

# South Australian Conveyancer

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December 2016

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SA



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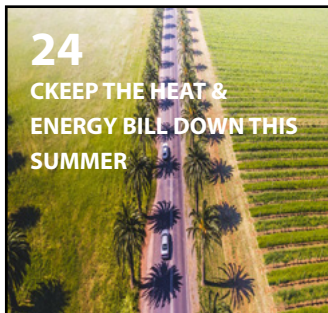
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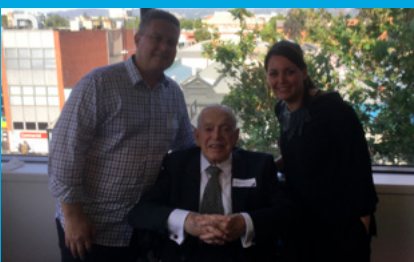
LTO Coffee and muffins brought to you by Stewart Title



Nicole Xenides-Rajan and Audrey Connell at the AICSA Member Christmas drinks



Jess Caire speaking at the AICSA State Conference



President Tim O'Halloran, with CEO Rebecca Hayes with Life Member Norman Duncan

## President's Forward

We are at the end of another year which has flown - clearly I am ageing as every year seems to go quicker.

On 4 November 2016 the E-Conveyancing transition period ceased and all documents dated after that date are to be lodged in the Land Titles Office in accordance with the new Regulations. Pleasingly the majority of all Conveyancers have adapted well to the change.

PEXA continues to add extra services to their platform and simultaneous settlements can now be completed via PEXA which is a significant move forward. PEXA will continue to broaden the transactions which can be completed in the electronic space and I would encourage you all to provide any feedback or suggestions you may have to PEXA.

Our State conference was held at Adelaide Oval this year and given the intense year we have had with Professional Development seminars it was pleasing to see a good number of Conveyancers and Staff attend the conference. I would encourage you all to bring your Staff along to future conferences, the feedback we receive from Staff is positive and I believe they take valuable information out of the conference.

### The Year Ahead

No doubt it will be another busy year next year. AICSA will continue to meet with Treasury regarding the impending sale of the Land Titles Office with a desire to ensure certain not negotiables are built into the sale.

Our programme for Professional Development next year has been set and I would encourage you all to invest in your and your staffs Professional Development by attending as many sessions as you can. Valuable information is always provided by the presenters.

I would like to thank you the Members and all Councillors and the staff of AICSA for the support you have given me over the last 12 months and on behalf of the Councillors and the staff of AICSA I wish you all a Merry Christmas and safe and Happy New Year.

Tim O'Halloran

AICSA President



Magazine proudly printed by AICSA Sponsor:



# CEO's Welcome

*Another day another year  
Another Christmas time is here  
And the children's eyes shine  
bright  
As they dream of Christmas  
night...<sup>1</sup>*

As 2016 comes to a close, and the children on the school stage belted out the words 'another day another year', I reflected on our achievements and the tasks still at hand.

It has been an exciting, challenging and surprising year. On 4 July, as Australians waited to find out who their Prime Minister would be, Conveyancers across South Australia embraced the amendments to the *Real Property Act 1886* and showed the rest of the country how alignment can be successfully achieved.

I congratulate each and every one of you on the seamless manner in which alignment was accomplished, it has been a privilege to work alongside you all as you reached this milestone.

As a mother of two young children the Christmas season is heralded in with nativity plays, joyous (and somewhat flat) singing of carols around the house, Christmas parties, a visit to the Magic Cave and the onset of 8 weeks of school holidays.

As Santa's arrival draws closer, the anticipation in William and Eloise's mood is palpable. I am lucky that I have these two little people to bring the magic of Christmas to me, to remind me to take a breath, to live in the moment, to be in the moment.

After such a watershed year and as we farewell 2016 take the time to breath, live and be; embrace the year that has been and all that you have accomplished and

experienced. Allow your eyes to shine bright, enjoy the magic that is Christmas and enjoy the chance to relax.

I wish you all a very Merry Christmas and the very best for a prosperous and happy 2017.

**Rebecca Hayes**

**Chief Executive**

*(Endnotes)*

1. *Words to Peace on Earth* verse 1



# CEO Report 2016

*2016 was an exciting period for Conveyancers. We saw, eventually, the passing of amendments to the Real Property Act 1886 (RPA) that made the final changes to align the paper and electronic processes and provide for the commencement of electronic settlements.*

Privatisation is the 'it' word for governments across Australia, and sadly the conveyancing profession will continue to deal with the impact of this strategy. During 2015/16 the South Australian Government undertook a scoping study which considered the potential outsourcing of some or all of the functions of the Land Services Group. The decision to move forward with an outsourced model will result in certain transactional land service functions being provided by the private sector within the next 9-12 months. The Institute will continue to lead and influence policy and legal decisions through the stakeholder engagement group.

## Membership

Membership as at September 2016 is 390 Ordinary, 4 Life (including 1 retired), 2 Fellows, 20 Associate Non-Practising, 88 Staff, 61 Students and 30 Non-Conveyancing Professional. Total membership is currently 595, as compared to 557 at the same time last year. This reflects an overall increase of 7% which is very pleasing.

We are beginning to see a shift in business ownership with the merger of firms and retirement of our older Members. Loss of the experience and knowledge held by these Members is disappointing and the Institute

is looking at ways to leverage this experience through positive forms of engagement.

Members receive a fortnightly newsletter, The Voice, which has excellent articles full of pertinent information. The open rates and feedback received are a testament to the quality publication. The SA Conveyancer Magazine is released twice a year with editions in December and June. The past three editions have reflected our new layout and branding. We have also attempted to make it representative of South Australia, using photos from around our beautiful State to bring life and colour to the publication.

A Student E-Newsletter is published once a quarter and provides valuable information on conveyancing topics as well as general tips regarding resume's, interviews and other employment related matters.

## Professional Development

In 2015 the Institute secured a one-off grant of \$150,000 from the Agent's Indemnity Fund that enabled us to provide meaningful, specialised and cost-effective training on the amendments to the Real Property Act (RPA reforms).

The positive feedback received from attendees is a reflection of the first-class training provided

by the Institute.

The considerable amount of work undertaken by Geoffrey Adam in researching, preparing and presenting the 'Alignment Series' must be acknowledged. On behalf of the Institute I take this opportunity to thank Geoffrey for his continued support and dedication to the conveyancing profession and the Institute. South Australian conveyancers can be comfortable in the knowledge that they are the best trained and most professionally advanced practitioners in Australia.

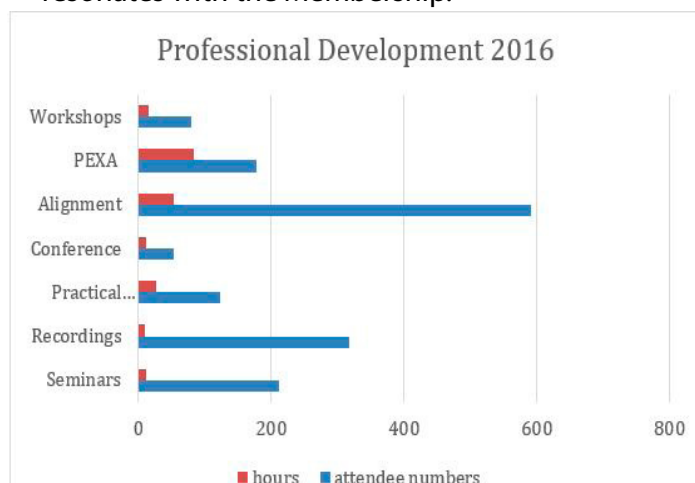
Professional development opportunities continue to keep the Institute very busy. The 2016 program finished with a one and a half day conference at the Adelaide Oval. The conference was well attended and attendees enjoyed interesting and engaging sessions.

Workshops are proving particularly popular with Members, the format allows participants to enjoy an intimate, practical experience. The 2017 program includes a greater number of workshops across a larger range of topics and builds nicely on the past years' experience. I think the program mapped out for 2017 is particularly exciting, with excellent presenters and varied, interesting and apposite topics.

Recordings continue to be popular and many Members are preferring to listen to seminars in their own time.

Professional development is an integral component of what the Institute offers our Members and, hopefully, your success. But, professional development is also a significant cost to the Institute. Costs are associated with presenters' time in preparing and presenting their seminars, printing, venue hire (including in-house), staff costs to organise each event, put the information online, liaise with venues, presenters and the like, register participants and to manage cancellations, changes and refunds. These costs must be recovered and a profit made to invest further into our Members. The fees charged for AICSA professional development sessions are very reasonable when compared to our peers and this should be acknowledged by the Members.

I would like to see an increased presence of Members at professional development sessions over the coming year. The Institute and the Professional Development Committee work hard to bring relevant and interesting topics to Members; suggestions and offers to assist are always welcome and will enable delivery of ongoing PD that resonates with the Membership.



### Certified Practising Conveyancer (CPC) program

The CPC program continues to work well. Disappointingly, even with the substantial volume of training in 2016, the number of Members eligible for CPC status in 2017 has decreased significantly.

The professional benefits along with the additional advantages for CPC's under the PI Insurance arrangements (see below) should be a considerable driver for CPC acquisition over the coming years.

