



DRAFT FINAL REPORT

Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law

PREPARED BY

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Submissions requested by 5 September 2019

Submissions will be published unless confidentiality is requested

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GLOSSARY

ABN	Australian Business Number
ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
ACSC	Australian Cyber Security Centre
AFS	Australian Financial Services (licence)
API	Application Programming Interface
APRA	Australian Prudential Regulation Authority
ARNECC	Australian Registrars' National Electronic Conveyancing Council
ARWG	Australian Registrars' Working Group
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
ATO	Australian Taxation Office
BEC	Business Email Compromise
CAF	Client Authorisation Form
CCP	Central Counter Party
CCSG	Change Control Sub Group
CFR	Council of Financial Regulators
COAG	Council of Australian Governments
CPI	Consumer Price Index
DvP	Delivery versus Payment
DMC	Dench McClean Carlson
ECNL	Electronic Conveyancing National Law
ELN	Electronic Lodgement Network
ELNO	Electronic Lodgement Network Operator
GST	Goods and Services
IGA	Inter-Governmental Agreement for an Electronic Conveyancing National Law
IPART	Independent Pricing and Regulatory Tribunal of New South Wales
ISMS	Information Security Management System
ISO	International Standards Organisation
LEXTECH	Category One approved ELNO
LPLC	Legal Practitioners' Liability Committee
LR	Land Registry
MOR	Model Operating Requirements
MPR	Model Participation Rules

NECDL	National E-Conveyancing Development Limited
NECDS	National Electronic Conveyancing Data Standard
NSW	New South Wales
NT	Northern Territory
ORG NSW	Office of the Registrar General New South Wales
PA	Participation Agreement
PEXA	Property Exchange Australia Ltd (formerly National E-Conveyancing Development Limited) - ELNO
PoA	Power of Attorney
QLD	Queensland
RBA	Reserve Bank of Australia
RITS	The Reserve Bank Information and Transfer System
RMF	Risk Management Framework
ROMS	Revenue Office Messaging Standards
SA	South Australia
SF	Settlement Facility
Sympli	ELNO
TAS	Tasmania
TDIF	Trusted Digital Identity Framework
Victoria	VIC
VOI	Verification of Identity
WA	Western Australia

1.0 EXECUTIVE SUMMARY

- 1.1 The Intergovernmental Agreement for an Electronic Conveyancing National Law (“IGA”) was signed in 2011 and 2012 and a set of documents, including the Electronic Conveyancing National Law (“ECNL”) were developed to establish the legal framework to implement eConveyancing. The system was to allow legal practitioners, conveyancers and financial institutions to electronically prepare and lodge land property dealings with title registries; transmit settlement funds and pay associated duties and tax; and remove the need to physically attend property settlements.
- 1.2 Dench McClean Carlson (“DMC”) was commissioned to review the IGA in September 2018. Following extensive face-to-face consultation with stakeholders and review of reports and surveys, we released an Issues Paper in February 2019. Responses were received from 19 stakeholders.
- 1.3 Since the release of the Issues Paper we have been participating in meetings and discussions with stakeholders to further explore issues and feedback, and in discussions with regulators to develop options to address developing issues where clearer regulation would be beneficial.
- 1.4 This draft Report presents our findings and draft recommendations, and seeks feedback from stakeholders to conclude our Review. We have been asked to publish these submissions with the final Report, and we will do so unless you ask us to keep it confidential.
- 1.5 The next three headings summarise our findings against the key issues identified in the scope provided to us.

Key findings against scope

- 1.6 The IGA has met its objective of establishing a framework to facilitate the implementation of eConveyancing and has partially met its objective of ongoing management of the regulatory framework. Conveyancing practitioners and financial institutions have requested improvements in several areas. With the advent of a second operator, some matters that were left to the management of the sole operator may need to be co-ordinated or managed by government.
- 1.7 The existing governance and regulatory arrangements for the land titling components of eConveyancing are fit-for-purpose for the future and provide appropriate accountability to participating Governments on those matters, but the regulatory arrangements for financial payment and settlement, for the collection of duties and taxes and for market regulation need to be defined and explicitly stated.
- 1.8 In order to support a competitive electronic network lodgment operator (“ELNO”) market, the minimum conditions for safe and effective competition must first be established. The electronic lodgment networks (“ELNs”) provide the systems by which financial transactions deal with the major (and sometimes only) asset of many Australians. Failed transactions in this environment whether by accident or fraud have significant impact. The eConveyancing systems manage transactions for an Australian property market that has a capitalization value of approximately \$6-7T. It is very important that Australians have confidence in these systems that governments have either licensed or mandated for use.

Implementation progress

- 1.9 The introduction of eConveyancing was expected to help drive consistency in business practices across participating jurisdictions. While some improvements have been made eg in the rationalization of mortgage forms, there has not been significant progress. We believe this is difficult due to the significant cost and resources required to seek change in related legislation in all participating jurisdictions with no guarantee of success.
- 1.10 Consistency is of importance to financial institutions many of which have a national focus.
- 1.11 Consistency is not important to most conveyancing practitioners who operate within one jurisdiction, but practitioners do want improved efficiency in business practices in the operation of eConveyancing. WA practitioners want consistency of operating hours. Currently settlements cannot be modified in WA after the Reserve Bank of Australia (“RBA”) closes at 5pm eastern standard time.
- 1.12 In relation to lessons learned, practitioners note that in the initial development of eConveyancing the stakeholder consultations were extensive and well regarded. They have requested more regular consultation as the environment changes and develops. Stakeholders have spoken of change fatigue as additional responsibilities imposed by the Australian Taxation Office have coincided with developments in eConveyancing.
- 1.13 Take up levels in eConveyancing have been high or very high where jurisdictions have announced mandates for all dealings able to be done electronically. Take up is low in the two jurisdictions that have not provided for this. A detailed breakdown by type of dealing and by jurisdiction is provided later in the Report.
- 1.14 The barriers to take up rated high or very high by practitioners included lack of skills, perceived lack of security, fees, insufficient training, and system complexity.
- 1.15 However, the feedback from individual practitioners in the survey conducted as part of the Review, indicates that the removal of the barriers will not necessarily drive take up in those jurisdictions that have not mandated. Some practitioners are ideologically opposed to eConveyancing, but many just do not want to learn the new system. In one jurisdiction the peak body reported that members say they will not learn eConveyancing until they are compelled to. Practitioners in the two jurisdictions that have not mandated express frustration that others in their industry will not learn the new system.

Regulatory framework

- 1.16 The IGA established the Australian Registrars National Electronic Conveyancing Council (“ARNECC”) and determined that it would facilitate the implementation and ongoing management of the regulatory framework for national eConveyancing. This included advising on changes required to the ECNL.
- 1.17 The regulatory framework under the existing ECNL includes the Model Operating Requirements (“MOR”) which determine the requirements against which the ELNOs must deliver for connection to the land registries and acceptance of the subsequent lodgments that will lead to a change in land title details. Each

registrar has an agreement/licence with each ELNO operating in its jurisdiction that encompasses the MOR and contains additional undisclosed conditions specific to individual jurisdictions. Those conditions that impact on conveyancing practitioners and their clients should be made public.

- 1.18 The Model Participation Requirements (“MPR”) stipulates the requirements that subscribers to the ELN must meet to be able to transact on the ELN. Subscribers are defined as the conveyancing practitioners (both legal services providers and conveyancers) and the financial institutions that interact with the ELN. Subscribers have an agreement with the ELNO to define their contractual relationship. The agreement is based on the MPR.
- 1.19 The key limitation of the regulatory framework is the lack of explicit and defined regulatory arrangements for financial payment and settlement, for the collection of duties and taxes and for market regulation. While the ELNOs have an obligation to comply with all applicable laws nationally and in each state and territory in which their system is available, the key requirements of these laws are not monitored by ARNECC as it does not have the skills or resources to do so.
- 1.20 Conformance with these requirements should be demonstrated by applicant ELNOs before they are given approval by the registrars to operate. The approval and annual monitoring processes for ELNOs should include appropriate sign off by the responsible regulators. Our understanding is that the RBA is the relevant regulator for the financial settlement process, the Australian Securities and investments Commission (“ASIC”) for payment systems and the Australian Competition and Consumer Commission (“ACCC”) for market regulation.
- 1.21 The contract with ELNOs provides an efficient mechanism for ensuring ELNOs comply with the national law as determined by the national regulators and for ensuring they comply with the requirements of the state and territory revenue offices. Registrars have an existing power to direct under their contracts with ELNOs which we believe may be used. This should be tested and if necessary a change made to broaden the power. We have recommended the introduction of an enforcement regime based on penalties as the current sanction available to registrars is termination. This is clearly not useful when mandates are in place and would be very disruptive to both the government and to the wider industry if it were enacted.
- 1.22 ARNECC will need access to nationally focused skills and resources to work closely with other responsible regulators to guide the development of eConveyancing and its impact on the wider environment in a manner that best meets the needs of the Australian community.
- 1.23 We have recommended the establishment of a new corporate body to provide those nationally focused skills and resources, and we have recommended that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and subscribers meeting the direct costs attributed to oversight of their operations.
- 1.24 ARNECC members are the statutory authorities responsible for land titling in the jurisdictions and they must remain the authoritative decision makers in those areas that impact on land registries. We note that registrars cannot be directed by other parties in relation to their statutory roles and must make independent decisions, however we believe they could act on recommendations from the national regulators in relation to non-land titling matters. We note that revenue

offices have their own contracts with ELNOs and presumably can provide directions under those contracts.

