

25 September 2014



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Dear Mr Schmitt

Draft PEXA Participation Agreement

The Law Council of Australia appreciates the opportunity to comment on the draft PEXA Participation Agreement for the national electronic conveyancing system.

I am pleased to enclose the Law Council's submission based on the review of the Participation Agreement by the several Law Council Committees, including the National Electronic Conveyancing System Committee (NECS Committee), the Business Law Section E-commerce Committee (BLSEC), the Business Law Section Privacy Committee (BLSPEC), the Large Law Firm Group (LLFG) and substantial input from the Law Society of New South Wales' Property Law Committee (LSNSW).

If you have any queries regarding the submission, please contact Gabrielle Lea on 02 9926 0375 or at GabrielleLea.NECS@lawsociety.com.au

Yours sincerely

A handwritten signature in black ink, appearing to read "M. Hagan", with a long horizontal line extending to the right.

MARTYN HAGAN
SECRETARY-GENERAL

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PEXA Participation Agreement

Property Exchange Australia Ltd (PEXA)

Dated 25 September 2014

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Acknowledgment

The Law Council acknowledges the assistance of its National Electronic Conveyancing System Committee (NECS Committee), Business Law Section E-commerce Committee (BLSEC), Business Law Section Privacy Committee (BLSPC), the Law Society of New South Wales Property Law Committee (LSNSW) and the Large Law Firm Group (LLFG) in the preparation of this submission.

The Law Council's NECS Committee is comprised of specialist property lawyers drawn from all States and Territories. It has been involved in consultation in relation to the National Electronic Conveyancing System since 2005.

The Law Council would also like to acknowledge the work of other stakeholders including the Electronic Conveyancing Group (of which the Law Council is a member) and several of the Professional Indemnity Insurers in reviewing this and prior drafts of the PEXA Participation Agreement.

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission in relation to the current draft PEXA Participation Agreement (Participation Agreement).
2. The Law Council, through its NECS Committee and as a member of the Electronic Conveyancing Group, has had the opportunity to provide feedback in relation to earlier confidential drafts of the Participation Agreement. The Law Council values its inclusion in this consultation process to date.
3. The Law Council is the peak national representative body of the Australian legal profession. It represents some 60,000 legal practitioners nationwide. Attachment A provides further details in this regard.

National Regulatory Framework

4. The Law Council notes that the Participation Agreement must be reviewed in the context of the national regulatory framework developed by the Australian Registrars' National Electronic Conveyancing Council (ARNECC).
5. The principal legislation is the *Electronic Conveyancing National Law* (ECNL), which commenced by proclamation on 1 January 2013 in New South Wales, and has been replicated in the other participating jurisdictions.
6. Two sets of model rules have been promulgated by ARNECC pursuant to the ECNL:
 - (a) the Model Participation Rules (MPR), which govern the relationship between an electronic lodgement network operator (ELNO) and participants in the system such as lawyers and conveyancers; and
 - (b) the Model Operating Requirements (MOR), which govern the relationship between an ELNO and the land title registries.
7. The Registrar-General, or equivalent official in each jurisdiction, determines the Operating Requirements (OR) and the Participation Rules (PR) for electronic conveyancing which will operate in the jurisdiction under sections 22 and 23 of the ECNL, having regard to the MOR and the MPR. Appropriately, under the Participation Agreement, the OR and PR is construed by reference to the jurisdiction of the land which is the subject of the transaction.
8. PEXA is the first and currently the only approved ELNO. It is subject to the ECNL, and the PR and the OR in each participating jurisdiction.
9. The activities and responsibilities of lawyers choosing to use the national electronic conveyancing system are primarily governed by the ECNL and the PR.
10. The Law Council notes that the provision of a Participation Agreement by an ELNO such as PEXA, to persons wishing to use its electronic lodgment network, is contemplated by the ECNL, see for example sections 22 and 26 of the ECNL.
11. The Law Council has been a strong supporter of the development of electronic conveyancing from its inception. Electronic conveyancing will potentially deliver benefits for lawyers and their clients through improvements in communication and transparency in the lead up to settlement of transactions, efficiency in the electronic

preparation of transfer documentation, efficiency in the electronic payment of settlement funds and distribution of proceeds, and the immediate lodgement of pre-validated transfer documentation following settlement.