Please contact Karen Holt, Membership Co-ordinator, to check your CPC status. I urge you to take advantage of the recordings to ensure you reach your 100 points for CPC.

### Insurance

The 2015-16 facility functioned well. Renewal went smoothly and it is pleasing that the insurer retained the current premium levels – the introduction of additional tiers in the premium table saw a significant number of premiums decrease overall.

Pleasingly, Consumer and Business Services (CBS) approved changes to the policy that enables a person or firm who has completed the Certified Practising Conveyancers (CPC) program to receive a **'Nil' excess\*** (subject to terms & conditions check with Marsh Insurance) with respect to a first claim. This is a noteworthy achievement and reflects the value both the insurer and CBS place on ongoing professional development.

Holders of CPC continue to receive a discount on their premium.

### Sponsorship

Sponsorship of the AICSA is integral to the ongoing viability of the Institute and our continued efforts to keep Membership fees low. This past year has seen a shift in focus, with our member/sponsor opportunities becoming more bespoke and of higher calibre. We trust this will yield a greater return for sponsors and Members alike.

AICSA's sponsorship has remained strong and we welcomed a new sponsor, MyConnect, in 2016. Sponsors and Members are looking for a greater return on their investment and time. It is important we support our sponsors, but equally it is important we support our Members with opportunities that grow networks and are fun and engaging. This will be the continued focus for the 2017 year.

### Relationships with other professional bodies

The Institute maintains an excellent working relationship with both The Law Society of South Australia (LSSA) and the Real Estate Institute of South Australia (REISA). These relationships continue to grow as all three bodies have worked toward the commencement of electronic settlements and in recent months on the privatisation of the Land Services Group.

AICSA meets regularly with REISA's CEO Greg Troughton and the Chair of the Law Society's Property Committee, Philip Page.

## **Representations**

The Institute makes numerous representations and submissions on behalf of its Members, and conveyancers generally, as well as the public (as clients). This is a time consuming component of the Institute's business, in fact many hundreds of hours each year can be applied to this role.

Representations are executed through a number of means. Primarily this is in the form of membership of various government committees including the LSG Consultative Committee, LSG's Industry Stakeholder Group, LTSA's Registration Advisory Committee, Revenue SA's State Taxes Liaison Group and the newly formed LSG Privatisation Stakeholder Engagement Committee. Through AIC National the Institute has also been in consultation with the Australian Taxation Office regarding the recent implementation of the Foreign Residents Capital Gains withholding tax.

The Institute continues to meet regularly with the Commissioner for Consumer Affairs and the Registrar-General. These meetings are of particular benefit.

Written submissions also form a significant component of the Institute's ongoing advocacy role. 2016 provided the Institute with the opportunity to make

public representations on the subject of LSG Privatisation. These representations have proved very successful and the Institute has achieved media coverage in the form of print and radio along with the establishment of an industry stakeholder group to advise and work with government on issues of concern pertaining to the privatisation.

A brief summary of written submissions on behalf of Members on particular issues is provided below.

### **Electronic Transactions Act 20100 (ETA)**

The AICSA wrote to the Attorney-General, Hon John Rau MP, confirming our position with respect to proposed amendments to the ETA to remove the exemption for land from the ETA. The AICSA repeated its concerns that consumers would be more vulnerable to 'sharp practices' and that more considered measures to protect consumers needed to be addressed prior to the proposed amendment occurring.

### **Real Property Act Amendments (RPA)**

The AICSA provided a lengthy submission to the Registrar-General in response to the draft *Real Property (Electronic Conveyancing) Amendment Bill 2015*. Although the AICSA's submission was supportive of the proposed Bill we did highlight some anomalies and provided feedback on when improvements or clarity could be made. Pleasingly, many of these suggestions were taken

on board and form part of the amended RPA. A special thank you to Geoffrey Adam for preparing this submission on the Institute's behalf.

### **Review of the CBS Compliance and Enforcement Policy (C&E Policy)**

The AICSA made a thorough submission to CBS on where their C&E Policy can be refined and improved. Additionally, CBS had sought information on the key threats and risks to the profession and stakeholders (primarily consumers). The opportunity to provide candid information to CBS was timely given the commencement of the amendments to the RPA.

### **Renewal of the CBS Funding Agreement**

CBS decided that after twelve years it was time to review the funding agreement with AICSA. This went smoothly and AICSA has achieved a good increase in the amount of funding that may be provided (along with CPI increase which we never previously received). Unfortunately the annual submission to receive the funding is now more onerous for us but monies can be applied more broadly – this year we have received money to fit out our new training facility and have UHY Haines Norton rewrite the Trust Account Manual.

### **Department of Planning, Transport & Infrastructure -**

AICSA became aware of delays in the provision of DPTI searches in response to Section 7 enquiries. As such, I wrote to the CEO of DPTI

requesting he look into the matter. This resulted in a very quick response and rectification of the issue. Correspondence is regularly had with Revenue SA to resolve issues that may arise from time to time. Pleasingly all departments have been very responsive to our concerns. Please feel free to raise issues with AICSA, we are here to assist and liaise with Government on your behalf.

### **Draft Revenue Ruling: Land Held on Trust s.13(3)(b) –**

AICSA made a submission against Revenue SA's draft ruling. AICSA was able to influence Revenue SA insofar as Revenue SA removed the duty on Conveyancers to ascertain information from their clients and review trust deeds. Unfortunately we were unable to have Revenue SA reverse its interpretation of a discretionary beneficiary's legal or equitable interest in land.

### **Privatisation of the Lands Titles Office –**

The AICSA has made significant submissions in response to the Treasurer's announcement that the Government intends to privatise a portion of the LTO services. Along with the submission, AICSA brought together a group of key influencers and arranged a meeting with Treasury to discuss the matter. The result of the AICSA's advocacy in this space is the establishment of a Stakeholder Engagement Group comprising Treasury and key stakeholders. The ambit of the group is to discuss concerns and work through the details

of privatisation as they become clearer.

I would like to thank Geoffrey Adam and Jeff Stevens who have both provided significant input into many of these submissions.

### **Banks**

In 2012 the AICSA established its Banking and Conveyancing Stakeholder Group involving the major banks, the Registrar-General and the Law Society. It has continued to successfully meet each quarter since then. Meetings have enabled relationships to develop and personal contacts with decision-making individuals within the banks. In turn, it has enabled problems to be resolved directly and promptly when raised by Members.

### **Federal Legislative Update Foreign Residents Capital Gains Withholding (FRCGW)**

- The FRCGW commenced across Australia on 1 July 2016. It has met with little fanfare in South Australia, most likely due to the exclusion of properties below \$2 million, along with the commencement 4 days later of the Real Property Act amendments.

There were some early issues with the timeliness of clearance certificates, but I understand this has now been resolved as more people use the online lodgement tool.

One glitch with the implementation of the FRCGW is the forms required to be lodged with the ATO, being the application for a Clearance Certificate, a Rate Variation

Application and the Purchaser Payment Form. All three forms require the person completing and/or lodging the form (if not the registered proprietor) to be either a legal practitioner or a registered tax agent with the Tax Practitioners Board (TPB)<sup>1</sup>.

AIC National and the AIC Divisions were able to negotiate a short term exemption with the ATO and the TPB to allow conveyancers to lodge the Purchaser payment form, however, the TPB has indicated that they will not allow this exemption to continue past its finish date of 31 December 2017. AIC continues to lobby the ATO and the TPB on this issue and further advice will be provided to Members throughout 2017.

### **ATO Third Party Reporting –**

The Federal Government has introduced legislation requiring third party reporting of real property, shares and units, business transactions made through payment systems and government grants and payments data which commenced on 1 July 2016.

The reporting regime applies to all real property transfers executed. State and Territory Revenue and Land Titles Offices will be required to report transfers within their jurisdiction of all freehold or leasehold interests in real property.

The start date for reporting is 1 July 2016 with the first quarterly report due for submission by 31 October 2016.

*continued on the next page...*

South Australia has delayed implementation of any additional data collection. I am advised that the LSG and the Revenue SA are targeting the 3rd quarter next year to commence the collection of this additional information. Further information will be provided at our earliest opportunity.

### **2017 – Here we come!**

There are changes afoot at the AICSA. We have moved office and have street signage – yeah! And have a vision for where we will be in 5 years' time and we are continually working on this and refining it. Not for Profits are finding it increasingly difficult as they vie for sponsorship dollars, government funding and compete, in some senses, not only with each other but with the for profit businesses. The Institute needs to remain competitive in this environment, be ahead of the game for it to move forward and diversify successfully in the future.

AICSA plays an integral role in the continuing development of the conveyancing profession. We aim to build upon this, continuing to add to our advocacy efforts and voice, building on our educational platform, promoting the conveyancing profession and providing Members with unique and meaningful experiences.

### **Public Campaign**

At the AICSA Council Planning day, held on 20 January 2016, the Council prioritised ten (10) key deliverables over a five (5) year period. The deliverable prioritised as number 1, was a Public Awareness Campaign.

The sourcing of a campaign architect, workshopping of the vision, the key deliverables and approving the final concept has been a focus of Council and the AICSA office throughout the year. For those of you who made it to the State Conference in October, you have already had the opportunity to meet 'Mike', our brand ambassador and face of the campaign.