- 1.25 In a multi-ELNO environment ARNECC will need to provide governance and management of matters that in the past could be managed by the only ELNO particularly when that ELNO was owned by governments. It will need to maintain a watching brief on matters such as developments in new technologies and cybersecurity, and industry training to meet new challenges as they emerge.
- 1.26 Following feedback from stakeholders, we will develop a high-level plan to implement the recommended changes.
- 1.27 Below we have provided a list of our draft recommendations and draft options for improvement with paragraph references to further discussion in this draft Report.

Draft recommendations

No	Recommendations
1	<p>We recommend that the appropriate national regulators ie the Council of Financial Regulators (“CFR”) and ACCC be requested to develop the minimum conditions for safe and effective competition for eConveyancing leveraging off the work done in relation to the ASX.</p> <p>We recommend that any investigation by the national regulators involve consultation with the affected regulators. These are the registrars and revenue offices currently actively using eConveyancing, and others that may be likely to progress in the near future.</p> <p>We recommend they consider the work done to date in this IGA Review, the work done by the Working Groups in the NSW interoperability process, and the outcome of the IPART pricing review regarding costs of achieving interoperability. Further consultation should occur with identified subscribers in all active jurisdictions and the financial institutions that facilitate payment and settlement.</p> <p>We recommend that there be a two-year moratorium on the issue of any further approvals for ELNOs while the national regulators develop the minimum conditions and interoperability models are assessed against in accordance with those conditions.</p> <p>Paragraphs 5.72 to 5.80</p>
2	<p>We recommend the establishment of a new corporate body to provide nationally focused skills and resources, and that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and perhaps subscribers meeting the direct costs attributed to oversight of their operations.</p> <p>Paragraphs 1.23 and 7.0</p>
3	<p>We recommend changes to the category One approval process for applicant ELNOs so that business plan requirements include evidence that costs are understood, and adequate finances are in place, including those costs to meet all regulatory requirements and payment connections to financial institutions.</p> <p>It may be sensible to provide the information to the identified national regulators and the appropriate revenue office(s) to get their assessment on whether the financial allowance made is adequate.</p> <p>Paragraph 6.14</p>

No	Recommendations
4	<p>We recommend that the approval process include further requirements for Category Two approval including:</p> <ul style="list-style-type: none"> • Approval from RBA that financial settlement system proposed meets RBA requirements • Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments • Approval from all appropriate revenue offices • Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law • Confirmation from financial institutions that appropriate payment connections are in place <p>It may be appropriate that these are separated into a new Category Two (A)</p> <p>Paragraphs 2.23, 4.13, Section 6.0</p>
5	<p>An enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach.</p> <p>Paragraphs 2.23, 4.10, 4.15, 4.46, 4.149, 8.15</p>
6	<p>A national agenda and roadmap should be developed through consultation with stakeholders to identify and prioritise issues for examination to improve efficiency and national consistency where possible.</p> <p>Paragraphs 3.27, 3.28 and 4.113</p>
7	<p>The regulatory framework for financial payments and settlement should be documented and the governance processes for annual audit and monitoring established in consultation with the national regulators, RBA and ASIC.</p> <p>Paragraphs 4.52 – 4.60</p>
8	<p>ARNECC should facilitate engagement with other regulators to ensure an efficient regulatory process for ELNOs and other regulators. Paragraph 2.22</p>
9	<p>A system-wide change control process should be developed to coordinate system change and manage priorities and risks between ELNOs, registrars, revenue offices, financial institutions and any other connected entities.</p> <p>Paragraphs 4.8 and 4.164</p>
10	<p>We recommend that the rules in the MOR for ELNOs operating in the wider market be reviewed by a qualified economic regulator (eg ACCC) in the near future to ensure they are clear and there is no abuse of market power.</p> <p>Paragraph 5.245</p>
11	<p>We recommend that eConveyancing pricing remain capped until there are three or more fully operational ELNOs and competition is assessed as effective.</p> <p>Paragraph 5.36</p>
12	<p>Conditions in contracts between ELNOs and governments should be made public if they impact on conveyancing practitioners and their clients.</p> <p>Paragraph 1.17</p>

Draft options for improvement

No	Options for improvement
1	Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process. Paragraphs 3.11 and 5.237 – 5.245
2	Consider establishment of a Stakeholder Committee with ARNECC members, stakeholder representatives nominated by industry including financial institutions and other regulators as appropriate, and agree an ongoing consultation process to develop a proactive agenda for eConveyancing improvement. Paragraph 4.95
3	Establish stakeholder consultative processes for coordination of industry wide changes and for industry input into the implementation plan for those changes. Paragraph 3.14
4	Consider developing a system wide risk management framework including risk mitigation strategies such as minimum mandatory residential guarantees, insurance provisions to ensure timely resolution for homeowners, clear liability rules to protect consumers, a dispute resolution framework. Paragraph 4.131
5	Stakeholders operating nationally want jurisdictional variations that drive high operational complexity, risk (including missed settlements) and cost for no consumer benefit, to be considered and harmonized where possible. Paragraph 3.26
6	Consider forming a risk and compliance committee comprising ARNECC and external experts to review audit results on a national basis and to develop improvement programs – the committee could also consider regulator action for ELNOs or subscribers that fail agreed thresholds. Paragraph 4.179
7	Consider developing formal consultative arrangements with federal government cybersecurity experts to enable development of strategies to counter threats Consider whether future certification of practitioners should require a reasonable level of competence in operating in an electronic environment and a good understanding of cybersecurity. Paragraphs 4.18, 4.150 and 7.12
8	Consider developing a process that allows subscribers to register once in the eConveyancing environment. Paragraph 5.188
9	Consider developing a privacy regime for eConveyancing that clearly identifies requirements, identifies a complaint process and provides for penalties for privacy breaches. Paragraph 4.200
10	ARNECC could consider requiring all ELNOs to provide a standardised set of APIs that allow third-parties the ability to populate the ELNOs workspace. Paragraph 5.211

2.0 BACKGROUND AND METHODOLOGY

Background

- 2.1 The total value of property recorded in Australian land registries is estimated to be \$6 trillion. Each year an estimated \$600 billion of property changes hands in 750,000 transfers. This is substantially higher than the total market capitalisation of the ASX, which is less than \$2 trillion.
- 2.2 For over 150 years, State and Territory land registries have played a critical role in the effective functioning of Australia's property market by successfully sustaining high levels of public confidence in the land titles administration system. Traditionally, each State and Territory has operated a paper-based registry.
- 2.3 In July 2008, the Council of Australian Governments ("COAG") agreed there should be a new single national electronic system for settling real property transactions in all Australian States and Territories. The system would allow legal practitioners, conveyancers and financial institutions to electronically prepare and lodge land property dealings with title registries; transmit settlement funds and pay associated duties and tax; and remove the need to physically attend property settlements.
- 2.4 In 2011 and 2012, all six States and the Northern Territory signed the IGA for developing, implementing and managing the regulatory framework for national eConveyancing, including the legislation to support national eConveyancing, the ECNL. To date five states have commenced eConveyancing; three of these have now mandated its use for all mainstream transactions, one has mandated for some transactions and another has not proposed any mandating.
- 2.5 Tasmania and the Northern Territory have yet to commence eConveyancing and the Australian Capital Territory is not yet a signatory to the IGA.
- 2.6 The IGA also provided for the formation, composition and operation of ARNECC to facilitate implementation and ongoing management of the regulatory framework including the ECNL.
- 2.7 The schematic overleaf identifies the documents that together make up the governance framework for eConveyancing.

The Intergovernmental Agreement for an Electronic Conveyancing National Law

- 2.8 The IGA provided for the creation of national eConveyancing. The IGA's purpose was described as follows:
 - *This Intergovernmental Agreement is created to provide governance for the development, implementation and management of the regulatory framework for National E-Conveyancing, including legislation to facilitate National E-Conveyancing. The legislation will facilitate electronic conveyancing in accordance with the National Partnership Agreement to Deliver a Seamless National Economy. The National Partnership Agreement to Deliver a Seamless National Economy is established under the Intergovernmental*

Agreement on Federal Financial Relations and should be read in conjunction with that Agreement and its subsidiary schedules.