12. The Law Council's support for the development of electronic conveyancing has always been based on the premise that lawyers using the system must not be exposed to any greater level of potential liability, nor their clients exposed to any greater risk, than currently occurs in the paper system.

Comments on the Participation Agreement

13. The Law Council provides the following comments in relation to the Participation Agreement.

Clause 3.1 Definitions

14. The final and recently added sentence in clause 3.1 reads:

To the extent that there is any inconsistency between the definitions in the ECNL, the Participation Rules or the Operating Requirements (as the case may be) and in Attachment B, the definitions in Attachment B shall take precedence.

15. The LSNSW submits that this sentence must be deleted as it undermines the correct approach to definitions now adopted, being that if a term is used in the Participation Agreement it has the same meaning in accordance with the ECNL, the PR or the OR as the case may be.
16. If a different meaning is intended, a different term should be used. The regulatory framework and PEXA Documentation is already complex enough without the added layer of complexity introduced by the same terms having different meanings.
17. Please also note the related comments made by the LSNSW in relation to the definition of "Suspension Event" in Attachment B.

Clause 3.2 Rules for interpreting this Participation Agreement

18. The BLSEC suggests that clause 3.2(a) should include the usual interpretative provision that a reference to a party includes its servants, agents contractors etc. The Law Council also notes that Attachment B includes a definition of Personnel which relates to this concept but all references to that term in the body of the Participation Agreement have now been deleted.

Clause 4.1 Subscriber's Obligations

19. The Law Council was pleased to see that in response to earlier feedback given, the contractual obligation to comply with the Participation Rules was deleted from this clause on the basis that contractual assumption of obligations is forbidden by most Professional Indemnity insurance policies. They do, however, provide cover for practitioner's liability imposed by statute. In this context the Law Council also calls for clause 14.1(c) of the MOR to be deleted.
20. Clause 4.1(f) provides that the Subscriber must comply with the Security Policy. The LLFG notes that clause 3.4.3 of the Security Policy reads:

3.4.3 Monitoring

Subscribers must take reasonable steps to monitor the usage of systems and activities of their Users that are accessing the PEXA System to identify unusual or suspicious activities of its Users.

21. In relation to this clause, the LLFG requests:

- (a) What actions would PEXA consider constitute “reasonable steps”?
- (b) What controls will PEXA have in place to allow the Subscriber Administrator to detect suspicious activity?
- (c) Can the Subscriber Administrator report on activity for Users?
- (d) Can a Subscriber restrict logon times for Users?
- (e) Can Subscribers restrict IP addresses from which their Users may logon to the system?

Clause 5.2 Notification

22. The LSNSW supports the deletion of “verified” in clause 5.2 where it previously described PEXA’s obligation to notify Subscribers of only verified Complaints or Claims made in relation to PEXA. However, the new definition of Complaint in Attachment B reads:

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

In the view of the LSNSW the word “valid” should be deleted as it is inconsistent with the balance of the definition and there is no process by which the validity of a complaint can be pre-tested.

Clause 5.3 Security

23. Clause 5.3(a)(ii)(A)(aa) currently provides that the Subscriber must take steps to prevent unauthorised access to PEXA by any person employed or engaged by the Subscriber or through any systems or access points owned or controlled by the Subscriber. The LLFG queries whether “or” should be removed?

24. The Law Council notes the Subscriber’s obligation to provide Logical Security protection such as Firewall protection in clause 5.3(a)(ii)(A)(bb). The BLSEC suggests that given many lawyers unfamiliarity with requirements in this area, it would be preferable to prescribe such requirements. The NECS Committee expects that further detail as to requirements will be prescribed in the Security Policy, the final form of which has yet to be provided. The question then arises as to how this clause 5.3 interacts with the Security Policy.

25. In relation to clause 5.3(a)(ii)(A)(cc), the LLFG seeks clarification as to what is involved to “ensure the integrity” of information retrieved or received from PEXA? There are other clauses dealing with Confidential Information. Not all information retrieved or received from PEXA will be Confidential Information so the obligation to maintain confidentiality may not be necessary.

