Destruction .....	22
12.7	Security.....	22
12.8	Right to injunctive relief .....	22
12.9	PEXA's use of de-identified data.....	23
13.	PRIVACY .....	23
13.1	PEXA's privacy obligations.....	23
13.2	Financial Institution's privacy obligations .....	24
13.3	Overseas access to PEXA System.....	24
13.4	Location of computer infrastructure.....	25
13.5	Compliance with Australian Privacy Principles .....	25
14.	OWNERSHIP OF INTELLECTUAL PROPERTY.....	25
14.1	Intellectual Property in the Services .....	25
14.2	Intellectual Property in Financial Institution systems .....	25
14.3	Financial Institution Data Formats.....	26
14.4	Ownership of Pre-Existing IPR .....	26
15.	INTELLECTUAL PROPERTY INFRINGEMENTS .....	26
15.1	Indemnity for infringement .....	26
15.2	Financial Institution obligations .....	26
15.3	Exclusions from indemnity .....	27
15.4	Service continuity notwithstanding claim .....	27
16.	REPRESENTATIONS AND WARRANTIES.....	28
16.1	Financial Institution's acknowledgements about Conveyancing Transaction information .....	28
16.2	Services warranty .....	28
16.3	General and Intellectual Property warranties .....	29
16.4	Exclusion of implied conditions and warranties .....	29
16.5	Statutory limitations .....	29
17.	LIABILITY ALLOCATIONS .....	30
17.1	Liability of PEXA to a Financial Institution where PEXA fails to perform the Services .....	30
17.2	When PEXA will not be liable .....	30

17.3	Limitation on PEXA's liability to the Financial Institution under sub-clause 17.1 .....	31
17.4	Notification .....	32
17.5	Other liability .....	32
17.6	Liability of the Financial Institution to PEXA.....	32
17.7	Excluded Loss .....	33
17.8	Releases in favour of PEXA.....	34
18.	SUSPENSION, RESTRICTION AND TERMINATION .....	34
18.1	Suspension or restriction by PEXA.....	34
18.2	Termination by PEXA.....	36
18.3	Termination by the Financial Institution .....	37
18.4	Effect of termination .....	38
18.5	Consequences of termination and/or suspension.....	38
18.6	PEXA's obligations on termination .....	39
18.7	Return of property on termination.....	39
19.	TRANSITION-OUT .....	39
19.1	Application.....	39
19.2	Performance of Transition-Out Services .....	39
19.3	Development of Transition-Out Plan .....	40
19.4	Payment for Transition-Out Services .....	40
	PART C – GENERAL .....	40
20.	INSURANCE .....	40
21.	EMERGENCY INTERIM SERVICES AND FORCE MAJEURE .....	41
21.1	Emergency Interim Services.....	41
21.2	Force Majeure .....	42
22.	SUB-CONTRACTING .....	42
23.	ASSIGNMENT AND NOVATION .....	43
23.1	Assignment.....	43
24.	VARIATION .....	43
24.1	Overview .....	43
24.2	Regulatory related changes.....	43
24.3	Changes specific to the Financial Institution .....	44
24.4	Changes by agreement.....	44
24.5	Changes after informing the Representative Body .....	45
25.	TECHNOLOGY AND RELEASE MANAGEMENT .....	47
25.1	Changes to the ELN.....	47
25.2	General release management.....	47
26.	DISPUTES .....	48
26.1	Application.....	48
26.2	Notice of dispute or difference .....	48
26.3	Negotiation between parties' representatives .....	48
26.4	Alternative dispute resolution and other mechanisms .....	49
26.5	Continuance of performance.....	49
26.6	Summary or urgent relief.....	49
27.	NOTICES .....	49
27.1	How to give a notice .....	49
27.2	When a notice is given .....	50
27.3	Authority to issue or receive notices.....	50

28.	GENERAL .....	51
28.1	Governing law .....	51
28.2	Compliance with Financial Institution's regulatory requirements .....	51
28.3	Compliance with Laws .....	51
28.4	Cooperation with independent enquiries and certification .....	51
28.5	Risk management.....	52
28.6	Business continuity and disaster recovery .....	52
28.7	Non-Use of Electronic Workspace.....	53
28.8	Liability for expenses.....	53
28.9	Giving effect to this Participation Agreement .....	53
28.10	Waiver of rights.....	53
28.11	Operation of this Participation Agreement .....	53
28.12	Operation of indemnities.....	54
28.13	Survival of covenants .....	54
28.14	Consents .....	54
28.15	Exclusion of contrary legislation.....	54
28.16	Counterparts.....	54
28.17	Remedies cumulative .....	54
29.	PUBLICITY .....	54
1.	RESPONSIBILITIES RELATING TO FINANCIAL SETTLEMENT.....	56
1.1	Responsibilities of PEXA.....	56
1.2	Responsibility of the Financial Institution for Line Items in a Settlement Schedule .....	56
1.3	Responsibility of the Financial Institution for the accuracy of all information it enters in a Settlement Schedule .....	56
2.	DUTY VERIFICATION .....	57
3.	SIGNING OF DOCUMENTS.....	57
4.	AUTHORISATIONS AND REQUESTS TO PEXA .....	57
4.1	Confirmations and authorisations.....	57
4.2	Confirmation of funds availability from a Source FI .....	57
4.3	Payment Instructions – PEXA System messaging to RBA for ESA Settlement .....	58
4.4	Time of Settlement Completion .....	58
4.5	Value held by a Financial Institution for an intended final payee .....	58
4.6	Return of funds to a Source Account where a Scheduled Settlement is cancelled .....	58
5.	ASSISTANCE WITH PAYMENT ERRORS.....	59

## Attachments

- A Settlement Terms and Conditions for Electronic Settlements and Payments
- B Definitions
- C Financial Institution Schedule
- D APRA Prudential Standards and SOCI Act

## 1. INTRODUCTION

- 1.1 This Participation Agreement is made between **Property Exchange Australia Limited** (ACN 140 677 792) ("**PEXA**") and [insert] ("**Financial Institution**").
- 1.2 This Participation Agreement, once executed by both parties, forms a binding contractual arrangement which, amongst other things, sets out the basis on which:
- (a) the Financial Institution, together with other financial institutions who (in accordance with sub-clause 6.1) also enter into a participation agreement with PEXA on consistent terms, have agreed to collectively acquire the use of; and
  - (b) PEXA authorises the Financial Institution to use,
  - (c) an electronic lodgement network provided and operated by PEXA in its capacity as an electronic lodgement network operator.
- 1.3 Subject to sub-clause 1.4, PEXA will:
- (a) implement a national ELN consistent with the ECNL and Operating Requirements;
  - (b) on request by the Financial Institution from time to time, provide the Financial Institution with an indicative timetable (updated as at the date of the request) of the steps to be taken to implement a national ELN, together with an indication of progress made against such timetable; and
  - (c) use reasonable endeavours to implement the national ELN in accordance with the indicative timetable referred to in paragraph (b).
- 1.4 For the avoidance of doubt, and notwithstanding sub-clause 1.3 above, the Financial Institution acknowledges that the implementation of a national ELN is dependent on factors outside PEXA's control, and that PEXA will bear no responsibility for a failure to implement a national ELN due to factors outside its control (including an inability, despite reasonable endeavours, to negotiate reasonable commercial terms relevant to such implementation).
- 1.5 This Participation Agreement consists of:
- (a) Attachment C;
  - (b) the main body of this Participation Agreement and Attachments A and B;
  - (c) Annexure D;
  - (d) the Service Charter; and
  - (e) the Pricing Policy, Security Policy, Pricing Schedule and SOE Requirements.
- To the extent that there is any conflict or inconsistency between the documents referred to above, the document listed higher in paragraphs 1.5(a) to 1.5(e) will prevail.
- 1.6 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), provided that where this Participation Agreement incorporates a higher or more stringent standard of service by PEXA or a higher or more stringent level of protection to the Financial

Institution than the ECNL, the Operating Requirements or the Participation Rules, such higher or more stringent standard of service or protection will apply.

## 2. **TERM**

This Participation Agreement begins on the Commencement Date, and continues until terminated in accordance with clause 18 of this Participation Agreement ("**Term**").

## **PART A – GENERAL**

### 3. **DEFINITIONS AND INTERPRETATION**

#### 3.1 **Definitions**

Capitalised terms used in this Participation Agreement:

- (a) have the meaning given to them in Attachment B; or
- (b) where not defined in Attachment B, but defined in the ECNL, the Participation Rules or the Operating Requirements, have the meaning given to them in the ECNL, the Participation Rules or the Operating Requirements (as the case may be).

#### 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 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 this Participation Agreement or some provision of it or because that party relies upon a provision of this Participation Agreement to protect itself.

## **PART B – OPERATIVE PROVISIONS**

### **4. FINANCIAL INSTITUTION'S OBLIGATIONS**

#### **4.1 Obligations**

- (a) The Financial Institution agrees:
  - (i) to only use the Services:
    - (aa) for the purpose of carrying out Conveyancing Transactions where the Financial Institution has a reasonable expectation that the Conveyancing Transaction will be completed using the PEXA System; and
    - (bb) in accordance with this Participation Agreement;
  - (ii) to comply, and continue to comply, with the Security Policy in relation to the Financial Institution's use of the Services;
  - (iii) to comply, and continue to comply, with its obligations in Attachment C of this Participation Agreement (if applicable) in relation to the Financial Institution's use of the Services;
  - (iv) to provide adequate training to each of its Users appropriate to, and to enable, their use of the PEXA System in a manner that helps maintain the integrity, security and effective use of the PEXA System for the benefit of all Subscribers (the nature and extent of such training to be determined by the Financial Institution in its reasonable opinion);

- (v) if the Financial Institution is a Participating Subscriber to a Lodgement Case, to agree a Responsible Subscriber with the other Participating Subscribers inside the Electronic Workspace;
- (vi) that in order to access and use the Services, it needs to satisfy the SOE Requirements;
- (vii) where it uses PEXA's document upload functionality to upload documents:
  - (aa) it will only upload documents which are relevant to the Conveyancing Transaction to which they are associated;
  - (bb) it will not upload documents that contain illegal or offensive content;
  - (cc) it is responsible for selecting the parties with whom to share uploaded documents in the relevant Electronic Workspace;
  - (dd) PEXA may require it to immediately delete any document that PEXA deems (acting reasonably) does not comply with this clause 4.1;
  - (ee) subject to the Operating Requirements, PEXA may delete any document the Financial Institution has failed to delete under sub-clause 4.1(a)(vii)(dd); and
  - (ff) PEXA may immediately delete documents containing illegal content provided that PEXA promptly notifies it that a document has been deleted (unless prohibited by law); and
- (viii) to comply and continue to comply with the Participation Rules.
- (b) For clarity, the Financial Institution is not required to, and does not represent or warrant that it will, procure any type or volume of Services from PEXA and the parties acknowledge and agree that the Financial Institution may acquire services which are the same as or similar to the Services from any third party.

#### 4.2 **Exchange Settlement Accounts**

- (a) For the purposes of participating in a Financial Settlement as a Source FI, the Financial Institution acknowledges that it needs to be an ESA Holder, or have an arrangement with an ESA Holder in connection with using that ESA Holder's ESA for the purposes of this Participation Agreement and the use of the Services.
- (b) If the Financial Institution intends to allow another financial institution to use its ESA for the purposes of that other financial institution participating in a Financial Settlement, the Financial Institution acknowledges that its consent to such use must be in the form prescribed by PEXA.
- (c) If the Financial Institution intends to use another financial institution's ESA, the Financial Institution acknowledges that it needs to procure the consent of that financial institution in the form prescribed by PEXA.

#### 4.3 **Financial Institution's profile**

- (a) The Financial Institution must appoint at least one Subscriber Manager, and may appoint more than one Subscriber Manager.

- (b) Each Subscriber Manager will be able to manage and monitor the overall use of the PEXA System by the Financial Institution, including by:
  - (i) allocating roles and authorities for Subscriber Administrators, other Users and/or Signers within the Financial Institution's Subscriber Profile within the PEXA System, which may include delegation of those tasks outlined below in sub-paragraphs (ii) to (iv);
  - (ii) entering into the PEXA System, and updating and maintaining, all relevant details pertaining to the Financial Institution, including details of:
    - (A) appointment, suspension and removal of Users and Signers;
    - (B) the financial accounts and authorisations held by the Financial Institution within the PEXA System;
    - (C) the contact details for the Financial Institution;
    - (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 Financial Institution's use of, or activities within, the PEXA System;
  - (iii) where applicable, managing the set-up, implementation, and ongoing monitoring of the Financial Institution's role as a Panel Master; and
  - (iv) assessing a given Conveyancing Transaction in the circumstances contemplated in sub-paragraph (c)(ii) below.
- (c) The Financial Institution agrees that:
  - (i) PEXA may restrict, suspend or terminate the use of the Services by a particular User within the Financial Institution:
    - (A) where that User has caused the occurrence of an Event of Suspension or Event of Termination, by giving as much notice as is reasonable in the circumstances to, and if appropriate, following consultation with, the Financial Institution's Relationship Manager; or
    - (B) where reasonably necessary to do so in order to stop fraudulent activity being undertaken by that User through the PEXA System and/or to protect the integrity of the PEXA System, by giving as much notice as is reasonable in the circumstances to the Financial Institution's Relationship Manager; and
  - (ii) if a User is restricted, suspended or terminated by PEXA in accordance with sub-paragraph (i) above, or by a Subscriber Manager under sub-paragraph (b)(ii)(A), the Financial Institution will be responsible for:
    - (A) 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; and
    - (B) taking all necessary steps to prevent any Conveyancing Transactions proceeding that would disadvantage any other Participating Subscribers in the relevant Conveyancing Transaction(s).

- (d) The Financial Institution acknowledges and agrees that all activities undertaken or carried out by a Subscriber Manager bind the Financial Institution, and that the Financial Institution will be liable for any acts, defaults or neglects of a Subscriber Manager in using the PEXA System or the Services as if they were the acts, defaults or neglects of the Financial Institution.

#### 4.4 **Financial Institution's security obligations**

- (a) The Financial Institution must effect and maintain adequate security measures in connection with its use of the Services. Without limiting the foregoing, the Financial Institution must:
  - (i) take all prudent and reasonable steps to ensure that any systems or access points owned or wholly controlled by the Financial Institution and through which the Financial Institution may access the PEXA System or an Electronic Workspace are protected against corruption, interference or loss, and against unauthorised access, use, modification, processing, disclosure or other misuse by any person employed or engaged by the Financial Institution;
  - (ii) provide prudent and reasonable protection (e.g. Firewall protection and intrusion prevention system protection) against any unauthorised intrusions or uncontrolled access to the systems and access points owned or wholly controlled by the Financial Institution through which the Financial Institution may access the PEXA System or an Electronic Workspace (regardless of whether such access occurs by means of the Internet or some other electronic form of communication); and
  - (iii) take prudent and reasonable steps to ensure the integrity and confidentiality of information retrieved or received from PEXA and information supplied to PEXA by the Financial Institution, while such information is in the possession and control of the Financial Institution.
- (b) If the Financial Institution becomes aware of a breach, or suspected breach, of paragraph 4.4(a) which the Financial Institution (acting reasonably) considers is material to the security and integrity of the PEXA System, the Financial Institution must as soon as reasonably practicable notify PEXA 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.

#### 4.5 **Member Code of Conduct**

- (a) The Financial Institution must comply with the Member Code of Conduct.
- (b) Serious or repeated breaches of the Member Code of Conduct, which PEXA regards (acting reasonably) as contrary to the interests of other Subscribers or the Registrar, may result in the Financial Institution's suspension or termination from use of the PEXA Platform.

### 5. **DIGITAL SIGNATURE MANAGEMENT AND RESPONSIBILITY**

#### 5.1 **Responsibilities**

Except:

- (a) as otherwise contemplated by this Participation Agreement (including the Service Charter), the ECNL or the Operating Requirements; or
- (b) where PEXA is the Certification Authority,

PEXA is not responsible for the management and certification of the Financial Institution's Digital Signatures and, for clarity, the Financial Institution is responsible for:

- (c) obtaining a valid Digital Certificate approved for use in the PEXA System by the Registrars, in accordance with the process set out by the relevant Certification Authority; and
- (d) compliance with any legal requirements or restrictions within the Active Jurisdiction in relation to the application, use, authentication and management of Digital Signatures.

## 5.2 **Where PEXA is not the Certification Authority**

The Financial Institution acknowledges and agrees that, where PEXA is not the Certification Authority in respect of a Digital Certificate, PEXA will not be responsible for the acts or omissions of the relevant Certification Authority (including where the Certification Authority is unavailable or unresponsive).

## 5.3 **When Digital Signatures are irrevocable**

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

## 5.4 **Preservation of PEXA's obligations**

For clarity, nothing in this clause 5 limits PEXA's obligations:

- (a) under the Operating Requirements, including to:
  - (i) ensure that Digital Certificates used in the PEXA System meet the requirements contemplated by the Operating Requirements; and
  - (ii) verify Digital Signing and verify that each Digitally Signed electronic document (as presented to the Registrar) has not been altered since it was executed; or
- (b) under any agreement between the Financial Institution and PEXA for the provision of a Digital Certificate to the Financial Institution where PEXA is the Certification Authority.

## 6. **PEXA'S OBLIGATIONS**

### 6.1 **Provision of the Services**

PEXA must:

- (a) provide the Services for use by the Financial Institution, in accordance with the ECNL, Operating Requirements (including by performing the obligations of the ELNO as set out in the Operating Requirements) and this Participation Agreement; and
- (b) ensure that each Subscriber (including other financial institutions who are Subscribers and who, together with the Financial Institution, collectively acquire the Services) has executed a participation agreement with PEXA which:
  - (i) is identical in relation to the services collectively acquired, including in particular the Services described in the Service Charter and the Pricing Policy and Pricing Schedule, and is otherwise consistent with this Participation Agreement (with the exception, for the avoidance of doubt, of Attachment C

and provisions which reflect different conditions applicable to classes of Subscribers where they are not financial institutions); and

- (ii) requires that Subscriber to comply with the Participation Rules and Settlement Terms and Conditions (to the extent applicable to that Subscriber),

and PEXA must take appropriate action in relation to a breach of such participation agreement having due regard to the security, integrity and proper operation of the PEXA System.