2.9 The IGA recorded the following context.

- *In July 2008 the Council of Australian Governments ("COAG") agreed that there should be a new single national electronic system for the settling of real property transactions in all Australian States and Territories. This single national electronic conveyancing facility would provide a convenient electronic way for legal practitioners, conveyancers, financial institutions and mortgage processors to:*
 - *prepare dealings and related instruments to register changes in land ownership and interests;*
 - *settle financial transactions, including the ability to pay disbursements, duties, and tax;*
 - *comply with State or Territory Revenue Office requirements;*
 - *lodge their dealings and instruments with the relevant State or Territory Land Registry; and*
 - *receive confirmation of the lodgment of dealings and instruments.*

2.10 COAG agreed the formation of a company with a skills-based board of directors to create, implement and operate the system.

2.11 In January 2010 NSW, Victoria and Queensland (the founding members) established the company National E-Conveyancing Development Limited ("NECDL") to progress the development of the system. At its April 2010 meeting COAG agreed that NECDL was to create, implement and operate the system.

2.12 In August 2012 when it became apparent that the cost of system development was greater than anticipated, the four major banks provided capital and subscribed for shares in NECDL. WA joined the founding members and invested in NECDL. The government shareholders agreed to maintain a majority shareholding in NECDL during the development of the system.

2.13 Further capital raisings followed and Macquarie Bank, Link Market Services and the Little Group joined as shareholders.

2.14 In March 2014 NECDL officially changed its name to PEXA, and title lodgement transactions commenced in Victoria and NSW later in 2014. The government shareholders maintained the largest shareholding in the company until the sale to private interests in early 2019.

2.15 In April 2013 the COAG Business Advisory Forum Taskforce provided the following update on National Partnership Agreement to Deliver a Seamless National Economy.

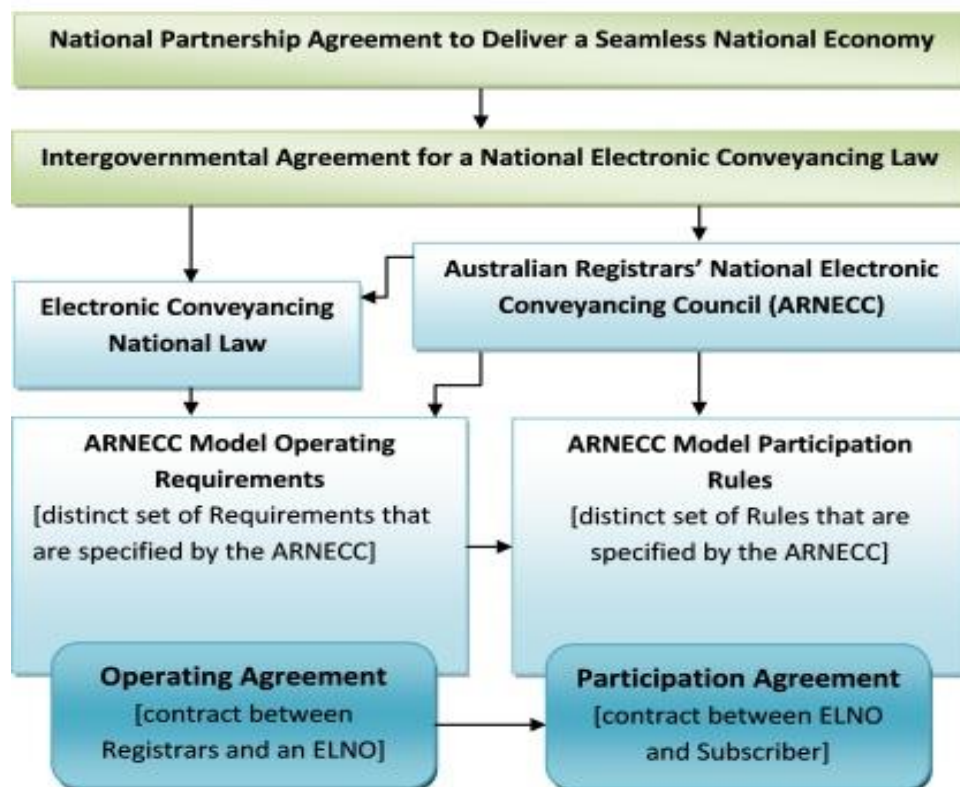
- *E-conveyancing – This reform is continuing to be implemented. The aim of this reform is to create a single national electronic system for land title transactions. E-conveyancing reform is on track to be completed in line with COAG agreed milestones, by June 2013, noting that the ACT has advised that, due to the disproportionate costs it faces as a small jurisdiction and its unique leasehold system, it is reserving its position on participating. The E-conveyancing National Law passed the NSW Parliament, and received Royal Assent on 20 November 2012; and passed the Victorian Parliament,*

and received Royal Assent on 26 February 2013. Legislation was also introduced into the Queensland Parliament in November 2012. The March 2013 election in Western Australia delayed consideration of the mirror legislation, and will be considered by the new Cabinet as soon as possible.

ECNL

- 2.16 The ECNL is adopted into each participating jurisdiction as an Act for electronic conveyancing applicable to each jurisdiction's land titles legislation.
- 2.17 The ECNL provides for:
- The electronic lodgment and processing of documents and enables digital signing of electronic registry instruments
 - A client authorisation document that allows subscribers to act on a client's behalf on matters such as digitally signing registry instruments or other documents, presenting registry instruments or other documents for lodgment electronically and authorising or completing any associated financial transaction
 - Reliance on digital signatures
 - Approval of ELNOs when they meet the qualifications for approval under the operating requirements and attach conditions which can be varied or revoked
 - Operating requirements for ELNOs and participation rules for subscribers
 - Appeals against decisions of the registrar in some circumstances
 - Compliance examinations of ELNOs and subscribers and action arising from such examinations
- 2.18 The ECNL is silent on the regulation of financial payments and settlement and on market regulation. The second reading speeches made it clear that RBA and ASIC were the financial regulators, but no information was provided on market regulation. In the absence of any direction, an assumption could be made that market regulation was expected to occur under national legislation and any relevant state and territory legislation.

National Electronic Conveyancing Legal Framework



- 2.19 A description of the framework documents is provided at Appendix III.
- 2.20 The Model Operating Requirements (“MOR”) set out the common requirements that registrars have agreed for the operation of an Electronic Lodgement Network (“ELN”). Although the IGA set the requirements for a financial payment and settlement system and for compliance with revenue offices requirements, the MOR reflects only the requirements for electronic lodgement to titles registries as specified by ARNECC.
- 2.21 The Model Participation Rules (“MPR”) set out the requirements for subscribers to the eConveyancing system in their use of the system.
- 2.22 The existing legal framework has enabled the successful development of the electronic lodgement component of the eConveyancing system to date with few risks and no reported incidence of title frauds to date. However, it does not transparently identify the regulatory requirements for other elements of the eConveyancing system including:
- Financial payment and settlement
 - Revenue office requirements
 - Market regulation
 - Privacy and confidentiality
- 2.23 We have recommended that these be identified and form part of the approval and ongoing requirements for ELNOs, which are discussed in more detail in section 6.0. We recommend that ARNECC facilitate the engagement with other

regulators to ensure an efficient regulatory process for ELNOs and the regulators. We also recommend that an enforcement regime more nuanced than the current regimes is developed. The current agreements provide for an ELNO's licence to be terminated if it transgresses but this is not practical now when some jurisdictions have mandated use of eConveyancing.

- 2.24 The registrars are the gatekeepers to the eConveyancing system as the agreements with registrars provide the licence for ELNOs to operate. It would be an efficient process if directions to accord with other regulatory requirements are given to ELNOs by way of direction under contract.

Methodology

- 2.25 The IGA Review methodology includes four main stages.

Environment review

- 2.26 The first was an environment review which considered the history and development of eConveyancing through a review of documents and desk top research. It included all the documents in the governance framework. The documents reviewed are identified at Appendix IV. From this review and a preliminary analysis, a list of key issues for consultation was developed. This list included the matters identified in the original brief to DMC from ARNECC.

Industry consultation

- 2.27 The second stage was an industry consultation process. We utilised an ARNECC stakeholder consultation list to arrange discussions with about 125 stakeholders listed at Appendix II Consultative record. The list of key issues was used as the basis for discussion, but stakeholders were able to raise any issues they believed were relevant for the review.
- 2.28 The second component of this stage was an online survey that was developed based on the stakeholder interview issues list and the early findings from the initial series of interviews.
- 2.29 The survey link was distributed to all stakeholders who were interviewed with the request that it be further distributed to interested parties. The link was also distributed to the complete ARNECC stakeholder email list. Peak Bodies were asked to distribute the link to their members.
- 2.30 A total of 339 full responses were completed by 18 February 2019. The majority of responses came from conveyancing services providers (173), legal services providers (98) and financial services providers (29), but responses were also received from government regulators and policy makers, a private registry operator, software providers, information brokers, a VOI provider, property developers, a local government entity, a private individual and a Real Estate Agent.
- 2.31 In parallel to the IGA review, two unanticipated industry consultations were commenced by the NSW government. One was an investigation into interoperability models to support competition in the horizontal ELNO market and the other was an investigation by the Independent Pricing and Regulatory Tribunal of New South Wales ("IPART") into the pricing of eConveyancing services.