A campaign of this style and scope comes at a cost. The Institute is now meeting with a range of parties to ascertain interest in funding the campaign. This is an exciting development and the concept continues to meet with enthusiastic responses.

We look forward to bringing 'Mike' to life and into your office in 2017.

### **AICSA and TAFE SA are joining forces**

As previously announced, the Institute has joined with TAFE SA to review, rewrite, and deliver the specialist conveyancing units in the Advanced Diploma in Conveyancing. Conveyancing units will be undertaken at the Institute, taught by practising conveyancers who have considerable experience in conveyancing.

In November 2016 we called for expressions of interest from conveyancers and lawyers desirous of delivering the conveyancing units. We received twenty-one applications, this is an incredible response and signifies a positive and successful transition to a revived course.

There are additional benefits to the arrangement. The Institute will become synonymous with conveyancer's education, raising its profile with government and other stakeholders. Students will become familiar with the role and function of the Institute, joining early in their career and becoming a strong part of the Institute's future. We can also value add to their studies by offering them opportunities to attend professional development and tailored programs to support their learning.

### **Thanks**

I would like to thank the Members for their continued support of the Institute. A special thank you to the staff of the AICSA who work hard and truly believe in the work they do for Members. I must also thank Tim O'Halloran, President, who has supported me throughout my first 18+ months in the CEO's chair and the whole of the AICSA Council, it is a pleasure working with each and every one of them.

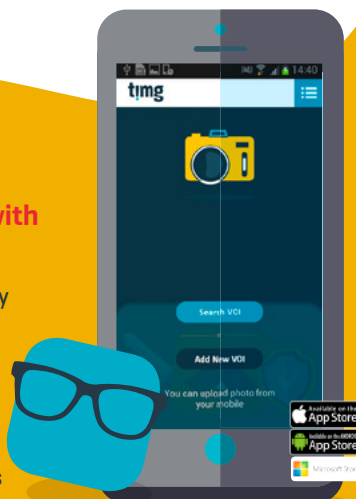
Rebecca Hayes

**Chief Executive**

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# Recommendations for the new Conveyancing order

## *Requests to inspect or copy documents, priority notices and Powers of attorney*

Under the former LTO requirements, parties lodged various documents supporting their authority to deal with the property (ie '**authority documents**') such as death certificates, probates, change of name documents and powers of attorney. The demise of the duplicate certificate of title and removal of the requirement to lodge these documents has outsourced some aspects of the LTO's gatekeeper role to the conveyancer.

These changes have also led to an increase in requests to inspect or obtain copies of such documents from other transacting parties. Such requests are understandable as we all try to protect our clients' interests whilst grappling with the new order of things and the new statutory requirements.

However, a careful analysis of these new requirements shows that many of these requests are not justified and that in many situations the relevant risks are actually less than under the former requirements.

It is also important to note that not every circumstance below applies across Australia. South Australia is the only jurisdiction to date to have implemented all of the reforms adopted by the Australian Registrars National Electronic Conveyancing

Council ("**ARNECC**") and other jurisdictions are not yet aligned with all reforms that have been implemented in SA.

The recommendations at the conclusion of this document apply in SA.

## **Client Authorisations**

There is some concern about handing over a cheque to a potentially unknown person to settle a transfer in the absence of a duplicate certificate of title. However, possession of a duplicate certificate of title did not conclusively establish the right to deal. Fraudsters in the old regime simply forged, stole, replaced and/or uttered the duplicate certificate of title.

In the new order a fraudster will have no qualms about signing a Client Authorisation. A vendor who is selling the property multiple times before disappearing will also have no qualms. So, getting a copy of another party's Client Authorisation won't help if fraud is planned.

If another party's Client Authorisation is evidence supporting your client's transaction, a copy must be retained. This creates additional tasks (including checking) and risks for Banks and others using electronic storage systems.

The paper document will need to be converted into electronic format and saved into the relevant file for the transaction. Automation of these tasks in Bank systems is not possible at present and to attempt to do so at this time would be difficult and expensive.

A Client Authorisation may contain information that cannot be disclosed without the client's authority. Hence, a conveyancer must assess whether or not his/her Client Authorisation includes such information (and seek instructions if it may) if a request to view or provide a copy is received.

A Priority Notice specifying the intended transaction will reduce the risk to an incoming party. Multiple settlements will be avoided because anyone searching the title will be immediately informed by the Priority Notice of the intended transaction.

This safeguard did not exist in the old order unless a caveat had been lodged. Those persons who subscribe to the LTO's new free Title Watch service will also receive electronic notification of the intended transaction and any request to the Land Services Group for a Property Interest Report, thereby increasing the chance of detection of a fraudulent transaction.

Further, whilst conveyancers have always been required to verify the identity and authority of their clients, the new requirements require greater rigour, formality and retention than was usually applied under the old order. The new requirements increase the difficulty for non-vendor fraudsters and would prevent many of the frauds that occurred in the old order.

### Death certificates, marriage certificates, probates, etc.

The old order required specified documents to be lodged as supporting evidence for particular instruments – eg the death certificate to register the death, the marriage certificate or other evidence to change the name, the probate to register the executor as the registered proprietor, etc.. Other instruments required various other authority documents to be lodged that the LTO would check in due course.

The new order does not generally require those authority documents to be lodged in the LTO. It requires the conveyancer (or mortgagee or its conveyancer for a mortgage) to verify the identity and authority of the transacting party.

Verification of authority involves obtaining the original of these authority documents, checking that they are authentic and confer the authority, and then retaining a certified copy for the statutory period. This happens before settlement and involves less risk to the person handing over the cheque than the old order's post-settlement LTO process.

One situation is excepted. The *Real Property Act* requires an executor, administrator or Public Trustee making application to be registered as proprietor of an estate or interest must produce to the Registrar-General the probate, letters of administration or order of the Court authorising the Public Trustee to administer the estate of the deceased registered proprietor (as the case may be) or a copy thereof (see section 176).

A Notice to Lodging Parties has previously indicated that production of these 3 documents was not required but, at the time of writing, a clarifying Notice to Lodging Parties is anticipated. However, because these 3 documents cannot be produced electronically, it is only a matter of time before the need to produce them is removed.

It is very remotely possible that, contrary to the certifications on the instrument, the conveyancer has not properly verified the identity and authority or is a willing party to a fraud. For an incoming party, this risk exists for the period of the registration gap – ie until a *bona fide* purchaser for value is registered as the proprietor, at which time their interest becomes indefeasible under section 69 of the *Real Property Act*.

In the new order, the LTO relies on the certification. A similar risk existed in the old order for an incoming party, too, but that risk was greater because the LTO's post-settlement process could result in the dealing being rejected if its requisition was not satisfactorily addressed. Of course, either registration gap could be covered by title insurance.

Should you insist on viewing these documents before settling now when you previously relied on the LTO's post-settlement checking? There may be rare circumstances in which it appears necessary to go beyond simple reliance on the certification on the instrument by/ on behalf of the other party. In such case, a copy of the relevant document should be retained as evidence supporting the transaction. It is also pertinent to note that a visual inspection of another party's documents falls outside the contemplated process for electronic settlement and lodgement.

### Documents for verification of identity or authority

A conveyancer must verify the identity of his/her client and any person who signs any document on the client's behalf. Likewise, a mortgagee (or its conveyancer) must verify the identity of the mortgagor and any person who signs any document on the mortgagor's behalf.

An Identity Agent conducting a VOI interview for the conveyancer or mortgagee must be appointed by that conveyancer or mortgagee.



The conveyancer's certification on the LTO instrument that he/she has taken reasonable steps to verify the identity requires consideration of all file activity, not merely an apparently successful VOI interview.

Consequently, the Identity Agent's Certification (given to the appointing conveyancer or Subscriber) cannot deliver safe harbour to a conveyancer working for another firm (ie another 'Subscriber' in EC). Nor can a previous conveyancer's certification on an instrument be relied upon to verify identity or authority.

Whilst these certifications may provide some minor support for a verification, they are not conclusive. In any event, the conveyancer has a statutory obligation to obtain original, genuine and current documents, a copy of which must be retained to support his/her certifications. In addition, whilst the Registrar-General's VOI Requirements require only an Identity Agent to certify these documents as true copies, it is recommended that the person conducting the VOI interview in the conveyancer's office also certify the documents as true copies in order to create a contemporaneous record for the file of that fact.

The retention of these documents will be a focus of the random audit of files to be implemented by the Registrar-General after November 2016 and a pilot audit has already been undertaken. Hence, it is neither appropriate nor effective to provide or use the results of a VOI interview to another conveyancer or mortgagee.

Most documents obtained or created to verify identity and authority contain confidential information (ie "personal information" for the purposes of the *Privacy Act*). Copies should not be provided to another person without the specific written



authority of the person to whom they relate.

### **Power of attorney**

A document on a public register is deemed to be accurate and should always be relied upon in the absence of information to the contrary. Indeed, section 160 of the *Real Property Act* provides that instruments executed under a power of attorney before the entry of the revocation shall be valid notwithstanding the revocation or death.

