

The Director Strategic Policy and Development
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Dear Sir/Madam

PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER

Thank you for giving Landgate the opportunity to provide feedback on the Property Industry Codes of Conduct Discussion Paper. The majority of the attached response relates to the introduction of Property Exchange Australia ("PEXA"), the first national electronic conveyancing system. Settlement agents will be able to participate in Release 2 of PEXA, scheduled for 2014.

Landgate has been consulting with the Department of Commerce to amend the *Settlement Agents Act 1981* to enable settlement agents to participate in PEXA. Mr Gary Newcombe and Ms Carolyn Allanson at the Department of Commerce have been assisting in this matter.

Landgate is engaging with the Australian Institute of Conveyancers (WA Division) and the Law Society of Western Australia to facilitate Continuing Professional Development education sessions in relation to National Electronic Conveyancing. Landgate would value the input of the Department of Commerce in preparing materials for the education sessions. It is anticipated that the sessions will occur early in 2014. Mr Craig Mariano of Landgate is the contact point in relation to this matter, at craig.mariano@landgate.wa.gov.au or 9273 7466.

In relation to settlement agents, a review of the *Settlement Agents Act 1981* would be helpful to update the regulatory framework so that it meets the needs of the community in delivering a modern land registry service. Such a review would ensure that settlement agents provide services with a heightened ability to protect registered property interests against fraud and other improper dealings. A review could occur as part of the introduction of national licensing, or as a scheduled review by the Department of Commerce. Landgate would be happy to provide input into such a review.

The attached response to the Discussion Paper also includes some comments in relation to the Codes of Conduct for real estate agents and/or sales representatives, as well as land valuers.

If you have any queries in relation to the matters raised in relation to PEXA, please contact Ms Rachael Offer at rachael.offer@landgate.wa.gov.au or 9273 7643. For queries relating to any of the other matters, please contact Ms Kelly Whitfield, at kelly.whitfield@landgate.wa.gov.au or 9273 7431.

Yours sincerely



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LANDGATE'S RESPONSE TO THE PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER

BACKGROUND

Landgate provides and administers the Torrens title register ("Title Register") in Western Australia which is maintained under the *Transfer of Land Act 1893* by the Registrar of Titles ("Registrar"). The State of Western Australia is committed, under the Intergovernmental Agreement for an Electronic Conveyancing National Law to implement National Electronic Conveyancing. National Electronic Conveyancing is a legislative and business environment providing for the:

- preparation and lodgement of registry instruments with Land Registries via an Electronic Lodgement Network ("ELN"); and
- settlement of real property transactions via an ELN.

Because of security requirements, only registered "Subscribers" (generally lawyers, conveyancers and lenders) will be entitled to use the system on behalf of their clients or on their own behalf. It is not intended that the electronic conveyancing system be available for use by members of the general public unless they are represented by a Subscriber. A Subscriber representing a client will enter into a Client Authorisation authorising the Subscriber to act for the client in an electronic transaction. Before entering into the Client Authorisation, the Subscriber must verify the identity of its client.

A Subscriber will create electronic documents (eg Land Registry documents and settlement schedules) in an electronic workspace shared with other Subscribers acting in relation to, or involved in, a conveyancing transaction. Various data and lodgement verification checks will occur before settlement. The electronic documents will be digitally signed by the Subscriber or a person authorised by the Subscriber. If the conveyancing transaction is complete and ready to settle on the nominated settlement date, financial settlement will occur automatically by electronic funds transfer. Once settlement has occurred, the Land Registry documents will be electronically lodged with the appropriate Land Registry.

Release 1 of the Property Exchange Australia ("PEXA") being developed by National E-Conveyancing Development Ltd ("NECDL"), commenced in Victoria in June 2013 and is scheduled to commence in Western Australia in November 2013. Release 1 of PEXA provides for discharges of mortgages and mortgages. Release 2 of PEXA will provide for transfers, caveats, withdrawal of caveats and for financial settlement between multiple parties to a conveyancing transaction. Real estate settlement agents (referred to as "settlement agents") will be able to participate in Release 2 of PEXA scheduled to commence in 2014.