## 6.2 **Personnel**

- (a) PEXA must, in relation to prospective Personnel, conduct pre-engagement screening to confirm that such Personnel have not been subject to any of the matters listed in section 4.3.1(b) of the Operating Requirements and otherwise are appropriately skilled and experienced to perform the Services which such Personnel are engaged by PEXA to perform.
- (b) If any pre-engagement screening identifies any matter in respect of any prospective Personnel which a reasonable supplier would consider may give rise to risks were the relevant prospective Personnel to perform any Services or have access to any PEXA System Data or Confidential Information of any Financial Institution Group Company, PEXA must ensure that such prospective Personnel does not perform any of the Services (in whole or in part) or have access to any PEXA System Data or any Confidential Information of any Financial Institution Group Company.
- (c) For clarity, PEXA must undertake the pre-engagement screening contemplated by this sub-clause 6.2 before assigning Personnel to the provision of Services under this Participation Agreement or otherwise permitting Personnel to access any PEXA System Data or Confidential Information of any Financial Institution Group Company.

## 6.3 **AML/CTF**

- (a) PEXA will provide the Financial Institution with any assistance reasonably required by the Financial Institution in order for the Financial Institution to comply with its AML/CTF Program to the extent applicable to the performance of PEXA's obligations under this Participation Agreement or the Operating Requirements.
- (b) Without limiting paragraph (a) or the Financial Institution's rights under clause 7, PEXA will provide the Financial Institution (to the extent reasonably required) with access, upon request, to such records, logs, information and documentation required to enable the Financial Institution to comply with, and manage its compliance with, all applicable Laws, including AML/CTF Requirements and economic and trade sanctions imposed by any country.
- (c) Further, PEXA acknowledges that nothing in this Participation Agreement or any document attached to or referred to in this Participation Agreement requires the Financial Institution to undertake any act which the Financial Institution considers may result in the Financial Institution being in breach of any applicable Laws as referred to above or otherwise involved in any unlawful act. If PEXA becomes aware that any transaction or activity in connection with the Services and with which the Financial Institution was involved has or may result in the Financial Institution breaching such applicable Laws or otherwise being involved in any unlawful act, PEXA must immediately notify the Financial Institution and provide details of the relevant transaction or activity. For clarity, the Financial Institution acknowledges that PEXA does not monitor a Financial Institution's transactions.

#### 6.4 **Notification**

PEXA will, promptly upon becoming aware of any of the matters referred to below, notify the Financial Institution of:

- (a) any activity that PEXA should reasonably anticipate will or is likely to compromise PEXA's ability to perform its obligations under this Participation Agreement fairly and independently or otherwise in accordance with this Participation Agreement;
- (b) any Complaint or Claim or other action (including any investigation or suspension or any actual or alleged breach of any Law, including Privacy Law) that will or is likely to, whether or not successful, compromise PEXA's ability to perform its obligations under this Participation Agreement; and
- (c) any circumstance where another financial institution ceases to participate in the ELN (whether temporarily or permanently), including where that financial institution is unable to process or participate in Financial Settlements. If required, the Financial Institution consents to PEXA issuing such notifications in relation to the Financial Institution to other Subscribers that participate in the ELN.

#### 6.5 **Regular review and reporting**

- (a) Each party will nominate a Relationship Manager to manage the working arrangements between the parties under this Participation Agreement.
- (b) During the Term, the Relationship Manager of each party will convene and attend regular review meetings or teleconferences between the parties to address any operational matters and facilitate the implementation of any potential process, or Service improvement under this Participation Agreement.
- (c) PEXA must provide to the Financial Institution any relevant reports as contemplated by the Operating Requirements, the Service Charter, Attachment C and as otherwise agreed by the parties.

#### 6.6 **Financial Institution Data**

Financial Institution Data is and will remain the property of the Financial Institution at all times. Except as required by Law, PEXA must:

- (a) only use Financial Institution Data for the purposes of the performance of its obligations under this Participation Agreement;
- (b) not use Financial Institution Data directly or indirectly to contact, market to, liaise with, approach or solicit any customer of the Financial Institution;
- (c) subject to paragraph (e), not make any Financial Institution Data available to a third party other than a subcontractor in accordance with clause 22 and then only to the extent necessary to enable that subcontractor to perform its part of PEXA's obligations under this Participation Agreement;
- (d) not sell, commercially exploit, let for hire, assign rights in or otherwise dispose of any Financial Institution Data; and
- (e) only disclose Financial Institution Data to any other Subscriber or PEXA System user for the purposes of providing the Services or in relation to matters that are integrally connected with the performance of the Services (for example, the recovery of misdirected payments).

## 6.7 **Accurate recording and storage of data**

- (a) PEXA must ensure that Financial Institution Data and Confidential Information of the Financial Institution provided to it in connection with this Participation Agreement is:
  - (i) stored, recorded, processed and transmitted accurately (including without transposition errors); and
  - (ii) not altered or amended except when being properly processed by PEXA as part of the Services.
- (b) PEXA must provide the Financial Institution with access to any Financial Institution Data and Confidential Information of the Financial Institution in PEXA's or its Personnel's possession or control within a reasonable period and in any event within 5 Business Days from receipt of any request by the Financial Institution. PEXA will bear the costs of complying with such a request, provided that the request does not result in a significant diversion of resources and personnel in complying with the request.

## 6.8 **Security**

- (a) PEXA must effect and maintain adequate security measures in respect of the PEXA System and PEXA System Data and in connection with the use of the Services by its Subscribers. Without limiting the foregoing, PEXA must:
  - (i) take all prudent and reasonable steps to ensure that the PEXA System Data held or handled in connection with this Participation Agreement or the Operating Requirements is protected against corruption, interference or loss, and against unauthorised access, use, modification, processing, disclosure or other misuse, and that authorised PEXA Personnel who have a legitimate need to access PEXA System Data are the only PEXA Personnel who are able to access PEXA System Data;
  - (ii) take all prudent and reasonable steps to ensure that security vulnerabilities do not result in security incidents that impact on the ability of PEXA to perform its obligations under this Participation Agreement or the Operating Requirements. Without limiting the foregoing, PEXA must establish from the Commencement Date, and thereafter maintain, enforce and comply fully with, safeguards and security practices that are consistent with, and no less rigorous than:
    - (A) AS/NZS ISO/IEC 27001;
    - (B) AS/NZS ISO/IEC 27002; and
    - (C) ISO/IEC 27005; and
  - (iii) comply with all Laws applicable to PEXA's use and custody of the PEXA System Data,

and if there is any conflict between any such standard or requirement, the most stringent or higher level of security standard will apply.

- (b) PEXA must procure, and provide to the Financial Institution upon request, an annual independent third party audit report (SOC 2 type 2) on:
  - (A) the compliance of PEXA's 'Information Security Management System' (ISMS) with such security standards; and

- (B) the status of security controls from the Statement of Applicability,  
which audit report must be produced using international standard audit methodology, SOC 2 Type 2.
- (c) PEXA must:
- (i) periodically undertake independent attack and penetration testing of the PEXA System, including for each Major Release prior to implementation of such release into production; and
  - (ii) promptly, on request by the Financial Institution, provide a summary of the results of such testing to the Financial Institution.
- (d) If any problems, deficiencies or other issues identified in the audit or testing report referred to in clauses 6.8(b) or 6.8(c), PEXA must prepare an action plan and timetable to address any deficiencies identified and changes suggested by the report and promptly take all steps necessary to remedy the problems, deficiencies or other issues identified.
- (e) PEXA must:
- (i) immediately notify the Financial Institution of:
    - (A) any breach of clauses 6.6, 6.7, 6.8, 6.9, 12 or 13;
    - (B) any actual security breach which:
      - (aa) PEXA (acting reasonably) considers material to the security and integrity of the PEXA System; or
      - (bb) relates to unauthorised disclosure, use, access or loss of PEXA System Data; and
    - (C) the measures taken at the time to deal with the breach; and
  - (ii) as soon as practicable following the breach referred to in sub-paragraph (i), undertake a post-incident review to identify and implement reasonable steps to prevent future breaches of a similar type;
  - (iii) co-operate with the Financial Institution regarding any investigation of any such breach; and
  - (iv) provide the Financial Institution with a reasonable opportunity to ask questions or seek further information in connection with the post-incident review referred to in sub-paragraph (ii) above.
- (f) PEXA must:
- (i) on a quarterly basis, undertake vulnerability scanning of internet facing host system interfaces used to interchange data with PEXA;
  - (ii) on request by the Financial Institution, provide the Financial Institution with the results of the scanning referred to in sub-paragraph (i) above; and
  - (iii) take reasonable steps to address any problems, deficiencies or other issues identified in the results of the scanning referred to in sub-paragraph (i) above.

## 6.9 **APRA Prudential Standards and SOCI Act compliance**

Subject always to the *Security of Critical Infrastructure Act 2018* (Cth) (as amended) this clause 6.9 and Annexure D apply if the Financial Institution is required to comply with the APRA Prudential Standards, as described in Attachment D.

## 6.10 **Financial Institution acknowledgements**

Notwithstanding any other provision of this Participation Agreement, the Financial Institution acknowledges and agrees that:

- (a) Financial Institution Data may be disclosed to a Land Registry to the extent required in connection with a Conveyancing Transaction and consequently may become publicly available; and
- (b) the Land Registry's right to deal with Financial Institution Data disclosed or provided to a Land Registry as contemplated in paragraph (a) above is not constrained by this sub-clause 6.10; and
- (c) PEXA will not be liable for a failure to comply with sub-clauses 6.6 and 6.7 to the extent that such failure relates to a Land Registry's subsequent handling of such Financial Institution Data as contemplated in paragraph (a) above.

## 6.11 **Consultation regarding audit terms of reference**

- (a) PEXA must consult with the Representative Bodies regarding the terms of reference for the audits conducted pursuant to clauses 6.8(b) and 6.9(a)(ii):
  - (i) prior to setting the terms of reference for the audits to be conducted in FY22; and
    - where an APRA Prudential Standard is reasonably likely to require a material change to the terms of reference to enable the Financial Institution to comply with the APRA Prudential Standard; and
- (b) PEXA must reasonably consider any feedback or requests for changes to the terms of reference received from the Representative Bodies pursuant to paragraph (a).

## 6.12 **IP Whitelisting Service**

This clause 6.12 applies if PEXA agrees to provide the Financial Institution with the IP Whitelisting Service.

- (a) PEXA will not charge a fee for the receipt and management of an IP Whitelist.
- (b) PEXA may provide reports to the Financial Institution in relation to the IP Whitelisting Service, upon request. The content of the report and the fee for the provision of the reports will be agreed in writing between the parties and will depend on the nature and frequency of the report.
- (c) Where the Financial Institution uses IP addresses issued by a cloud proxy server (or any other service that routes Financial Institution network traffic via a public cloud service), the Financial Institution acknowledges that:
  - (i) IP addresses can be shared across the customer base of the cloud proxy provider; and

- (ii) PEXA cannot determine whether incoming requests from these services originated from the Financial Institution's network or from the network of another cloud proxy service customer.

### 6.13 **Modern Slavery and Anti-Corruption Laws**

- (a) In performing its obligations under this Participation Agreement, PEXA agrees that it will, to the extent legally possible, comply with:
  - (i) Australian Modern Slavery Laws and foreign Modern Slavery Laws applying in any locations in which PEXA operates; and
  - (ii) Applicable Anti-Corruption laws.
- (b) PEXA represents that PEXA has not been convicted of any offence, or subjected to any investigation, inquiry or enforcement proceedings by any government, administrative or regulatory body relating to any offence in connection with Modern Slavery or any Applicable Anti-Corruption Laws.
- (c) PEXA agrees that:
  - (i) It will use best endeavours to ensure that there is no Modern Slavery in any part of its business; and
  - (ii) If any instances of Modern Slavery are identified, it will issue a notice to the Financial Institution within 10 Business Days which describes the incident, sets out the steps that have or will be taken to remedy the incident and prevent its recurrence, and sets out the date by which such steps will be taken.
- (d) PEXA agrees to include terms in any contracts with Associated Parties with respect to its obligations under this Participation Agreement that are at least as onerous as its obligations under this clause.

## 7. **PROVISION OF INFORMATION**

### 7.1 **Requests for information by FIs**

The parties agree that:

- (a) where there is an actual or suspected breach by PEXA of its obligations under this Participation Agreement (including PEXA's security obligations), the Financial Institution may request PEXA to provide all relevant information, documents or other materials (as appropriate in the circumstances) that relate to the actual or suspected breach so as to allow the Financial Institution to better understand and investigate the actual or suspected breach ("Information Request"); and
- (b) on receipt of an Information Request under paragraph (a) above, and where the Information Request outlines the actual or suspected breach in sufficient or reasonable detail, PEXA must provide the relevant documents, information or materials that relate to the actual or suspected breach to the Financial Institution, as soon as reasonably practicable, but only to the extent that such documents, information or materials:
  - (i) are not subject to:
    - (A) obligations of confidentiality owed by PEXA to a customer, client or other third party; or

- (B) any applicable Laws (including, but not limited to, the Privacy Laws and the Operating Requirements),

which impose an enforceable legal prohibition against the disclosure or provision of the particular documents, information or material to the Financial Institution by PEXA; and

- (ii) directly relate to the Financial Institution's use of the Services or the obligations of PEXA to the Financial Institution under this Participation Agreement.

## 7.2 **Costs of production by PEXA**

The parties agree to bear their own costs incurred in complying with an Information Request submitted by the Financial Institution under this clause 7, provided that the Information Request does not result in a significant diversion of resources and personnel in complying with the request, as determined by PEXA (acting reasonably) and notified to the Financial Institution. In the event that PEXA considers that an Information Request will result in an unreasonable and significant diversion of resources and personnel, and has notified the Financial Institution to this effect and in accordance with this clause, the parties will consult to seek to agree on the scope for any potential modification to, or limitation on, the request. If the parties cannot then reach an agreement on the implementation of any proposed modifications or limitations to be applied to the Information Request, the parties will be in dispute under this Agreement and subject to the process set out in clause 26, and pending the resolution of that dispute PEXA will take such action as it considers reasonable to comply with the Information Request.

## 7.3 **Requests for information by PEXA**

The parties agree that:

- (a) where there is an actual or suspected breach of this Participation Agreement or the Participation Rules by the Financial Institution, PEXA may by reasonably detailed written notice to the Financial Institution request the Financial Institution to provide all relevant information, documents or other materials (as appropriate in the circumstances) required by PEXA to monitor the Financial Institution's compliance with this Participation Agreement or Participation Rules, as applicable ("**PEXA Information Request**"); and

- (b) within a reasonable time of receipt of a request under paragraph 7.3(a) above, the Financial Institution will provide such information, documents or other materials to the extent comprised in the relevant information categories, but only to the extent that such documents, information or materials:

- (i) are not subject to:

- (A) obligations of confidentiality owed by a Financial Institution to a customer, client or other third party; or

- (B) any applicable Laws,

which impose an enforceable legal prohibition against the disclosure or provision of the particular documents, information or material to PEXA by the Financial Institution; and

- (ii) directly relate to the Financial Institution's use of the Services and are required by PEXA to monitor and confirm the Financial Institution's compliance with this Participation Agreement or the Participation Rules (as the case may be) in accordance with paragraph 7.3(a).

#### 7.4 **Costs of production by Financial Institution**

The parties agree to bear their own costs incurred in complying with a PEXA Information Request submitted by PEXA under this clause 7, provided that the PEXA Information Request does not result in a significant diversion of resources and personnel in complying with the request, as determined by the Financial Institution (acting reasonably) and notified to PEXA. In the event that the Financial Institution considers that a PEXA Information Request will result in an unreasonable and significant diversion of resources and personnel, and has notified PEXA to this effect and in accordance with this clause, the parties will consult to seek to agree on the scope for any potential modification to, or limitation on, the request. If the parties cannot then reach an agreement on the implementation of any proposed modifications or limitations to be applied to the PEXA Information Request, the parties will be in dispute under this Participation Agreement and subject to the process set out in clause 26, and pending the resolution of that dispute the Financial Institution will take such action as it considers reasonable to comply with the PEXA Information Request.

#### 7.5 **Record-keeping**

- (a) PEXA must keep documents, records (including reasonable records and supporting documentation in relation to the Charges) and data:
  - (i) that are adequate and in sufficient detail for PEXA to demonstrate its compliance with this Participation Agreement (including in relation to the accuracy of its invoices); and
  - (ii) as required by any Laws,in an accessible and secure form for a period of at least 7 years from the date of their creation, or longer if required by applicable Laws.
- (b) The Financial Institution 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 Financial Institution Data Formats or data or other information provided to PEXA by the Financial Institution or its customers, it may do so in accordance with the Operating Requirements, subject to PEXA's compliance with clauses 6.6, 6.8, 12 and 13.