In simplistic terms, the *Real Property Act* essentially requires the deposit in the LTO of a duplicate or an attested copy of a power of attorney where it authorises any person to execute an instrument to give effect to a dealing with land (see sections 155 and 156). The Registrar-General must be reasonably satisfied, by a comparison with the original power of attorney, that the duplicate or attested copy is valid before depositing it.

The Act does not prevent a conveyancer from relying upon an undeposited power of attorney.

However, the conveyancer carries the primary risk/liability if he/she relies upon a power of attorney that has not been deposited in the LTO or a copy that has not been obtained from the LTO.

Hence, it is suggested that you always check the Power of Attorney Index for applicable powers and revocations: if the power of attorney has been deposited and not revoked, you should obtain a copy for your file.

If the power of attorney has not been deposited with the LTO, you seek instructions with the objective of ensuring deposit (if possible) before giving any Certifications on an instrument. Carefully consider the circumstances and your position. If it is possible to have the power of attorney deposited but the attorney is reluctant to do so.

Apart from the issue of risk, it is common for powers of attorney to be mislaid over the years. This can create great difficulty if the donor of the power is no longer able to give a new authority and provides a further reason to attend to the deposit of the power of attorney.

Verification of authority requires the conveyancer or mortgagee to carefully read the deposited power of attorney to ensure that the power has been given for the transaction and any requirements for exercising the power. A copy must be retained as evidence supporting the transaction.

## Recommendations

After discussions with various interested parties, AICSA recommends the following:

1. A conveyancer is not required to inspect the following documents held by another conveyancer:

- a. the Client Authorisation; or
- b. except in extraordinary circumstances, any document obtained or created to verify a person's identity or authority (including a death certificate, probate, registrar's certificate, letters of administration, marriage certificate, power of attorney, etc.).

Such documents may include confidential information and should not be provided without the client's specific written authority.

2. A request to another conveyancer to inspect a document should be made in writing within a reasonable time before settlement to enable the other conveyancer to obtain written instructions.
3. Any authority from a client to provide a copy of a document to a third party should be in writing.
4. When seeking to verify the identity and authority of a person, a conveyancer or mortgagee should not seek to obtain or rely upon –
  - a. the copy of an identity or authority document previously obtained by another conveyancer or mortgagee to verify that person's identity or authority, or

- b. any certification previously obtained, created or given by another conveyancer or mortgagee to verify that person's identity or authority.

For the purposes of this provision, "*another conveyancer*" does not mean a conveyancer employed by the conveyancer or in the same firm as the conveyancer.

5. A conveyancer acting for a mortgagee may, in the absence of reasonable doubt, rely upon a written statement by the mortgagee that the mortgagee –
  - a. has verified the identity and authority of the mortgagor in the transaction; and
  - b. has retained the required supporting evidence.
6. Where a person is signing any document under a power of attorney, the conveyancer should check the Power of Attorney Index for applicable powers and revocations and obtain a copy of any current deposited power. If the conveyancer is provided with a power of attorney that has not been deposited in the LTO, the conveyancer should seek instructions with the objective of ensuring its deposit (if possible) before giving any Certifications on any instrument. Where the power of attorney is unable to be deposited before giving a certification on an instrument or at all, the conveyancer should take further steps to verify the authority of the person who is signing under that power of attorney.
7. The purchaser's conveyancer should lodge a Priority Notice specifying the intended transaction(s) with the LTO. Any other incoming party should require a Priority Notice specifying the intended transactions to be lodged with the LTO.
8. A conveyancer should recommend to an incoming party that they should subscribe to the LTO's new free Title Watch service.

**Geoffrey Adam**

**EC & Legislative Projects**



# Desktop and software as a service can be effective models for some conveyancers but pays to get advice on what's best for your business

*Keeping ahead of the technology curve is one of the greatest challenges for conveyancers, big and small – particularly in this age of cybersecurity threats and rapid app development.*

Software as a service and desktop as a service, which enable users to subscribe to applications hosted in the cloud can be useful, particularly for smaller businesses or those with a widely distributed workforce, says Hood Sweeney director of Technology services Graham Wadsley.

Yet each business needs to evaluate cloud-based vs on-premise solutions on their merits, he says.

Subscriptions to cloud-hosted software or desktop can be more effective than investing in on-premise solutions for some conveyancers but the best strategy is not always obvious.

Software as a service is a software licensing model which enables clients to subscribe to access applications, such as an accounting package or other line of business application, rather than hosting them on a server onsite.

Software as a service is typically per user per month, transforming a capital expense into an operating expense. This usually has an accounting advantage but that is something that every business owner needs to examine closely.

The other good thing about this subscriber model from the user's perspective is that the vendor is responsible for ongoing maintenance to ensure the system is working effectively. The provider is also responsible for the security and privacy requirement aspects of data storage.

As a software as a service subscriber you will tend to automatically receive more regular software upgrades as these are more readily

available for online users.

Similarly, desktop as a service enables users to access their Windows desktop via a subscription model.

For smaller businesses or those with a distributed workforce, desktop as a service typically makes very good business sense. It's also a wonderful business tool for those with multiple regional sites and a highly mobile workforce using multiple devices to access their desktop.

Size is an important factor in the decision-making process. With fewer than 10 users, desktop as a solution can be a more efficient business model. When you start talking 20, 30 and 40 users, it may become a more expensive exercise.

Over 4-5 years, this model will potentially cost you more than an on-premise solution.

It's important that you consider what's on offer. The ability to pay on a per-user, per-month option with the ability to flex up or down can be very important for businesses that are dynamic.



While many subscription-based cloud applications are likely to become the norm in future, there are many factors to consider before you invest. You need to look at the on-premise solution versus the cloud solution, the reasons for considering it: do the business decisions stack up?

Software as a service and desktop as a service business models are not for everyone and there are some factors to consider before moving away from on-premise solutions. If your business has limited need of remote access the cloud isn't the most cost effective solution.

It's also important to consider the ongoing security of your data, particularly if the vendor is a smaller player. Office 365 or

Microsoft security is first class but the same cannot be said of all software vendors who may not have the resources or expertise. You also need to be clear about what kind of backup they are offering. Will you be able to access backups of old data, for example?

That's why it is sensible to seek expert advice about what functionality your business needs and how best to achieve it before you leap. Once you have invested in desktop as a service, it is quite difficult to unwind it.

Hood Sweeney's technology team has a client-focused approach to providing technological advice that is agnostic about the solution, so long as it is the best solution for the client.

Hood Sweeney's approach is to provide the facts to assist clients in making the right business decision for their business, rather than pushing a particular product or service.

Committed to maintaining its trusted adviser status with the client, Hood Sweeney's team provides a tailored solution to each information technology question.

For more information about desktop as a service and software as a service contact Hood Sweeney director of Technology Services Graham Wadsley on 1300 764 200

## Quick and easy Land Title ID verification



If your clients buy, sell or transfer property, you must ensure Verification of Identity (VOI) steps are taken or risk potential liability.

The good news is Australia Post provides a leading verification service that's quick, easy, and convenient for you and your clients with nearly 1,450 participating Post Offices nationwide.



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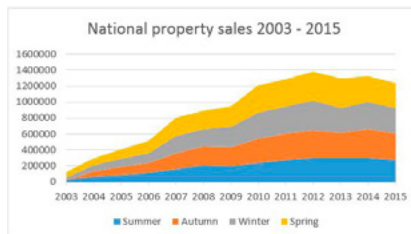
To find out more please visit [auspost.com.au/landtitles](https://auspost.com.au/landtitles)



# Residential property market blooms

*Spring time sees more property settlements and transactions across Australia than any other season, according to leading conveyancing technology experts GlobalX.*

GlobalX CEO Peter Maloney said from September to November the grass is greener, gardens are in full bloom and the weather is comfortably warm, making for optimal house selling conditions.



Source: GlobalX

Mr Maloney said spring sales were often driven by the desire for a new beginning, with individuals, couples and families preferring to move before the end of the year.

"Buyers who have children prefer to get settled ahead of the new school year, and a spring sale means relocation can take place near or over the holiday period, allowing ample time for unpacking," Mr Maloney said.

"Similarly, investment properties can be renovated in time for the January-February period, which sees many people searching for rental properties before universities and training institutions begin the academic year."

This year's spring sales are off to a strong start, with auction clearance rates over the past nine weeks above 75 per

cent, according to CoreLogic's November market report.

"That puts them at their strongest level in more than a year and only marginally under a five-year high," Mr Maloney said.

Nationally, capital city home values rose by 9.1 per cent over the first ten months of 2016, with only two cities, Perth and Darwin, recording falling values over the past quarter.

Annually, home value increases have been strongest in Sydney (10.6 per cent), Melbourne (9.1 per cent) and Canberra (7.9 per cent), Hobart (5 per cent), Adelaide (2.5 per cent) and Brisbane (4.1 per cent), while falls were recorded in Perth (down 3.7 per cent) and Darwin (down 3.8 per cent).

"It's also worth noting that the average level of discount (to a property's listed or reserve price) on homes has eased from 6.1 per cent a year ago to 5.8 per cent, so home sellers are coming away with more cash from their sales," Mr Maloney said.

"It is the same for unit owners, with the average discount reducing slightly from 6.1 per cent a year ago to now 5.5 per cent."

