



## Public Competition Assessment

8 November 2022

### Dye & Durham - proposed acquisition of Link

#### The ACCC's decision

1. On 8 September 2022 the ACCC announced its decision not to oppose the proposed acquisition by Dye & Durham Corporation (**D&D**) of Link Administration Holdings (**Link**) (the **proposed acquisition**) after accepting a section 87B undertaking from Dye & Durham Limited (**D&D Limited**) and Dye & Durham Holdings Pty Ltd (**D&D Holdings**) (the **Undertaking**).
2. The Undertaking required D&D Limited and D&D Holdings to divest all of D&D's existing Australian businesses (including all assets, licences, agreements and other tangible and intangible property held by those businesses) to a purchaser to be approved by the ACCC.
3. The ACCC considered that the proposed acquisition, taking into account the Undertaking, would have been unlikely to contravene section 50 of the *Competition and Consumer Act 2010* (the **Act**). Section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
4. The ACCC considered the competitive effects of the proposed acquisition in markets for the supply of:
  - electronic lodgment network (**ELN**) services
  - information search and broking services, and/or
  - practice management software (**PMS**).
5. Without the Undertaking, the ACCC considered that the proposed acquisition would have aligned PEXA, a near monopoly supplier of ELN services, with D&D, a significant supplier of information search and broking services and PMS. The ACCC identified strong concerns that this alignment would have allowed each of PEXA and D&D to engage in mutual preferential dealing that would have hindered competition in the conveyancing workflow.

6. On 23 September 2022, Link and D&D Limited announced that the proposed acquisition would not be proceeding. Following these announcements, D&D Limited and D&D Holdings sought the ACCC's consent to withdraw the Undertaking and, pursuant to s 87B(2) of the Act and clause 4.1 of the Undertaking, the ACCC gave consent to the withdrawal of the Undertaking in its entirety on 20 October 2022.
7. This Public Competition Assessment outlines reasons for the decision by the ACCC not to oppose the proposed acquisition, taking into account the Undertaking. Although the proposed acquisition did not proceed and the Undertaking was subsequently withdrawn, the ACCC considers it is appropriate to publish a Public Competition Assessment in this matter given the significant preliminary competition concerns identified by the ACCC prior to accepting the Undertaking.
8. Please note that this and other public competition assessments are subject to the following qualifications:
  - The ACCC considers each transaction on a case-by-case basis and so the analysis and decision outlined in one assessment will not necessarily reflect the ACCC's view of another transaction.
  - As assessments are relatively brief and do not refer to confidential information, assessments do not necessarily set out all of the issues and information considered by the ACCC.

## **The parties and the transaction**

### **The acquirer: D&D**

9. D&D is an international provider of cloud-based software and technology solutions to legal and business professionals, including lawyers and conveyancers. D&D acquired SAI GlobalX's Property Division in January 2021 and GlobalX in July 2021. D&D's core products and services relevant to the proposed acquisition include:
  - Information search and broking services: including property, commercial and personal information.
  - Practice management software (including conveyancing and legal practice management software): including Matter Centre, Conveyancing Manager, Conveyancing Directory, Open Practice, SettsPlus and Atom as well as ancillary solutions that support conveyancing transactions such as verification of identity (**Vol**) and digital signing software.
  - Manual property settlement services: including physical property settlement attendance, stamp duty calculations and manual stamping, lodgment and registration.

### **The target: Link**

10. Link is a technology-enabled provider of outsourced administration services for superannuation fund administration and corporate markets, as well as related

services including data management, analytics, digital communication and stakeholder education and advice. Link (via Link Property Group Pty Ltd) also holds a ~42.77% shareholding in PEXA, which D&D would have acquired through the proposed acquisition.

## PEXA

11. PEXA principally operates as an Electronic Lodgment Network Operator (**ELNO**), through its ELN product, PEXA Exchange. An ELNO provides and operates an ELN, which enables users (also known as subscribers) to complete property lodgments and settlements electronically through a digital process known as e-conveyancing.
12. The PEXA Exchange is integrated with six land titles offices and five state revenue offices for the lodgment of documents, as well as the Reserve Bank of Australia, the Australian Taxation Office and major financial institutions to facilitate financial settlement.
13. The PEXA Exchange was born out of a 2010 Council of Australian Governments initiative to transition property lodgment away from paper-based to more efficient digital processes. The ACCC considered PEXA is a near monopoly provider of ELN services. It is the only fully operational ELNO in Australia and in states where e-conveyancing has been mandated, PEXA completes almost all transactions.<sup>1</sup>
14. PEXA was listed on the Australian Securities Exchange in 2021 and its largest shareholders are Link Property Group Pty Ltd (42.77%) and Commonwealth Bank of Australia (23.9%). No other shareholder has a shareholding greater than 10%.