#### 7.6 **Regulator-related requests**

Subject always to Annexure D:

- (a) Where related to a requirement or a request of a Regulator, on the Financial Institution's request, PEXA must (unless otherwise precluded by legislation or other regulatory obligation):
  - (i) provide the Regulator and its nominated auditor(s) with access on reasonable prior written notice to its Personnel, sites, facilities, records, materials, policies, resources and/or information relevant to this Participation Agreement, including sites, facilities, records, policies, resources or information of its Personnel;
  - (ii) permit the Regulator and its nominated auditor(s) to view and/or make copies of any such records, materials, policies, resources or information relevant to this Participation Agreement, including any licenses, permits, records and information required to be obtained and maintained by PEXA under this Participation Agreement, within a reasonable time of the Financial Institution's written request; and

- (iii) confirm compliance with those matters set out above or otherwise answer any questions to confirm compliance with any of those matters. If reasonably requested by the Regulator or its nominated auditor(s), PEXA must answer these questions or confirm these matters in writing.
- (b) Except to the extent limited or excluded by legislation or other regulatory obligation, nothing in this sub-clause 7.6 limits or excludes the performance of any activity which is requested to be performed by any auditor, inspector or representative of a Regulator where that auditor, inspector or representative is acting within its powers and authority and in compliance with Laws. The purposes for which an audit of the kind described in this clause may be undertaken include any purpose requested by the auditor where the auditor is an auditor, inspector or representative of a Regulator and is duly authorised or required by applicable Law to conduct the audit, inspection and/or on-site visit (as applicable).
- (c) Subject to any other obligations owed by PEXA under applicable legislation or regulations, PEXA must provide all reasonable assistance required by the Financial Institution or its nominated auditor(s) in exercising the rights granted under this sub-clause 7.6.
- (d) If an audit or an on-site visit is performed by or on behalf a Regulator, then the fact that such audit or on-site visit has been performed is Confidential Information of the Financial Institution. PEXA must not disclose or advertise to any person (other than to the Financial Institution) that a Regulator has conducted an audit or an on-site visit.
- (e) While PEXA acknowledges that the Financial Institution cannot control or dictate the conduct of a Regulator, the Financial Institution will, if appropriate, use reasonable endeavours to inform the Regulator of the fact that PEXA is likely to have information relating to different financial institutions on the same shared systems and request the Regulator to have regard to this when seeking to access information pertaining only on a single financial institution.
- (f) This sub-clause 7.6 survives termination or expiry of this Participation Agreement for a period of 7 years following the date of termination or expiry.

## 7.7 **Post Incident Review**

If the Financial Institution causes or contributes to a Severity 1 or 2 incident (as defined in the Service Charter), PEXA may require the Financial Institution to undertake a post incident review and provide relevant details to PEXA within 10 Business Days of the request (or such other time as agreed between the parties) to assist the parties to prevent recurrence.

## 8. **PEXA'S STATUS**

### 8.1 **Independent contractors**

Subject to sub-clause 8.2, the Financial Institution 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 Financial Institution and PEXA or any of PEXA's Personnel.

### 8.2 **Limited agency**

- (a) The Financial Institution appoints PEXA as its agent solely for the purposes of:
  - (i) providing instructions to the RBA, including for initiating and withdrawing Funds Reservation and initiating the exchange of settlement funds across the

ESA, but only in accordance with the Final Settlement Schedule which has been Digitally Signed by, or on behalf of, the Financial Institution, or a financial institution for which the Financial Institution acts as a Financial Settlement Agent; and

- (ii) (where the Financial Institution is a Payment Integrated Financial Institution) receiving payment instructions from those customers of the Financial Institution who, at the time such instructions are received:
  - (A) are Representative Subscribers, approved by PEXA to participate as a Subscriber within the PEXA System;
  - (B) hold a statutory trust account with the Financial Institution; and
  - (C) have registered that statutory trust account as a Subscriber Trust Account within the PEXA System in accordance with the process described in the Service Charter, including by having the Financial Institution validate:
    - (aa) the relevant account details; and
    - (bb) the payment authorisers who are authorised signatories on that account,

provided that such appointment is limited to PEXA receiving payment instructions in relation to that account from those validated payment authorisers referred to in paragraph (C) when that account is used as a Source Account for Conveyancing Transactions through the PEXA System.

- (b) In performing the tasks referred to in paragraph (a), PEXA must ensure that:
  - (i) the instructions referred to in paragraph (a)(i) are accurately compiled; and
  - (ii) the instructions referred to in paragraph (a)(ii) are passed on to the Financial Institution as provided by the customer without alteration,and in both cases (subject to clause 21) promptly and without delay.
- (c) Upon request, PEXA must provide reasonable assistance (including production of relevant records) to assist the Financial Institution in investigating or resolving any query or dispute (including any query or dispute by the relevant customer) in relation to any instructions referred to in paragraph (a).
- (d) PEXA will be liable to the Financial Institution for any loss or damage (excluding loss or damage of the kind excluded under paragraph 17.7(a)) that the Financial Institution may suffer or sustain arising from PEXA acting, or purporting to act, as the Financial Institution's agent other than as expressly permitted by this clause 8.
- (e) The Settlement Terms and Conditions and the Service Charter may contain further particulars of the processes that the parties will adopt in relation to the performance of the tasks referred to in paragraph (a), however no such particulars will vary paragraph (a) or increase the scope of the appointment of PEXA as the Financial Institution's agent. Any such variation or increase may only be made in accordance with clause 24.

*NOTE: For the avoidance of doubt, clause 8 is not intended by the parties to affect the RBA's ability to rely on PEXA's instructions to the RBA under clause 8.2 (a) (i).*

9. **FINANCIAL SETTLEMENT TERMS AND CONDITIONS**

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

10. **PAYMENT**

10.1 **Charges payable by Financial Institution**

- (a) In consideration for PEXA's supply of the Services, the Financial Institution must pay, in accordance with this clause 10, the applicable Charges for each Conveyancing Transaction undertaken by:
  - (i) the Financial Institution; or
  - (ii) a Panel Member acting on behalf of a Panel Master, when the Panel Master and the Panel Member have instructed PEXA that the Panel Master should be billed for the Conveyancing Transactions.
- (b) The PEXA Fees must be calculated in accordance with this Participation Agreement, the Pricing Policy and the Pricing Schedule.
- (c) The billing procedure will be as follows:
  - (i) unless otherwise agreed with PEXA, the PEXA Fees will be paid to PEXA through direct debit of the Financial Institution's nominated fee paying account on a daily basis; and
  - (ii) the Land Registry Lodgement Fees will be:
    - (A) if the Conveyancing Transaction involves Financial Settlement: as set out in the relevant Settlement Schedule, and to be paid as disbursements out of the settlement funds; or
    - (B) if the Conveyancing Transaction does not involve Financial Settlement: paid through direct debit of the Financial Institution's nominated fee paying account on a daily basis.
- (d) PEXA will supply the Financial Institution, on a daily basis, with an invoice in accordance with sub-clause 10.3 showing the applicable Charges incurred by the Financial Institution on that day, together with a daily transaction file.
- (e) As at the Commencement Date, the PEXA Fees and Land Registry Lodgement Fees comprise the entirety of the Charges for the Services. Any fees and charges, and related billing procedures, for additional or bespoke services will be as separately agreed in writing between the parties (and the parties may agree for those fees and charges to form part of the Charges).

10.2 **Land Registry Lodgement Fees**

Where the Financial Institution is liable for payment of Land Registry Lodgement Fees in respect of a Conveyancing Transaction in accordance with applicable Laws in the relevant Active Jurisdiction, PEXA will:

- (a) collect such Land Registry Lodgement Fees from the Financial Institution on a direct pass-through, zero margin basis; and
- (b) pay those fees to the relevant Land Registry on behalf of the Financial Institution in accordance with the requirements of that Land Registry.

### 10.3 **Invoicing and payment terms**

Any invoice to be provided by PEXA in accordance with this Participation Agreement is correctly rendered only if:

- (a) the amount claimed in the invoice is due for payment and relates to Services duly performed pursuant to this Participation Agreement;
- (b) the invoice is addressed to the Financial Institution (to the address nominated by the Financial Institution from time to time) and identifies this Participation Agreement;
- (c) the invoice is set out in a manner that enables the Financial Institution to ascertain the Services and Conveyancing Transactions the invoice covers, and contains sufficient detail to enable the Financial Institution to verify its accuracy; and
- (d) the invoice is a valid Tax Invoice and complies with the GST Law.

### 10.4 **Other provisions**

- (a) If PEXA becomes aware (either through its own internal processes or following receipt of notification from the Financial Institution) that PEXA has overcharged the Financial Institution for the Services, PEXA must:
  - (i) promptly (and in any event within 10 Business Days of becoming so aware) refund the amount of the overcharge ("Overcharge Amount");
  - (ii) provide the Financial Institution with an "adjustment note" pursuant to section 29.75 of the GST Law; and
  - (iii) provide a statement showing the Overcharge Amount as refunded.
- (b) If any Taxes are required by Law to be withheld from any payment for any goods or services provided by PEXA under this Participation Agreement, the Financial Institution will deduct those Taxes from the amount payable and remit them to the relevant taxing authority. The Financial Institution will provide to PEXA details of any Taxes so remitted in accordance with the taxation law.

## 11. **GST**

### 11.1 **Definitions and interpretation**

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

### 11.2 **GST pass on**

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

- (a) the consideration otherwise provided for that supply under this document 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.

## 12. CONFIDENTIALITY

### 12.1 Meaning of Confidential Information

(a) Subject to paragraph (b), "**Confidential Information**" means information in any form disclosed, provided, or made available by (including via the PEXA System) one party or any of its Group Companies ("**Discloser**") to the other party ("**Recipient**") under or in connection with this Participation Agreement, whether before on or after the date of this Participation Agreement, which:

- (i) is by its nature confidential;
- (ii) the Recipient knows, or ought to know, is confidential (having regard, without limitation, to the technical and commercial sensitivity of the information); or
- (iii) is designated by the Discloser as confidential at or before the time of disclosure,

and includes:

- (iv) information relating to the business, assets, affairs, Personnel, policies, business strategies, customers, products or services, contractual or commercial dealings of the Discloser;
- (v) information comprised in or relating to the Intellectual Property rights of the Discloser, information which relates to the systems or processes of the Discloser, information which is confidential as a result of the relationship between the Discloser and one of its customers, and (where the Financial Institution is the Discloser) Financial Institution Data;
- (vi) information that is made available by or on behalf of a party to the other party for the purposes of, or in connection with, enabling payment integration (as applicable); and
- (vii) information relating to the technical specifications or configuration of either party's systems.

(b) Confidential Information does not include information that:

- (i) is in or enters the public domain through no fault of the Recipient or any of its officers, employees or agents;
- (ii) is or was:
  - (A) known by the Recipient; or
  - (B) made available to the Recipient by a person (whether or not by the Discloser),  
  
other than in circumstances where the Recipient is under an obligation of confidence; or
- (iii) is or was developed by the Recipient independently of the Discloser and any of its officers, employees or agents.

### 12.2 Use and disclosure of Confidential Information

The Recipient must not:

- (a) use any of the Confidential Information of the Discloser 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 disclosure to third parties as necessary to complete a Conveyancing Transaction); or
- (b) disclose any of the Confidential Information of the Discloser except in accordance with sub-clauses 12.3 or 12.4 of this Participation Agreement.

**12.3 Disclosures to personnel and advisers**

- (a) The Recipient may disclose Confidential Information of the Discloser to an officer, employee, agent, contractor, or legal, financial or other professional adviser of the Recipient if:
  - (i) the Recipient obtains the prior consent of the Discloser; or
  - (ii) the disclosure is necessary to enable the Recipient to perform its obligations or to exercise its rights under, or seek professional advice in relation to, this Participation Agreement.
- (b) The Recipient may disclose Confidential Information of the Discloser to:
  - (i) any Group Company of the Recipient;
  - (ii) any licensee or sub-licensee of any Intellectual Property rights which vest in the Recipient or which are licensed to the Recipient in accordance with this Participation Agreement where reasonably required in relation to the enjoyment of those licence rights; and
  - (iii) any Personnel of any Group Company of the Recipient where reasonably required in relation to the activities of that Personnel with respect to that Group Company, provided reasonable obligations of confidentiality exist between that Group Company and that Personnel.
- (c) The Recipient will ensure that any person to whom Confidential Information of the Discloser is disclosed under this sub-clause 12.3 keeps the Confidential Information confidential and does not use it for any purpose other than as permitted under sub-clause 12.2.

**12.4 Disclosures required by Law**

- (a) Subject to paragraph (b), the Recipient may disclose Confidential Information of the Discloser 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;
  - (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) Subject to paragraph (c), if the Recipient is required to make a disclosure under paragraph (a), 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 such Confidential Information to the extent necessary to comply; and
  - (B) use reasonable efforts to ensure that any such Confidential Information disclosed is (to the extent possible) kept confidential.
- (c) The requirements of paragraphs (b)(i) and (ii) do not apply where:
  - (i) the disclosure is required by Law or by an order of any court or tribunal of a competent jurisdiction; and
  - (ii) a customer of the Financial Institution is the subject of such requirement (for example, where PEXA receives a statutory notice in respect of a customer of the Financial Institution).

## 12.5 Confidentiality of this Participation Agreement

For the avoidance of doubt and without limiting the definition of Confidential Information in sub-clause 12.1 of this Participation Agreement, information concerning the terms of this Participation Agreement as applied specifically to the Financial Institution is Confidential Information and will not be disclosed by a party other than in accordance with sub-clauses 12.3 or 12.4 of this Participation Agreement.

## 12.6 Destruction

Without limiting sub-clause 18.6, on termination or expiry of this Participation Agreement, and subject to any term of this Participation Agreement to the contrary, a party will if requested in writing by the other party:

- (a) return to the other party all documents, reports, notes, memoranda, computer media and other materials which record or contain 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 copies and other materials that the Recipient is required by Law to retain (including, for clarity, the Operating Requirements).

## 12.7 Security

The Recipient must take reasonable steps to protect the Confidential Information of the Discloser against unauthorised use or disclosure.

## 12.8 Right to injunctive relief

The Recipient acknowledges that monetary damages may not be a sufficient remedy for a breach of its obligations under this clause 12, and that the Discloser will be entitled, without limiting any of its other rights or remedies, to such injunctive or equitable relief as may be deemed proper by a court of competent jurisdiction if any such breach occurs.

## 12.9 **PEXA's use of de-identified data**

- (a) Subject to clauses 6.6 (Financial Institution Data), 12.1 to 12.8 (Confidentiality) and 13 (Privacy), PEXA may use aggregated and de-identified data generated through PEXA's provision of the Services and the Financial Institution's use of an Electronic Workspace or the PEXA System, as PEXA (in its sole discretion) considers appropriate for commercial or any other purposes whatsoever.
- (b) For the purposes of paragraph (a):
  - (i) "de-identified":
    - (A) in the case of personal information, has the meaning given in section 6(1) of the *Privacy Act 1988* (Cth); and
    - (B) in the case of a Subscriber, means information that is no longer about an identifiable Subscriber, or a Subscriber who is reasonably identifiable,  
  
and, for the purposes of assessing sub-paragraphs (A) and (B) above, when the information is in the hands of PEXA (and not a third party), the fact that PEXA may be able to re-identify the relevant data because it holds the source data will be disregarded; and
  - (ii) "aggregated" means a collation of data which, for the avoidance of doubt, may relate to more than one individual and/or more than one Subscriber.

## 13. **PRIVACY**

### 13.1 **PEXA's privacy obligations**

- (a) PEXA agrees to comply with its obligations under the Australian Privacy Principles (as amended or replaced) and any other applicable Privacy Laws in relation to the handling (including collection, use, retention and disclosure, including any disclosure to any overseas entity) of Personal Information that comes into its possession or control in the course of providing the Services. In doing so, PEXA agrees to give due consideration to any reasonable directions made by the Financial Institution in relation to Personal Information provided to PEXA by the Financial Institution, or held by PEXA on behalf of the Financial Institution.
- (b) Where PEXA has received Personal Information from the Financial Institution, or holds it on behalf of the Financial Institution, PEXA will only use or disclose that Personal Information for the purpose of performing the Services or for fulfilling PEXA's obligations under this Participation Agreement.
- (c) PEXA will ensure that the Personal Information held by it, and that has been provided to it, by the Financial Institution (or on behalf of the Financial Institution) is protected against misuse, loss, interference, unauthorised access, unauthorised modification and unauthorised disclosure.
- (d) PEXA agrees to notify the Financial Institution as soon as practicable after PEXA becomes aware of any actual or suspected misuse, interference, loss or unauthorised access, modification or disclosure of Personal Information, or if it becomes aware of a likely breach of this clause 13.
- (e) In the event of a data breach which, in PEXA's reasonable opinion, poses a real risk of serious harm to the affected individuals, PEXA will undertake reasonable steps to notify the affected individuals.

### 13.2 **Financial Institution's privacy obligations**

- (a) The Financial Institution agrees to comply with its obligations under the Australian Privacy Principles (as amended or replaced) and any other applicable Privacy Laws in relation to the handling (including collection, use, retention and disclosure, including any disclosure to any overseas entity) of Personal Information that comes into its possession or control in the course of PEXA providing the Services. In doing so, the Financial Institution agrees to give due consideration to any reasonable directions made by PEXA in relation to Personal Information provided to the Financial Institution by PEXA.
- (b) The Financial Institution will ensure that the Personal Information held by it and that has been provided to it by PEXA is protected against misuse, loss, interference, unauthorised access, unauthorised modification and unauthorised disclosure.
- (c) The Financial Institution agrees to notify PEXA as soon as practicable after the Financial Institution becomes aware of any actual or suspected misuse, interference, loss or unauthorised access, modification or disclosure of Personal Information held by it and that has been provided to it by PEXA, or if it becomes aware of a likely breach of this clause 13.
- (d) Before providing any Personal Information to PEXA or within an Electronic Workspace, the Financial Institution must provide such notices or obtain such consents as are required to comply with its obligations under the Australian Privacy Principles (as amended or replaced) and any other applicable Privacy Laws in relation to the handling (including collection, use, retention and disclosure, but not disclosure by PEXA to any overseas entity) of Personal Information where such notice or consent is required for the purposes of PEXA carrying out the Conveyancing Transactions contemplated by this Participation Agreement.