In a market where Australian residential real estate is worth around \$6.7 trillion, six out of every 10 new home listings are currently located in capital cities. However, while the nation's total mortgage debt of \$1.59 trillion represents around 23 per cent of the value of residential real estate; just over half the average Australian's

household's wealth is invested in housing (51.5 per cent).



*GlobalX CEO Peter Maloney says spring is here and the market is showing signs of blooming once more.*

"To put the nation's accumulated mortgage debt into context, the total value of Australia's residential real estate market is more than three times the funds held in the nation's superannuation accounts, and just under four times the amount held in Australian listed stocks," Mr Maloney said.

In the past year, more than 451,000 properties changed hands, with the average house price sitting at \$600,000 nationally and the average unit price at \$510,000.

"With the Reserve Bank of Australia holding the official cash rate at a historically low 1.5 per cent, and lending institutions vying fiercely for every mortgage dollar, now is a good time to consider purchasing property," Mr Maloney said.

*GlobalX is a leading provider of conveyancing services, property information and software workflow solutions.*

## What a great time to be a conveyancer in South Australia!

We hit 200 registered subscribers in SA on the 4th of November, with Weldon and Coluccio Lawyers jumping on board and opening workspaces straight away. That's now a whopping 2 out of every 3 practitioners in this great state on board with PEXA! Once again SA leads the charge, many people have worked tirelessly over the years to get this off the ground, so it's great to see it finally happening despite all the obstacles.

The value of property transacted through the PEXA network exceeds \$30 billion as at the time of writing this article.

For those practitioners out there who come up to me at the LTO or in the street, the dominant issue has been about digital disruption in their businesses. First and foremost, e-conveyancing adds value to your Practice. Secondly, your time is valuable, especially in the context of a fixed fee service.

Finally, PEXA facilitates the transfer of security and monies so that it removes the element of human error that comes with paper instruments and cheques.

"I have experienced various approaches to incorporating the PEXA platform into Practice management. The most common method of adoption has been to incorporate PEXA in your engagement letter as a value adding service, proceed to settle in PEXA where the scope of the transaction allows, and incorporate the fee into your schedule of disbursements. I'm impressed by the degree of success with this approach.

You will of course be best positioned to understand your business and decide what works best for your team." The benefits of embracing online settlements are now compelling and well documented by your early adopting peers. And for those of you who need a bit of help

to get started, the PEXA Direct team of specialists are an immediate and free service to augment your staff managing your PEXA settlements' pipeline.

I'm looking forward to success for you all in the New Year. For PEXA in SA, success will be defined by the success of you, its practitioners. Ready to settle into a well-earned holiday season break but know that you have settlements? Don't stress.

PEXA is perfect for remote working. Contact me or one of the local PEXA team members and we'll set you up so that you can check in from the comfort of your kitchen table or home study. In the meantime, read about how some of your peers are doing this at [pexa.com.au/news](http://pexa.com.au/news) And don't forget to stay home over the Xmas break by settling your matters with PEXA!

Dan Roesler  
PEXA



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# Membership 2016 and beyond

*As we settle into the summer and welcome the warm weather, bright colours and fun filled activities, I'd like to take this opportunity to thank you for attending and contributing to our events in 2016.*

This year we held some new events, and continued the popular state conference which was held at the Adelaide Oval. Some of our Members were lucky enough to enjoy the roof climb and take in the sights and marvel at the beauty of Adelaide. We also got to hear from some amazing guest speakers who gave compelling messages on relevant topics of business success and also listened to our keynote address from Senator Simon Birmingham. Stay tuned for 2017 conference details!

We had a great turnout to the networking event at the beautiful surroundings of the Adelaide Zoo Sanctuary for our inaugural business breakfast. We were entertained by guest speaker Steve Sammartino as he discussed humanities journey from the industrial age to the technological age.

It also gave us a chance to meet with fellow Members and our valuable partners of the AICSA. We also experienced close-up encounters with some of the zoo's most popular animal personalities.

We enjoyed another winery tour in the second half of the year which again proved to be a great success and special thanks must go to our valued partner Tim in bringing this experience to our Members.

Some of our Members also enjoyed time with our partners at the Melbourne Cup Luncheon which was a fabulous day at the Adelaide Convention Centre.

We held our Christmas Members celebration at our new office. It was the AICSA's way of saying a festive thank you to our Members for their membership and support throughout 2016. It was great to see so many of our Members turn out to catch-up with their fellow conveyancers. Thanks to Australia Post for their support of this party.

Below is some of the feedback received from members attending the winery tour, AICSA Breakfast, and conference;

***"I was recently invited to the AICSA McLaren Vale winery tour as part of the AICSA initiative to develop relationships between ourselves as industry members and our sponsors. I found that networking throughout the day to be beneficial in developing relationships for mutual gain both personally and professionally. I would like to thank the AICSA for arranging the day and believe these events will benefit members"***

***"The AICSA always hold great functions. Loved the concept and ability to bring our partners together to meet which would not ordinarily happen. The time, the venue, the presenter.. enjoyable way to start the day"***

***"The conference was a wonderful opportunity for networking and provided some very useful (and entertaining) tools for those that attended. Thanks to Tarnia Conti, we learnt about the basics of business success and we became skilled in influence people and staff. The brilliant insights to the current economic climate given by Senator Simon Birmingham and Peter Malone from Global X, left us more prepared for the future. Armed with lots of pens and lollies, this week will be all about incorporating the tools and skills I gained into my business"***

We wouldn't be able to put on such fantastic events without the support of our valued partners and of course you our Members! We are planning and coordinating a full calendar of events in 2017 that will complement and enhance your business, and we cant wait to share this with you!

On behalf of the Membership and Events team, I would like to thank you all for attending and contributing in 2016 and we look forward to a busy 2017!

Have a Great Christmas and Safe New Year

**Matt Netherwood**

**Manager, Membership & Partnership**





Melbourne Cup Ladies shot from left: Penny Erskine, Lara Paholski, Stella Sinanis, Angie Nguyen, CEO Rebecca Hayes, Nicole Xenides- Rajan, Jess Caire, Melani Mugford and Lauren Price.



From Left Angie Nguyen, Nicole Xenides-Rajan, and Membership Coordinator at the Melbourne Cup lunch



From left: Penny Erskine and Jess Caire at the Melbourne Cup lunch



From left: Roger Scott, CEO Rebecca Hayes & Stella Sinanis at the Xmas Member Drinks



From left: Ben De Palma, Tara Olsen at the Xmas Member Drinks

# Australia Post. Helping you comply with VOI.

When it comes to your clients' needs, you don't just need to know what's what. You need to be certain of who's who. In order to reduce the risk of land title fraud, each state authority is introducing reforms for a new Verification of Identity (VOI) policies.

They are now in place in South Australia, New South Wales, Victoria and Western Australia. To comply with these policies, conveyancing practitioners need to make sure face-to-face identity checks are being made on each of their clients who are buying, selling or transferring property.

These policies mean a whole lot more process to include in your day-to-day, so if you're finding identity checks to be a tedious distraction from your business, a VOI service can take the tedious verification off your hands and complete all the face-to-face checks for you.

## How Australia Post can help:

Australia Post's Verification of Identity service makes identity checks easier, faster and safer for you and your clients. A leader in the field with over 30 years of experience in identity verification, Australia Post performs over five million identity related checks every year. Our checks are performed thoroughly and are compliant with verification

standards.

Australia Post will perform the identity checks on your behalf. This will save you time and paperwork so you can focus your energies on what you know best – the buying and selling of properties. All you need to do is register now to gain access to your own VOI Report Portal and you can get started straight away.

## How it works in 4 easy steps:

1. Australia Post create a unique VOI form, which you provide your client.
2. Your client then visits a participating Post Office to be identified by our staff.
3. They check, scan and encrypt the relevant document, take the client's photo and witness their signature.

4. They will digitally notify you when a VOI Report has been completed by your client.

You can access, view, download and print all your completed VOI reports through your Australia Post portal. And because it's all taken care of online, you don't have to worry about keeping track of and storing multiple VOI forms for records. Too easy!

## All the help you need when you need it:

Australia Post's VOI services are supported by a dedicated specialist support team who are on stand-by, ready to help you through the process with any questions or assistance you may need. Their professional service will help set your business up to manage your VOI needs in an efficient and secure way.

To sign up or learn more about how Australia Post can help you manage your Verification of Identity needs, visit [auspost.com.au/landtitles](https://auspost.com.au/landtitles).

This article is provided for general information purposes only and is not intended to be specific advice for your business needs.





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After 20+ years, we've grown to deliver more than 'just' legal solutions to become Australia's best partner to conveyancers too.

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# Keep the heat and your energy bill down this summer

Have you ever noticed that your energy bills tend to increase over summer? Have you ever wondered how much electricity you are using in your homes every day? The number one drainage of energy in the average home is from heating and cooling systems.

It can be justified to have the air conditioner running during the hours of a scorching Australian summers day but did you know that you may actually be letting the cool air escape from your house and the hot air sift in? There are plenty of simple and easy ways you can reduce your energy bill while still keeping cool this summer.

## ***Close windows, doors and vents!***

If you are going to use your cooling system, be sure to close all windows and doors in your property. Try to limit the amount of rooms you are staying in and close surrounding doors and vents

around the house to keep the cool air in a smaller space. By doing this, rooms will cool down quicker and you don't need to keep your air conditioner on for as much time. Keeping vents open in unused rooms is a big waste of energy.