- 2.32 Although interactions with these processes were not part of our methodology, we believed that it was important to understand the stakeholder feedback on these matters. Due to the timing of release much of our review of this work followed the release of our Issues Paper on 13 February 2019.
- 2.33 We have reviewed the Directions Paper on Interoperability and the IPART Issues Paper and the stakeholder submissions which were public for both. We attended the two interoperability forums held in Sydney and dialled in to two working party meetings. We reviewed much of the documentation produced by the working parties provided via an online site, the draft Report on Interoperability released on 10 June 2019 and the submissions to that draft Report.

Options exploration

- 2.34 We analysed the information gathered from the first two stages to develop our key findings and identify significant issues to be addressed in the regulation, governance and management of eConveyancing for the future.
- 2.35 An Issues Paper was prepared describing the key findings from stakeholders and our analysis having regard to both the stakeholders' feedback and relevant matters identified in our document review. We provided an analysis of the key issues and identified preliminary options for future regulatory and governance arrangements.
- 2.36 The Paper was released on 13 February 2019 with submissions requested by 29 March 2019. However, a number of stakeholders requested extensions to the submission date due to the work associated with the interoperability Working Groups and the IPART review. We agreed to the requested extensions and the final submission was received on 8 May 2019. We received 19 submissions, 18 written and one by way of a meeting with a regulator.
- 2.37 On 16 May we facilitated a working session with ARNECC to seek registrars input with respect to:
- Factual correctness and comprehensiveness of the understanding we had developed on issues where registrars might be the most authoritative source of truth
 - Test the practical implementation possibilities on our preliminary positions on a number of regulatory and governance change matters
 - Understand particular issues that may be more difficult to resolve in some jurisdictions than others eg where state/territory legislation may make a proposed change difficult
 - Brief ARNECC on discussions with other regulators to date and receive any feedback
 - Collect any additional evidence that registrars as stakeholders may have wanted us to consider as we worked through the issues
- 2.38 We had discussions with other regulators concerning their likely roles in the future regulation and governance of eConveyancing and further consultations with PEXA, Sympli and LEXTECH.

Report and recommendations development

- 2.39 We have considered the matters raised in the submissions to our Issues Paper and the material available from the two NSW processes as we prepared this draft Report and draft recommendations.
- 2.40 We are continuing discussions with other regulators to determine potential models to address the lack of transparency in some regulatory areas.
- 2.41 Following receipt and review of any stakeholder submissions to this draft Report, we will consider any potential revisions and publish as a Final Report.

3.0 IMPLEMENTATION PROGRESS

Original IGA intent and departures

Has the IGA met its objectives

- 3.1 The IGA was created to provide governance for the development, implementation and management of the regulatory framework for national eConveyancing, including developing appropriate legislation. The legislation was to facilitate eConveyancing in accordance with the National Partnership Agreement to Deliver a Seamless National Economy.
- 3.2 The Council of Australian Governments ("COAG") agreed that there should be a new single national electronic system for the settling of real property transactions in all Australian States and Territories. This single national electronic conveyancing facility would provide a convenient electronic way for legal practitioners, conveyancers, financial institutions and mortgage processors to:
 - Prepare dealings and related instruments to register changes in land ownership and interests
 - Settle financial transactions, including the ability to pay disbursements, duties, and tax
 - Comply with State or Territory Revenue Office requirements
 - Lodge their dealings and instruments with the relevant State or Territory Land Registry
 - Receive confirmation of the lodgment of dealings and instruments
- 3.3 The overall objective was to establish a framework to facilitate the implementation and ongoing management of the regulatory framework for national eConveyancing including to:
 - Enact and manage the Electronic Conveyancing National Law
 - Provide for the formation, composition and operation of ARNECC
- 3.4 The participating jurisdictions agreed to cooperate on the implementation and management of national eConveyancing to minimise inconsistencies between jurisdictions and to:
 - Use their best endeavours to ensure that national eConveyancing was implemented in their own jurisdiction as soon as practicable
 - Work collaboratively to ensure that business practices are consistent where possible
 - Collaborate in good faith to ensure that all stakeholders continued to be consulted in an effective manner in connection with the implementation and operation of the regulatory framework for national eConveyancing
- 3.5 Our analysis has considered evidence from stakeholders, expert reports and transaction data to determine the extent to which the original objectives have been met.
- 3.6 We concluded that ARNECC has initially met these objectives with success particularly in the enactment and management of the ECNL. We note that it has

established a suitable framework for implementation and management of the land titling components of eConveyancing. Stakeholders comment that the national system is up and running in five states and most transactions have gone through with less fraud than in the paper space. The mistakes and fraud that have occurred have been in financial transactions not in land titling matters.

- 3.7 ARNECC has done well in its identified area of expertise although stakeholders are now requesting further development and management of the system to improve business efficiency and national consistency.
- 3.8 We note also that financial settlement has operated well in most cases although fraud and mistaken payments have occurred. Cybersecurity risks will need to be carefully monitored and risk mitigation strategies developed given the attractiveness of the large value payments handled in eConveyancing, and the criticality of those payments to individual homeowners.
- 3.9 The financial regulators for eConveyancing were named in the second reading speeches as RBA and ASIC and we recommend that both regulators be consulted on a regular basis. Recommendations from these regulators should be given effect by registrars in ELNO contracts.
- 3.10 Both RBA and ASIC gave regulatory guidance during developments by NECDL and then PEXA, but the legal framework documents do not capture these regulatory processes. In the implementation of the current PEXA system, RBA agreed the use of RITS for financial settlement and ASIC reviewed the payments systems and granted PEXA relief from holding an Australian Financial Services licence.
- 3.11 ARNECC has recently considered competition matters with respect to ELNOs participating in conveyancing and related markets, responding to concerns expressed by conveyancers. Although market regulation is not a core skill of ARNECC members, the MOR consultation process was used to provide some controls on the potential adverse impact of ELNO competition in the conveyancing market.
- 3.12 Practitioners still have concerns despite the introduction of separation clauses in the MOR. This matter needs more attention.
- 3.13 There has been less focus on working collaboratively to ensure that business practices are consistent where possible and practitioners want ARNECC to consider business efficiency as well as national consistency.
- 3.14 In the development to date industry efficiency appears to have been addressed mainly by PEXA rather than ARNECC. With the introduction of a second ELNO, the focus will need to change, and there will be a need for coordination of stakeholder consultative processes and industry input into any implementation plans.
- 3.15 The IGA has not met its original intent of a single national system and no objectives were set for an environment of two or more systems.

Development of a national eConveyancing system

- 3.16 The IGA was signed by the responsible Ministers in 2011 and 2012. In accordance with the IGA, the development of a single national eConveyancing platform commenced in 2013. This was initially commenced under the auspices

of a wholly government owned entity, the National E-Conveyancing Development Limited (“NECDL”).

- 3.17 Subsequent to commencement of system development it was agreed that equity from the banks was necessary to progress the development; the four major banks contributed funds and were allocated shares in NECDL. At that stage the shareholders agreed that it was the intention of the government shareholders to maintain a majority shareholding during the development of the system.
- 3.18 It became apparent that greater resources were required to fully develop the system and private equity was incorporated to enable this to occur. Government ownership was reduced to 30% but the intention to create a robust, fit for purpose system remained.
- 3.19 The system became operational for document lodgment in 2014 and the first four party transfer occurred later that year. NECDL was renamed Property Exchange Australia (“PEXA”). The current PEXA eConveyancing platform was developed under government stewardship with a focus on risk minimisation for parties to the transaction.
- 3.20 In 2018 the government shareholders agreed to sell their equity in PEXA into the private market and this was finalised in January 2019. The eConveyancing platform became fully commercially owned and operated, but governed by a regulatory framework.
- 3.21 The Electronic Conveyancing National Law (“ECNL”) was passed in Queensland, New South Wales, Victoria, South Australia and Western Australia in 2012 and 2013. Tasmania and the Northern Territory signed the IGA but are yet to pass the ECNL. The ECNL created the opportunity for a registrar to “approve a person as an Electronic Lodgment Network Operator” to operate an Electronic Lodgment Network (“ELN”).
- 3.22 In 2018 two companies applied to become ELNOs, one of which commenced electronic lodgement of documents without financial settlement in 2018.
- 3.23 No regulations are in place to govern interactions between two or more ELNOs or to accommodate the complexities of two systems instead of a single national system.
- 3.24 Additional governance arrangements became necessary when the ECNL was enacted and provided for the registrar to approve additional ELNOs (section 15). However, the only additional governance arrangements were the ability for the registrar to attach conditions to approval. No consideration appears to have been given to the necessary regulatory arrangements for competition including but not limited to access and pricing between ELNOs, management of risk and liability, increased complexity and change management for regulators and financial institutions, costs of competition (including cost/benefit thresholds), potential changes to vertical competition constraints/provisions including equitable access fees for subscribers.
- 3.25 These governance arrangements should be determined by the appropriate national regulators ie the CFR and ACCC.