### 13.3 **Overseas access to PEXA System**

- (a) The parties acknowledge that:
  - (i) a Subscriber (or another entity acting for or on behalf of a Subscriber) may access the PEXA System from outside Australia; and
  - (ii) in connection with such access, there is a possibility that Personal Information provided by or on behalf of the Financial Institution to PEXA may be disclosed by PEXA to a recipient outside Australia, and the Financial Institution consents to such disclosure by PEXA.
- (b) Where the Financial Institution (or another entity acting for or on behalf of the Financial Institution) accesses the PEXA System from outside Australia (i.e. acts as the 'recipient' for the purposes of sub-paragraph (a)(ii)), the Financial Institution must ensure that it (or the relevant entity acting for or on behalf of the Financial Institution) complies with the Australian Privacy Principles (as amended or replaced) as if it was an organisation under and for the purposes of the Privacy Act in relation to the handling (including collection, use, retention and disclosure, including any disclosure to any overseas entity) of Personal Information that comes into its possession or control in the course of PEXA providing the Services.
- (c) PEXA must ensure that every other Subscriber is subject to an equivalent obligation to that set out in paragraph (b) (as if a reference to "the Financial Institution" were a reference to the relevant Subscriber).
- (d) Where the Financial Institution discloses Personal Information to a recipient outside Australia, the Financial Institution must ensure that the overseas recipient complies with the Australian Privacy Principles (as amended or replaced) as if it was an

organisation under and for the purposes of the Privacy Act. For clarity, where a Subscriber (that is not the Financial Institution or an entity acting for and on behalf of the Financial Institution) accesses the PEXA System from outside Australia, such access will not constitute a disclosure of Personal Information by the Financial Institution for the purposes of this paragraph 13.3(d).

#### 13.4 **Location of computer infrastructure**

PEXA must ensure that any computer infrastructure forming part of the ELNO System and in which Personal Information, Confidential Information of the Financial Institution or Financial Institution Data is stored is located within Australia.

#### 13.5 **Compliance with Australian Privacy Principles**

Except in the circumstances described in clause 13.3(b), where PEXA discloses Personal Information to a recipient outside Australia, PEXA must ensure that the overseas recipient of the Personal Information complies with the Australian Privacy Principles (as amended or replaced) as if it was an organisation under and for the purposes of the Privacy Act.

### 14. **OWNERSHIP OF INTELLECTUAL PROPERTY**

#### 14.1 **Intellectual Property in the Services**

- (a) Subject to paragraphs 14.3(a) and 14.4(a) of this Participation Agreement, the Financial Institution 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 Commencement Date.
- (b) Subject to paragraphs 14.3(a) and 14.4(a), to the extent that the Financial Institution at any time acquires any right, title or interest in any such Intellectual Property brought into existence by PEXA in providing the Services, the Financial Institution, by this Participation Agreement, assigns to PEXA all such rights, title and interest in that Intellectual Property.
- (c) PEXA grants to the Financial Institution, during the Term and for any Transition-Out Period, an irrevocable, non-exclusive, royalty-free licence to use any such Intellectual Property brought into existence by PEXA in providing the Services, solely to the extent required by the Financial Institution to receive and utilise the full benefit of the Services in accordance with this Participation Agreement during the Term (and for any Transition-Out Period). Such licence is transferable and sub-licensable by the Financial Institution, including to such persons who are or may be entitled to receive the benefit of, provide services in respect of, or access the Services and to whom the performance of all or any part of its obligations under this Participation Agreement and/or the exercise of any of its rights under this Participation Agreement may be assigned or sub-contracted (each an "**Authorised Licensee**").

#### 14.2 **Intellectual Property in Financial Institution systems**

- (a) Subject to paragraph 14.4(a) of this Participation Agreement, PEXA shall not have any ownership rights in any Intellectual Property brought into existence by the Financial Institution or an Authorised Licensee in connection with the implementation or integration of the Services into the Financial Institution's own systems (including, for example, interfaces or other bespoke customisations created for or on behalf of the Financial Institution), including such items developed or enhanced after the date of this Participation Agreement.
- (b) Subject to paragraph 14.4(a), to the extent that PEXA at any time acquires any right, title or interest in any such Intellectual Property brought into existence by the Financial Institution or an Authorised Licensee, PEXA, by this Participation

Agreement, assigns to the Financial Institution all such rights, title and interest in that Intellectual Property.

#### 14.3 **Financial Institution Data Formats**

- (a) The Financial Institution will own and maintain ownership of all Intellectual Property in any Financial Institution Data Formats that it supplies to PEXA pursuant to this Participation Agreement.
- (b) The Financial Institution grants to PEXA, during the Term and for any Transition-Out Period, a non-exclusive, royalty free licence to PEXA to use any of its Intellectual Property in the Financial Institution Data Formats it provides to PEXA pursuant to this Participation Agreement, for the purpose of providing the Services to the Financial Institution in accordance with this Participation Agreement.
- (c) The parties acknowledge that from time to time PEXA may wish to make improvements to Services, provide or develop new and/or value-added Services for provision to the Financial Institution and other Subscribers and customers. To the extent this requires any use of any of the Intellectual Property in the Financial Institution Data Formats, PEXA may consult with the Financial Institution and the parties may agree the terms on which such Intellectual Property may be licensed to PEXA for the relevant purposes.

#### 14.4 **Ownership of Pre-Existing IPR**

- (a) Each party acknowledges and agrees that 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 Financial Institution, PEXA will grant the Financial Institution and each Authorised Licensee a non-exclusive, perpetual, irrevocable and non-transferable licence to use its Pre-Existing IPR to the extent necessary to enable the Financial Institution to use the Services during the Term (and for any Transition-Out Period) for the purpose for which they are supplied under this Participation Agreement, and to use its Pre-Existing IPR to the extent necessary to enjoy the full benefit of the Financial Institution's Intellectual Property in the Services during the Term (and for any Transition-Out Period).

### 15. **INTELLECTUAL PROPERTY INFRINGEMENTS**

#### 15.1 **Indemnity for infringement**

- (a) PEXA will indemnify the Financial Institution against liability or loss under or in connection with any claim made by a third party against the Financial Institution regarding its use of the Services or any Intellectual Property in accordance with this Participation Agreement.
- (b) PEXA's obligation to indemnify the Financial Institution in paragraph 15.1(a) will be reduced to the extent that:
  - (i) the Financial Institution fails to comply with its obligations in sub-clause 15.2 below; and / or
  - (ii) the circumstances in sub-clause 15.3 apply.

#### 15.2 **Financial Institution obligations**

The Financial Institution must:

- (a) notify PEXA in writing as soon as reasonably practicable after it becomes aware of any claim under sub-clause 15.1 of this Participation Agreement;
- (b) on leave being granted, 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:
  - (i) PEXA must have regard to the Financial Institution's interests and reputation and PEXA must consult with the Financial Institution and keep the Financial Institution informed of the defence and settlement of the claim;
  - (ii) the Financial Institution may direct PEXA in the conduct of the defence or settlement of any claim to the extent reasonably necessary to:
    - (A) protect the reputation of the Financial Institution to the extent reasonable; and/or
    - (B) ensure the Financial Institution continuity of the use of the Services in accordance with this Participation Agreement; and/or
    - (C) determine the amount of any settlement sum to be granted;
  - (iii) the Financial Institution will retain the right to defend or settle any portion of a claim to the extent that PEXA is not liable to indemnify the Financial Institution for that portion of the claim; and
  - (iv) PEXA must not settle any claim or consent to any judgment involving an adverse finding against the Financial Institution without the prior written consent of the Financial Institution;
- (c) provide PEXA with reasonable assistance in conducting the defence of such a claim, subject to the Financial Institution being reimbursed by PEXA for the costs of providing such assistance (and the parties acknowledge that the Financial Institution may also appoint separate counsel, at its own cost, to advise it in relation to the claim, and PEXA must have regard to the advice, opinions and recommendations given by that separate counsel);
- (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 Financial Institution a licence or other authority to enable the Financial Institution to continue the use of the Services.

### 15.3 Exclusions from indemnity

PEXA's obligation to indemnify the Financial Institution in paragraph 15.1(a) is reduced to the extent that such infringement, suspected infringement or alleged infringement arises from the Financial Institution's use of the Services in breach of this Participation Agreement.

### 15.4 Service continuity notwithstanding claim

If any such action, claim, dispute, suit or proceeding is made, brought or threatened, PEXA must, without limiting its obligations under paragraph 15.1(a), at its own expense:

- (a) obtain for the Financial Institution the right to continue to use the Services; or
- (b) replace or modify the Services or supply the Services again in a manner reasonably acceptable to the Financial Institution without adversely affecting the features,

functionality or performance of the Services or their outputs, so that the infringement or alleged infringement ceases.

## 16. REPRESENTATIONS AND WARRANTIES

### 16.1 Financial Institution's acknowledgements about Conveyancing Transaction information

The Financial Institution acknowledges and agrees that, other than as contemplated by this Participation Agreement (including the Service Charter) and the Operating Requirements:

- (a) before Lodgement, PEXA need not examine or check for accuracy or otherwise any information that:
  - (i) the Financial Institution enters into an Electronic Workspace or provides to PEXA; or
  - (ii) is entered into an Electronic Workspace by means of an integration solution (however described) offered by PEXA in accordance with the Service Charter or this Agreement;
- (b) the Financial Institution is responsible for the accuracy and correctness of all information entered into the PEXA System at the time it is Digitally Signed, including information entered into an Electronic Workspace in accordance with clause 16.1(a)(i) or (ii)) and regardless of whether the relevant User accessed the Electronic Workspace using an IP address contained in an IP Whitelist;
- (c) 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
- (d) any Registry Information Supply data entered into an Electronic Workspace by PEXA through the PEXA System will be limited to the data provided by the relevant Land Registry to PEXA, and therefore may not include all relevant data in the Titles Register.

### 16.2 Services warranty

- (a) PEXA warrants, and continues to warrant throughout the Term (including any Transition-Out Period), that:
  - (i) it will not, and will ensure that its Personnel do not, during the Term (including any Transition-Out Period), engage in any activity that is likely to compromise PEXA's ability to perform its obligations under this Participation Agreement and the Operating Requirements fairly and independently. PEXA will immediately notify the Financial Institution of any activity which constitutes or may constitute a conflict of interest in accordance with paragraph 6.4(a);
  - (ii) the Services and the ELN:
    - (A) will be fit for the purposes contemplated by, and will comply with the requirements of, this Participation Agreement, the Operating Requirements and the ECNL; and
    - (B) are of merchantable quality and are suitable for widespread use by participants in the conveyancing industry; and
  - (iii) it will provide the Services and the ELN in accordance with all Laws, this Participation Agreement and the Operating Requirements.

### 16.3 **General and Intellectual Property warranties**

PEXA warrants, and continues to warrant throughout the Term (including any Transition-Out Period), that:

- (a) it has all necessary rights, authorisations, consents and licences to provide the ELN and the Services as contemplated by this Participation Agreement, including:
  - (i) any necessary rights, authorisations, consents and licences to Intellectual Property subsisting in the ELN and the Services; and
  - (ii) any necessary rights, authorisations, consents and licenses required under any Laws;
- (b) the Services and the ELN do not, and their use will not, infringe or make any unauthorised use of the rights (including Intellectual Property rights) of any person;
- (c) execution and performance of the obligations of PEXA under or pursuant to this Participation Agreement does not breach the terms and conditions of any agreement PEXA has with any other person; and
- (d) the Financial Institution's and its Personnel's (including each Authorised Licensee's) use in accordance with this Participation Agreement of the ELN, the Services or any material provided by PEXA to such persons under this Participation Agreement will not infringe the Intellectual Property rights of any person.

### 16.4 **Exclusion of implied conditions and warranties**

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

### 16.5 **Statutory limitations**

If any condition, guarantee or warranty which is implied into this Participation Agreement under the *Competition and Consumer Act 2010* (Cth) or under any applicable legislation (and which cannot, by law, be excluded) has been breached by PEXA, then PEXA's liability for breach of that implied condition, guarantee or warranty will be limited, at its option, to:

- (a) if the breach relates to goods:
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of such goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
  - (iv) the payment of the cost of having the goods repaired; and
- (b) if the breach relates to services:
  - (i) the supplying of the services again; or
  - (ii) the payment of the cost of having the services supplied again.

## 17. **LIABILITY ALLOCATIONS**

### 17.1 **Liability of PEXA to a Financial Institution where PEXA fails to perform the Services**

- (a) Subject to the exclusions set out in sub-clause 17.2 and the limitations set out in sub-clause 17.3, PEXA will be liable to the Financial Institution for any loss or damage (excluding loss or damage of the kind excluded under paragraph 17.7(a)) that the Financial Institution may suffer or sustain arising from a breach by PEXA of its obligations under paragraph 6.1(a) of this Participation Agreement. The amount of any such loss or damage that is recoverable by the Financial Institution from PEXA will be calculated in accordance with the general law (subject to the exclusion referenced in paragraph 17.7(a)).
- (b) For clarity:
  - (i) nothing in paragraph 17.1(a) limits any other rights, remedies or actions of the Financial Institution in relation to matters other than loss or damage arising from a breach by PEXA of its obligations under paragraph 6.1(a) of this Participation Agreement; and
  - (ii) without limiting any other provision of this Participation Agreement, PEXA will be liable to the Financial Institution for any loss or damage that the Financial Institution may suffer or sustain arising from any error in the PEXA System or ELN that is caused by PEXA (including where such error causes incorrect payments in amount, source or destination).

### 17.2 **When PEXA will not be liable**

To the maximum extent permitted by applicable law, PEXA excludes liability for any loss, damage, cost or expense that is suffered or sustained by the Financial Institution in consequence of PEXA's failure to perform the Services in accordance with paragraph 6.1(a) of this Participation Agreement in respect of the following:

- (a) any delay to the completion of a Scheduled Settlement, where:
  - (i) that delay occurs because of the operation of an extension to the time or date for a Scheduled Settlement; and
  - (ii) that extension occurs in accordance with the requirements of the Service Charter;and provided always that such exclusion:
  - (iii) will not apply to the extent that such delay has been caused or contributed to by any act or omission of PEXA or failure by PEXA to perform any of its obligations under this Participation Agreement; and
  - (iv) does not limit any other obligations of PEXA under this Participation Agreement in connection with the relevant delay or its remediation or management (including, for example, in relation to the execution of business continuity or disaster recovery processes);
- (b) a Financial Settlement completing in circumstances where there has been a delay in the Lodgement of the relevant documents to a time after the completion of the Financial Settlement, including in circumstances where there is further title activity following the time of the occurrence of the Financial Settlement that later prevents the Lodgement and/or Registration of any document, and provided always that:

- (i) such loss, damage, cost or expense has not been caused or contributed to by any act or omission of PEXA or failure by PEXA to perform any of its obligations under this Participation Agreement; and
- (ii) for clarity, this does not limit any other obligations of PEXA under this Participation Agreement in connection with the events giving rise to that loss, damage, cost or expense or their remediation or management (including, for example, in relation to the execution of business continuity or disaster recovery processes).

**17.3 Limitation on PEXA's liability to the Financial Institution under sub-clause 17.1**

- (a) To the maximum extent permitted by applicable law and subject to paragraph 17.3(b), the maximum liability of PEXA to the Financial Institution in respect of any loss, damage, cost or expense that is suffered or sustained by the Financial Institution in relation to Conveyancing Transactions in consequence of PEXA's breach of its obligations under paragraph 6.1(a) of this Participation Agreement will not exceed the Limitation Amount.
- (b) For clarity and without limiting sub-clause 17.5 (**Other liability**), the limitation in paragraph 17.3(a) and the exclusions in sub-clauses 17.2 and 17.7 do not apply in connection with:
  - (i) PEXA's wilful misconduct, fraud or recklessness;
  - (ii) wrongful repudiation or total non-performance of this Participation Agreement by PEXA;
  - (iii) PEXA's liability for loss or damage to tangible, personal or real property or for personal injury, sickness or death;
  - (iv) liability for a breach of the warranty in sub-clause 16.3 (**General and Intellectual Property warranties**);
  - (v) PEXA's liability arising under the indemnity in sub-clause 15.1 (**Indemnity for infringement**); or
  - (vi) PEXA's liability with respect to a breach of clauses 12 (**Confidentiality**), 13 (**Privacy**) or 14 (**Ownership of Intellectual Property**).
- (c) In paragraph (a), "**Limitation Amount**" means, in respect of loss, damage, cost or expense that is suffered or sustained by the Financial Institution:
  - (i) in relation to a single Conveyancing Transaction, an amount of \$5 million per Conveyancing Transaction; and
  - (ii) in relation to all Conveyancing Transactions for which the relevant cause of action arises in an Annual Period, an amount of \$20 million,

in each case subject to adjustment under paragraph (d).
- (d) At the commencement of each Annual Period after the first Annual Period, the Limitation Amount will be adjusted to an amount that:
  - (i) in the case of the Limitation Amount in sub-paragraph (c)(i), is \$5 million multiplied by the Adjustment Factor; and
  - (ii) in the case of the Limitation Amount in sub-paragraph (c)(ii), is \$20 million multiplied by the Adjustment Factor.

- (e) For the purposes of paragraphs (c) and (d) above:
  - (i) the "**Adjustment Factor**" is 100% plus the aggregate percentage increase in the Residential Property Index since the start of the first Annual Period. For clarification, the Adjustment Factor may not be less than 100%; and
  - (ii) "**Annual Period**" means:
    - (A) for the first annual period, the Commencement Date until 30 June 2015; and
    - (B) thereafter, each subsequent 12 month period commencing on 1 July and ending on 30 June.

