

Jeremy Cox
Registrar General of NSW
Via email: ORG-admin@finance.nsw.gov.au

28 February 2019

Dear Jeremy,

Discussion Paper - Certificates of Title: the next evolution

PEXA appreciates this opportunity to provide its submission in response to the Discussion Paper.

PEXA commends the NSW Government's plan to convert all paper CTs to eCTs from 1 July 2019 and supports your approach of considering this issue against the backdrop of 100% electronic lodgment.

It is important to understand that any change to the NSW model will mean Subscribers and PEXA itself will need a suitable transition period to make the necessary updates to their systems and processes.

This reform is an opportunity for the states to achieve greater national consistency. PEXA strongly supports the commitment made by *Intergovernmental Agreement for an Electronic Conveyancing National Law* (IGA) signatory jurisdictions to a nationally consistent approach to electronic conveyancing.

Greater national consistency delivers on the spirit of the IGA, creating a more efficient, streamlined experience for our Members who transact across Australia. Furthermore, a nationally consistent framework reduces regulatory burden and the associated cost of compliance, attracting private sector investment and enhancing the opportunity for further innovation.

The comparisons with business practices of other comparable jurisdictions described in the Discussion Paper illustrates the considerable differences in the business practices applying to eCTs. NSW will be aware that other Australian jurisdictions are considering further reform in this area, including the merits of aligning with the model in SA and Queensland, eliminating the role of eCTs.

The NSW model is the least efficient and more complex model. Given these developments, PEXA submits that NSW should adopt a version of model 3 to align with the trend toward eliminating eCTs and CoRD Holder Consents entirely.

In following the lead of South Australia, NSW should look to make available alternative protective measures to parties to electronic transactions. Model 3 does not rely on the outmoded concept of a duplicate certificate of title which is produced as evidence of consent to a dealing, relying instead upon other fraud mitigation measures. Alternative fraud mitigation measures include the requirement for verification of identity, verification of the right to deal, as well as the opportunity to lodge a priority notice or to take other steps such as utilising Title Watch. The advent of e-conveyancing and the introduction of ELNOs may make new digital fraud mitigation measures

possible, which PEXA would be keen to explore with the Office of the Registrar General (ORG) and other stakeholders in NSW.

The experience in South Australia shows that a combination of fraud mitigation measures can offset any additional risk introduced by removing the role of duplicate titles.

In the following sections, PEXA provides an outline on the impact and its costs of the three models described in the Discussion Paper.

Consideration of Implementation

Consideration needs to be given to the timeframes for implementing model 2 or 3, as in either case technical changes will need to be released and industry education will be important for ensuring the reform is successful.

Considering model 2 from a technical perspective, new functionality will need to be built and released by all active ELNs and by the LRS to extend CoRD Holder Consent. When building out similar capability in Victoria, considerable effort over months was required to design, build and test the functionality prior to release.

PEXA anticipates that facilitating model 2 would not take as long in NSW however, it will be important for representatives from NSW to engage with the ARWG process to agree upon the required functionality and schedule its build and release. Further consultation with effected industry stakeholders to discuss implementation of any reform is also likely to be required.

Functional requirements to facilitate model 3 are not as cumbersome from the perspective of ELNs however, it is still important for any changes to be raised and agreed upon via the ARWG process.

PEXA believes that an education program driven by the ORG of all industry stakeholders in NSW will be critical to the success of any Certificate of Title reform. Such education will need to cover the impact on processes for transactors, as well as the extent to which transactors have responsibilities to ensure parties have a right to deal, prior to proceeding with a transaction.

Model 1 – The current mixed eCT and paper CT environment

This Model is unsatisfactory because it differentiates between encumbered and unencumbered titles and further differentiates between mortgagees whether they are ADIs or non-ADIs. For example, some banks have non-ADI related entities and relationships with other entities in cases where such entities act as custodians of a mortgage book acquired by the bank. The effect of model 1 is the running of dual-processes across their corporate groups.

A mature, end-state model is one that does not differentiate between mortgagees as to whether they are ADIs or non-ADIs or does not regulate the handling, production and storage of titles.

In an electronic environment the concept of a duplicate certificate of title as a key part of completing the transaction should be removed and replaced with an expeditious means for a party to validate the transaction.

Model 1 differs significantly from the models of other active jurisdictions and in PEXA's view, model 1 should be discontinued.

Questions for discussion

1. PEXA submits that none of the existing CT environment should be retained.
2. The existing environment has not taken into account developments in other active jurisdictions which the Discussion Paper now opens for consideration.