Consistency and efficiency

Consistency and efficiency

- 3.26 The Review was asked to consider the level of consistency achieved in business practices across jurisdictions. We sought feedback from stakeholders in both interviews and the survey and found that while all stakeholders wanted a national approach, only stakeholders operating nationally indicated that jurisdictional variations drive high operational complexity, risk (including missed settlements) and cost for no consumer benefit.
- 3.27 Practitioners (both conveyancers and legal practitioners) generally were not focussed on national consistency but did want a national focus on improving business practices to drive efficiencies.
- 3.28 The Review led to the conclusion that a national agenda and roadmap should be developed through consultation with stakeholders to identify and prioritise issues for examination to improve efficiency and national consistency where possible.
- 3.29 There are mixed views regarding the outcome of the review of the national mortgage form. We believe this has delivered an improvement in efficiency. It is likely that the regulatory changes required in each jurisdiction to create one form are too onerous to practically implement further change.
- 3.30 One of the registrars noted the following outcomes in a briefing to stakeholders on the re-development of the mortgage form. *A small number of jurisdictional differences remain largely due to existing legislation. The PDF smart form controls these differences.*
- *In some jurisdictions (SA, TAS, VIC, WA) mortgagee execution is not required*
 - *Some jurisdictions (all except VIC and NSW) allow capacity for mortgagor and mortgagee*
 - *Some jurisdictions (all except QLD) require address for mortgagor and mortgagee*
 - *Some jurisdictions (all except QLD and NT) only allow land description if part land indicator is checked*
 - *Jurisdictions require different information for PoA (QLD, NSW, SA, NT, WA require PoA number, others require PoA date)*
 - *Only NSW requires duty information – all other jurisdictions do not*
- 3.31 We note that the smart form provides “swim lanes” depending on the jurisdiction in which the property transaction is occurring and suggest that this is an efficient process. Considering the amount of legislative change that would be required for consistency across all jurisdictions it may be that any additional benefits would not outweigh the costs.
- 3.32 Stakeholders have expressed concern that the development of an interoperability model by NSW and the lack of a collaborative approach threatens national consistency. We note that interoperability models also impact on costs, complexity, risk and liability issues and recommend that interoperability models should be considered on a national basis with the appropriate national regulators.

- 3.33 We note that with the introduction of the second ELNO the implementation has departed from the original intent of a single national system. However, no governance arrangements were considered for a multi-ELNO environment and this has given rise to a range of issues, including interoperability, that require resolution. These are discussed in further detail in section 5.

Take up levels

- 3.34 The take up and use of eConveyancing to date varies markedly across the five jurisdictions that have commenced eConveyancing.
- 3.35 There is evidence of a very high take up for refinances and standalone discharges/mortgages which indicates that all major and many smaller financial institutions are using the eConveyancing platform extensively.
- 3.36 The three states that mandated transfers – Victoria (mandated 1 October 2018), Western Australia (mandated 1 December 2018), New South Wales (mandated 1 July 2019) have high or very high take up of electronic transfers.
- 3.37 South Australia (which has mandated electronic lodgment of some documents but not transfers) and Queensland have low take up rates of electronic transfers, less than 10%.
- 3.38 The chart below provides a breakdown of transactions by lodgment type between July 2014 and May 2019, across the five jurisdictions that are actively utilising the national eConveyancing platform.

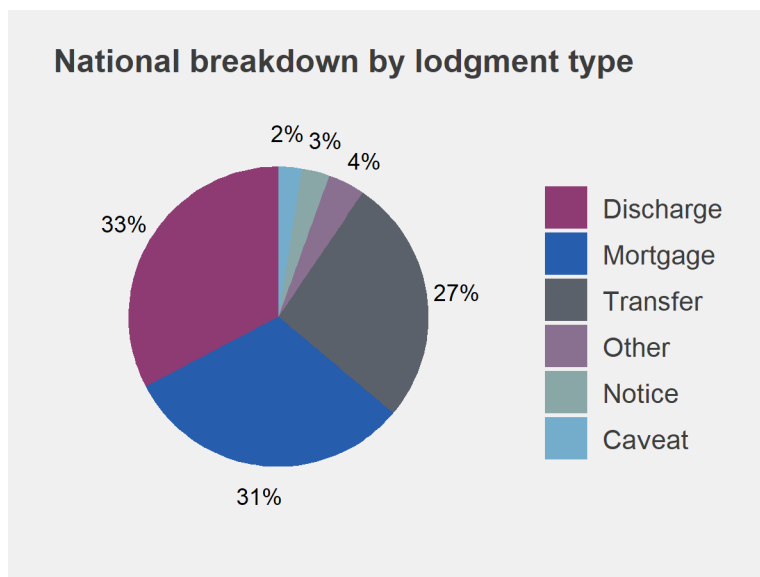


Figure 1 - National breakdown by lodgment type

- 3.39 The following chart shows the impact of the progressive introduction of lodgment types and mandating over time.

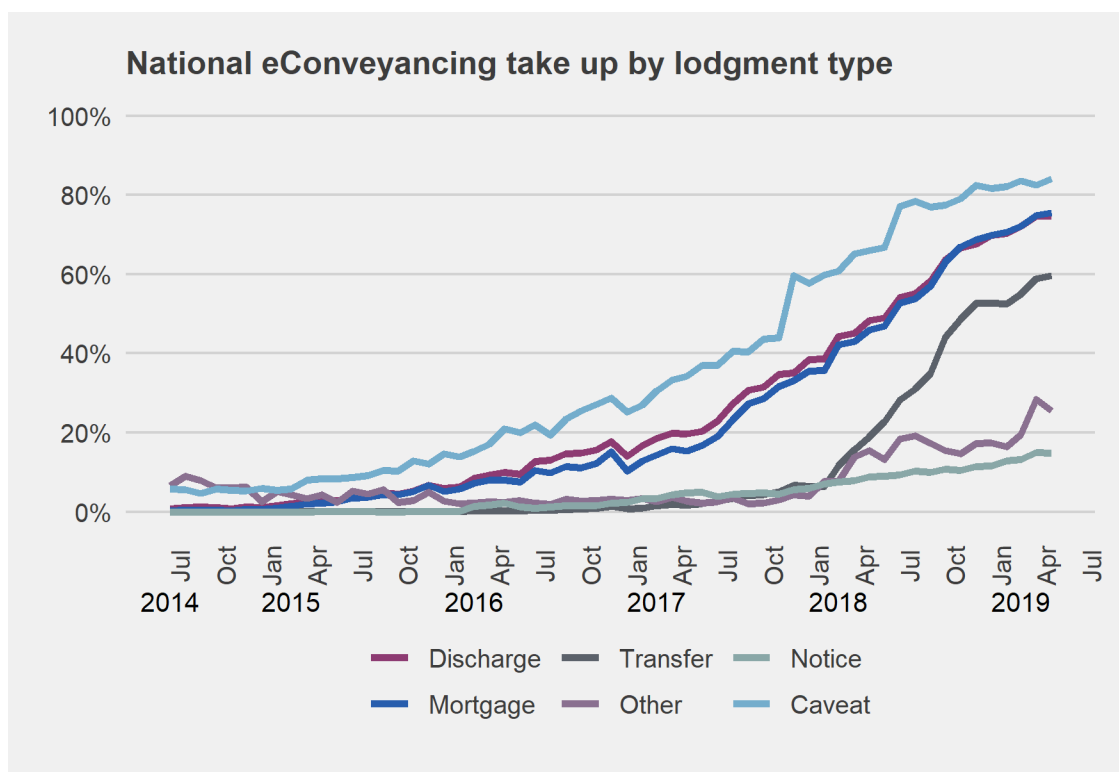


Figure 2 - National eConveyancing take up by lodgment type

3.40 The following chart shows the take up of all dealings by jurisdiction over time. Take up increased as mandating was announced in the three jurisdictions for transfers, while take up remains significantly lower in SA (where mandating for transfers has not occurred) and QLD (where no mandating has occurred). Another factor impacting take up in QLD is the relatively low fees charged for conveyancing in the paper environment and the impact of the additional eConveyancing fees on competition.