## The transaction

15. D&D, via Link Acquisition Australia Pty Ltd (a wholly owned Australian incorporated subsidiary of D&D), proposed to acquire 100% of the issued share capital in Link by way of a scheme of arrangement.
16. The proposed acquisition was due to complete on or before 30 September 2022. However, on 23 September 2022, Link and D&D Limited each issued public statements confirming that the proposed acquisition would not be proceeding.

## Review timeline

17. The following table outlines the timeline of key events for the ACCC in this matter.

| Date         | Event  |
|--------------|--|
| 1 March 2022 | The ACCC commenced a review of the proposed acquisition under its Merger Process Guidelines. |

<sup>1</sup> 1. To date, Victoria, Western Australia, New South Wales and South Australia have mandated e-conveyancing. Queensland and Australian Capital Territory have enabled e-conveyancing but have not mandated its use. The Northern Territory and Tasmania have not implemented e-conveyancing.

|                   |   |
|-------------------|---|
| 10 May 2022       | The ACCC requested additional information from D&D. The timeline was suspended pending receipt of this information.             |
| 16 June 2022      | The ACCC issued a Statement of Issues regarding the proposed acquisition.   |
| 4 August 2022     | The ACCC commenced market consultation on the draft proposed s87B undertaking.  |
| 8 September 2022  | The ACCC announced it would not oppose the proposed acquisition following the acceptance of the Undertaking by the ACCC.        |
| 23 September 2022 | Link and D&D Limited announced that the proposed acquisition would not be proceeding.   |
| 20 October 2022   | Following a request from D&D Limited and D&D Holdings, the ACCC consented to the withdrawal of the Undertaking in its entirety. |

## Market inquiries

18. The ACCC conducted market inquiries with a range of industry participants, including competitors, potential competitors, customers, industry bodies, regulatory agencies and other interested parties. Submissions were sought in relation to the potential competition issues arising from the proposed acquisition. The ACCC also conducted market consultation on the proposed section 87B undertaking.

## Statement of Issues

19. On 16 June 2022 the ACCC published a Statement of Issues on the proposed acquisition. In the Statement of Issues, the ACCC stated its preliminary view that the proposed acquisition was likely to substantially lessen competition in one or more markets in the conveyancing workflow.

## Industry background

### The conveyancing workflow

20. The steps in the conveyancing process are commonly referred to as “the conveyancing workflow”. While the specifics of the conveyancing process differ based on the type of transaction, as well as relevant state or territory laws, the ACCC understands that some of the key steps in a typical process include:
- Verification of Identity: the identity of the seller and buyer as the relevant transaction parties is confirmed. Vol software and an information search service may be used in the verification process. These tools may also integrate with the PMS of the lawyer or conveyancer engaged by the buyer and seller.

- Contract: a contract for sale is prepared. PMS may be used to generate a contract from a template library. This contract may also be automatically populated with integrated information search results (titles, plans, planning certificates etc).
  - Listing: property is listed for sale.
  - Due Diligence: buyer's lawyer/conveyancer undertakes further searches using an information search service.
  - Exchange: contracts are signed and exchanged between the buyer and seller. Electronic signature software may be used to sign the contracts, which may be integrated with the PMS of the lawyer/conveyancer.
  - Deposit: buyer pays the deposit.
  - Pre-settlement: buyer and financier undertake final due diligence/checks, possibly using an information search service.
  - Settlement: buyer (or financier) transfers funds to seller and seller transfers title to buyer. This may occur electronically via an ELN, or the parties may meet to manually exchange contracts, titles and funds. If an ELN is used, the vendor's conveyancer/solicitor will create a digital workspace using the ELNO's platform and invitations to join the workspace will be sent to the financial institutions and purchaser's conveyancer/solicitor to complete the transaction electronically. The ELNO workspace may also be integrated with the parties' PMS or information search software.
  - Lodgment: relevant conveyancing documents are lodged with the relevant regulatory authorities (manually or via an ELNO).
21. Conveyancing is an efficiency driven process and the steps in the conveyancing workflow have become increasingly digitised in recent years. Application Programming Interfaces allow software integration, providing the seamless transfer of information between software at the various steps in the conveyancing workflow. Seamlessly integrating the steps in the conveyancing workflow increases the software value proposition for customers (typically lawyers and conveyancers) as it minimises duplicative manual processes.
22. D&D and Australian Technology Innovators (**ATI**) have emerged as prominent vertically integrated suppliers of conveyancing workflow solutions, with product offerings applicable to most steps in the conveyancing workflow. These suppliers offer integration with their own product suite, as well as API integration with third parties.