Subscribers will enter into a Participation Agreement with an Electronic Lodgement Network Operator ("ELNO") and must comply with Participation Rules, made under the Electronic Conveyancing National Law ("ECNL"). The ECNL will be implemented in Western Australia as corresponding law. A copy of the ECNL and the Model Participation Rules ("Participation Rules") are enclosed for your information (Attachments 1 and 2). The Participation Rules, when applied in Western Australia, will be a form of subsidiary legislation.

The Participation Rules are the Registrar's regulatory requirements on Subscribers and users of the ELN. Compliance by Subscribers with the Participation Rules is fundamental to the proper completion of conveyancing transactions electronically and the maintenance of the integrity of the Title Register. The importance of compliance with the Participation Rules is reflected in section 26(1) of the ECNL which requires Subscribers to an ELN to comply with the Participation Rules for the ELN.

The majority of Landgate's response relates to changes proposed to the settlement agent's Code of Conduct, arising due to the introduction of the National E-Conveyancing System. Some comments are included in relation to the Codes of Conduct for real estate agents and/or representatives, and land valuers; these are not in relation to PEXA.

1 RESPONSE TO DISCUSSION QUESTIONS

In general terms, changes to the code of conduct for settlement agents and real estate agents should promote professionalism and best practice across the industry, with protection of registered interests and consumers of property industry services at the centre of the reason for being.

1.1 Discussion Q1(b): Interpretation

Landgate supports the suggestion that the Code be amended to clarify the meaning of "licensee" to ensure that, where appropriate, it extends to an employed settlement agent. This could perhaps be achieved by amending the word "licensee" to "settlement agent" where the obligation in the Code should apply generally, regardless of whether the person is or is not a licensee.

1.2 Discussion Q2: Knowledge of Act and Code of Conduct

Landgate supports the retention of Rule 4 of the Code and notes that it enables the disciplining of a settlement agent for contravention of conduct provisions.

It is noted that section 84(2)(b) of the *Settlement Agents Act 1981* (SAA) provides that it is a proper cause for disciplinary action if a settlement agent is guilty of conduct that constitutes a breach of "any law".

The question is whether the breach by a Subscriber (such as a settlement agent) of the Participation Rules would be a breach of a law for the purposes of section 84(2)(b). Whilst section 46(1) of the *Interpretation Act 1984* provides that a reference to a written law includes a reference to subsidiary legislation made under that law, it is suggested that consideration be given to including in the Code an express obligation to comply with the Participation Rules as follows:

"A settlement agent who is a subscriber to an Electronic Lodgement Network must comply with the participation rules relating to that Electronic Lodgement Network."

The following definition of Electronic Lodgement Network would need to be inserted:

"Electronic Lodgement Network" has the same meaning as in the Electronic Conveyancing National Law (Western Australia) Act (note: title of Act to be confirmed)."

Breach of the Participation Rules would then be a proper cause for disciplinary action under section 84(2)(c)(iii) of the SAA.

Additionally, Landgate requests that consideration be given to including in the Code the following:

"In preparing documents to be presented, lodged or deposited with the Registrar of Titles or Landgate, settlement agents will comply with any requirements set by the Registrar of Titles and/or Commissioner of Titles."

1.2.1 Discussion Q6(a): Agents to act in the best interest of their client unless unlawful to do so

This discussion point is not in relation to the implementation of PEXA.

Landgate believes that the Property Industry Code of Conduct should include that real estate agents, settlement agents and licensed valuers should act in the best interest of their clients and detail their responsibilities to their **vendor clients** and **purchaser clients**. This is because an agent may act on behalf of both the seller and buyer in the property transaction process. A client should understand the role and responsibility of the agent in relation to them, as either buyer or seller, and agents should be able to explain these differences. This requirement would assist in enhancing transparency and minimising conflicts of interest.

Most home buyers in Western Australia rely on the real estate sales representative acting for the vendor to provide them with important information about a property such as all known interests, in order to make an informed decision. While the Joint Form for General Conditions for the Sale of Land (used in over 90% of land transactions in WA) requires the vendor to disclose, this is on a limited basis and the consequences of non-disclosure will vary depending on the circumstances. The vendor is not mandated by law to disclose certain information about a property and it is not common practice for a purchaser to request a Vendor Disclosure Summary prior to negotiating a contract price.

The Property Industry Code of Conduct should make it mandatory that real estate agents and representatives acting on behalf of the vendor disclose all known material interests affecting the listed property. This could be in a format similar to the Vendor Disclosure Statement in South Australia. More is outlined on this topic in the response to Question 20.