Clause 8.2 Invoicing of PEXA fee

26. The LSNSW and the BLSEC share Lawcover's concerns about the invoice issuing the day *after* the charges have been debited from the Subscriber's account or disbursed as a payment in a financial settlement. Ideally the invoice should be provided prior to or, at worst, on the same day. If it is to be raised the next day, the invoice must be predictable and must be for the amount actually paid; otherwise this will create practical difficulties for lawyers when billing their clients or seeking to transfer trust moneys. The LSNSW suggests that the words "(being in no greater sum than that paid in accordance with clause 8.1)" be inserted after the word "invoice".

Clause 8.3 Invoicing of Land Registry Lodgement Fees

27. The BLSEC requests that a timeframe for the supply of the invoice be provided in clause 8.3.

28. The LLFG requests the addition of the word "promptly" before the word "refund" in clause 8.3(b)(iii).

Clause 9.2 GST pass on

29. The LSNSW notes the effect of clause 9.2 that where GST is or will be payable in relation to a supply, a reference to any consideration not stated to include GST will exclude GST. Under the *Competition and Consumer Act 2010* prices for taxable supplies are required to be stated on a GST-inclusive basis. The Law Council therefore requests that all references in a PEXA workspace to amounts payable be stated on a GST-inclusive basis.

Clause 10.1 Meaning of Confidential Information

30. In relation to clause 10.1(b)(i), the NECS Committee and the LSNSW request that the phrase "at or before the time the information is made available", be inserted after the words "which is designated by either Party as confidential". Parties cannot decide after the event that information earlier disclosed is confidential.

Clause 10.4 Disclosures required by law

31. The LLFG notes that under clause 10.4(b), if a Recipient is required to make a disclosure of Confidential Information, the Recipient must, if permitted by Law, notify the Discloser; however, an exception is made for a Party's customers. Why is there an exception made in connection with Confidential Information about a Party's customers? Paragraph (b) does not require the Recipient to notify the Discloser's customers, only the Discloser, ie the other party.

Clause 10.6 Destruction

32. In relation to clause 10.6(b)(i) the LLFG submits that it needs to be made clear that anything required to be kept particularly by the respective Law Societies or regulatory authorities can be kept and not just "notes and other records".

33. The LLFG requests insertion of a new clause 10.6(b)(iii) to state "copies made as a result of the Subscriber's computer systems routine, automated back-up processes". This is sought on the basis that it is not feasible technically to destroy all copies of Confidential Information created as a result of these processes.

Clause 10.7 PEXA's use of de-identified data

34. In providing PEXA with the ability to use de-identified data, PEXA's obligation to de-identify the data should not only require de-identification of the client and subscriber but also the property involved, as this information would facilitate identification of the client. The LSNSW requests the final sentence of the clause be amended to read:

For the avoidance of doubt, such de-identified data must not identify the Subscriber, its Client or the land the subject of the Conveyancing Transaction.

35. Given that the volume of personal information used by the service is potentially very large the BLSPC suggests it would be prudent to articulate the proposed use of the information. This should be supported by appropriate notices to the individuals specifying what the uses are and other related matters.

Clause 11.2 Consent to use customer information

36. In relation to clause 11.2(a) the LLFG notes that compliance with APP 6 is not limited to consent. A requirement that the Subscriber comply with the Australian Privacy Principles in relation to the use/disclosure of personal information should be sufficient.

37. In relation to clause 11.2(b) the LLFG submits that the requirement to refer individuals to the PEXA privacy policy imposes a contractual obligation on law firms over and above their own *Privacy Act 1988* (Cth) obligations.

38. The LLFG considers the references to "must ensure" in clauses 11.2(b) and 11.3(c)(ii) as far too prescriptive. Subscribers cannot ensure that recipients or agents absolutely comply with Australian Privacy Laws. Accordingly "must ensure" should be replaced with "use best endeavours" or similar such wording.