#### 17.4 **Notification**

The Financial Institution will, as soon as it is practical to do so, give notice to PEXA in writing if it believes that it has or is likely to suffer or sustain any loss, damage, cost or expense in consequence of a failure by PEXA to perform the Services in accordance with sub-clause 6.1 of this Participation Agreement. When giving such a notice to PEXA, the Financial Institution must provide such detail as it is reasonably able to provide at that time as to the nature and extent of the loss, damage, cost or expense that the Financial Institution has suffered or sustained, or that it then expects to suffer or sustain, including the extent to which such loss, damage, cost or expense will arise in consequence of any liability or payment to a third party by the Financial Institution. Notwithstanding this clause or any other provision of this Participation Agreement, the parties acknowledge that the failure to provide such notice will not compromise, reduce or affect any liability of PEXA in relation to the relevant loss, damage, cost or expense, except to the extent that such failure compromises PEXA's ability to mitigate the relevant loss, damage, cost or expense.

#### 17.5 **Other liability**

For the avoidance of any doubt, it is acknowledged that the acceptance of PEXA's liability to the Financial Institution under sub-clause 17.1 does not extend to (or affect) any rights that the Financial Institution may separately have or acquire against PEXA under this Participation Agreement where those rights have arisen other than from PEXA's breach of paragraph 6.1(a) of this Participation Agreement (including, in consequence of a breach by PEXA of its obligations under clauses 12, 13, 14 and 15 of this Participation Agreement).

#### 17.6 **Liability of the Financial Institution to PEXA**

- (a) To the maximum extent permitted by applicable law, the maximum aggregate liability of the Financial Institution to PEXA under or in connection with this Participation Agreement or its subject matter is limited to (regardless of the basis on which such liability arose, whether in tort (including negligence), under statute, indemnity or otherwise) an amount equal to the FI Limitation Amount.
- (b) The limitation in paragraph 17.6(a) and the exclusion in sub-clause 17.7 do not apply in connection with:
  - (i) the Financial Institution's wilful misconduct, fraud or recklessness;
  - (ii) wrongful repudiation or total non-performance of this Participation Agreement by the Financial Institution;
  - (iii) the Financial Institution's liability for loss or damage to tangible, personal or real property or for personal injury, sickness or death; or

- (iv) the Financial Institution's liability with respect to a breach of clauses 12 (**Confidentiality**), 13 (**Privacy**) or 14 (**Intellectual Property**).
- (c) In paragraph 17.6(a), "**FI Limitation Amount**" means an amount equal to the total Charges paid or payable by the Financial Institution to PEXA (other than Land Registry Lodgement Fees or any other amounts that are passed through in full by PEXA to a third party) in the calendar year in which the liability arose.
- (d) The parties acknowledge that, in relation to the Financial Institution's liability to PEXA, the following are not excluded by sub-clause 17.7 (to the extent such losses may fairly and reasonably be considered to arise naturally, that is according to the usual course of things, from the breach or other act or omission giving rise to the relevant liability):
  - (i) any liability that PEXA may incur to any person; and
  - (ii) any loss, damage, cost or expense that PEXA may suffer,

as a direct consequence of a technical inability of the Financial Institution to receive or process a Payment Instruction File that PEXA has sent, or attempted to send, where this has caused the cancellation of a Scheduled Settlement by reason of the Financial Institution's inability to receive or process the Payment Instruction File.

#### 17.7 **Excluded Loss**

- (a) Subject to sub-clause 17.1 and to the extent permitted by law, in no circumstances will either party be liable, whether in contract, tort (including negligence or breach of statutory duty) or otherwise, and whatever the cause, to the other party for any indirect loss, damage, cost or expense suffered or incurred by that other party and arising out of the provision of the Services or of this Participation Agreement, even if the claiming party has advised the other party of their possibility, including with respect to (but only to the extent comprised in the foregoing types of indirect loss, damage, cost or expense) loss of business profits, revenue, opportunity, goodwill or anticipatory profits or business interruption, that may be incurred by the party.
- (b) Nothing in paragraph 17.7(a) will preclude the recovery by a party of loss or damage which may fairly and reasonably be considered to arise naturally, that is according to the usual course of things, from the breach or other act or omission giving rise to the relevant liability.
- (c) Without limitation, the parties agree that the following kinds of losses are not excluded by paragraph 17.7(a):
  - (i) any reasonable legal costs incurred by the Financial Institution as a consequence of a delay in the occurrence of a Scheduled Settlement of a Conveyancing Transaction, to the extent that delay caused or contributed to by an act or omission of PEXA;
  - (ii) any loss suffered or sustained by the Financial Institution by the payment of an incorrect amount by that Financial Institution as a consequence of a Payment Instruction File that was incorrectly prepared by PEXA and that did not correctly record some or all of the payment instructions received by, or given to, PEXA by a Participating Subscriber;
  - (iii) any loss suffered or sustained by the Financial Institution by the processing of any incorrect amount as a consequence of an ESA Settlement Instruction that was prepared by PEXA and that was incorrect or did not correctly record some or all of the required payments or amounts to be exchanged; and

- (iv) any other loss or damage that has been suffered or incurred by the Financial Institution as a consequence of a delay in the occurrence of a Scheduled Settlement, to the extent that the delay was caused or contributed to by an act or omission of PEXA.

## 17.8 **Releases in favour of PEXA**

- (a) Save and except for any liability of PEXA arising under sub-clause 17.1, the Financial Institution releases PEXA from all claims, damages, losses, liability, costs and expenses that the Financial Institution may suffer or incur in connection with the following events, but only where such loss, damage, cost or expense has not been caused or contributed to by any act or omission of PEXA or failure by PEXA to perform any of its obligations under this Participation Agreement:
  - (i) a delay to, an extension of, or a cancellation of a Scheduled Settlement;
  - (ii) any claim, demand, suit or proceeding that is made or brought against the Financial Institution in respect of:
    - (A) a Settlement Schedule, the Financial Institution's Digital Signing of a Settlement Schedule, document or of a required statement (including any Certifications); and/or
    - (B) a matter that is entered, Verified, or Authorised by the Financial Institution within a Settlement Schedule.

## 18. **SUSPENSION, RESTRICTION AND TERMINATION**

### 18.1 **Suspension or restriction by PEXA**

- (a) Without limiting the generality of any other provision in this Participation Agreement (including PEXA's termination rights in sub-clause 18.2 below):
  - (i) PEXA will suspend or restrict the Financial Institution's use of the Services immediately by notice in writing if PEXA or the Financial Institution receive a direction from the Registrar (or Land Registry) pursuant to the ECNL, in which case the suspension or restriction must only be in respect of the relevant Active Jurisdiction; and
  - (ii) PEXA may, at its discretion, opt to suspend or restrict the Financial Institution's use of the Services immediately by notice in writing if:
    - (A) the Financial Institution is in material breach of this Participation Agreement or the Participation Rules, and such breach:
      - (aa) cannot be remedied by the Financial Institution; or
      - (bb) if it can be remedied:
        - (a) the Financial Institution fails or refuses to do so within a period of not less than 30 calendar days of notification by PEXA, such notice specifying the nature of the breach and requiring the Financial Institution to remedy the breach; and
        - (b) the Financial Institution 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) it is reasonably necessary to do so to maintain the integrity and security of the PEXA System, provided that (where practicable) PEXA has first consulted with the Financial Institution with a view to rectifying the event causing the PEXA System integrity or security concern;
  - (C) the Financial Institution owes unpaid PEXA Fees which are not subject to a bona fide dispute and are overdue by over 30 calendar days, and/or unpaid Land Registry Lodgement Fees which are not subject to a bona fide dispute and are overdue by more than 6 calendar days (in the case of restriction), and such amount remains unpaid or undisputed 30 calendar days after the Financial Institution's receipt of notice from PEXA specifying the unpaid amount and requesting payment; or
  - (D) the Financial Institution owes unpaid PEXA Fees which are not subject to a bona fide dispute and are overdue by over 45 calendar days, and/or unpaid Land Registry Fees which are not subject to a bona fide dispute and are overdue by more than 20 calendar days (in the case of suspension), and such amount remains unpaid or undisputed 30 calendar days after the Financial Institution's receipt of notice from PEXA specifying the unpaid amount and requesting payment;
- (iii) PEXA may, at its discretion, opt to suspend or restrict a User's use of the Services if the User has not accessed the PEXA System for 100 days or more.
- (b) Where the Financial Institution's use of the Services is restricted pursuant to subparagraphs (a)(i) or (a)(ii) above:
- (i) the Financial Institution must either (but only in respect of the Active Jurisdiction to which the restriction relates):
    - (A) complete any Conveyancing Transactions that are Outstanding Conveyancing Transactions as at the time of the restriction; or
    - (B) withdraw from any Conveyancing Transactions that are Outstanding Conveyancing Transactions as at the date 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 Financial Institution's ability to Digitally Sign Electronic Workspace Documents will (in respect of the Active Jurisdiction to which the restriction relates) be suspended on such conditions as PEXA may advise the Financial Institution from time to time.
- (c) Where the Financial Institution's use of the Services is suspended pursuant to subparagraphs (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 Financial Institution'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 Financial Institution from time to time.
- (d) PEXA will use its best endeavours to exercise its rights under this sub-clause 18.1 and reasonably consult with the Financial Institution before having recourse to its termination rights under sub-clause 18.2. 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 sub-clause 18.1 as a prerequisite to exercising its termination rights under sub-clause 18.2.

- (e) Upon PEXA being reasonably satisfied that an event that has caused PEXA to exercise its rights under this sub-clause 18.1 has been resolved, PEXA will promptly:
  - (i) notify the Financial Institution that the underlying cause of the restriction or suspension has been resolved; and
  - (ii) allow the Financial Institution to use the Services in the same manner to which the Financial Institution was entitled prior to the suspension or restriction.

## 18.2 Termination by PEXA

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

- (a) the Financial Institution is in material breach of this Participation Agreement or the Participation Rules, and such breach:
  - (i) cannot be remedied by the Financial Institution; or
  - (ii) if it can be remedied:
    - (A) the Financial Institution fails or refuses to do so within a period of not less than 30 calendar days of notification by PEXA, such notice specifying the nature of the breach and requiring the Financial Institution to remedy the breach; and
    - (B) the Financial Institution 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 Financial Institution owes unpaid PEXA Fees which are not subject to a bona fide dispute and are overdue by over 60 calendar days, and/or unpaid Land Registry Lodgement Fees which are not subject to a bona fide dispute and are overdue by more than 30 calendar days, and such amount remains unpaid or undisputed 30 calendar days after the Financial Institution's receipt of notice from PEXA specifying the unpaid amount and requesting payment;
- (c) the Financial Institution's profile has been suspended for 12 months or more;
- (d) the Financial Institution becomes or resolves to become subject to any form of insolvency administration;
- (e) it is reasonably necessary to do so to maintain the integrity and security of the PEXA System;
- (f) PEXA is required to do so following a direction by a Registrar or Land Registry (including pursuant to the ECNL) with respect to a particular Active Jurisdiction, provided that in such circumstances PEXA may only suspend or restrict the Financial Institution's use of the Services in the Active Jurisdiction in respect of which the Registrar's direction related, and Services with respect to other Active Jurisdictions remain unaffected;
- (g) PEXA is required to do so otherwise by Law; or

- (h) 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. For the purposes of this paragraph (h):
  - (i) a "materially adverse commercial effect" means that the continued provision of the Services by PEXA to all Subscribers in an Active Jurisdiction is commercially unrealistic or impossible, and cannot be accommodated through the variation procedure in clause 24;
  - (ii) PEXA may only terminate pursuant to this paragraph (h) after:
    - (A) providing as much notice as is practicable in the circumstances; and
    - (B) endeavouring, in good faith, to change this Participation Agreement in accordance with clause 24;
  - (iii) for the avoidance of doubt, a decision by PEXA to terminate pursuant to paragraph (h) may be contested by the Financial Institution in accordance with the dispute resolution process set out in clause 26 of this Participation Agreement; and
  - (iv) the parties acknowledge and agree that, for the purposes of termination under paragraph (h):
    - (A) PEXA will seek to restrict the termination to the Active Jurisdiction directly impacted by the relevant material adverse commercial effect; and
    - (B) notwithstanding sub-paragraph (A), it may be appropriate to terminate the Services in more than one Active Jurisdiction (and possibly all Active Jurisdictions) depending on the nature and extent of the relevant material adverse commercial effect.

### 18.3 Termination by the Financial Institution

- (a) The Financial Institution may terminate this Participation Agreement immediately by notice in writing if:
  - (i) PEXA is in material breach of this 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 30 calendar days of notification by the Financial Institution, 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 Financial Institution to rectify the breach; or
  - (ii) PEXA becomes or resolves to become subject to any form of insolvency administration.
- (b) Subject to sub-clause 18.5, the Financial Institution may terminate this Participation Agreement for no cause and without penalty by giving 42 calendar days' written notice to PEXA. If the Financial Institution terminates this Participation Agreement

under this paragraph (b), the Financial Institution must, prior to such termination, either:

- (i) do everything reasonably necessary to complete any Outstanding Conveyancing Transactions; or
- (ii) withdraw from any Conveyancing Transactions that are Outstanding Conveyancing Transactions as at the date of termination,

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.

#### 18.4 **Effect of termination**

Each party's further rights and obligations under this Participation Agreement will cease immediately on the expiry or termination of this 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.

#### 18.5 **Consequences of termination and/or suspension**

- (a) If notice is given to the Financial Institution pursuant to sub-clause 18.2 of this Participation Agreement, PEXA may, in addition to terminating this 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) Subject to paragraph 18.5(c), the Financial Institution agrees that:
  - (i) in the event of termination by PEXA of this Participation Agreement, or suspension by PEXA of the Financial Institution's ability to use the Services, PEXA may not allow, and has no obligation under this Participation Agreement to allow, a Conveyancing Transaction initiated by the Financial Institution after the effective time of such termination or suspension 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 due to PEXA's fraud, negligence or breach of this Participation Agreement.

This will not limit any other rights or remedies of the Financial Institution under this Participation Agreement in relation to other acts or omissions of PEXA.

- (c) In the event that this Participation Agreement is terminated by either party, or the Financial Institution resigns as a Subscriber, to the extent the Financial Institution is able and legally permitted to do so:
  - (i) if the Financial Institution is a Payment Integrated Financial Institution, the Financial Institution must continue to make available the existing payment integrated service for an additional 45 Business Days after the date of termination;
  - (ii) if the Financial Institution is supporting another participant in the ELN for payment processing via its ESA, the Financial Institution must continue to make available the existing ESA service for an additional 90 Business Days after the date of termination; and

- (iii) if the Financial Institution is providing services contemplated under clause (ii) above, the Financial Institution must provide its customer with notice of the termination period and provide PEXA with a copy of such notice within 5 Business Days of termination.

## 18.6 **PEXA's obligations on termination**

If notice is given to PEXA pursuant to sub-clause 18.3 of this Participation Agreement by the Financial Institution, PEXA must (subject to PEXA's obligations in the Operating Requirements):

- (a) promptly provide to the Financial Institution on request an extract of all Transaction Data in an agreed or accepted export file format (PEXA will bear the costs of complying with such request, except where compliance with the request would result in a significant additional cost to PEXA, as determined by PEXA (acting reasonably), in which case PEXA will notify the Financial Institution in advance and the parties will in good faith agree an appropriate arrangement to carry out the tasks referred to in this paragraph (a)); and
- (b) work in good faith with the Financial Institution to procure, to the extent reasonably practicable, that the exported Transaction Data delivered to the Financial Institution is human-readable and provided in a way that promotes its useability and the ordinary re-inputting of that Transaction Data into any alternate transaction systems.

## 18.7 **Return of property on termination**

If notice is given by either party pursuant to sub-clause 18.2 or 18.3 of this Participation Agreement, each party must promptly return (or, at the other party's option, destroy and certify the destruction of, or delete from the its system and certify the deletion of) any of the other party's property in its possession, custody or control.

## 19. **TRANSITION-OUT**

### 19.1 **Application**

- (a) This clause 19 applies, at the option of the Financial Institution as notified to PEXA in writing, during the period:
  - (i) commencing on the date on which this Participation Agreement expires or is terminated; and
  - (ii) ending on the date specified in the Financial Institution's notice, provided that such date must be no later than 12 months after the date of expiry or termination,  
  
(the "**Transition-Out Period**").
- (b) Any services which PEXA is required to provide under this clause 19 which are in addition to the Services which PEXA is otherwise required to provide under this Participation Agreement are referred to in this clause 19 as the "**Transition-Out Services**".

### 19.2 **Performance of Transition-Out Services**

- (a) PEXA must:
  - (i) except to the extent otherwise requested by the Financial Institution, continue to provide the Services (including any associated reporting and other related

services required under this Participation Agreement) during the Transition-Out Period in accordance with the terms of this Participation Agreement;

- (ii) do everything within its control to ensure that there is no disruption to such Services during the Transition-Out Period; and
  - (iii) provide for the orderly hand over of such Services to the Financial Institution or a third party supplier nominated by the Financial Institution.
- (b) All Transition-Out Services will be provided by PEXA in accordance with this Participation Agreement, including any Transition-Out Plan approved by the Financial Institution in accordance with sub-clause 19.3.
- (c) The Financial Institution may terminate the Transition-Out Services, in whole or in part, at any time by giving PEXA 5 Business Days written notice of such termination.

### 19.3 **Development of Transition-Out Plan**

- (a) PEXA must prepare a plan for transition-out and deliver that plan to the Financial Institution for its approval as soon as practicable following the receipt of any notice of termination and otherwise where requested by the Financial Institution. The transition-out plan must detail the Transition Out Services to be provided by PEXA during the Transition-Out Period, including any Charges for such Transition-Out Services.
- (b) Once approved by the Financial Institution, the detailed transition-out plan (the "**Transition-Out Plan**") will be incorporated into this Participation Agreement.
- (c) PEXA must update the Transition-Out Plan where reasonably requested by the Financial Institution from time to time, and submit each updated version of the Transition-Out Plan to the Financial Institution for approval.