Model 2 - eCTs and CoRD Holder Consents

Transacting electronically with an unencumbered title

When transacting with an unencumbered title on behalf of the proprietor it is questioned whether, given the role of the Subscriber in identifying the registered proprietor and verifying their right to deal, the further step of lodging a CoRD Holder Consent is necessary.

More broadly, PEXA believes that where a party to a transaction is the CoRD Holder, their participation should be taken as an implied consent to the transaction eliminating the need for a CoRD Holder Consent to be lodged.

Transaction in paper with an unencumbered title

With the approach of the e-conveyancing mandate for 1 July 2019 it is acknowledged that uncertainty with this process will be minimised.

Fraud and mitigation

PEXA acknowledges there are practicalities of extending this Model to non-ADI lenders and registered proprietors but the rules in the MPR concerning VOI and the right to deal are designed to mitigate fraud and affirm the expectation that Subscribers will take the necessary steps to ensure a transaction is in order (as they do in transactions today conducted either electronically or in paper).

If model 2 is adopted, NSW should consider adopting the same model as in Victoria whereby only Subscribers to an ELN are able to hold eCT Control. This would of course mean that where the party with control of the right to deal is not a Subscriber to an ELN, their representatives will be recorded on title as holding eCT. Without such a requirement, model 2 would do little more than model 3 to mitigate fraud as the provision of consent would be just as reliant upon verification of identity and right to deal as under model 3.

Other considerations

PEXA has no comments to make on these matters or regarding the two questions posed as "Questions for discussion".

Model 3 – No eCTs and no CORD Holder Consents

This Model 3 lends itself to achieving a more convenient and expeditious approach with subscribers taking responsibility to ensure a transaction is in order. This is reflective of the approach taken in the MPR.

PEXA acknowledges that reliance on the concept of paper duplicate titles is replaced with an approach which avoids replicating the physical environment in favour of the electronic environment. In this environment it is accepted that each party would be relying on its own inquiries to satisfy itself that any necessary consents have been given e.g. a first mortgagee's consent to a second mortgage. ADIs and most mortgagees would include in their mortgage terms and conditions a requirement for the mortgagee's consent to be given to a second mortgage.

PEXA agrees that the facilities described under section "4.3 Other considerations" in the Discussion Paper are very relevant to this Model 3 approach; that is that the parties take responsibility for the identification of their party/parties and establishing the right to deal. PEXA endorses Model 3.

Questions for discussion

5. PEXA recommends that if this model is adopted the ORG should publicly promote the responsibility for subscribers (which is already required under the MPR) to verify the key elements of identity and the existence of the right to deal
6. This question is better addressed by subscribers.
7. Subscribers' awareness of the importance of the need to diligently conduct their own verifications will be critical. Subscribers generally are expected to provide their own views of other risks.

Concluding Comments

This important reform provides NSW with an opportunity to align their system of electronic titling with other Australian jurisdictions, reducing the complexity of transacting land in Australia and taking advantage of new fraud mitigation measures to further modernise real property ownership.

PEXA acknowledges that different industry stakeholders will bring different perspectives and priorities to this reform and its potential impact. PEXA believes that three principles should guide the decision making of the ORG.

First and foremost this reform should be viewed as an opportunity to align NSW with the trend emerging across Australian jurisdictions, to eliminate the role of eCTs and related forms of electronic consents.

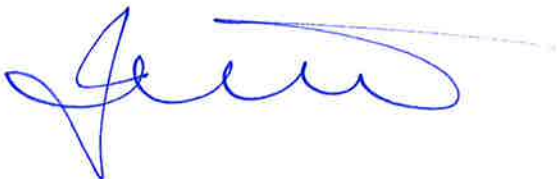
Equally important is ensuring that any reform takes a wholistic view to fraud mitigation, to ensure that where any protections are removed the overall risk of fraud does not increase.

Additionally, any reform should ensure the responsibility for integrity of the register is not unduly shifted to Subscribers. The regime should also be flexible enough to allow for the introduction of fraud mitigation and risk prevention measures in the future.

PEXA also reiterates the offer to work with the ORG and other industry stakeholders, to explore opportunities created by the advent of e-conveyancing to develop new fraud mitigation measures.

PEXA looks forward to working with the ORG and other stakeholders via the ARWG and other forums in the coming months, to ensure the success of any reform to certificates of title in NSW.

Regards,

A handwritten signature in blue ink, appearing to read 'Justin Schmitt', with a long horizontal flourish extending to the right.

Justin Schmitt

Chief Transformation Officer