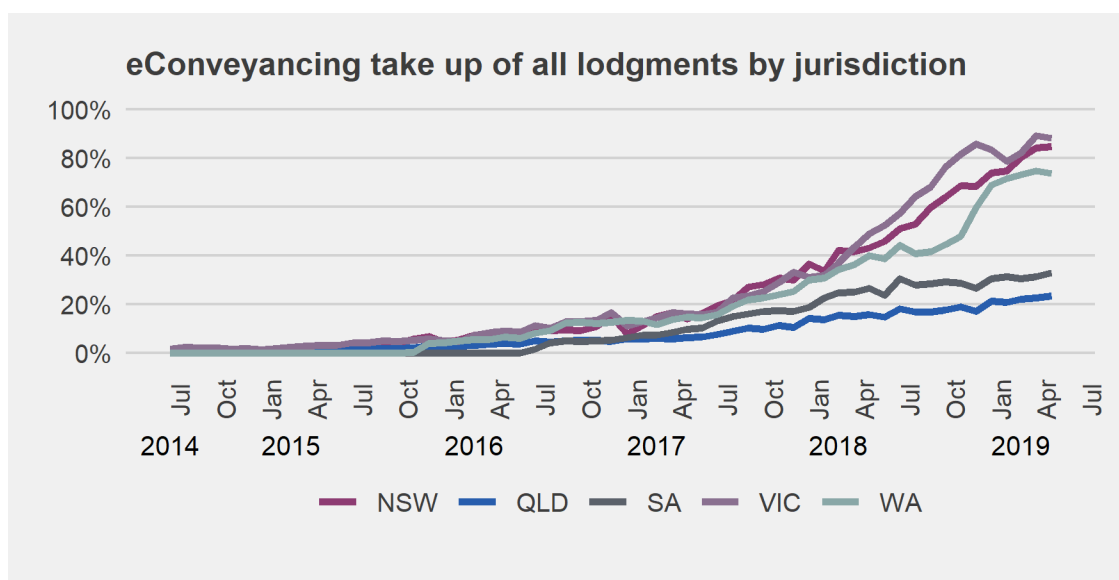


Figure 3 - eConveyancing take up by jurisdiction (all lodgment types)

- 3.41 The following chart shows the take up of transfers by jurisdiction over time. Take up increased as mandating was announced in the three jurisdictions while take up remains significantly lower in SA and QLD.

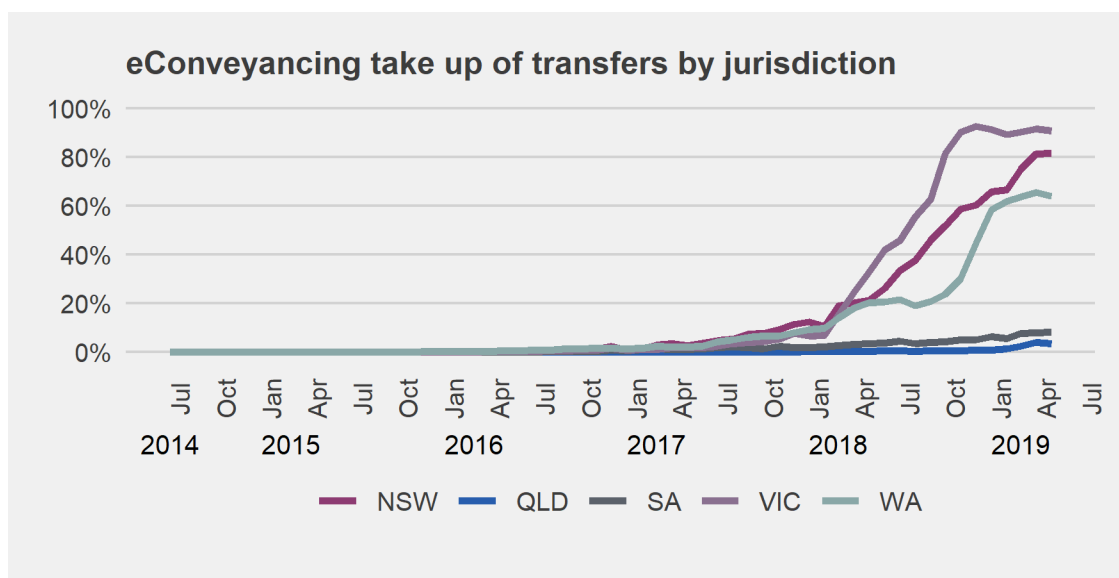


Figure 4 - eConveyancing transfer take up by jurisdiction

- 3.42 Progressive mandating of mortgages occurred across WA, VIC, NSW and SA over an 18 month period between August 2016 and February 2018. This drove take up (shown below) to around 40% in these jurisdictions. QLD take up also rose with a lag, possibly due to nationally operating lenders also switching processes in QLD for consistency within their operations.
- 3.43 Take up of mortgages in VIC, NSW and WA continued to grow from around 40% to between 80% and 98% in line with their mandate driven transfers take up. In SA and QLD (where transfers are not mandated) mortgage take up has plateaued just above 40% and 30% respectively.

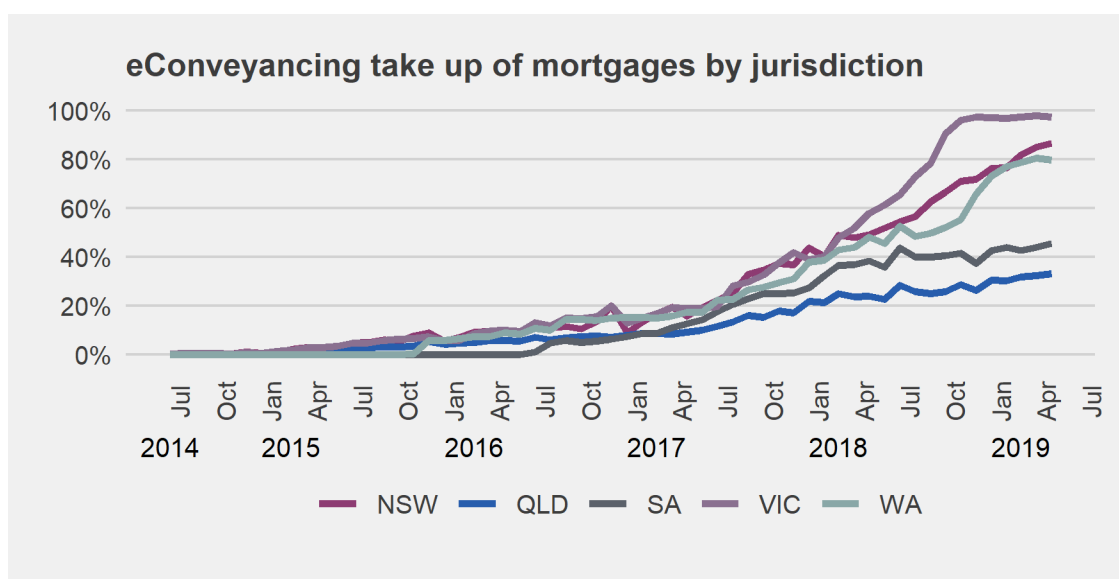


Figure 5 - eConveyancing mortgage take up by jurisdiction

3.44 The discharges take up shown below matches that of mortgages, which is unsurprising given they had almost identical mandating dates.

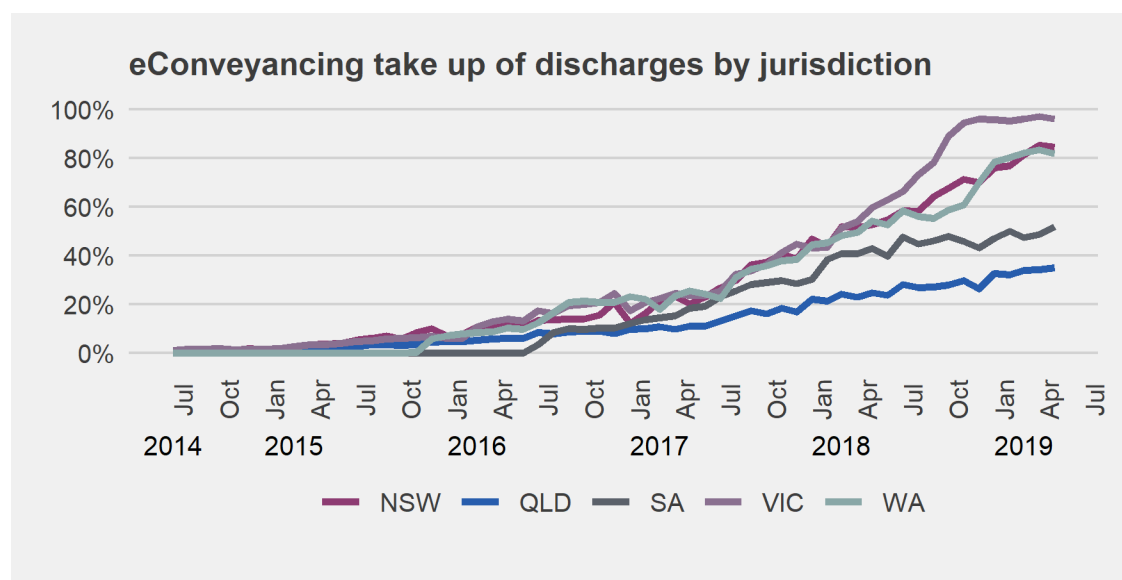


Figure 6 - eConveyancing discharge take up by jurisdiction

3.45 While we have provided the data for caveats by jurisdiction for completeness, it is noted that this represents approximately 2% of all dealings. The steady growth in take up followed by sharp spikes to very high levels in VIC and NSW aligns with caveat mandating in December 2017 and July 2018 respectively. WA which mandated caveats from December 2018 shows a similar pattern but only reaches 50% take up.