## ***Seal those cracks***

A bit of home DIY does not go astray. In addition to doors and windows, cool air can be escaping through cracks and spaces throughout your house, often surrounding your windows and doors. Windows and doors will naturally wiggle around in their frames as time goes on, it's a good idea to go around your home and fill any gaps around window and door frames with insulation.

## ***Clean your AC***

The ultimate goal for you in summer is to limit the amount of time you are running your air conditioning for. In addition to that, the lower your temperature is set, the harder your air con has to work and subsequently the more energy you will be using and more you will be charged. It is also important to make sure your AC filter is clean; a dirty air con filter can restrict air flow and thus works harder to pump air around your home.

### **Turn the lights off**

Try to hold out on turning the AC on for as long as you can. Keep lights off and windows covered, light from the sun and artificial light from the lightbulbs can radiate heat and cause your house to be hotter (as well as drain energy). It might be a good idea to consider planting trees around your property, particularly near windows that attract the most sun or even to cover your cooling system. If your cooling system is shaded, it will cool your house more efficiently. I am a huge fan of ceiling fans.

Ceiling fans can cool the temperature in the room by

2-3 degrees and the best thing is they only cost about 2 cents per hour to run.

### **Turn it ALL off**

As well as cooling systems, there are other things that can be draining electricity in your home. A lot of people don't realise this but even when you turn appliances off, they can still be using up electricity. Turn switches off at the wall or even unplug electronics that you are not using to ensure that your appliances aren't eating electricity even when they are not in use.

### **Late night laundry?**

You can lower your electricity bill by using electricity during off-peak hours. Use your washing machine/dryer and dishwasher early in the morning or late at night, it is recommended to wait until after 6pm. Electricity suppliers charge less for energy consumed during off-peak hours.

If you need help connecting or changing energy suppliers, give MyConnect a call on **1300 854 478** and we can organise your no lock-in connections with one easy phone call.

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## Your whole life could **change in the next 30 minutes.**

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But the free preliminary meeting we'd like to offer you as a member of the Australian Institute of Conveyancers (SA) could be the first step on your journey with us towards a more prosperous future. You'll meet people who will listen to your story and convey some of the ways we could help you and your conveyancing business prosper (some of which are listed below).

For a no-obligation talk, email [aicso@hoodsweeney.com.au](mailto:aicso@hoodsweeney.com.au) or call 1300 764 200 and join the journey we're already on, growing and advancing businesses just like yours.

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# Licensing for Residential Property Managers Coming Soon

The State Government recently announced that it would be introducing a registration system for residential property managers throughout South Australia.

Currently, residential property managers are not required to be registered in South Australia - the only State that does not mandate a compulsory registration system for residential property managers.

The Real Estate institute of South Australia (REISA) has fiercely lobbied the State Government for the compulsory registration of residential property managers for many years now and has written many detailed submissions on the need for its introduction in South Australia.

It may seem incongruous that, as a peak body, REISA would advocate for a system that introduced additional statutory requirements for its members. However, REISA was always mindful of the following:

1. The need for consumer (and property manager) protection by instilling a required minimum level of knowledge and skill.

2. The desire to recognise residential property management as a profession - a profession that encompasses its own set of unique skills and experience.

3. The elimination of unprofessional property managers from the real estate profession.

REISA is delighted that the proposed system is supported by the vast majority of its members - agencies and individuals who strongly desire to see transparency and accountability in residential property management.

Now that the formal announcement has been made, the real fun begins.

Over the next few months, REISA will be working closely with the State Government on the following issues:

- \* A statutory Code of Conduct;
- \* How the Code and standards will be set and enforced;
- \* Implementation of the registration scheme;
- \* Scope and subject matter of the units and/or qualifications required to achieve registration with Consumer and Business Services; and
- \* Recognition of prior learning and existing qualifications.

REISA, in conjunction with the AICSA, will keep members fully informed as these developments progress.

**Paul Edwards,**  
**Legislation and Policy Advisor,**  
**REISA**





## 2016 Conference

*I thank you for providing to me a wonderful collection of guest "contributors" who, each and every one of them, provided to me inspiration and confidence to proceed in my capacity as a Conveyancer.*

*Well done!*

*I do appreciate the time and effort the AICSA has contributed the members.*

*I look forward to next year!*

*Vicki Johnson  
Brokers on Barton*





# Local firms lead with digital property transactions



Locally owned and operated conveyancing firms, Speight & Brown Conveyancing and Julie Hammond Conveyancing are elated after completing the first Riverland electronic property settlement for their respective clients using the new (to South Australia) PEXA system.

Both firms are registered members of Property Exchange Australia (PEXA) - the digital property settlement exchange formed by Australia's state governments - and are very excited to be part of this new conveyancing technology.

**"We were amazed at how quickly the transaction was noted on the Certificate of Title and the settlement funds processed to our client's account"**

Like the ASX did for the exchange of shares, PEXA removes manual processes and paperwork when exchanging property. Land registries, financial institutions and conveyancers all transact together, online via a secure platform with funds securely settling through the Reserve Bank of Australia. "We were amazed at how quickly the transaction was noted on the Certificate of Title and the settlement funds processed to our client's account," said Speight & Brown's Sue Matthews who acted for the purchaser. Julie Hammond acted for the vendor.

**"Conveyancers acting for property buyers and sellers have complete control of settlement with up to the minute checking"**

Under the new PEXA system conveyancers acting for property buyers and sellers have complete control of settlement with up to the minute checking to ensure a clear title is transferred between the parties involved. The conveyancers and the banks for each client involved in the transaction are linked in the one online 'workspace'.

This means easy communication. We can track the file's progress in the lead up to settlement day.

PeXA represents a huge step forward in an industry that to date has been paper driven. Until the introduction of e-Conveyancing settlements, all property settlements involved an exchange of paper documents at the Land Titles Office in Adelaide. This could involve several more weeks to complete settlement and for documents to be examined prior to registration.



Bank cheques for settlement, which often had to be rushed by courier to the Land Titles Office settlement room, were then deposited to the client's account. The funds were then subject to bank imposed clearing times of three to five days.

**"Settlement funds are sent to bank accounts and payees within minutes"**

On completion of the settlement online with PEXA, the transfer document is noted on the Certificate of Title to the property very quickly. Proceeds from settlement are processed to nominated bank accounts and payees within minutes\* of settlement being completed.

As with any new system and particularly online technology, the conveyancer has an increased responsibility to complete much more stringent processes to verify the identity of the property buyer and seller and their respective right to deal with the subject property. Nevertheless, the whole process is able to be more closely monitored by all parties involved as the matter progresses to the nominated time and date for settlement

*\* Depending on the seller's financial institution*

# The South Australian Conveyancing Community

I have long been a believer in the strength and closeness exhibited by the conveyancing community in South Australia. What I call the Conveyancing Family.

We are in a unique business, where the participants, colleagues, competitors, lenders and their representatives, all meet on a regular basis, sometimes daily. We interact in a friendly and co-operative fashion like good citizens should. However, I think we all, as a group, go one or two steps past the expected norm. We care about each other and support each other, sometimes in special ways.

As some of you would know, I recently had a bout of bowel cancer which required me to spend a couple weeks in hospital and several months in rehabilitation. I had an added complication in that my wife preceded me to the operating table and then 10 days before I was operated on, she broke her hip.

As an owner of a sole practice, with only part time contractors working with me, I faced a dilemma on how I would hand my practice over to others whilst I was incapacitated.

I had to authorise someone to sign on my Trust account, give internet access to RevNet, Sailis, Banking etc. when I had never had to do so before.

I needed someone to take over my current files, start the new ones as they arrived, and go to settlements for me.

I had told quite a few people of the position I was in and I had offers to help me in any way possible, from running files to attending settlements, some offering to pick up files and drop them back, as they pass my office on the way to the LTO. In fact it was hard to believe the number of people who wanted to help.

I accepted the offer handed to me by Tammy Edwards at Tuckfields. She authorised Miriam Errington, who took over my files and conducted them in an exemplary fashion until I was able to return to work. I will be eternally grateful for Miriam's assistance and friendship shown during this time. Bruce Twelftree took over the office matters and settlements to keep the ball rolling.

I have been overwhelmed with the feeling and caring attention that I received from the whole conveyancing community and I continue to be questioned on my recovery, with several of them taking on the 'Mum' role, pestering and cajoling me for returning to work too soon, etc.. I'm sure they had my good health in mind by offering to damage me if I didn't comply!!!

It has been 3 months since I was carved up and it took all that time for wounds to heal and for me to recover my strength.

A huge thank you to all who knew what was happening and to those special people I have mentioned, and the others who will recognise themselves, (Anita, Angie, Bec, Samantha, Sandra, Dale, Kenton, Hugh, Andrew, Grant, Graham, Ben. I apologise to anyone I have omitted. Part of my memory also may have been removed in Ashford)

As a footnote, I had a deadline to work to as I had a date on which I was to enter hospital. Had I suddenly fallen ill it would have been a different matter. Maybe this could serve a special prompt to those of you who have no contingency plan in place.