The Codes of Conduct should enshrine that all known interests be disclosed, whether these are:

- interests that affect the use and enjoyment of the property; or
- interests that relate to honesty and fairness of the agent.

This would reduce the liability of the property industry to the risks associated with non-disclosure of such information and bring Western Australia in line with the rest of the Australian States and Territories.

1.3 Discussion Q7: Act with honesty and fairness

It is fundamental for the protection of consumers, and the maintenance of the integrity of the Title Register and public confidence in that Register, that settlement agents be under a professional duty to act with honesty.

In National Electronic Conveyancing, Subscribers (settlement agents or their authorised employees) will be digitally signing Land Registry documents for their clients pursuant to a Client Authorisation. The client will not sign the Land Registry document themselves. The digital signing by a Subscriber will be relied on by parties to the transaction and by the Registrar of Titles in changing the Title Register. Compliance with a Subscriber Security Policy and safekeeping of the digital certificate and access credentials used in the ELN will be essential to prevent unauthorised access to the ELN and fraudulent transactions.

In addition to the duty to act with honesty, and taking into account the growing risk of fraud perpetrated through electronic systems, it is suggested that consideration be given to including in the Code a provision relating to the prevention of crime or fraud along the following lines:

“A settlement agent must take reasonable steps to prevent any person perpetrating a crime or fraud through the settlement agent’s practice, including the taking of

reasonable steps to ensure the security of electronic systems and the authorised use of and access to those systems.

The security of electronic systems and the authorised use of and access to those systems would encompass the protection of security items such as access credentials (usernames, passwords and personal identification numbers relating to electronic banking), digital certificates and private keys and electronic workspace identifiers.

The suggested additional rule is based on Rule 11.4 of the New Zealand Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

A breach of the suggested provision would enable disciplinary action under section 84(2)(c)(iii) of the SAA.

1.4 Discussion Q8: Exercise skill, care and diligence

In National Electronic Conveyancing, a settlement agent will give various certifications in an electronic document. The certification is given when the electronic document is digitally signed.

The certifications are set out in Schedule 3 to the Participation Rules and include certifications that:

- reasonable steps have been taken to verify the identity of their client
- a Client Authorisation is held
- supporting evidence has been retained
- reasonable steps have been taken to ensure that the document is correct and compliant with relevant legislation and prescribed requirements.

It is likely that in the future, certifications will also be required to be given in paper documents. An example of this is a certification stating that the identity of the transacting party and the authority of that party to deal has been verified.

It will be an offence under the *Transfer of Land Act 1893* to provide a false certification. The penalty will be a maximum of \$100 000 or 10 years imprisonment or both. In addition to this penalty, a Subscriber who gives a false or negligent certification may also be liable under the common law.

The certification of an electronic document together with digital signing by a Subscriber is relied on by parties to the transaction and by the Registrar of Titles in changing the Title Register. The obligation on the Subscriber to ensure that the certifications can be properly given before digitally signing a document is fundamental.

It is suggested that consideration should be given to including in the Code a provision relating to certifications along the following lines:

“A settlement agent must not provide, or allow to be provided, a certification in relation to any matter unless the settlement agent believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.”

The suggested additional rule is based on Rule 2.5 of the New Zealand Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

A breach of the suggested provision would enable disciplinary action under section 84(2)(c)(iii) of the SAA.

1.5 Discussion Q 13: Supervision and control of the business

Landgate supports the retention in the Code of obligations relating to supervision and control of a settlement agent's business. The possibility of disciplinary action being taken if that obligation is not met provides an incentive for proper management. Proper management mitigates the risk of fraud occurring in relation to property transactions.

If the elements of effective supervision are to be specified in the Code, consideration should be given to including in the list of "appropriate procedures" (set out at page 49 of the Discussion Paper) the following:

- use of an Electronic Lodgement Network
- issuing, use and protection of digital certificates
- security of electronic systems and the authorised use of and access to those systems
- document retention.

1.6 Discussion Q 20: Professional responsibilities when undertaking functions

Please note that the functions of a settlement agent set out in Schedule 2 to the SAA are to be amended to enable settlement agents to conduct transactions electronically.