Clause 11.3 Overseas transfer of Personal Information

39. The LLFG submits that this clause is too broadly worded and seeks further information regarding the circumstances in which it is contemplated that PEXA will transfer Personal Information to a recipient outside Australia.

40. The BLSPC requests that the references in the Participation Agreement to "transfer" of Personal Information in relation to trans-border disclosure be replaced with references to "disclose" to reflect the wording of Australian Privacy Principle 8. For example, the following references to "transfer" should be replaced with "disclose":

- (a) The heading of clause 11.3 should be amended to overseas "disclosure" of personal information;
- (b) The reference to "transferred" in clause 11.3(d)(i) and (ii) should be changed to "disclosed"; and
- (c) In the comment to clause 11.3(d)(ii), the references in the draft consent wording to "transfer" should be changed to "disclose".

41. The LSNSW notes that "party" is a defined term, so the reference in this clause should presumably be "Party", for example in clause 11.3(b).

Clause 12.1 Intellectual Property in the Services

42. This clause provides that the Subscriber shall not have any ownership rights in any Intellectual Property brought into existence by PEXA in providing the Services. The LLFG queries whether this would include all documents created in PEXA.

Clause 12.3 Ownership of Pre-existing IPR

43. The NECS Committee suggests that the reference to “Subscriber” in clause (b), on line 2 should be a reference to “PEXA”.

Clause 13.2 Intellectual Property Infringements - Subscriber obligations

44. The BLSEC queries whether the Professional Indemnity Insurers have approved any delegation to PEXA of the conduct of a defence of a claim for Intellectual Property Infringement against a Subscriber.

Clause 14.2 Satisfaction of SOE Requirements and all applicable regulatory requirements

45. The LLFG seeks clarification as to whether the SOE Requirements have been determined.

Clause 14.5 Statutory limitations

46. The NECS Committee and the LSNSW strongly submit that this clause should be deleted. It is inconsistent with the liability provision, clause 15. If PEXA has a liability arising under the *Australian Consumer Law* this should not enable PEXA to limit its liability to re-supply of an ineffective service or to repay the cost of the original service.

Clause 15.1 Liability of PEXA to the Subscriber where PEXA fails to perform the services

47. The Law Council and LLFG are interested in knowing the submissions of the LPLC on the amendments and any limitations on PEXA's liability which may affect contribution rights in the event a claim is made against a Subscriber law firm.

48. The Law Council was pleased to see that clause 15 Liability was substantially rewritten from prior drafts of the Participation Agreement. However the NECS Committee and the LSNSW strongly opposes PEXA's liability under the Participation Agreement being confined only to breaches of clause 5.1, that clause being PEXA's obligations to provide the Services, comply with the OR and not store certain information overseas. PEXA should bear the ordinary legal liability for breach of contract. Accordingly the words “clause 5.1 of” should be deleted from clause 15.1(a) so that it reads:

PEXA will be liable to the Subscriber for any loss or damage that the Subscriber may suffer or sustain arising from a breach by PEXA of its obligations under this Participation Agreement;

49. Appropriately clause 15.1 (b) then states:

the amount of any such loss or damage that is recoverable by the Subscriber from PEXA will be calculated in accordance with the general law.

The LSNSW request that after the words “general law”, the phrase “as applicable in accordance with clause 26.1(a)” be added so as to incorporate clause 26.1 Governing Law for consistency.

Clause 15.2 When PEXA will not be liable

50. The NECS Committee and the LSNSW request that in the opening line of the clause, the reference to “any person or subscriber (including the Subscriber)” should simply be a reference to “the Subscriber”.
51. A corresponding change as required for clause 15.1, is required in line two of clause 15.2, that is, delete the words “clause 5.1 of”.
52. Clause 15.2 acknowledges that PEXA will not be liable where its failure to comply with its obligations is attributable to the act or omission of government agencies such as the Land Registry, Duty Authority or Reserve Bank of Australia. The NECS Committee and the LSNSW is comfortable with that limitation only to the extent that PEXA’s failure is attributable solely to the act or omission of government agencies such as the Land Registry, Duty Authority or Reserve Bank of Australia.
53. Accordingly, clause 15.2 should be amended to read:

For the avoidance of doubt, PEXA will not be liable to the Subscriber in respect of a failure to comply with its obligations under this Participation Agreement to the extent that the failure is attributable to the act or omission of any government agency, State or Federal (including, but not limited to, a Land Registry or Duty Authority or the Reserve Bank of Australia).