Roger Scott

Councilor and Committee Member



# Case Study – a warning to Purchasers and Conveyancers

*On 4 June 2015, Judge Tracey of the South Australian District Court, handed down a judgement in **McInnes v Davies & Anor (2015) SADC 88**, which considered the subject to finance conditions for contracts for the sale and purchase of land and service of notices.*

As we are all too familiar with, it is quite common for finance not to be approved within the timeframe provided by the land contract. This leaves the Vendor and Purchaser in a difficult situation regarding the termination of the contract.

*McInnes* is important as it is a warning to Purchasers and Conveyancers. The Purchaser failed to adhere strictly to the special condition and notwithstanding finance approval was obtained, albeit belatedly, the Court held the approval to be insufficient.

## Facts of the Case

On 3 April 2014 the parties executed a (REISA) contract for the sale of residential property. The contract was subject to a condition that the purchaser obtain a loan of not less than \$394,250.00 for not less than 30 years at an interest rate of not more than 5.5% pa by 24 April 2014. That date was later extended by agreement to 16 May 2014. The purchaser failed to obtain finance by 16 May 2014.

The vendors and the purchaser appointed the same conveyancer (a legal practitioner) to act for them.

On 26 May 2014 the vendors sent an email to their agent stating that they wished to ensure that “all dealings of this sale are and have been cancelled”. The conveyancer was informed of the situation by the agent and provided a draft termination notice (the first notice) to the vendors’ agent who forwarded it to the vendors for signature. On 27 May 2014 the vendors sent a further email to their agent enclosing a signed termination notice addressed to the purchaser with an instruction to return the purchaser’s deposit.

For reasons that are not made clear, the agent did not attempt to serve the notice at that time nor was the deposit returned. Later that day the NAB emailed to the vendors’ agent a copy of a letter dated 27 May 2014 to the purchaser advising him that finance had been approved to assist with the purchase of the subject property (NAB letter). On that same day the vendors executed a contract of sale of the property with a third party at a slightly lower price.

On 5 June 2014 the purchaser’s solicitors wrote to the vendors, advising that the special condition had been satisfied and the purchaser was proceeding with the contract. The vendors sent a new termination notice (the second notice) plus a copy of the first notice by email directly to the purchaser on 6 June 2014. On the same day, the purchaser lodged a caveat over the subject property. Subsequently, the purchaser’s

solicitors wrote to the vendors’ solicitors asserting that their client had not received the first notice of termination until 6 June 2014 and consequently that as at 27 May 2014 the contract was still on foot and that, upon that day, the finance condition having been satisfied the contract had become unconditional. The purchaser issued proceedings seeking specific performance of the contract and the extension of the caveat.

There was no dispute that the purchaser had a caveatable interest in the land. The judge found there was a serious issue to be tried. There was no challenge to this conclusion on appeal. However, the judge found that the balance of convenience did not favour an extension of the caveat. The purchaser successfully appealed this decision and proceedings were brought before Judge Tracey of the District Court in June 2015 seeking rectification of the special condition, specific performance of the contract and damages by way of remedy.

## Issues

Tracey J had to decide whether or not the purchaser had waived the special condition, thereby making the contract unconditional, and whether or not the NAB letter had fulfilled the requirements of the financed condition. A finding in the affirmative for either would have won the case for the purchaser, however, in both matters the judge found for the vendor.

### Did the Defendants (Vendor) give effective notice of termination?

It was determined that the conveyancer acting for the purchaser did so in the capacity of 'conveyancer' and was not authorised to act as their agent to give and receive notices. Clause 19 of the contract does not prohibit giving notice to an agent, even though it provides that an authorised agent may sign any such notice. Tracey J concluded that in the absence of a specific provision allowing for the receipt of a notice by an agent the contract intends service to be made upon the relevant party.

Of interest, Tracey J confirmed that service via email satisfies the requirement that a notice be in writing. Additionally, inclusion of the sender's name on the email amounts to 'signing' for the purposes of the clause.

Hence, Tracey J concluded that the first notice was not served on 26/27 May 2014. However, service of the second notice on 6 June 2014 was effective if the special condition had not previously been satisfied or waived.

### Was the Purchaser entitled to unilaterally waive the special condition?

In determining this question, Tracey J reviewed various authorities including two decisions of the SA Full Supreme Court, namely *Willing v Baker*<sup>1</sup> and *Clark v Refeld*<sup>2</sup>. Tracey J concluded that the benefits afforded by a special condition differ between vendor and purchaser. For the vendor, the finance condition provides certainty of time insofar as they are not waiting an unlimited period for the purchaser to

obtain finance, and it provides them with the ability to terminate where the condition is not fulfilled<sup>3</sup>.

With reference to Mason J in the High Court decision of *Meehan v Jones*<sup>4</sup> her Honour held the special condition is there to benefit or protect the purchaser so they are not bound to a contract if they are unable to obtain finance<sup>5</sup>.

Given the authorities considered, Tracey J held that the purchaser was entitled to unilaterally waive the condition.

### Was there an effective waiver?

Having determined the purchaser's position with respect to waiver, Tracey J then considered whether the waiver claimed by the purchaser was effective. For a waiver to be effective it must be an unequivocal representation by either words or actions.

The purchaser was relying on a telephone call by the agent to the vendors informing them of receipt of a letter from the NAB (on 27 May 2014) and also on the letter from their solicitor emailed directly to the vendors (on 5 June 2014). The question to be determined was whether either of these communications was enough for the vendors to have understood the purchaser was waiving their reliance on the finance condition.

In this case the NAB letter was found to be vague in its content and merely provided that 'finance has been approved to assist with the purchase of the property'. Tracey J held that nothing in the letter amounted to a waiver.

When considering the content of the NAB letter and the letter

from the purchaser's solicitor, Tracey J found there was no clear and unequivocal waiver of the finance condition communicated and found that there was not an effective waiver of the special condition.

### Was the special condition fulfilled?

The final question to be determined by Her Honour was whether or not the special condition had been fulfilled. The purchaser offered this argument in the alternative. The purchaser claimed that pursuant to clause 4 of the special condition, the NAB letter had notified the vendor that the '*Lender has agreed to the loan*'.

In consideration of the contract, which clearly expressed the terms upon which the loan was to be obtained, the NAB letter did not disclose such detail and only referred to the loan application without reference to the contractual requirements. Tracey J found that it did not comply with the requirements of the contract regarding obtaining finance.

Even when the NAB did disclose the terms of its offer, that offer was for only \$394,000 over 25 years at an interest rate of 5.5% pa when the contract was subject to a loan of not less than \$394,250.00 for not less than 30 years at an interest rate of not more than 5.5% pa: the court was not willing to accept 'close enough' as fulfilment. Accordingly, Tracey J found that the NAB letter did not satisfy the special condition.

This is an important point and should be seen as a warning for purchasers and those acting as their conveyancer.

The finding would suggest that, subject to the terms of the contract, an approval letter may not be sufficient to satisfy the special condition unless it sets out an offer which meets or better the terms specified in the contract or states that the offer is being made on the same terms as those specified in the contract.

Hence, whilst the vendors' first notice was not served, the purchaser had not formally waived the special condition and it had not been fulfilled by the NAB letter, assertions of fulfilment or in the precise terms required by the contract: so, service of the vendors' second notice terminated the contract. The purchaser's claim was dismissed. The Vendor was awarded compensation in the sum of \$32,814.05 for the losses they incurred as a result of the injunction that restrained any dealing with their property.

## Conclusion

This case demonstrates the complex nature of conveyancing. It highlights the importance of the conveyancer-client relationship and how you, as your client's advisor, must be intimately familiar with the terms of the contract and be able to provide advice to your client accordingly.

Should your vendor client choose to terminate the contract, termination must be effective. In this case the contract required the notice to be served on the relevant party, not the 'agent'. Interestingly, the Court decided that the purchaser's conveyancer was not acting as their 'agent' – this is something you may wish to consider and clarify with each individual client in the absence of a provision in the contract

expressly enabling service on a specified agent.

Your decision will rest upon the nature of the dealing.

If you are acting for the purchaser you should explain the implications of any special condition they must fulfil. As the Court found, 'close enough' is not acceptable. Should your client wish to waive the benefit or protection derived from a special condition this should be carefully considered, weighing up all aspects of the matter with careful attention to the contract terms and conditions. Any waiver must be communicated clearly and be unequivocal in its interpretation.

In any event, termination is a very serious step with very serious consequences if not validly done. A registered conveyancer cannot give legal advice on these issues. You should stress the client's need to obtain legal advice and it should be confirmed in writing.

Preparation of a draft termination notice created a clear conflict of interest for a conveyancer under section 30 of the *Land and Business (Sale and Conveyancing) Act 1994*. A registered conveyancer should cease to act in such circumstances and, only if both parties agree, may a conveyancer resume acting for one (see regulation 31 of the *Land and Business (Sale and Conveyancing) Regulations 2010*).

This case illustrates that it is important to pay attention to the terms of the contract and not fall into what is industry practice or may be convenient. Finance approvals are often dealt with informally and this case highlights the risk of allowing this practice to continue.

## Nota bene

I found *McInnes* of particular personal interest. In 2003 I acted for the purchaser of a property on Morphet Street, Adelaide. The contract was subject to the vendor procuring the removal of a tenant. The vendor purported to terminate the contract, claiming he could not fulfil the special condition.