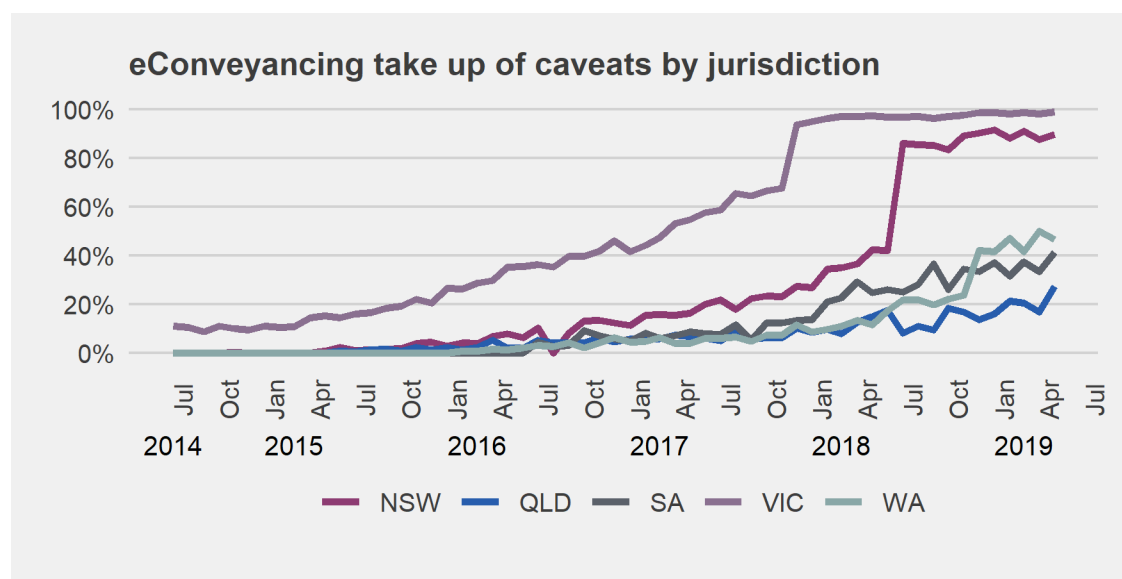


Figure 7 - eConveyancing caveat take up by jurisdiction

- 3.46 In the following chart WA data indicates priority/settlement notices are not used whilst in SA all priority notices are lodged directly with the registry via an alternate electronic channel. While we have provided the data for notices by jurisdiction for completeness, it is noted that this represents approximately 3% of all dealings.

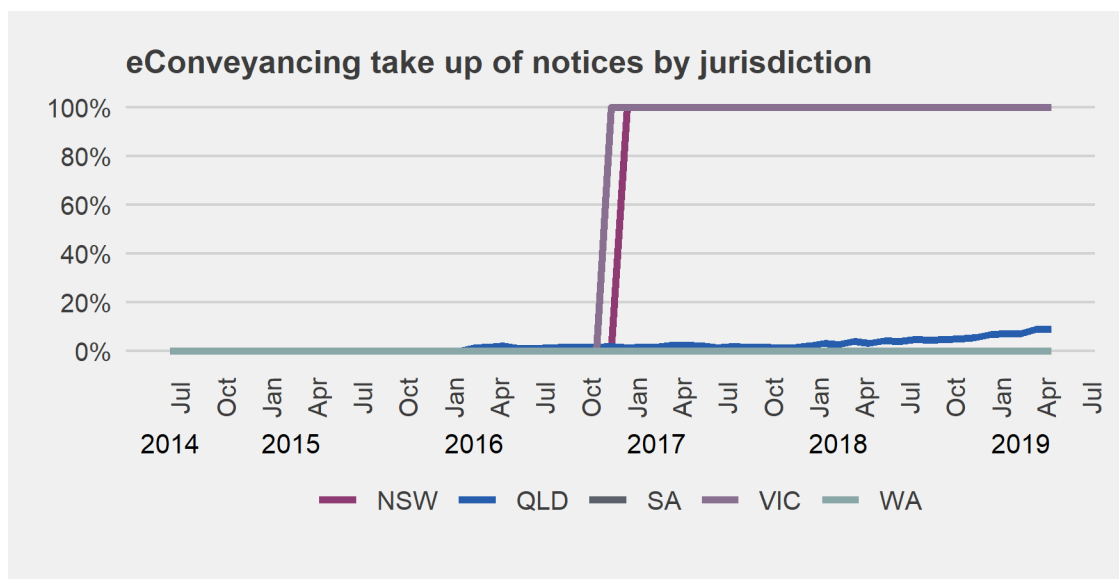


Figure 8 - eConveyancing priority/settlement notices take up by jurisdiction

- 3.47 The following chart has no data supplied for other dealings from NSW and QLD. While we have provided the data for other dealings by jurisdiction for completeness, it is noted that this represents approximately 4% of all dealings.

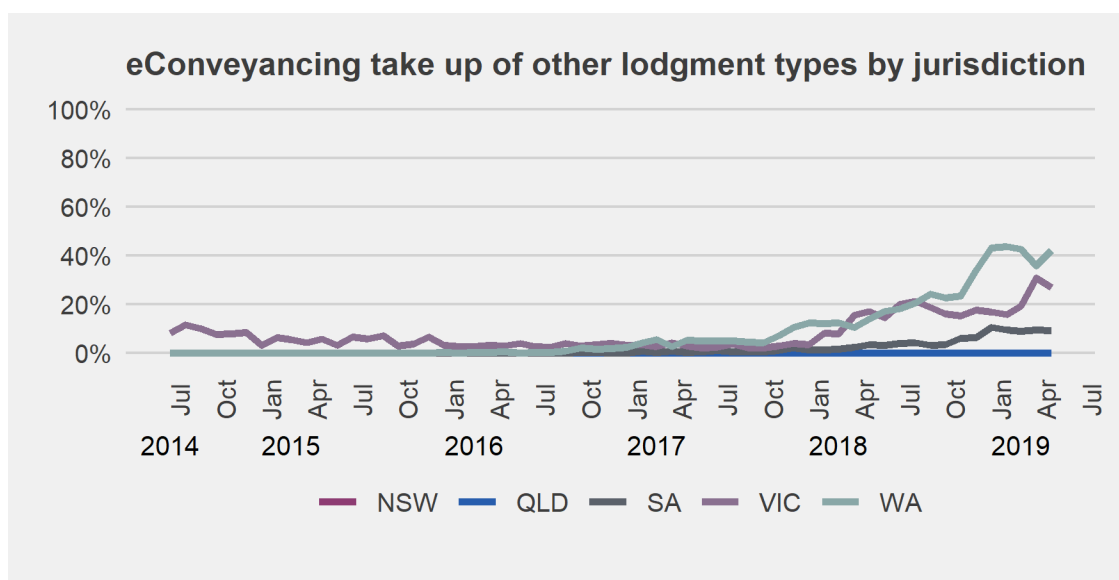


Figure 9 - eConveyancing other lodgment types take up by jurisdiction

Options to improve and barriers to take up

- 3.48 It is apparent that mandating has a very significant impact on eConveyancing transactions including settlements, with evidence of lower take up in jurisdictions that have not mandated.
- 3.49 In jurisdictions where take up has not reached a critical mass a very high proportion of eConveyancing interactions do not proceed ie subscribers revert to a paper process making it unattractive for practitioners to invest time and resources in the new system.
- 3.50 Given the length of time eConveyancing has been operational it seems unlikely that take up will improve substantially without mandating or provision of significant incentive to practitioners.
- 3.51 Previously practitioners have raised the issue of conflicts of interest when governments that were part owners of PEXA mandated use. With the sale of all government holdings in PEXA this issue no longer exists. In our consultative process with government regulators including those responsible for the shareholdings in PEXA, we asked whether any there had been any influence exerted by the shareholders on registrars to mandate. All of the shareholders and the registrars told us that this was not the case.
- 3.52 Other barriers identified in the survey (Appendix I) include lack of skills in practitioners, perceived lack of security and system complexity. Conversely enablers included ease of use and confidence in the security of the system.
- 3.53 While the lack of competition was considered a moderate barrier to take up, we note that practitioners did not want to learn more than one ELNO system. We also note that stakeholders do not want an interoperability model that increases costs, risks, or liabilities.
- 3.54 The barriers to take up that were assessed as moderate to high (on a scale of 0-5) in the survey are listed below.
- Lack of skills in practitioners (3.58)
 - Perceived lack of security (3.49)
 - Electronic fees and costs (3.38)
 - Insufficient training for change process (3.22)
 - Complexity of electronic system (3.16)
- 3.55 Two other potential barriers were assessed by survey respondents as having less impact (on a scale of 0-5) on the take up of electronic conveyancing. They were:
- Lack of competition (2.88)
 - Exclusion of purchasers and sellers directly interacting (2.42)
- 3.56 Respondents were also given the opportunity to specify other barriers to take up. The free text comments mostly reinforced the quantitative responses with explanatory comments, but some additional matters were raised.