### 19.4 **Payment for Transition-Out Services**

- (a) To the extent PEXA continues to provide the Services (other than the Transition-Out Services) during the Transition-Out Period, the Financial Institution will continue to pay PEXA the Charges for those Services in accordance with this Participation Agreement.
- (b) Subject to paragraph (c), PEXA will be entitled to be paid for performing the Transition-Out Services in accordance with the Transition-Out Plan, including the Charges set out in that plan.
- (c) Where the Financial Institution terminates this Participation Agreement under any provision of this Participation Agreement (other than under paragraph 18.3(b)), PEXA must provide the Transition-Out Services at no cost or charge to the Financial Institution.

## **PART C – GENERAL**

### 20. **INSURANCE**

- (a) PEXA must hold and maintain for the Term (including any Transition-Out Period) the insurances PEXA is required to hold and maintain as an ELNO under the Operating Requirements or by Law.
- (b) PEXA must, on the Commencement Date and thereafter on an annual basis, provide the Financial Institution with certificates of currency showing PEXA's compliance with the insurance requirements set out in paragraph (a) above. For the avoidance of

doubt, the presentation of the documentary evidence on an "annual basis" will be on a date nominated by PEXA occurring once every calendar year and common to all Subscribers.

- (c) If the Financial Institution is not an authorised deposit-taking institution (as that term is defined in the *Banking Act 1959* (Cth)), the Financial Institution must, on the Commencement Date and each anniversary of the Commencement Date, provide PEXA with documentary evidence (including certificates of currency and any other documentation as reasonably requested by PEXA) of the Financial Institution's compliance with the Insurance Rules.

## 21. **EMERGENCY INTERIM SERVICES AND FORCE MAJEURE**

### 21.1 **Emergency Interim Services**

- (a) The Financial Institution acknowledges that circumstances may, in PEXA's reasonable opinion, necessitate an immediate change to the manner in which the Services are delivered in the interests of preserving the integrity and efficiency of the PEXA System and the Services, and that in these circumstances it would be impractical (due to time constraints and the urgency of the situation) to seek prior approval from the Financial Institution. Specifically, these circumstances include situations in which, without reasonable prior notice, either:

- (i) PEXA is prevented from providing part of the Services due to a change to the services provided to PEXA by government agencies over whom PEXA has no control; or
- (ii) PEXA reasonably suspects that the network is subject or potentially subject to fraudulent use or a similar form of abuse by Users, or another urgent or emergency situation, which threatens to undermine the integrity of the PEXA System,

("Emergency Interim Circumstances").

- (b) In the event of Emergency Interim Circumstances, PEXA may, on an interim basis (and without limiting PEXA's obligations under this Participation Agreement to mitigate or otherwise address circumstances which adversely impact upon the Services, including PEXA's obligations under sub-clause 28.6), provide the Services in an altered or modified form in a manner which would otherwise be inconsistent with the terms of this Participation Agreement ("**Emergency Interim Services**"):

- (i) to the extent that (in PEXA's reasonable opinion) it is necessary to do so for the efficient functioning of the PEXA System, and to avoid loss, disruption or other inconvenience to Subscribers; and
- (ii) pending review by the parties of the relevant provisions of this Participation Agreement with which the Emergency Interim Services are inconsistent.

- (c) Where PEXA considers there is a need to provide Emergency Interim Services in the manner contemplated in paragraph (b) above, PEXA must:

- (i) notify the Financial Institution as promptly as possible that the Services will be replaced with Emergency Interim Services; and
- (ii) to the extent practicable, indicate an approximate time frame for resolving the circumstances necessitating the provision of Emergency Interim Services.

- (d) No later than 30 days after the commencement of Emergency Interim Services:

- (i) the parties must meet to determine whether:
  - (A) this Participation Agreement requires variation to reflect the changed circumstances; or
  - (B) the Emergency Interim Services should continue for an agreed further period, at the expiration of which the parties will again confer in accordance with this paragraph (B);

and for the avoidance of doubt, PEXA must continue to provide the Emergency Interim Services pending the outcome of the process in this paragraph (d).

## 21.2 Force Majeure

- (a) Neither party will be liable for any delay or failure to perform its obligations under this Participation Agreement to the extent that such delay is due to a Force Majeure Event provided that:
  - (i) such party notifies the other party promptly of the occurrence of the Force Majeure Event;
  - (ii) the delay or failure could not have been prevented by reasonable precautions, or could not have reasonably been circumvented by such party by means of alternate sources, workarounds or other means; and
  - (iii) in the case of a failure or delay on the part of PEXA, PEXA complies with its obligations under sub-clause 28.6 in respect of such failure or delay, including by implementing its Business Continuity and Disaster Recovery Plan and such party continues to comply with any provisions under this Participation Agreement which by their nature are intended to continue during the Force Majeure Event.
- (b) Upon receipt of the notification referred to in sub-paragraph (a)(i), the parties must meet and discuss in good faith how to address the Force Majeure Event and to resume performance in accordance with this Participation Agreement. Without limiting the foregoing, the party which is unable to perform its obligations must use its best efforts to minimise the effect of the Force Majeure Event and resume performance in accordance with this Participation Agreement as soon as possible.

## 22. SUB-CONTRACTING

- (a) A party may sub-contract the performance of all or any part of its obligations and/or the exercise of any of its rights under this Participation Agreement, provided that:
  - (i) in the case of PEXA, where PEXA appoints, or there is a change to, a subcontractor involved in the provision of a critical aspect of the Services (which will include any subcontractor providing services offshore), PEXA must:
    - (A) provide the Financial Institution with as much advance notice as is reasonable in the circumstances; and
    - (B) in any event, notify the Financial Institution's Relationship Manager within 7 days of such appointment; and
  - (ii) in the case of the Financial Institution:
    - (A) a subcontractor may only participate in an Electronic Workspace if it does so by using the Financial Institution's credentials, and will not participate in an Electronic Workspace in its own right; and

- (B) the Financial Institution will provide to PEXA such documents, information and materials regarding the activities of a subcontractor if so requested by PEXA in accordance with, and subject to the process and limitations set out in, sub-clause 7.3.
- (b) The subcontracting party will not be relieved of any of its liabilities or obligations under this Participation Agreement as a result of entering into any subcontracts of its obligations under this Participation Agreement, and will be liable for the acts and omissions of its subcontractors as fully as if they were its own.
- (c) The subcontracting party agrees that a subcontractor's failure to perform does not constitute an event which is beyond the control of the subcontracting party.

## 23. ASSIGNMENT AND NOVATION

### 23.1 Assignment

- (a) The Financial Institution must not assign, novate, transfer or otherwise deal with its subscription to the ELN.
- (b) Subject to PEXA obtaining prior approval from each of the Registrars, PEXA may assign, novate, transfer or otherwise deal with its rights under this Participation Agreement. For the avoidance of doubt, PEXA is not permitted to assign its rights and status as an ELNO.

## 24. VARIATION

### 24.1 Overview

- (a) This clause 24 sets out the various grounds on which PEXA may vary the terms of this Participation Agreement. For summary and information purposes only (and without limiting the detail in sub-clauses 24.2 to 24.5 below), the various change categories and processes to be followed are set out in the following table:

	<b>Change category</b>	<b>Process</b>
1.	Regulatory changes	PEXA may change by providing notice to the Financial Institution – sub-clause 24.2
2.	Changes specific to the Financial Institution	Requires written agreement of the Financial Institution – sub-clause 24.3
3.	Material changes affecting rights and obligations and ability to receive Services	PEXA may change following consultation with, and agreement of, the Representative Body – sub-clause 24.4
4.	Operational changes, and changes not covered by categories 1 – 3 above	PEXA may change after informing the Representative Body – sub-clause 24.5

- (b) If a particular proposed change meets more than one of the change categories set out in sub-clauses 24.2 to 24.5 below, then the applicable change process for that proposed change will be the one appearing higher in the table above.
- (c) There must be a Representative Body appointed at all times for the purposes of this clause 24.

### 24.2 Regulatory related changes

PEXA may change this Participation Agreement where that change:

- (a) is necessary to comply with:
  - (i) a change in applicable Law (including the ECNL), the Operating Requirements or Participation Rules after the Commencement Date; or
  - (ii) a validly issued direction after the Commencement Date of a Registrar or regulator that governs or administers PEXA, in the Active Jurisdiction in which that Registrar or regulator has jurisdiction (including where that direction is given to preserve the integrity of the network or the Services), and provided that PEXA provides evidence of such direction to the Financial Institution; or
- (b) comprises the removal of availability of the Services or ELN in any Active Jurisdiction due to the acts or decisions of a government agency that are outside PEXA's control,

by giving the Financial Institution as much notice of that change as is reasonably practicable in the circumstances.

### 24.3 **Changes specific to the Financial Institution**

Subject to paragraph 24.1(b), PEXA may only change Attachment C to this Participation Agreement where that change is agreed in writing with the Financial Institution.

### 24.4 **Changes by agreement**

- (a) Subject to paragraph 24.1(b), PEXA may change this Participation Agreement:
  - (i) in a manner that would, or would be reasonably likely to:
    - (A) materially adversely affects the rights or obligations of the Financial Institution under this Participation Agreement;
    - (B) materially adversely affect the ability of the Financial Institution to access, or receive and enjoy the benefit of, the ELN and the Services; or
    - (C) adversely affect the Financial Institution's ability to comply with applicable Law;

provided that PEXA has first obtained the agreement of the Financial Institution via its Representative Body in accordance with paragraphs (c) to (d) below.

- (b) Without limitation, changes that PEXA may make in accordance with paragraph (a) include:
  - (i) changes to this clause 24;
  - (ii) changes relating to any liability or indemnity provisions in this Participation Agreement;
  - (iii) changes to the Pricing Policy or Pricing Schedule (for the avoidance of doubt, this does not include changes to the Charges described in clause 24.5(a)(i));
  - (iv) changes that are reductions to the Services or which materially adversely affect the value of the Services to the Financial Institution; and
  - (v) changes to the scope of PEXA's appointment as agent of the Financial Institution under clause 8.

- (c) If PEXA wishes to make a change to this Participation Agreement of the type described in paragraph (a), PEXA must first:
  - (i) inform the Representative Body of the nature of the proposed change, including:
    - (A) details of the reason for the proposed change and a summary of the proposed change;
    - (B) a copy of the latest version(s) of the documents that PEXA proposes to change, showing the proposed change(s) in mark-up; and
    - (C) the date on which PEXA proposes the change will take effect,
      - (with such notice to also be provided to the Financial Institution);
  - (ii) consult with the Representative Body regarding the proposed change and allow the Representative Body a reasonable opportunity to comment on the proposed change (including whether a longer period of notice for the proposed change to take effect should apply); and
  - (iii) having reasonably considered the Representative Body's response to the proposed change, either:
    - (A) issue to the Financial Institution and the Representative Body a final change notice for the proposed change which reflects the agreement between the parties on the nature of the change (including the date on which the change will take effect), and provided that the minimum notice period for such change to take effect will be 30 days from the date on which the relevant change notice was issued (or as otherwise agreed);
    - (B) abandon the proposed change; or
    - (C) vary the proposed change and re-submit it for consultation under subparagraphs (i) and (ii).
- (d) If, after following the consultation process referred to in paragraph (c) (repeated if necessary), the Representative Body communicates the approval of the change in writing, then:
  - (i) PEXA may implement that change in accordance with the terms of such approval; and
  - (ii) the Financial Institution accepts the terms of the change as communicated in writing by the Representative Body.

#### **24.5 Changes after informing the Representative Body**

- (a) Subject to paragraph 24.1(b), PEXA may change this Participation Agreement after informing the Representative Body in accordance with paragraphs (b) and (c) below. Without limitation, changes that PEXA may make in accordance with this sub-clause 24.5 include:
  - (i) changes to the Charges that are made in accordance with the Pricing Policy, other than an annual adjustment to the PEXA Fee that is no greater than CPI or an adjustment of LSS (as that term is defined in the Pricing Policy) which may be made by PEXA and implemented without informing or consulting the

- Representative Body (but in each case in accordance with and subject to the Pricing Policy);
- (ii) changes that are operational in nature, apply to the network as a whole and do not affect the Financial Institution's ability to comply with applicable Law; and
  - (iii) changes that reflect improvements to the Services.
- (b) If PEXA wishes to make a change to this Participation Agreement under paragraph (a), PEXA must:
- (i) provide the Representative Body with as much notice as reasonably practicable of the nature of the proposed change, including:
    - (A) details of the reason for the proposed change and a summary of the proposed change;
    - (B) the reasons why PEXA considers the proposed change to be one to which sub-clause 24.5 applies (and not sub-clauses 24.3 or 24.4);
    - (C) a copy of the latest version(s) of the documents that PEXA proposes to change, showing the proposed change(s) in mark-up; and
    - (D) the date on which PEXA proposes the change will take effect,
 (with such notice to also be provided to the Financial Institution);
  - (ii) reasonably consider any comments or observations provided by the Representative Body regarding the proposed change, having allowed the Representative Body a reasonable opportunity to comment on the proposed change (including whether a longer period of notice for the proposed change to take effect should apply, or (if applicable) whether the proposed change is more appropriately a change to which sub-clauses 24.3 or 24.4 ought to apply); and
  - (iii) having reasonably considered the Representative Body's comments or observations, either:
    - (A) issue to the Financial Institution a final change notice for the proposed change, provided that the minimum notice period for such change to take effect will be 30 days from the date on which the final change notice was issued (or as otherwise agreed). For the avoidance of doubt, such 30 day notice period will commence after PEXA has reasonably considered any comments or observations provided by the Representative Body under sub-paragraph (ii) above and has issued the final change notice;
    - (B) abandon the proposed change; or
    - (C) vary the proposed change and re-notify the Representative Body under sub-paragraph (i) above.
- (c) The Financial Institution agrees that PEXA may implement any change described in a change notice issued under sub-paragraph (b)(iii)(A) in accordance with the terms of that change notice, provided that PEXA has otherwise complied with paragraph (b) above.

## 25. **TECHNOLOGY AND RELEASE MANAGEMENT**

### 25.1 **Changes to the ELN**

- (a) The Financial Institution acknowledges that the core ELN application as available to Subscribers (excluding any System Interfaces) will only ever be offered as one version, and that, subject to the terms of this Participation Agreement and the Operating Requirements, 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.
- (b) Subject to clause 24 and this clause 25, for the avoidance of doubt, nothing in this Participation Agreement prohibits PEXA from making technological improvements to the ELN where such changes do not impact the use (including the benefit derived from use) of the Services by the Financial Institution or other Subscribers (provided that any change requiring the Financial Institution to incur costs or liabilities in updating System Interfaces or integrating with the updated ELN will not be considered a technological improvement for the purposes of this clause).
- (c) The Financial Institution may be required to modify the processes, procedures, systems or access points through which the Financial Institution accesses and by which it uses the PEXA System, an Electronic Workspace or the ELN to accommodate Major Releases and Minor Releases. However, PEXA will ensure that any Scheduled Maintenance will not, to PEXA's knowledge, require the Financial Institution to materially modify such processes, procedures, systems or access points.
- (d) The Financial Institution acknowledges and agrees that PEXA shall not be responsible for or accept any liability for any of the Financial Institution's cost, loss or damage resulting from such modifications where such Major Releases and Minor Releases are scheduled in accordance with sub-clause 25.2.

### 25.2 **General release management**

- (a) Within 90 calendar days prior to the start of a calendar year (or as otherwise reasonably advised by PEXA to the Financial Institution), PEXA will provide the Financial Institution with an indicative timetable of the new release programs, Major Releases and Minor Releases, to be implemented in that calendar year.
- (b) PEXA will schedule no more than two Major Releases and two Minor Releases (this does not include any Scheduled Maintenance) in relation to the ELN each calendar year, unless otherwise agreed between the parties.
- (c) PEXA will, prior to implementing any release into production, rigorously test that release to a standard which would reasonably be expected of a well run and diligent professional services organisation providing services similar to the Services and, where requested by the Financial Institution, provide a summary of such test results, including details of any known issues, to the Financial Institution.
- (d) For any release other than Scheduled Maintenance, PEXA will, prior to implementing that release into production:
  - (i) provide the Financial Institution with at least 6 calendar months' notice of the scheduled date of implementation of that release into production and regularly update the Financial Institution of any changes to that scheduled date. PEXA will use its best endeavours to schedule releases during non-peak periods and at times which minimise disruption to the Services;

- (ii) provide the Financial Institution with the specification and list of enhancements and modifications ("**Release Notes**") for the release as soon as practicable prior to implementation of that release into production and in any event with reasonably sufficient notice in order to enable the Financial Institution to properly implement any necessary modifications to its internal processes, procedures, systems or access points;
- (iii) provide the Financial Institution with controlled access to the release in a non-production environment in line with an agreed (with each Financial Institution) implementation schedule (provided that such access is provided in a mutually agreed timeframe prior to the implementation of that release into production unless otherwise agreed in writing), to enable the Financial Institution to:
  - (A) conduct its own tests on the release, including with respect to any integration with or access points to the Financial Institution's systems; and
  - (B) conduct such training with the Financial Institution as is reasonably considered necessary by the Financial Institution in relation to that release; and
- (iv) reasonably consult with the Financial Institution to ensure that the Financial Institution makes such changes to the Financial Institution's processes, procedures, systems and access points as are reasonably necessary to accommodate the release, including by reasonably assisting the Financial Institution with testing and training contemplated by sub-paragraph (iii) above.

## 26. **DISPUTES**

### 26.1 **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 this Participation Agreement ("**Dispute**") will be resolved as set out in this clause 26 of this Participation Agreement.

### 26.2 **Notice of dispute or difference**

- (a) If a Dispute arises a party will commence the process contained in this paragraph 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 sub-clause 26.2; and
  - (iii) include or be accompanied by reasonable particulars of the Dispute.

### 26.3 **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 Relationship Manager meets with the Relationship Manager of the other party 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 26.3(b) of this Participation Agreement in relation to all or part of the Dispute within 5 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 26.3(a), a senior manager of the Financial Institution and the General Manager (or equivalent) of PEXA will meet to resolve the dispute.

