

# Discussion Paper for Solicitors, Conveyancers & Settlement Agents

Re: Industry Concerns in relation to the looming mandate for electronic settlement and registration & why a mandate is wrong for the Industry.

Purpose: To inform the industry of the consequences of a mandate and in turn, determine the extent of any support for a suspension of the mandate.

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## Stakeholders:

- ARNECC - The regulatory Authority created by a COAG initiative under the Rudd government to initiate and facilitate electronic conveyancing for the national interest
- PEXA - Private commercial enterprise created to facilitate electronic transfer of Title and other registrable dealings directly with the land registries of WA, NSW, VIC & QLD, with other states to join in the future. Owned by Macquarie Bank, the big four banks, the land registries of WA, NSW, VIC & QLD, as well as some large private investors
- Solicitors, Conveyancers and Settlement/Registration firms
- The general public, who have always had a right to lodge documents over the counter at the Land Registries

## Current Process

- The settlement and registration process can currently be done either manually or online via PEXA. However, the take up by the industry for the electronic process has been poor, with electronic settlements remaining in single digit percentages some three years out from inception. This has become a source of frustration for the owners of PEXA, who have aspirations of a \$1-3billion public float. In order to guarantee success of the float, ARNECC, PEXA, and together with the land registries, have moved to invoke a mandate which makes it compulsory for the industry to settle and register electronically from July 2019 in NSW (earlier for some other states)

## Concerns

- **The Regulatory Environment is not sufficient or ready for a mandate:**

ARNECC is a body made up of the Registrars (or their nominees) of the Land Titles Offices for each State & Territory in Australia. Is this a body that we can trust to oversee a multi-trillion dollar industry?

The Land Registries of WA, NSW, VIC & QLD are also shareholders in PEXA

Recently, Infotrack have announced a joint venture with ASX to create an ELNO (Electronic Network Operator) to compete with PEXA. This move should be welcomed by all stakeholders, as it will help to control prices and encourage innovation. However, **any mandate should be suspended until the eco-system of multiple ENO's is proven and verified as reliable**. This "inter-operability" is crucial to the success of an e-conveyancing platform, and without a timeframe of active participation between PEXA, Infotrack/ASX, and the Registries, it could be disastrous if its implemented too early.

However, PEXA will no doubt use its powerful ownership and first mover advantage to push a position of dominance in the marketplace. It may resist any moves of inter-operability and insist that all transactions go through them. This has to be sorted out and regulated before any mandate comes into place.

So far the Regulator has been slow in promoting and encouraging competition. In fact, potential new entrants are struggling to understand the Regulator's view on competition. Australia already has the best form of land titling in the world and online competition would guarantee top of class processing. We need a new regulator that supports competition and provide the guidelines for how the process will work.

Assuming ARNECC approves the Infotrack/ASX application, it should now distance itself from PEXA. The relationship between the Regulator and PEXA has also drawn criticism. How can the Chair of the Regulator, which intends to mandate the use of ELNO's, also be the person in charge of an organisation which is a shareholder (11%) in PEXA? Surely the two parties need to be at arms-length.

Further, ARNECC have appointed their own lawyers, Gilbert & Tobin to conduct a review of the regulations and make recommendations. The review should be INDEPENDENT, not by a current adviser.

There appears to be a lack of clarity and strength in the regulations, which is leading to an erosion of confidence within the conveyancing community.

With property transactions of over \$7 Trillion annually, the industry needs a strong, productive and demanding regulator to oversee the process.

- **Is it Legal?**

The legality of this mandate is yet to be tested, however we believe a challenge in the courts would be successful.

The ACCC have confirmed that there is no breach of the Competition and Consumer Act 2010 in regards to the Land Registries invoking a mandate, however they have serious concerns over the monopoly of PEXA.

Any mandate should be suspended until the State Land Registries answer the concerns of the ACCC in regards to PEXA and their conflicted position.

