



THE LAW SOCIETY
OF NEW SOUTH WALES

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24 September 2014

Mr Martyn Hagan
Secretary-General
Law Council of Australia
DX 5719 Canberra

By email: martyn.hagan@lawcouncil.asn.au

Dear Secretary-General

Property Exchange Australia Limited (PEXA) Participation Agreement

Thank you for your Memorandum dated 15 September 2014 seeking feedback on the current draft of the PEXA Participation Agreement ("Participation Agreement"). The Law Society's Property Law Committee ("Committee") has reviewed the Agreement.

1. National regulatory framework

The Committee 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").

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.

Two sets of Rules have been made by ARNECC pursuant to the ECNL:

- (a) the Model Participation Rules ("MPR"), which govern the relationship between the electronic lodgement network operator ("ELNO") and participants in the system such as lawyers; and
- (b) the Model Operating Requirements ("MOR"), which govern the relationship between the ELNO and the land title registries.

The NSW Registrar General, like his counterparts in other jurisdictions, determines both the NSW Operating Requirements and NSW Participation Rules for electronic conveyancing under section 22 and section 23 respectively of the ECNL, having regard to the MOR and the MPR.

Effective 1 October 2014, NSW has adopted version two of the MOR and MPR as its Operating Requirements ("OR") and Participation Rules ("PR"). Under the Participation Agreement, the OR and PR is determined with reference to the jurisdiction of the land which is the subject of the transaction.

PEXA is the first and currently the only approved ELNO. It is subject to the ECNL, the PR and the OR.

The activities and responsibilities of lawyers choosing to use the national electronic conveyancing system are primarily governed by the ECNL and the PR.

The Committee notes that the provision of a Participation Agreement by an ELNO such as PEXA, to persons wishing to use its electronic lodgement network, is contemplated by the ECNL, see for example ss 22 and 26 of the ECNL.

The Law Society and the Committee have been strong supporters 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-checked transfer documentation following settlement.

The Law Society'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.

The Committee would like to acknowledge the work of other stakeholders including the Law Council's NECS Committee, the Electronic Conveyancing Group and the Professional Indemnity Insurers (such as Lawcover) in reviewing this and prior drafts of the Participation Agreement.

2. Comments on the Participation Agreement

The Committee provides the following comments in relation to the Participation Agreement.

2.1. Clause 3.1 Definitions

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.

In the Committee's view, 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.

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.

Please also note the related comments made by the Committee in relation to the definition of "Suspension Event" in Attachment B.

2.2. Clause 5.2 Notification

The Committee supports the deletion of the word "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 Committee's view, 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 tested.

2.3. Clause 8.2 Invoicing of PEXA fee

The Committee shares LawCover's concerns about the invoice coming 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 on the same day. If it is to be raised the next day, the invoice must be predictable and must be for the same amount actually paid, otherwise this will potentially create practical difficulties for lawyers when billing their clients. The Committee suggests that the words "(being in no greater sum than that paid in accordance with clause 8.1)" be inserted after the word "invoice".

2.4. Clause 9.2 GST pass on

The Committee 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. The Committee queries whether each workspace screen will specify "GST inclusive".

2.5. Clause 10.1 Meaning of Confidential Information

In relation to subclause 10.1(b)(i), the Committee requests 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.

2.6. Clause 10.7 PEXA's use of de-identified data

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 Committee requests the final sentence of the clause be amended to read:

For the avoidance of doubt, such de-identified data must de-identify the Subscriber, its Client and the subject matter of the Conveyancing Transaction.

2.7. Clause 11.3 Overseas transfer of Personal Information

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

2.8. Clause 14.5 Statutory limitations

The Committee strongly submits that this clause should be deleted. This provision 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 or the cost of the original supply.

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

The Committee strongly opposes PEXA's liability under the Participation Agreement being confined to breaches of clause 5.1 only, that clause being PEXA's obligations to provide the Services, comply with the OR and not store certain information overseas. In the Committee's view liability should flow from breaches of any provision of the Participation Agreement. 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;

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 Committee requests 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.

2.10. Clause 15.2 When PEXA will not be liable

The Committee requests 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".

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".

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 Committee accepts that limitation but only to the extent that PEXA's failure is attributable to the act or omission of government agencies such as the Land Registry, Duty Authority or Reserve Bank of Australia.

As a result of these changes, 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 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).

The Committee 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 Committee also supports that alternative approach.

2.11. Clause 15.3 No warranty as to accuracy of data

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

2.12. Clause 16.1 Suspension or restriction by PEXA

The Committee 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 PR 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.

The Committee regards the phrase "any applicable Laws" as too wide and considers 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).

The Committee 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 and the Committee requests that this expanded definition be deleted.

The Committee is also concerned in relation to 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.

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

The Committee also notes that clause 16.9 essentially duplicates clause 16.5; accordingly 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 Committee suggests, there is no need to retain the definition of "Suspension Event".

2.13. Clause 20.1 Precedence and Severance

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

2.14. Clause 22 Variation

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

2.15. Clause 26.1 Governing Law

The Committee strongly supports 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.

The Committee does however also acknowledge PEXA's concerns in respect of the ease of administering the agreement by reference to the laws of one State.

Accordingly the Committee strongly suggests 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 any 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 any 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.

While the Committee notes that electronic conveyancing is a national system, until such time as the relevant legislation and conveyancing practice is sufficiently harmonised, 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.

2.16. Clause 26.13 Survival of covenants

The Committee notes that the cross reference to the title of clause 15 in this clause needs to be updated and questions whether any other cross references may need to be updated.

2.17. Clause 26.14 Consents

The Committee submits that the word "absolute" should be deleted from the phrase "in its absolute discretion, acting reasonably" as it is inconsistent.

2.18. ATTACHMENT A - SUBSCRIBER SETTLEMENT TERMS AND CONDITIONS FOR ELECTRONIC SETTLEMENTS AND PAYMENTS Definitions and Abbreviations

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

2.19. ATTACHMENT B Definitions and Abbreviations

The Committee notes that the definition of "Physical Security" unnecessarily contains the word "includes".

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

The Committee also notes that the definition of "Trailing Workspace" is no longer required. The Committee suggests there may be other definitions that may be able to be deleted on the basis that they are no longer required.

The Committee reserves its rights to make further comments in relation to the Participation Agreement once the final form of the PEXA Contract Suite documentation issues, including the Service Charter, Pricing Schedule, Security Policy and SOE Requirements.

Any questions in respect of this letter should be directed to Gabrielle Lea, Policy Lawyer for the Property Law Committee on 9926 0375 or email: gabrielle.lea@lawsociety.com.au

Yours sincerely,

A handwritten signature in black ink that reads "Ros Everett". The signature is written in a cursive style with a large initial "R".

Ros Everett
President