#### 26.4 **Alternative dispute resolution and other mechanisms**

Nothing in this clause 26 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.

#### 26.5 **Continuance of performance**

The parties submit to the following principles in respect of a Dispute:

- (a) 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;
- (b) PEXA may not withhold Services in the event of a Dispute; and
- (c) if the Financial Institution is receiving other paid services from PEXA (other than standard conveyancing services), the Financial Institution must continue to make payment for such other services as required according to the terms on which those other paid services are procured.

#### 26.6 **Summary or urgent relief**

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

### 27. **NOTICES**

#### 27.1 **How to give a notice**

- (a) A notice, consent or other communication under this Participation Agreement is only effective if it is:
  - (i) in writing, signed by or on behalf of the person giving it;
  - (ii) addressed to attention of the person referred to in sub-clause 27.3 for the party to which it is to be given; and

- (iii) either:
  - (A) delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's address as set out in sub-clause 27.3; or
  - (B) sent by fax to that person's fax number as set out in sub-clause 27.3 and the machine from which it is sent produces a report that states that it was sent in full; or
  - (C) sent to that person's email address as set out in sub-clause 27.3, except in the case of notices in relation to breach of this Participation Agreement, termination of this Participation Agreement, or third party claims of infringement of Intellectual Property (such notices must be delivered or sent in accordance with sub-paragraphs (A) or (B) above).

## 27.2 **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 – 5 Business Days after posting; or
  - (ii) to or from a place outside Australia – 5 Business Days after posting; and
- (c) if it is sent by email - when the email message comes to the attention of the addressee.

## 27.3 **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 Product and Digital Experience Officer (or such other senior executive holding an equivalent position as notified by PEXA to the Financial Institution from time to time), using the following contact details:

Attention: James Ruddock

Address: Tower 4, Level 16, Collins Square, 727 Collins Street Melbourne VIC 3008

Fax: (03) 9621 2182

Email: [compliance@pexa.com.au](mailto:compliance@pexa.com.au); and

- (b) for the Financial Institution, the Relationship Manager, using the following contact details:

Attention:

Address:

Fax:

Email:

## 28. **GENERAL**

### 28.1 **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 in connection with this Participation Agreement.

### 28.2 **Compliance with Financial Institution's regulatory requirements**

- (a) PEXA must use reasonable endeavours to comply with the Financial Institution's reasonable requests to assist the Financial Institution to comply with its legal or regulatory obligations from time to time and the Financial Institution's own policies from time to time.
- (b) The Financial Institution will reimburse PEXA for any of its reasonable and evidenced costs or expenses arising out of compliance with paragraph 28.2(a) of this Participation Agreement (without margin or any management fee) where the Financial Institution's requests result in any cost or expense to PEXA which it would not otherwise incur as part of its own costs of complying with legal or regulatory requirements applicable to PEXA or performing its other obligations under this Participation Agreement or the Operating Requirements, and if such effort cannot reasonably be accommodated by PEXA without increasing the resources or Personnel currently being utilised to provide the Services to the Financial Institution.

### 28.3 **Compliance with Laws**

Each party and its Personnel must comply with all applicable Laws in the performance of this Participation Agreement.

### 28.4 **Cooperation with independent enquiries and certification**

- (a) Subject to any obligation of confidence owed to any third party and to the extent not prohibited by any Law or other legal obligation on the Financial Institution, the Financial Institution will make available to the relevant Independent Expert or Registrar (with a copy to PEXA if required by the Independent Expert or Registrar) at times convenient to the Financial Institution (acting reasonably), all information reasonably required by the Independent Expert or Registrar (as the case may be) for the purposes of conducting an Independent Certification, Compliance Examination Procedure or review of PEXA's Risk Management Framework under the Operating Requirements.
- (b) PEXA will reimburse the Financial Institution for any of its reasonable and evidenced costs or expenses arising out of compliance with this sub-clause 28.4 (without margin or any management fee) where PEXA's, the Registrar's or any Independent Expert's requests result in any cost or expense to the Financial Institution which it would not otherwise incur as part of its own costs of complying with legal or regulatory requirements applicable to the Financial Institution, and if such effort cannot reasonably be accommodated by Financial Institution without increasing the

resources or Personnel currently being utilised by the Financial Institution to manage its use of the Services.

- (c) PEXA may only, and must ensure that the relevant Independent Expert or Registrar (as the case may be) may only, retain information obtained under paragraph (a) of this Participation Agreement to the extent required by:
  - (i) the Registrar in accordance with the Compliance Examination Procedure required under the Operating Requirements; or
  - (ii) the Independent Expert to complete the Independent Certification or review in accordance with the Operating Requirements.
- (d) For clarity, the Financial Institution acknowledges its obligations under the ECNL in relation to co-operating with the Registrar (or any other person conducting a compliance examination on behalf of the Registrar) during any such compliance examination conducted by the Registrar (or any other person) under the ECNL.

## 28.5 Risk management

PEXA must, in accordance with the Operating Requirements, 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 PEXA System.

## 28.6 Business continuity and disaster recovery

- (a) PEXA must, in accordance with the Operating Requirements and this Participation Agreement, and with effect from the Commencement Date, establish, implement, operate, monitor, review, maintain, test and keep current a documented, detailed and comprehensive Business Continuity and Disaster Recovery Plan.
- (b) Without limiting paragraph (a), PEXA must:
  - (i) provide its Business Continuity and Disaster Recovery Plan to the Financial Institution on the Commencement Date (if it has not already done so prior to the Commencement Date), and promptly following any update to that plan (without in any way limiting PEXA's obligation to have in place a Business Continuity and Disaster Recovery Plan from the Commencement Date);
  - (ii) at least once every 12 months, conduct an operational test of its Business Continuity and Disaster Recovery Plan and any alternate facilities and provide to the Financial Institution the results of such tests; and
  - (iii) provide the Financial Institution with a copy of the Business Continuity and Disaster Recovery Plan (including any updates) upon request.
- (c) In the event of a Disaster, including where the Financial Institution informs PEXA that a Disaster has occurred, PEXA must immediately implement the Business Continuity and Disaster Recovery Plan.
- (d) If the Services are not restored despite PEXA implementing the Business Continuity and Disaster Recovery Plan, PEXA must continue to use its best endeavours to minimise any interruption to the Services and to restore the Services in accordance with this Participation Agreement.
- (e) PEXA must keep the Business Continuity and Disaster Recovery Plan and associated plans and processes up to date (providing an update to the Financial Institution no less than once each year), including so that they remain consistent with the then

current Services and provide for any changes in the provision of the Services or the facilities supporting the provision of the Services.

#### 28.7 **Non-Use of Electronic Workspace**

- (a) Subject to paragraph (b), where there has been no activity within an Electronic Workspace for 120 days, PEXA may notify the Financial Institution by giving the Financial Institution at least 14 days' notice that PEXA intends to remove the Electronic Workspace from the PEXA System.
- (b) Where the Electronic Workspace is marked as 'parent', and there has been no activity within an Electronic Workspace for 3 years, PEXA may notify the Financial Institution by giving the Financial Institution at least 14 days' notice that PEXA intends to remove the Electronic Workspace from the PEXA System.

#### 28.8 **Liability for expenses**

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

#### 28.9 **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.

#### 28.10 **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.

#### 28.11 **Operation of this Participation Agreement**

- (a) This Participation Agreement (including Attachments A, B and C to this Participation Agreement), the Pricing Schedule, the Service Charter, the Pricing Policy and the Security Policy 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 document is in addition to, and does not replace or limit, any other right that 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.

#### 28.12 **Operation of indemnities**

- (a) Each indemnity in this Participation Agreement survives the expiry or termination of the 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.

#### 28.13 **Survival of covenants**

Clauses 3.1, 4.1(a)(viii) (to the extent that it relates to compliance with Participation Rule 3(c)), 6.7(b), 11, 12, 13, 14, 15, 17, 23, 26, 27 and 28 of this Participation Agreement, together with any other clause which, by its nature is intended to survive the expiry or termination of this Participation Agreement, survive the expiry or termination of this Participation Agreement.

#### 28.14 **Consents**

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

- (a) agree or consent, or not agree or consent, in its absolute discretion, acting reasonably; and
- (b) agree or consent subject to conditions,

unless this Participation Agreement expressly contemplates otherwise.

#### 28.15 **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 this Participation Agreement is excluded to the full extent permitted by law.

#### 28.16 **Counterparts**

This 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 this Participation Agreement will be of no force and effect until the counterparts are exchanged.

#### 28.17 **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.

### 29. **PUBLICITY**

- (a) The parties agree that each party will not, and will procure that its Personnel do not, without the prior written consent of the other party, use in advertising, publicity or otherwise, any name, trade name, trade mark, trade device, service mark, symbol or any abbreviation, contraction or simulation thereof owned by the other party or any Group Company of that party, including for the avoidance of doubt referring to the name or logo of such person on the first party's website or in any marketing material.
- (b) The parties agree that each party will not, and will procure that its Personnel do not, without the prior written consent of the other party, represent directly or indirectly,

that any product or any service provided by the first party has been approved or endorsed by the other party, any Group Company of that party or any of their representatives.

- (c) For clarity, either party may grant or withhold any consent under paragraph (a) and (b) in its sole discretion.

## **ATTACHMENT A**

### **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 Participation Agreement and is authorised by the Financial Institution to act in accordance with those requirements and the instructions and authorisations that are given to PEXA as contemplated or provided for under the terms of the Participation Agreement.

##### **1.2 Responsibility of the Financial Institution for Line Items in a Settlement Schedule**

When completing a Settlement Schedule, as a Participating Subscriber, the Financial Institution must:

- (a) identify and list all Source Funds (if any) that will be provided directly by that Financial Institution as a Participating Subscriber and that will not be provided from a Subscriber Trust Account or from the PEXA Source Account;
- (b) provide all required account details that are to be provided by that Financial Institution in the relevant Line Items; and
- (c) 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 Financial Institution (if any), and do so in the manner required by PEXA.

##### **1.3 Responsibility of the Financial Institution for the accuracy of all information it enters in a Settlement Schedule**

- (a) Neither the Financial Institution nor PEXA will 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 Financial Institution completes any information in a Line Item, the Financial Institution acknowledges that it is responsible for the continuing accuracy of all of the information in that Line Item.
- (c) Where the Financial Institution uses the Auto-Balancing Function or Auto-Calculating Function, the Financial Institution acknowledges that it is responsible for the final figure of the Auto-Balanced Source Line Item or Auto-Calculated Destination Line Item.
- (d) By Verifying a Line Item that it has completed in the Settlement Schedule and by signing the Settlement Schedule, the Financial Institution represents that:
  - (i) the Source Funds (if any) that have been listed or described by that Financial Institution within the relevant Line Item will, at the time of the Scheduled Settlement, be fully and readily available 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 Financial Institution within a Line Item is, at the time the Line Item is Verified, the correct amount that is required to be included by that Financial Institution 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 Financial Institution in respect of a relevant account of that Financial Institution are complete and correct in every particular.
- (e) If, for any reason, the Financial Institution has incorrectly entered or Verified information in a Line Item, it will be the responsibility of that Financial Institution 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 Financial Institution may request assistance from other Participating Subscribers and (to the extent reasonable) from PEXA, in accordance with PEXA's obligations under the Service Charter.
- (f) Where a change is made to an amount or to any account details in a Line Item that forms a part of a Final Settlement Schedule by the Financial Institution then, after making that change, the Financial Institution must Digitally Sign the Settlement Schedule that is the subject of that change unless the Line Item is an Auto-Balanced Source Line Item or Auto-Calculated Destination Line Item that does not exceed the Maximum Amount or fall below the Minimum Amount.

## 2. **DUTY VERIFICATION**

- (a) PEXA is not, and will not be, responsible for the accuracy of any information or stamp duty amount entered or provided by any Subscriber or Duty Authority in a Duty Line Item.
- (b) The Financial Institution 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) Subject to the matters set out in the ECNL, the Participation Agreement, the Service Charter and these Settlement Terms and Conditions, the Digital Signature of a Subscriber to a document will be binding from the time that the document is Digitally Signed.
- (b) 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 Financial Institution agrees and acknowledges that PEXA is able to rely on each matter that is Verified, and subsequently authorised by the Financial Institution within the Final Settlement Schedule.

PEXA will initiate Financial Settlement in accordance with the details contained in that Final Settlement Schedule.

### 4.2 **Confirmation of funds availability from a Source FI**

Where the Financial Institution has been given a Payment Instruction File as a Source FI, it must provide PEXA with a response file to notify PEXA:

- (a) that the Financial Institution has completed the instructions in the Payment Instruction File; or
- (b) that the Financial Institution has not been able to complete the instructions in the Payment Instruction File and the reasons why it could not complete the instructions.

#### 4.3 **Payment Instructions – PEXA System messaging to RBA for ESA Settlement**

- (a) Where an ESA Settlement Instruction is prepared by PEXA in accordance with this clause and the Service Charter, and is prepared on behalf of the Financial Institution as an ESA Holder:
  - (i) the Financial Institution hereby authorises PEXA to submit the ESA Settlement Instruction to the RBA and to do so for the purpose of facilitating a required payment in respect of a Scheduled Settlement;
  - (ii) the Financial Institution must ensure it has sufficient funds in its ESA for Funds Reservation to occur; and
  - (iii) the Financial Institution must ensure that it remains a valid and authorised RITS Member with an established and maintained ESA at the RBA and a branch and cash account in RITS for the settlement of Conveyancing Transactions.
- (b) The Financial Institution acknowledges that the reserved funds in an ESA, that have been reserved at the request of PEXA in respect of a Final Settlement Schedule, cannot be used for any purpose other than the settlement of the Conveyancing Transaction connected with the relevant Final Settlement Schedule and that the Financial Institution will not be entitled to request the release of the reserved funds.

#### 4.4 **Time of Settlement Completion**

The Financial Institution agrees 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 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.

#### 4.5 **Value held by a Financial Institution for an intended final payee**

If, after Settlement Completion, the Financial Institution is holding value for:

- (a) the intended final payee(s) nominated in a Final Settlement Schedule; or
- (b) another financial institution(s) (where the Financial Institution is acting as a Financial Settlement Agent),

the Financial Institution must process that amount to the relevant recipient as soon as practicable after receiving a payment instruction.

#### 4.6 **Return of funds to a Source Account where a Scheduled Settlement is cancelled**

Where the Financial Institution has moved funds from the Source Account of a customer to an internal clearing account held or maintained by that Financial Institution, and has done so in anticipation of a Scheduled Settlement, the Financial Institution will return those funds to the originating Source Account as soon as practicable after the Financial Institution has been advised by PEXA that the Scheduled Settlement has been cancelled and will not proceed on the scheduled date.

## 5. **ASSISTANCE WITH PAYMENT ERRORS**

- (a) PEXA will notify the Financial Institution if funds associated with a Line Item created by the Financial Institution could not be credited by the relevant financial institution to the account details specified by the Financial Institution.
- (b) In the event that the Financial Institution is notified of the circumstances set out in paragraph (a), the Financial Institution will provide corrected or amended details of the account that was listed (or that was intended to be listed) in the relevant Line Item by the Financial Institution:
  - (i) by entering corrected or amended account details into the 'Corrective Payments' section of the Subscriber Profile and Digitally Signing those details; or
  - (ii) as otherwise required by PEXA.
- (c) Where funds are or may be Misapplied Funds, the Financial Institution must take all reasonable steps to assist with the return of funds, including (where relevant):
  - (i) notifying PEXA that a payment has, or may have, been made to an unrelated or unintended account;
  - (ii) providing corrected or amended details in accordance with the process set out in paragraphs 5(b)(i) or 5(b)(ii); and
  - (iii) returning funds to the PEXA Returns Account or processing returned funds to the actual intended recipient in accordance with the corrective payment instructions received by PEXA and notified by PEXA to the Financial Institution.
- (d) If the Financial Institution is a Payment Integrated Financial Institution, the Financial Institution agrees that notwithstanding clause 1.6 of this agreement, the Financial Institution's obligations in paragraph 5(c) prevail to the extent of any inconsistency with its obligations in Attachment C.
- (e) Where the Financial Institution provides PEXA with corrected or amended account details in accordance with paragraphs 5(b) or 5(c)(ii), the Financial Institution:
  - (i) represents to PEXA that those corrected or amended details are complete and correct in every particular; and
  - (ii) authorises PEXA to provide a payment instruction containing those corrected or amended account details to the relevant financial institution.

## 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.

"**AML/CTF Program**" means the Financial Institution's policy regarding compliance with the AML/CTF Requirements as updated by the Financial Institution from time to time.

"**AML/CTF Requirements**" means:

- (a) the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ("**AML/CTF Act**") and any regulations and rules made in connection with the AML/CTF Act; and
- (b) any directions given by a Regulator in relation to that Act.

"**Applicable Anti-Corruption Laws**" means rules, regulations or industry codes relating to anti-corruption, anti-bribery, money laundering, fraud or similar activities, including but not limited to: *USA Foreign Corrupt Practices Act of 1977, as amended. 15 U.S.C. §78dd-1, et seq*, *Australian Criminal Code Act 1995* (Cth), *Crimes (Secret Commissions) Amendment Act 1987* (NSW), *UK Bribery Act 2010*, and, those laws enacted to comply with the *UN Convention Against Corruption* and the *OECD Anti-Bribery Convention* (as applicable).

"**Associated Parties**" means any subcontractor, independent contractor or supplier or goods or services to PEXA.

"**Australian Privacy Principles**" has the meaning given in the Privacy Act 1988 (Cth).

"**Authorisation/Authorised**" means an approval, by means of the Digital Signature of the Representative Subscriber, or of their appropriately appointed and authorised 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.

"**Authorised Licensee**" has the meaning given in paragraph 14.1(c).

"**Auto-Balanced Source Line Item**" is a Line Item in the Settlement Schedule that is automatically modified by the PEXA system to update the Source Funds as required to balance the Settlement Schedule.