- **Cost to consumers**

The cost of doing a transfer of title online via PEXA is currently \$110.55. This fee does not include the authority fees for registration. Even allowing for stamping, registration, final search and bank cheque fees, this is still on par with doing it manually, and none of those costs apply to a sale, so therefore it is more expensive!

Furthermore, the higher risk of fraud will see a big rise in Title Insurance, which will be passed on to the consumer. This will be a double whammy of PEXA fees plus Title Insurance fees passed on to the consumer.

- **Security Risk & Potential for Fraud**

Any online environment is at risk to fraud. If they can hack Uber, then they can easily infiltrate any legal or conveyancing firm. The current PEXA process uses digital key tokens, which can easily be stolen and used for illegal purposes.

Transactions are "signed" using a USB stick, which places considerable liability on practitioners, which will inevitably lead to larger industry premiums for insurances.

There is a significant lack of account verification in PEXA, and any same day transfers of money that go to the wrong account do not have the same window for stopping payment that a manual cheque clearing process provides.

But perhaps the most worrying security risk in the electronic environment is the hacking of emails, and the ability of fraudsters to redirect instructions and theft by stealing email identity.

Surely, you should have a choice of doing it manually or electronically.

- **Diminished Earning Capacity for Industry Professionals**

If the settlement and registration process is mandated, then PEXA or their equivalent are not restricted in what services they can provide, therefore they may decide to compete with lawyers and conveyancers in the marketplace for the whole conveyancing process. Considering the market power they have, its not unrealistic to think that they will attempt to control as much of the marketplace they can, as long as its profitable.

Additionally, new market entrants such as TitleXchange have signed agreements with mortgage brokers where the conveyancing process will be offered to the consumer via bids by aligned conveyancing firms. This will no doubt lead to discounts by scale, in an already competitive marketplace. Expect the fees for conveyancing online to reduce dramatically (see <https://www.businessinsider.com.au/gouging-this-australian-startup-is-on-a-mission-to-end-ridiculous-conveyancing-fees-2017-9>)

- **Significant Job losses**

Many lawyers and their secretaries do not want to learn a new and complicated process. This will lead to many retirements and successions. Settlement clerks will become redundant and with them , the ability to fix problems that occur late in the process and the flexibility to resurrect settlements that have failed for whatever reason. Why should someone have to re-train for a process that has worked well for many generations?

Further, the State Land Registries will pursue mass sackings of public servants once the mandate is in place, with up to 60% of current staffing levels to become redundant.

- **The process is not significantly easier or beneficial**

We have had consultation with many current users of PEXA and almost all of them confirm that doing settlements via PEXA actually adds to their work, not saves them time.

In the last few days, a report by KPMG which was commissioned by the NSW Office of the Registrar General, purports to show time and cost benefits to users, however not all share that view.

But assuming their findings are accurate, why hasn't the industry jumped at the opportunity to save time and money and therefore be more competitive?

Almost all of the critics of the PEXA system point out that the stakeholders most benefited are the Banks and Land Registries. These are the very stakeholders who will benefit from a mandate and subsequent float or private sale.

Even though PEXA has provided extensive training, applied virulent sales pressures, and have been supported by the Law Societies and Conveyancing Institutes nationally, they have only achieved single digit % of transactions for four party title transactions. What does that tell you?

## **The industry should have a choice**

### **Opinion**

We accept and support progress and we accept and support online settlement and registration, BUT it should be by way of organic growth and led by free market innovation and competition, NOT by forcing it on the professional community by way of a mandate that makes the big end of town rich.

Further, we believe that any mandate should only be invoked when a critical mass has been achieved, which verifies its process and reliability. This figure should be 66% of eligible transactions.

### **Action Plan**

- Please pass this on to any interested or uninformed colleagues
- Contact us on [nomandate@legalagents.com.au](mailto:nomandate@legalagents.com.au) to pledge your support or express any differing views
- Contact the current federal minister for finance to demand a review into this mandate and its effects on the industry
- Push back to any sales pressures being applied by PEXA, or Infotrack. There is still time to have this mandate suspended.

# **NO MANDATE**