54. The Law Council understands that the Electronic Conveyancing Group requests that clause 15.2 be deleted and its substance (as amended above) be subsumed in clause 15.4(a). The Law Council supports that alternative approach.

Clause 15.3 No warranty as to accuracy of data

55. The Law Council reserves its rights to make further comments in relation to clause 5.1, clause 15 and other parts of the Participation Agreement that incorporate by reference the Service Charter once the final form of the Service Charter is provided.

Clause 15.4 Reduction of PEXA’s liability

56. The NECS Committee requests deletion of the words “all” and “to complete the Conveyancing Transaction using physical documents” in clause 15.4(b) so as to read:

the Subscriber did not take reasonable steps to mitigate any potential loss.

The NECS Committee is concerned that as currently drafted the clause implies that a practitioner should always run a concurrent paper transaction as a fall back, which of course would entirely eliminate any advantage of the NECS.

Clause 15.5 Subscriber to notify PEXA

57. The Law Council notes that Lawcover has commented in relation to this clause and that its requested amendments have been adopted. The Law Council queries whether Professional Indemnity Insurers in other jurisdictions have accepted the proposed delegation of the right to conduct the defence of such claims.

Clause 16.1 Suspension or restriction by PEXA

58. The LSNSW notes that clause 16.1(a)(i) gives PEXA the discretion to suspend or restrict the Subscriber's use of the PEXA Services if the Subscriber is in material breach of the Participation Agreement, the Participation Rules or any applicable Laws, and such breach cannot be remedied by the Subscriber; or if it can be, isn't remedied in the stipulated time or the Subscriber fails to agree an appropriate remediation strategy.

59. The LSNSW regards the phrase "any applicable Laws" as too wide and regards those concerns as adequately addressed elsewhere. (For example, PEXA's ability to suspend or restrict under clause 16.1(ii) where it considers it reasonably necessary to do so to maintain the integrity and security of the ELN).

60. The LSNSW has raised its concern in its comments on clause 3.1 above in relation to the Participation Agreement giving an expanded meaning to terms used in the Participation Agreement beyond that given in the PR, the OR or ECNL as the case may be. The term "Suspension Event" has been given an expanded meaning in the Participation Agreement and the LSNSW requests that this expanded definition be deleted.

61. The LSNSW is also concerned about the tension between the expanded definition of Suspension Event as appearing in Attachment B and the operative provisions of clause 16. For example, the definition of Suspension Event in Attachment B is:

"Suspension Event" has the meaning given to it in the Participation Rules and occurs:

- (a) in the circumstances contemplated by paragraph 9.2 of the Participation Rules;*
- (b) where the Subscriber's acts or omissions are, in the reasonable opinion of PEXA, contrary to the interests of other subscribers, PEXA or the Registrar; or*
- (c) where the Subscriber fails to pay the Charges in accordance with this Participation Agreement.*

62. The concepts referred to in subclauses (b) and (c) of the above definition are already covered in clauses 16.1(a)(ii) to (iv). This is a further basis upon which the LSNSW submits that the definition of "Suspension Event" should be deleted from Attachment B.

63. The LSNSW also notes that clause 16.9 essentially duplicates clause 16.5; clause 16.9 should be deleted. As clause 16.9 is the only reference to Suspension Event in the operative provisions, if this clause is deleted as the LSNSW suggests, there is no need to retain the definition of "Suspension Event".

Clause 16.3 Termination by the Subscriber

64. This clause provides that, subject to clause 16.5, the Subscriber may terminate the Participation Agreement by giving 30 Business Days' written notice. Clause 16.5 relates to the consequences of termination of the agreement by PEXA. The LLFG queries what is meant by "subject to clause 16.5"?