## **E-conveyancing and interoperability**

23. Digitisation of the conveyancing workflow has coincided with the advent of e-conveyancing. E-conveyancing allows lawyers, conveyancers and financial institutions to transact through an ELN. ELNOs provide and operate ELNs which enable transacting parties or their representatives to collaborate electronically to complete property lodgments and settlements. Many Australian jurisdictions

have mandated the use of an ELN to complete property settlement and lodgment transactions.

24. Currently, all parties to an e-conveyancing transaction must use the same ELN. The existing infrastructure and regulatory regime do not yet enable parties using separate ELNs to exchange data to complete a transaction. This puts competing (and potential future) ELNOs at a significant disadvantage, as it makes it more difficult for them to attract subscribers. Absent interoperability between ELNs, PEXA's position as the near monopoly supplier of ELN services is unlikely to change.
25. If implemented, interoperability should enable the exchange of information between ELNs to allow participants to complete an electronic conveyancing transaction using different ELNOs. The current reform process has achieved certain milestones, including the amendments to the Electronic Conveyancing National Law (**ECNL**) to include a requirement for ELNOs to establish and maintain interoperability. However, the timeline for implementing interoperability is uncertain, and market feedback raised strong concerns about likely delays in the implementation of complete interoperability. Market participants also raised concerns regarding PEXA's capacity to further frustrate certain aspects of the reform process.

## **Other industry participants**

### *PMS suppliers*

26. In addition to D&D, other suppliers of PMS include ATI, LexisNexis, Thomson Reuters and Aderant. ATI is the largest supplier of conveyancing and legal PMS in Australia. Its associated software products include LEAP Legal Software and PracticeEvolve.

### *Information search and broking services*

27. In addition to D&D, other "full service" suppliers of information broking services include InfoTrack (owned by ATI), Equifax, CITEC and Ilion. Suppliers with narrower offerings include DirectInfo, PsiGlobal and Hazlett.
28. Lawyers and conveyancers also obtain information search results directly from regulatory authorities (e.g. state/territory land titles offices) and authorised resellers of information broking services (e.g. PEXA Plus).

### *ELN services*

29. In addition to PEXA, Sympli Australia Pty Limited (**Sympli**) is approved to operate as an ELNO in multiple jurisdictions in Australia. ATI holds a 50% stake in Sympli. LEXTECH, owned by Purcell Partners is a potential third provider of ELN services. However, it is unclear whether LEXTECH will obtain relevant operational approvals to commence operations in the near future.

## Competition analysis

### Market definition

30. The ACCC's starting point for considering which markets would have been affected by the proposed acquisition was to identify any meaningful economic relationships between the parties. The ACCC then considered other actual or potential suppliers and customers of products or services supplied to or purchased by the parties that could have been affected by changes to their existing relationship following the proposed acquisition.
31. In this matter, the ACCC considered that the proposed acquisition would have affected the vertical integration in the conveyancing workflow in light of the existing relationship between D&D and (noting Link's ~43% shareholding) PEXA. The ACCC considered the competitive effects of the proposed acquisition in national and/or state-based markets for:
  - the supply of ELN services
  - the supply of information search and broking services, and/or
  - the supply of PMS.

### Foreclosure of competition in one or more markets in the conveyancing workflow

32. The ACCC considered that, in the absence of the Undertaking, the proposed acquisition would have resulted in the alignment of PEXA, a near monopoly provider of ELN services, with D&D, a significant provider of upstream services. This vertical alignment would have created incentives for each of D&D and PEXA to engage in preferential dealing conduct, resulting in the foreclosure of competition in one or more markets in the conveyancing workflow.
33. The form of this conduct could include:
  - PEXA degrading the quality of integration with PEXA for D&D's rivals, or offering discounts on its ELN services only to D&D's customers, and/or
  - D&D refusing or diminishing integration of its software products with PEXA's rival suppliers of ELN services, or offering discounts on its software on condition that those customers transact a minimum volume on PEXA's ELN.

### *Market power of D&D and PEXA*

34. The ACCC concluded that PEXA has market power in the supply of ELN services. PEXA is a near monopoly supplier, having benefited from a significant first mover advantage and continuing network effects. Absent the introduction of timely and effective interoperability between ELNs, the ACCC considered PEXA is likely to retain its near monopoly position.
35. The ACCC did not reach a concluded view as to whether D&D has market power in the supply of PMS and information search and broking services. However, the

ACCC considered that D&D is a significant supplier of these upstream software services and has a particularly significant position in the supply of certain segments of PMS, especially in Victoria and Western Australia. The ACCC also concluded that D&D would be likely to acquire (or increase existing) market power as a result of preferential treatment by PEXA following the proposed acquisition, in the absence of the Undertaking.