Coincidentally the vendor had a buyer willing to purchase the property at a higher price. The matter was heard in the District Court<sup>6</sup>, which held the condition was for the benefit of my purchaser client and the vendor was in breach of this contract by wrongfully terminating or purportedly terminating it. The Court made an order for specific performance of the contract.

## Rebecca Hayes, CEO AICSA

With thanks to Geoffrey Adam for his review of this paper.

### (Endnotes)

- 1 (1992) 58 SASR 357.
- 2 (1980) 25 SASR 246.
- 3 (2015) SADC 88 at 45.
- 4 (1982) 149 CLR 571 at 588.
- 5 (2015) SADC 88 at p44.
- 6 Boating Industry Association of South Australia v IMEG Pty Ltd (2003) SADC 130.

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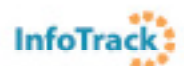
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# LTO Statistics 2016

## COMPARISON MONTHLY LODGEMENTS OF PREVIOUS YEARS

|           | 2012  | 2013  | 2014  | 2015  | 2016  |
|-----------|-------|-------|-------|-------|-------|
| July      | 13075 | 15713 | 15547 | 16462 | 15211 |
| August    | 14718 | 15885 | 14933 | 15412 | 17184 |
| September | 13499 | 15520 | 15210 | 16314 | 16896 |

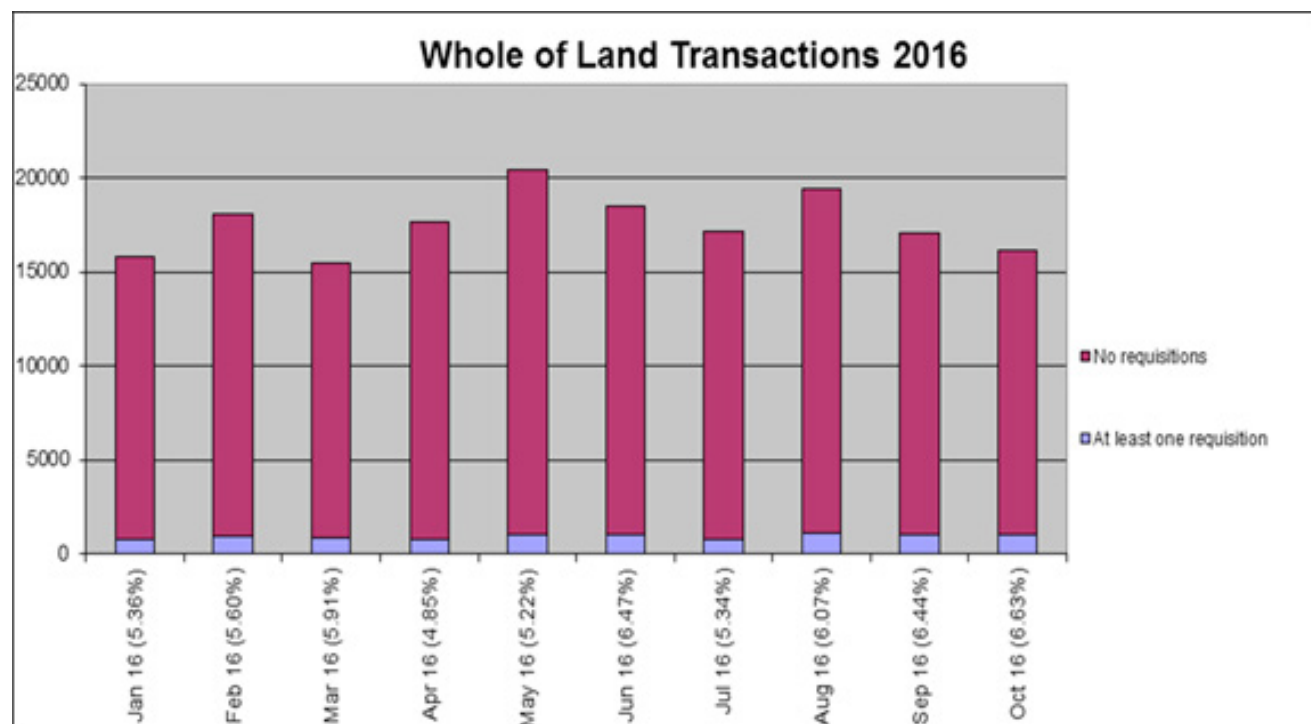
## COMPARISON AVERAGE DAILY LODGEMENTS OF PREVIOUS YEARS

|           | 2012 | 2013 | 2014 | 2015 | 2016 |
|-----------|------|------|------|------|------|
| July      | 594  | 687  | 676  | 716  | 724  |
| August    | 640  | 722  | 711  | 734  | 747  |
| September | 675  | 739  | 691  | 742  | 768  |

## BREAKDOWN COMPARISONS ON PARTICULAR DOCUMENTS

|           | July 2016* | August 2016 | September 2016 |
|-----------|------------|-------------|----------------|
| Transfer  | 3492       | 3893        | 4001           |
| Mortgage  | 4536       | 5134        | 4907           |
| Dis/Mtge  | 4413       | 5058        | 4767           |
| Leases    | 135        | 110         | 99             |
| Division* | 259        | 302         | 325            |

The prefixes for the Division documents are RTC, RTU ACT and RTD



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# Professional Development Calendar 2017

## FEBRUARY

| DATE | SESSION NAME                     | CPC | TIME             | LOCATION |
|------|----------------------------------|-----|------------------|----------|
| 14   | Family Law Seminar               | 15  | 4:30pm – 6:00pm  | AICSA    |
| 22   | <i>Alignment Series Workshop</i> | 20  | 8:00am – 11:00am | AICSA    |

## MARCH

| DATE | SESSION NAME                             | CPC | TIME            | LOCATION |
|------|------------------------------------------|-----|-----------------|----------|
| 14   | Cyber Security Seminar - Risk Management | 15  | 4:30pm – 6:00pm | AICSA    |

## APRIL

| DATE | SESSION NAME            | CPC | TIME             | LOCATION |
|------|-------------------------|-----|------------------|----------|
| 5    | Land Divisions Workshop | 20  | 8:00am – 11:00am | AICSA    |
| 11   | Land Divisions Workshop | 20  | 8:00am – 11:00am | AICSA    |

## MAY

| DATE | SESSION NAME          | CPC | TIME             | LOCATION |
|------|-----------------------|-----|------------------|----------|
| 3    | Off The Plan Workshop | 20  | 8:00am – 11:00am | AICSA    |
| 24   | Off The Plan Workshop | 20  | 8:00am – 11:00am | AICSA    |

## JUNE

| DATE | SESSION NAME                                 | CPC | TIME            | LOCATION      |
|------|----------------------------------------------|-----|-----------------|---------------|
| 13   | Dealing with Death Seminar - Risk Management | 15  | 4:30pm - 6:00pm | Your Computer |

## JULY

| DATE | SESSION NAME    | CPC | TIME             | LOCATION |
|------|-----------------|-----|------------------|----------|
| 5    | Form 1 Workshop | 20  | 8:00am – 11:00am | AICSA    |
| 26   | Form 1 Workshop | 20  | 8:00am – 11:00am | AICSA    |

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# Practical Skills Course 2017:

## JANUARY

| DATE | SESSION NAME                                  | TIME         | LOCATION |
|------|-----------------------------------------------|--------------|----------|
| 31   | Introduction to Interest and Dealings in Land | 2pm – 4:45pm | AICSA    |

## FEBRUARY

| DATE | SESSION NAME                   | TIME            | LOCATION |
|------|--------------------------------|-----------------|----------|
| 15   | Open, Manage, & Closing a File | 2:00pm – 4:45pm | AICSA    |

## MARCH

| DATE | SESSION NAME                              | TIME            | LOCATION |
|------|-------------------------------------------|-----------------|----------|
| 1    | Contractual Issues for Clerks (Session 1) | 2:00pm – 4:45pm | AICSA    |
| 8    | Contractual Issues for Clerks (Session 2) | 2:00pm – 4:45pm | AICSA    |
| 22   | General Practices & Procedures            | 2:00pm – 4:45pm | AICSA    |

## APRIL

| DATE | SESSION NAME                              | TIME            | LOCATION |
|------|-------------------------------------------|-----------------|----------|
| 5    | Open your own Conveyancing Business       | 2:00pm – 4:45pm | AICSA    |
| 26   | Financial & Accounting Issues (Session 1) | 2:00pm – 4:45pm | AICSA    |

## MAY

| DATE | SESSION NAME                              | TIME             | LOCATION |
|------|-------------------------------------------|------------------|----------|
| 3    | Financial & Accounting Issues (Session 2) | 2:00pm – 4:45pm  | AICSA    |
| 10   | <b>Land Services Group</b>                | 9:30am – 12:30pm | AICSA    |
| 24   | Introduction to Vendor Statements         | 2:00pm – 4:45pm  | AICSA    |

## JUNE

| DATE | SESSION NAME    | TIME            | LOCATION |
|------|-----------------|-----------------|----------|
| 7    | Conveyancing IT | 4:30pm – 6:00pm | AICSA    |

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