65. The LLFG notes there is no need for sub paragraph (a) in clause 16.4 since it is a single paragraph clause.

Clause 16.7 Subscriber resignation

66. The LLFG seeks clarification as to how Subscriber resignation differs from Subscriber termination under clause 16.3.

Clause 16.8 Restriction Event

67. The LLFG requests addition of the words "in writing" after the word "Subscriber" in clause 16.8(b).

Clause 20 Precedence and Severance

68. If the amendment to clause 3.1 as requested by LSNSW is made, clause 20.2 does not need to be made "Subject to clause 3.1".

69. In respect of clause 20.2(a), the LLFG queries what is intended to be in Attachment C.

Clause 22 Variation

70. The Law Council reserves its right to make further comments once this clause is finalised in line with the Participation Agreement for Financial Institutions.

71. In relation to clauses 22.1(b)(i), (ii) and (iii), the LLFG requests addition of the words "in writing" after the word "notice" in each of these clauses.

72. The LLFG notes that clause 22.3(a)(i) currently provides that consultation is only required if there is a material reduction in the Services resulting in a material cost to the Subscriber. The LLFG submits that this clause should be amended to provided that a material reduction in Services "or" a material increase in cost should require consultation.

73. In relation to clause 22.4(a) the LLFG requests addition of the words "by notice in writing given to the other Party" at the end of this clause.

Clause 23 Technology and Release Management

74. The LLFG queries whether there is a risk that completion may be delayed as a result of a modification?

Clause 26.1 Governing Law

75. The NECS Committee and the LSNSW strongly support Lawcover's concerns in relation to the governing law of the Participation Agreement being specified as the laws of the State of Victoria. Torrens title legislation and duties legislation varies

significantly amongst the States as does conveyancing practice. Indeed in developing the electronic platform, PEXA has been made aware of a number of such differences.

76. The Law Council does acknowledge PEXA's concerns in respect of the ease of administering the agreement by reference to the laws of one State.

77. Accordingly the NECS Committee and the LSNSW suggest that clause 26.1 be amended to read as follows:

(a) *This Participation Agreement is governed by:*

- (i) *the laws of the Active Jurisdiction where the subject of the dispute relates to a specific Conveyancing Transaction; and*
- (ii) *the laws of the State of Victoria, in any other case.*

(b) *Each Party submits to:*

- (i) *the exclusive jurisdiction of the courts of the Active Jurisdiction where the subject of the dispute relates to a specific Conveyancing Transaction; and*
- (ii) *the non-exclusive jurisdiction of the courts of the State of Victoria in any other case,*
and any court that may hear appeals from any of those respective courts, and waives any right it might have to claim that those courts are an inconvenient forum.

78. The Law Council understands that Lawcover supports this approach but due to time constraints, the Law Council has not had the opportunity to canvass this approach with Professional Indemnity Insurers in other jurisdictions.

79. While it is noted that electronic conveyancing is a national system, until such time as the relevant legislation and conveyancing practice is sufficiently harmonised amongst the participating jurisdictions, property lawyers and their clients in every State other than Victoria have a very strong incentive to remain in the paper environment. That outcome would be most unfortunate.

Clause 26.2 Audit

80. In relation to clause 26.2(a), the LLFG submits that access to a Subscriber's records and premises should be subject to the requirement that the access does not breach the Subscriber's obligation to maintain privilege or client confidentiality.

Clause 26.7 Non-use of Electronic Workspace

81. This clause provides that if there is no activity in an Electronic Workspace for 120 days, PEXA may remove the Electronic Workspace. The LLFG seeks an exception to be made for Electronic Workspaces created for "off the plan" sales. The provided timeframe of 120 days is not acceptable in that context and should be longer, say 240 days. In Sydney for example a Subscriber may work on a development for say 6 months and then have 300 settlements in a very short timeframe, there is a real possibility that the workspace may not be used for 6 months.

Clause 26.13 Survival of covenants

82. The LSNSW notes that the cross reference to the title of clause 15 in this clause needs to be updated and notes that other cross references may also need to be updated.

Clause 26.14 Consents

83. Clause 26.14(a) provides that PEXA may 'agree or consent, or not agree or consent, in its absolute discretion, acting reasonably'. The LSNSW and the LLFG submit that this language seems inconsistent and the words "in its absolute discretion" should be deleted.