"**Auto-Balancing Function**" means a feature that allows a Workspace to automatically balance by allowing the Incoming Mortgagee to create an Auto-Balanced Source Line Item.

"**Auto-Calculated Destination Line Item**" is a Line Item in the Settlement Schedule that is automatically modified by the PEXA system to update the vendor's Destinations as required to balance the Settlement Schedule.

"**Auto-Calculating Function**" means a feature that allows a Workspace to automatically balance by allowing the Proprietor on Title or Mortgagee on Title to create an Auto-Calculated Destination Line Item.

"**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 Lodgements 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 Lodgements 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.

**"Certification"** means a certification as provided in accordance with the Certification Rules.

**"Charges"** means the PEXA Fees as set out in the Pricing Schedule and Land Registry Lodgement Fees, and any other fees and charges that the parties agree will form part of the Charges in accordance with paragraph 10.1(e).

**"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.

**"Client Authorisation"** has the meaning given to it in the ECNL.

**"Commencement Date"** means the date of release by PEXA of increment 2.3 of the PEXA System, or the first date by which all parties have executed this Participation Agreement (whichever is the later).

**"Complaint"** means a complaint that is not frivolous or vexatious.

**"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 in sub-clause 12.1.

**"Conveyancing Transaction"** has the meaning given to it in the Operating Requirements.

"**CPI**" means the consumer price index (all groups, weighted average of eight capital cities) published by the Australian Bureau of Statistics.

"**Data Standard**" has the meaning given to it in the Operating Requirements.

"**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.

"**Digital Certificate**" has the meaning given to it in the Operating Requirements.

"**Digital Signature**" has the meaning given to it in the Operating Requirements.

"**Disaster**" means an event (which may include a Force Majeure Event) that causes, or is likely to cause, a material adverse effect on the provision of the Services that cannot be managed within the context of normal operating procedures including interruption, destruction or other loss of operational capacity.

"**Discloser**" has the meaning given to it in paragraph 12.1(a).

"**Duty Authority**" has the meaning given to it in the Operating Requirements.

"**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.

"**Electronic Workspace**" has the meaning given to it in the Operating Requirements.

"**Electronic Workspace Document**" has the meaning given to it in the Operating Requirements.

"**ELN**" has the meaning given in the ECNL.

"**ELNO**" has the meaning given in the ECNL.

"**ELNO System**" has the meaning given in the Operating Requirements.

"**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 (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).

**"Event of Suspension"** means where PEXA is entitled to suspend this Participation Agreement in accordance with clause 18.1(a)(ii)(A).

**"Event of Termination"** means where PEXA is entitled to terminate this Participation Agreement in accordance with clause 18.2(a).

**"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 within the hour prior to the originally Scheduled Settlement.

**"Financial Institution Data"** means all data and information (including Personal Information) relating to the Financial Institution and its customers, Personnel and transactions, that is entered or transmitted into an Electronic Workspace or the ELN by or on behalf of the Financial Institution, in whatever form such information may exist, including information regarding the Financial Institution's authorised signatories. For the avoidance of doubt, Financial Institution Data does not include any data sourced from the applicable Land Registry, from another Subscriber, or from any other third party other than the Financial Institution.

**"Financial Institution Data Formats"** means all specific data formats created by or on behalf of, proprietary to, or unique to the Financial Institution, and associated with the way in which the Financial Institution enters, retrieves or exchanges data or information into, from or with an Electronic Workspace or the ELN, including data, data templates, information, materials, codes, processes and scripts.

**"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, 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.

**"Group Company"** means a party or a 'related body corporate' (as that term is defined in the *Corporations Act 2001* (Cth)) of that party.

**"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).

**"Independent Certification"** has the meaning given to it in the Operating Requirements.

**"Independent Expert"** has the meaning given to it in the Operating Requirements.

**"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.

**"IP Whitelist"** means a whitelist of IP addresses provided by the Financial Institution to PEXA.

**"IP Whitelisting Service"** means the service described as such in the Service Charter.

**"Land Registry"** has the meaning given to it in the Operating Requirements.

**"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 or PEXA in relation to a Conveyancing Transaction.

**"Link/ed"** means where two or more Electronic Workspaces are associated in PEXA for the purposes of Simultaneous Lodgement 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.

**"Lodge" or "Lodgement"** has the meaning given to "Lodge" or "Lodgment" in the Operating Requirements.

**"Lodgement Fees"** has the meaning given to "Lodgment Fees" in the Operating Requirements.

**"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).

**"Maximum Amount"** means the amount inputted when creating an Auto-Balanced Source Line Item that indicates the maximum amount the Auto-Balancing Source Line Item can increase to before the Settlement Schedule is unsigned.

**"Member Code of Conduct"** means the code of conduct which governs the Financial Institution's interactions with other Subscribers and PEXA, available at [www.pexa.com.au].

**"Minimum Amount"** means the amount inputted when creating an Auto-Calculated Destination Line Item that indicates the minimum amount the Auto-Balancing Destination Line Item can decrease to before the Settlement Schedule is unsigned.

**"Minor Release"** means small enhancements and fixes (system interface changes may occur). For clarity, any enhancement or fix that has a material impact on the security of the PEXA System or ELN will not qualify as a Minor Release (and will be deemed a Major Release).

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

**"Modern Slavery"** includes, but is not limited to, conduct which is defined as 'modern slavery' under section 4 of the *Modern Slavery Act 2018* (Cth).

**"Modern Slavery Laws"** means any statutes, regulations, rules or other instruments, either of the Commonwealth of Australia or any Australian states or territories, or of any foreign jurisdiction, which relate to Modern Slavery.

**"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).

**"Outstanding Conveyancing Transaction"** has the meaning given to it in the Participation Rules.

**"Panel Master"** means a Subscriber including a financial institution or other entity designated as such by PEXA 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 Panel Master for the purposes of receiving one or more invitations to an Electronic Workspace(s) and acting for the Panel Master in a given Conveyancing Transaction.

**"Participating Subscriber"** has the meaning given to it in the Operating Requirements.

**"Participation Agreement"** means this agreement and comprises the documents set out in sub-clause 1.5.

**"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.

**"Personnel"** means the directors, officers, employees, secondees, agents, contractors and subcontractors of a party.

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

**"PEXA Platform"** means the PEXA System.

**"PEXA Returns Account"** means a trust account maintained by PEXA to receive returned funds that were unable to be credited to the intended payee of a Conveyancing Transaction completed via the PEXA Platform.

**"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. Referred in the PEXA Platform as the "PEXA Registered Source Account".

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

**"PEXA System Data"** means:

- (a) any data held, handled or processed by the PEXA System or the ELN;
- (b) any Transaction Data; and
- (c) any Financial Institution Data.

**"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).

**"Pricing Policy"** means the document available at [www.pexa.com.au/pricing-policy](http://www.pexa.com.au/pricing-policy).

**"Pricing Schedule"** means the schedule of pricing information available at [www.pexa.com.au/pricing-schedule](http://www.pexa.com.au/pricing-schedule).

**"Privacy Law"** has the meaning given in the Operating Requirements.

**"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 the time after which a Subscriber cannot schedule a settlement for a later time on that same day (and must reschedule for a subsequent Business Day) and is 4 pm AEST or AEDT.

**"Recipient"** has the meaning given to it in paragraph 12.1(a).

**"Registrar"** has the meaning given to it in the Operating Requirements.

**"Registration"** means the act of registering a Lodged document by the relevant Registrar.

**"Registry Information Supply"** has the meaning given to it in the Operating Requirements.

**"Regulator"** means a regulatory body that governs or administers the Financial Institution, including the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission.

**"Relationship Manager"** means each party's representative (or his or her delegate), nominated under clause 6.5 of this Participation Agreement to manage the working relationship with the other party, and any replacement notified to the other party.

**"Representative Body"** means a representative body that has agreed to be appointed and is appointed to represent the Financial Institution and that can facilitate agreement and discussions between (collectively) the Financial Institution and all other financial institutions that have appointed that representative body for the purposes of clause 24 of this Participation Agreement.

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

**"Residential Property Index"** means the Residential Property Price Index: Eight Capital Cities, published by the Australian Bureau of Statistics. If for any reason such index is discontinued, the Residential Property Index will be a suitably equivalent index determined in accordance with clause 24.4, or if the Representative Body and PEXA are unable to agree on such equivalent index in accordance with that clause 24.4, as determined by an expert appointed by the President of the Law Society of NSW in accordance with the Law Society of NSW's Rules for Expert Determination.

**"Responsible Subscriber"** has the meaning given to it in the Operating Requirements.

**"Risk Management Framework"** has the meaning given to it in the Operating Requirements.

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

**"RITS Member"** means a member of RITS.

**"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, to be provided in accordance with the Operating Requirements and as notified in advance to the Financial Institution.

"**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](http://www.pexa.com.au/security-policy).

"**Service Charter**" means the description of the Services as set out in [www.pexa.com.au/service-charter](http://www.pexa.com.au/service-charter).

"**Services**" means the services which are to be provided by PEXA to the Financial Institution under this Participation Agreement and more particularly described in the Service Charter.

"**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, 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 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.

"**Signer**" has the meaning given to it in the Operating Requirements.

"**Simultaneous Lodgement**" means the linking of Electronic Workspaces for Lodgement 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](http://www.pexa.com.au/soe), or as otherwise advised or amended by PEXA from time to time by giving reasonably sufficient notice in order for the Financial Institution to satisfy the amended SOE Requirements.

"**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 Funder**" means a Subscriber that is an ESA Holder, or that has an arrangement with a Financial Settlement Agent, and is a participant in the Electronic Workspace only for the purpose of providing 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.

"**Statement of Applicability**" has the meaning given to it in security standard AS/NZS ISO/IEC 27001.

"**Subscriber**" has the meaning given to it in the Operating Requirements.

"**Subscriber Administrator**" has the meaning given to it in the Participation Rules.

"**Subscriber Manager**" means an individual or individuals appointed by the Financial Institution under clause 4.3(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.

"**System Interfaces**" refers to the ability of two software systems to exchange data over a network using agreed interfacing and data standards and, in the context of the PEXA System, refers to system-to-system interface between the PEXA System and the systems of the Financial Institution.

"**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.

"**Term**" has the meaning given in clause 2.

"**Titles Register**" has the meaning given to it in the Participation Rules.

"**Transaction Audit Records**" has the meaning given to it in the Operating Requirements.

"**Transaction Data**" means all data which is accessible by a Financial Institution through the PEXA System or the ELN during the Term in respect of Conveyancing Transactions with which the Financial Institution is involved.

"**Transition-Out Period**" has the meaning given in paragraph 19.1(a).

"**Transition-Out Plan**" has the meaning given in sub-clause 19.3.

"**Transition-Out Services**" has the meaning given in clause 19.1(b).

"**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.

"**User**" has the meaning given to it in the Operating Requirements.

"**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.

"**Workspace Data**" has the meaning given to it in the Operating Requirements.

**ATTACHMENT C**  
**FINANCIAL INSTITUTION SCHEDULE**

## ATTACHMENT D

### APRA Prudential Standards and SOCI Act

#### Part A

##### Definitions

The following definitions are applicable to this Attachment D:

**APRA** means the Australian Prudential Regulation Authority.

**ARNECC** means the Australian Registrars' National Electronic Conveyancing Council.

**Business Continuity and Disaster Recovery Program** has the meaning given to it in the MOR.

**Business and Services Transition** has the meaning given to it in the MOR.

**CPS 230** means APRA Prudential Standard CPS 230 Operational Risk Management.

**CPS 234** means APRA Prudential Standard CPS 234 Information Security.

**Critical Infrastructure** has the meaning given to it in the SOCI Act.

**Fourth Party** means a party that PEXA relies on in delivering services to a Financial Institution.

**information security** has the meaning given to it in CPS 234.

**information security controls** has the meaning given to it in CPS 234.

**information asset** has the meaning given to it in CPS 234.

**information security incident** has the meaning given to it in CPS 234.

**information security control** has the meaning given to it in CPS 234.

**material offshoring arrangement** has the meaning given to it in CPS 230.

**material service provider** has the meaning given to it in CPS 230.

**Minimum Performance Levels** has the meaning given to it in the MOR.

**Minimum System Requirements** has the meaning given to it in the MOR.

**MOR** means the Model Operating Requirements issued by ARNECC.

**operational risk** has the meaning given to it in CPS 230.

**PEXA Critical Third Parties** means a supplier who provides a service that is essential to the daily operations of the Exchange platform or enables PEXA to support Exchange customers, without which, there would be a significant adverse impact to the business

**RPO** means recovery point objective.

**RTO** means recovery time objective.

**SOCI Act** means *Security of Critical Infrastructure Act 2018* (Cth) (as amended).

## **Part B**

Subject always to the SOCI Act as applicable to PEXA from time to time, the following APRA Prudential Standards apply to PEXA:

- CPS 234; and
- CPS 230.

but only to the extent set out in Part C.

## **Part C**

### **Operative Part**

The parties acknowledge and agree that:

- (a) PEXA is regulated by ARNECC and not by APRA;
- (b) Subject to paragraph (c) and despite paragraph (a), PEXA agrees:
  - (i) to be considered a *material service provider* for the purposes of CPS 230 and to align where relevant with CPS 230 as set out in Part C of Attachment D; and
  - (ii) to align where relevant with CPS 234 as set out in Part C of Attachment D.
- (c) PEXA has been designated as Critical Infrastructure and is, therefore, restricted from providing some information and material under CPS 230 and CPS 234 to any Financial Institution.

Therefore, subject always to the SOCI Act:

### **CPS 234**

- (a) For the purposes of CPS 234, PEXA will:
  - (i) Implement and maintain *information security controls* in relation to the Financial Institution's *information assets* to the extent the *information assets* are managed by PEXA that are commensurate with:
    - (A) vulnerabilities and threats to those *information assets*;
    - (B) the criticality and sensitivity of those *information assets*;
    - (C) the stage at which those *information assets* are within their life-cycle; and
    - (D) the potential consequences of an *information security incident*.

- (b) procure, and make available, an annual independent third party audit report to determine whether PEXA's 'Information Security Management System' is consistent with the requirements which relate to *information security* of the Financial Institution's *information assets* as contained in the Standard, which audit report will ensure that any such contractual arrangement obliges the sub-contractor or other third party to establish and maintain safeguards and notification procedures in respect of *information security* in a manner consistent with PEXA's obligations under this clause.
- (c) If there is any conflict between a requirement in this clause and any other requirement in this Participation Agreement, the most stringent or higher level of security standard will apply.

### **CPS 230**

For the purposes of CPS 230, PEXA will

- (d) comply with the MOR in respect of the following:
  - (i) Minimum System Requirements;
  - (ii) Minimum Performance Levels;
  - (iii) Business Continuity and Disaster Recovery Management Program; and
  - (iv) Business and Services Transition.
- (e) annually review (and enhance where required) its SOC 2 Type 2 Report(s) (as more particularly described in clause 6.8(b) of this Participation Agreement) to:
  - (i) include assurance for controls and processes reasonably required under CPS 230; and
  - (ii) ensure PEXA's controls and processes reasonably required under CPS 230 are effective.
- (f) make PEXA's Business Continuity Policy available to Financial Institutions.
- (g) subject always to PEXA only participating in one (1) business continuity and disaster recovery exercise per year, unless PEXA, at its sole discretion, determines otherwise) where possible, participate:
  - (i) in industry level testing (where more than one Financial Institution participates) of business continuity and disaster recovery exercises, subject to the agreed costs for such testing being shared between all participating Financial institutions; and
  - (ii) individual Financial Institution testing of business continuity and disaster recovery exercises, subject to all costs of such testing being borne by the relevant Financial Institution.
- (h) provide its RPO and RTO on an annual basis to each Financial Institution in relation to PEXA's *information assets*.
- (i) take all reasonable steps to implement and maintain *information security controls* which are commensurate with relevant vulnerabilities and threats.

- (j) design, implement and embed internal controls in order to mitigate PEXA's operational risks;
- (k) report annually in respect of any PEXA Critical Third Parties.
- (l) notify Financial Institutions:
  - (i) as soon as soon as possible (and in any case, no later than 48 hours), after becoming aware of an *information security incident*;
  - (ii) as soon as possible, and no later than 72 hours, after becoming aware of an *operational risk* incident that it determines to be likely to have a material financial impact or a material impact on PEXA's ability to maintain its critical operations; and
  - (iii) immediately, if it suffers a disruption to a critical PEXA service (in which case the notification will cover the nature of the disruption, the action to be taken, the likely impact on PEXA's business operations and the timeframe for returning to normal operations).
  - (iv) will remain liable for all acts and omissions of a critical Fourth Party, as if they were PEXA's acts or omissions but only where the critical Fourth Party is providing services directly to PEXA. For the avoidance of doubt PEXA will not be liable for the acts and omissions of any critical Fourth Party, where such critical Fourth Party:
    - (A) provides services to Financial Institutions such as, without limitation, any Financial Institution payment rail providers; or
    - (B) is a register of titles, land titles office (or equivalent) or any commercial operator granted a concession or licence to operate such a body, any state or territory revenue authority or any other government or semi-government organisation that provides services directly to PEXA.
- (m) will not enter into a *material offshoring arrangement* or make a significant change to such an arrangement without informing the Financial Institution in writing.

### **SOCI Act**

Notwithstanding any other provisions of this Attachment D or this Participation Agreement, PEXA will comply with the SOCI Act, including without limitation:

- (a) developing, complying with, reviewing and updating an incident response plan;
- (b) undertaking a cyber security exercise, on a yearly basis, to test PEXA's cyber incident response capabilities; and
- (c) maintain business continuity and disaster recovery plans for critical processes;
- (d) comply with PEXA's obligations (to the extent applicable to PEXA) to:
  - (i) maintain positive security obligations;
  - (ii) maintain enhanced cyber security obligations; and
  - (iii) provide relevant Government assistance.