A further responsibility is suggested for real estate agents and/or sales representatives, not related to the implementation of PEXA. Australia-wide there is a move towards greater vendor disclosure of interests that impact on properties. WA and the Northern Territory are the only states that do not have mandatory vendor disclosure of interest information. A recent newspaper article in the West Australian on 23 May 2013 titled "Homebuyer Sues over Noise" detailed the case of a purchaser who was seeking to sue their real estate agent, alleging negligence and misleading or deceptive conduct. There would have been virtually no grounds for these claims if the real estate agent had provided available information on the Land Use Planning and flight paths in the vicinity of Perth and Jandakot Airports.

Under the current *Code of Conduct for Agents and Sales Representatives 2011*, Western Australian real estate agents have a general requirement to ascertain, verify and communicate facts. They are obliged to advise purchasers about encumbrances registered on a Certificate of Title, but are not currently required to provide a complete list of interests affecting a property. This should be changed so that real estate agents and representatives acting on behalf of the vendor are obliged to disclose all known interests that could affect the current and future use and enjoyment of the property they are listing for sale. They should be able to explain to the would-be purchaser the potential impacts of those interests. The purchaser should receive a copy of the current Certificate of Title for all registered interests. However, some interests may not be listed on the Certificate of Title. Full disclosure will enhance transparency and reduce the agent's and vendor's exposure to misrepresentation claims, and their legal liability. This will enhance consumer protection measures for both buyers and sellers of residential property.

It should be the responsibility of the real estate agents and representatives to find out and verify all material facts pertaining to the vendor disclosure of interest not listed on the certificate of title

The disclosure of property interests would promote:

- public confidence in the performance of property agency work
- regulatory best practice
- a speeded up decision-making process by purchasers
- evaluation of proposed property uses.

The WA Settlement Agent's Code of Conduct requires for all available pertinent facts to be communicated to the client, and for work to be done with due care and skill. This should

include the disclosure of all interests that affect the use of the land, especially for private sales that are completed without the use of a real estate agent.

The Landgate Interest Enquiry Report is an example of how detailed the provision of interest information should be. The provision of this type of report and information to prospective purchasers (prior to the signing of the contract of sale) would ensure all known interests that could affect the current and future use and enjoyment of the property are disclosed. This includes those interests which are not listed on the Certificate of Title. The Interest Enquiry Report could be added to the contract of sale to demonstrate that the vendor and agent have used due diligence and made a reasonable effort to provide accurate and complete information and disclosed all interests affecting the listed property.

The Interest Enquiry Report has been designed in consultation with a West Australian Property Industry Reference Group, with representatives from the Real Estate Institute of Western Australia, the Australian Institute of Conveyancers WA Division Inc, the WA Property Council, the Department of Commerce, Landgate, and the Urban Development Institute of Australia. The Interest Enquiry Report contains information on approximately 86 interests that are known to exist in Western Australia which have legislation or policy backing them, but are not registered on the Certificate of Title. Information relating to the separate interests are currently held and maintained by various Government agencies. This information is gathered from a whole of government shared land information platform and produced by Landgate as a single report. The report is available 24/7, with support availability in business hours 99.5% of the time.

The use of an Interest Enquiry Report is an efficient use of time, as vendors and real estate agents will not need to contact each individual Government agency for provision of the relevant interests.

An example of an Interest Enquiry Report has been enclosed (Attachment 3). The report is currently being enhanced and streamlined, the new format report being available in August 2013.

1.7 Discussion Q 23(a): Additional Guidance

In relation to National Electronic Conveyancing and the obligations of Subscribers under the Participation Rules and how the Participation Rules relate to their obligations under the SAA, Regulations and Code, it may be beneficial if Practice Guidelines were developed.

New Zealand's electronic lodgement system for property transactions is called "Landonline". It is noted that the New Zealand Law Society published Practice Guidelines addressing a conveyancing professional's obligations in relation to e-dealings prepared and lodged through Landonline. A copy of the Practice Guidelines is attached (Attachment 4). You will see that the Practice Guidelines refer to and extract some of the rules under the New Zealand Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Landgate's view is that any Practice Guidelines should be developed by the representative bodies of the conveyancing industry (Australian Institute of Conveyancers and Law Society), either at a State or national level. Landgate would appreciate the views of the Department of Commerce on whether the development of Practice Guidelines for electronic conveyancing is desirable and, if it is, who should facilitate this.