84. In relation to clause 26.14(b), the LLFG submits that any conditions imposed by PEXA should be reasonable.

Clause 26.15 Exclusion of contrary legislation

85. The LLFG submits that this clause is worded too broadly and may include relevant electronic conveyancing legislation.

ATTACHMENT A - SETTLEMENT TERMS AND CONDITIONS

Clause 1 Definitions and Abbreviations

86. The LSNSW suggests that in clause 1, the word "to" needs to be inserted after the word "applicable" in the last line.

Clause 2.2 Responsibilities of the Representative Subscriber in respect of Source Funds

87. The BLSEC requests that in clause 2.2(b) the words "to the extent that the Subscriber is able to do so" be inserted after the words "must continue to ensure". This is necessary to limit the Subscriber's liability where there is fraud by third parties or where it is represented to the Subscriber that the funds received are "cleared", when in fact the funds are still subject to the usual rules of clearances used between Financial Institutions.

88. The Law Council is aware that PEXA has been consulting with Trust Account regulators in New South Wales and Victoria. The Law Council would be pleased to know the extent to which Trust Account regulators in other jurisdictions have been consulted in respect of this clause and the provisions of Attachment A generally.

Clause 3.3 Responsibility of the Representative Subscriber for the accuracy of all information it enters in a Settlement Schedule

89. The Law Council notes that this section includes references to the "PEXA Settlement Money Trust Account". Presumably this definition will replace the "PEXA Source Account" or will a cross reference be inserted?

90. The BLSEC notes the recent publication of the PEXA Settlement Money Trust Account Deed Poll. Please provide the following further information in relation to the PEXA Settlement Money Trust:

- (a) the scope of PEXA's liability as trustee of this trust;
- (b) PEXA's responsibility for loss of funds deposited into the trust;
- (c) details of PEXA's insurance cover for its exposure as trustee;

-
- (d) details of the confirmations that PEXA will ordinarily provide to the Subscriber, such as the receipt of funds from third parties, notification once funds are cleared and whether any further instructions have been given by the third party; and
 - (e) how will any interest earned on funds held in the PEXA Settlement Money Trust Account be utilised.

91. The responsibility of PEXA to ensure that funds in the PEXA Settlement Money Trust Account are cleared funds should be an express obligation included in Attachment A, in line with the analogous responsibility of Subscribers to ensure that the relevant funds in its Subscriber Trust account are cleared funds.

Clause 6 Assistance with Payment Errors

92. The BLSEC queries whether the Professional Indemnity Insurers have commented in relation to clause 6.

ATTACHMENT B - DEFINITIONS AND ABBREVIATIONS

93. The BLSEC queries whether the Professional Indemnity Insurers have commented in relation to the definition of "Force Majeure Event",

94. The LSNSW notes that the definition of "Physical Security" inappropriately contains the word "includes".

95. In its comments above in relation to clause 16.1, the LSNSW submits that the definition of "Suspension Event" be deleted so that this term will have the same meaning as given to it by the PR.

96. The BLSPC requests that definitions of "Personal Information" and "de-identified" be inserted in Attachment B and aligned to the *Privacy Act 1988* (Cth).

97. The LSNSW also notes that the definitions of "Personnel" and "Trailing Workspace" are no longer required. The LSNSW suggests there might be other definitions that may be able to be deleted on the basis that they are no longer required.

98. In relation to the definition of "Verify", the BLSEC requests deletion of the words "and in the case of Source Funds that they are cleared and available for use in the Schedule Settlement". Wherever a Subscriber must certify that funds are available and "cleared" that obligation is too important to be captured by way of a definition only and ought to be expressly stated in the operative provisions.

Conclusion

99. The Law Council reserves its rights to make further comments in relation to the Participation Agreement after being furnished with the final form of the PEXA Contract Suite documentation, including the Service Charter, Pricing Schedule, Security Policy and SOE Requirements.

100. The Law Council looks forward to its continued involvement in consultation with PEXA and ARNECC in relation to the Participation Agreement, the PEXA Contract Suite documentation and the commencement of electronic conveyancing in Australia.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on national issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.