*D&D and PEXA's incentives to engage in foreclosure conduct*

36. The ACCC considered that the alignment of D&D and PEXA would have provided PEXA with incentives to favour D&D's information broking and PMS services (to the detriment of D&D's rivals), in the absence of the Undertaking.
37. Given both its financial interest in PEXA and the reciprocal benefit it would have been likely to receive from PEXA's conduct, D&D would have had strong incentives to favour PEXA's ELN (to the detriment of PEXA's emerging rivals).
38. Although PEXA would not have obtained an immediate benefit from favouring D&D's software, by doing so it would have been likely to materially elevate D&D's market position, which would have been likely to have longer term benefits.
39. The key threat to PEXA's near monopoly position stems from planned reforms compelling interoperability between ELNOs. By 'locking in' a large proportion of law and conveyancing firms to an integrated package of PMS and ELN services prior to interoperability occurring, and by concurrently reducing the size and scale of alternative suppliers of information search and broking services and PMS, PEXA would have been in a much stronger position to preserve its near monopoly position in ELN services into the future.
40. Further, while D&D's post-acquisition stake in PEXA would have been a minority shareholding, it would have been a substantial stake and likely enable D&D to exert significant influence on PEXA's strategy and behaviour.

*Likely effect of foreclosure conduct*

41. The ACCC considered that the foreclosure resulting from the mutual preferential dealing described above would be likely to result in a substantial lessening of competition in one or more markets in the conveyancing workflow. The effects would also likely be self-reinforcing, raising barriers to entry and expansion at various levels of the conveyancing workflow. The ACCC was particularly concerned that, over time, the conduct would:
  - entrench PEXA's market position in the supply of ELN services
  - decrease competing PMS and information search service suppliers' sales and access to scale efficiencies forcing them to raise their prices or exit, allowing D&D to raise its own prices for these services, and/or
  - materially raise competing suppliers' costs of entry and expansion within the conveyancing workflow, such that to compete effectively, suppliers would be required to provide an end-to offering.



### *Limited constraint from the regulatory framework*

42. There is considerable uncertainty regarding the extent to which the existing and likely future regulatory framework under the ECNL could be relied upon to constrain PEXA and D&D's conduct post-acquisition.
43. Under the ECNL, ELNOs are required to comply with Operating Requirements which (amongst other things) require ELNOs to:
  - provide equivalent access to parties seeking to integrate with its ELN, subject only to differences attributable to the type, level or class of integration with the ELN
  - ensure that its ELN and any non-ELN businesses are structurally separated to limit the ELNO, and the related businesses, from obtaining an advantage over competitors as a result of the ELNO's position, and
  - set its service fees according to a publicly available and equitable pricing policy.
44. In the context of PEXA's near monopoly position and the significant structural change in the market, the ACCC was concerned this framework would be insufficient to constrain PEXA and a combined D&D-Link's ability to engage in foreclosure conduct.

### *Conclusion*

45. The ACCC concluded that, in the absence of the Undertaking, the proposed acquisition would have resulted in the alignment of D&D and PEXA. This alignment would have been likely to provide each of D&D and PEXA with the ability and incentive to engage in mutual preferential dealing that would have been likely to result in the foreclosure of competition in the conveyancing workflow.

## **Undertaking**

46. To remedy the ACCC's concerns, D&D Limited and D&D Holdings gave the ACCC a court enforceable undertaking in accordance with section 87B of the Act. Pursuant to the Undertaking, D&D Limited and D&D Holdings were required to divest D&D's existing Australian businesses to a purchaser approved by the ACCC.

## **Key obligations**

47. The key obligations in the Undertaking required D&D to:
  - ensure that the approved purchaser would have all the necessary assets and rights to compete effectively for information search and broking services, PMS and manual settlement services in Australia
  - maintain the economic viability, marketability, competitiveness and goodwill of the business to be divested prior to divestiture, including by

appointing and maintaining an ACCC approved independent manager to oversee the divestiture interest until it was sold to an approved purchaser

- hold its interest in the business to be divested separate from its other assets and businesses (including the interest D&D will acquire in PEXA) and ensure it was operated separately from those assets and business pending divestiture, and
- provide for the effective oversight of D&D's compliance with the Undertaking.

### **Assessment of the Undertaking**

48. The ACCC considered that the Undertaking would have addressed its competition concerns as identified in the SOI. Divesting D&D's existing Australian businesses would remove the vertical alignment between D&D and PEXA.
49. In reaching this view, the ACCC assessed the risks associated with accepting the Undertaking, which included consulting a range of market participants in relation to the Undertaking.

### **Withdrawal of the Undertaking**

50. On 23 September 2022, Link and D&D Limited announced that the proposed acquisition would not be proceeding. Following these announcements, D&D Limited and D&D Holdings sought the ACCC's consent to withdraw the Undertaking and, pursuant to s 87B(2) of the Act and clause 4.1 of the Undertaking, the ACCC gave consent to the withdrawal of the Undertaking in its entirety on 20 October 2022.