3.57 We have provided verbatim comments on these additional matters below grouped under relevant headings:

Not wanting to learn – resistant to change

- *I believe many Solicitors/Conveyancers are unwilling to change well established practices unless forced to do so.*
- *People hate change*
- *Those who have not used the platform are scared to start*
- *Some older practitioners are reluctant to change, which is frustrating*
- *Resistance to change on the part of practitioners*
- *practitioners have had plenty of time to learn. they will inherently wait until the last minute- practitioners prefer the total control method*
- *Many barriers are perceived rather than real, conservative industry with no catalyst to adopt*
- *I think there are a number of 'older' practitioners who are happy to continue with the manual transactions, but for me in a remote regional area , electronic is wonderful because I don't have to get city agents or worry about things getting lost in the mail - only complaint is banks leave it a bit last minute*
- *We have transitioned well to electronic conveyancing, however we are finding a lot of resistance from other solicitors - they are not registering due to fear of change*
- *The main reason is if just one party is not on the ELNO network, then the Transactions where the other party is not willing or able to transact electronically whole transaction is required to be in paper*

Ideologically opposed

- *It is an intrusion on basic legal right to transact the sale or purchase of a property, often the largest transaction a person will conduct*
- *You deny the right of the owner to deal with his or her or its property*
- *This is a fundamental breach of human rights in the western world*
- *When I retire i will not be able to manage my own real estate*

Inefficient

- *System costs more to use and takes more time of principals than paper system.*
- *Significantly increased time for completing tasks*
- *... lack of appetite to change (because the econveyancing systems do not offer sufficient benefit /efficiencies over existing paper processes to warrant significant investment required to change processes*
- *lack of certainty about when the transaction is completed - lodgment of documents is not simultaneous with payment/receipt of consideration and this causes anxiety and confusion for clients*
- *You cannot get ahead in a transaction, because you are dependent on the activity of others*

- *Bank staff lack training and generally response time is about same as what it was before the PEXA intranet site*
- *Communication with the big banks is difficult when they are discharging. I find they have not adapted their systems and have so many teams that you get transferred between, especially in business banking, that make the process of getting settlement dates and invitations accepted quite difficult*
- *electronic conveyancing can be relatively inefficient compared to paper processes for larger users (particularly for off-the-plan sales, and complex transactions). It is a retail system, not well designed for institutional users*
- *Failure of Lenders to transact within participation rules, eg finalising preparations as late as 5minutes before settlement time. Some firms are then unable to sign off straight away, and this ties practitioners to the workspace sometimes for the whole day*
- *lack of response by the banks who do not meet their agreed service level agreements is the biggest turn off for me*
- *Banks accepting the uptake of electronic conveyancing but not upholding the Transfer guidelines & deliberately tardy most of the time to the detriment of the clients*
- *The biggest barrier is lack of actual benefits. Electronic settlements take longer, are more difficult and roll over meaning there's no certainty of settlement. The consumer is being impacted and I've had to charge higher fees*
- *there are no timeframes for action and requirements to be met*
- *The biggest problem is the lack of communication with banks and banks not doing what they are supposed to do when they are supposed to do it*

Consistency/complexity

- *Lack of consistency across jurisdictions*
- *Complexity associated with keeping up to date with rules/mandates across jurisdictions*
- *Lack of clarity between interaction of verification of identity, verification of authority and client authorisation rules"*
- *Lack of commitment by registrar to making transition to digital over a set period*
- *Lack of consistency across jurisdictions is a barrier to uptake. Change management - more than just communications and training - is also an area which should have had greater attention. Finally, lack of mandates for e-conveyancing impacted the uptake. Where mandates exist, uptake is high*
- *Unable to process all types of documents required for settlement*
- *Shifting of risk to practitioners to verify correctness of documents which should be checked and verified by the Land Registry*

3.58 All of the enablers identified in the survey question were assessed as moderate to high (on a scale of 0-5). They are listed below.

- Timeliness and ease of lodgement (4.05)
- Timeliness and ease of settlement (4.04)

- Ease of use (4.04)
- Confidence in the security of the system (3.90)
- Integration with existing systems and processes (3.84)
- Ability to settle at variable times (3.70)
- Reduced requirement to coordinate settlement meetings in person (3.69)
- Demonstrable security of documentation eg fewer lost titles (3.58)
- Training materials (3.29)
- Competition between ELNOs (3.19)

3.59 Respondents were also given the opportunity to specify other enablers to take up. We have provided verbatim comments from survey responses below. Some relevant comments are also included from the submissions to the Issue Paper.

Mandates

- *Electronic Mandates will have the most powerful effect on uptake*
- *Mandating*
- *I have now conducted between 200-300 electronic settlements in South Australia We are pleased with the process and wish that it could be mandated in all states today*

Fees

- *Variable cost for paper and electronic*
- *The availability to transact in paper will always impact the use of the electronic platform. Also, fees are much less in the paper based environment*

Efficiency

- *Ability to use a single digital certificate across all ELN*
- *The variable times is a nightmare. Banks need to be held responsible for settling on time. People are moving in to these properties and need to know when they can move in. Banks need to be more responsible*
- *Electronic conveyancing is a very good idea if everyone do their bit prior to settlement, the same timeline as per paper settlement - not 2 minutes prior to settlement which is very stressful! Electronic conveyancing should minimise if not mean fail proof settlement - but sometimes time is just not the essence. They just let it roll until the next time - so frustrating*
- *Education in Security is important for uptake*
- *banks seem to think they can sign off at last minute. sometimes they dont sign off until after the scheduled settlement time and they seem to think this is okay. Its not okay, our clients are sitting in removal trucks and paying an hourly rate*
- *again the banks need more staff to make sure they sign off day prior to settlement and confirm monies*

Consistency/complexity/security

- *Demonstrable security of documentation eg fewer lost titles - the removal of titles in SA has streamlined the settlement process, however adding additional requirements to ensure right to deal in its place has cause confusion. Other jurisdiction continue to require titles or are in a phasing out process only adding further complexities to the process, particularly in cross border transactions*
- *Priority Notices were introduced to provide security in light of no duplicate title, however the financial institutions undertook a risk assessment and determined this to be unnecessary. working together to ensure security for all parties is the best way forward however each part of the industry continues to work in silos*
- *Stricter participation rules requiring preparations to be finalised earlier on settlement day or the day prior. Recently I could not attend a funeral because of PEXA settlements, if they had been paper I could have finalised the day before and been free to attend*

Support

- *prompt accessible support when things go wrong (not waiting for 1hour + on the phone for a call back) and more stringent timeframes for banks in particular completing their tasks*

Regulatory framework

- *A more robust regulatory framework needs to be in place:*
 - *We do not have national standards and policies under ARNECC, though this has been the intent*
 - *We need a regulator to have the ability to understand the impact on cost and customer outcomes*
 - *And the regulatory framework needs to be through a body with the mandate for enforceability for areas such as participant liability and security*
 - *Standards and security matter, particularly in an inter-operable world*
 - *Regulators should have the ability to create price, platform and payment standards and transparency*
 - *Participants should have the standards and transparency to keep costs down and maintain the quality of customer outcome*
 - *Security and controls in a multi-ELNO space needs to be across the market, not just bi-lateral between a participant and an ELNO*

Interoperability

- *In jurisdictions where it is mandatory this question is not really applicable. The biggest issue that will affect the daily experience for users is interoperability. This must be addressed urgently*
- *interoperability considerations*

4.0 REGULATORY FRAMEWORK

Current framework

- 4.1 COAG's agreement to establish an eConveyancing system and the functionality that it would include is described in section 3.0.
- 4.2 The regulatory framework to governance of the system included the new ECNL and existing legislation at the national level for financial regulation, competition and consumer protection and privacy. State and territory legislation also formed part of the regulatory framework especially in the collection of duties by revenue offices and in certification of conveyancers and legal practitioners. In some cases, it also provided additional privacy requirements.
- 4.3 The ECNL covers the regulatory framework for the lodgement of title information very well. It created ARNECC as the special purpose entity to develop common requirements such as the MOR and the MPR which form the basis of the Operating Agreements between each Registrar and the ELNOs.
- 4.4 The land titling regulatory arrangements are robust and comprehensive and ARNECC has the most appropriate skill set to manage these requirements now and in the future. There do not appear to have been any reports of significant failures in land title regulation in eConveyancing to date although constant vigilance will be required as cyber-attacks grow more sophisticated.
- 4.5 The existing arrangements worked reasonably well when the initial development of the eConveyancing system commenced with NECDL and was subsequently completed when PEXA was formed. The initial system was described by ASIC when granting relief from the need to hold an AFS licence as a special-purpose entity set up to initiate and manage the National Electronic Conveyancing Scheme. It was initially wholly government-owned and remained in part government-owned until early 2019.
- 4.6 All involved had a good understanding of government expectations with respect to the system and the regulatory requirements. Governments generally have a low appetite for risk when developing systems that impact on citizens. Reputational risk is an important consideration. Minimising development costs to ensure profitability is not a driver in the development of government systems.
- 4.7 PEXA has become a fully commercial entity with no government ownership. Similarly, the new operational ELNO, Sympli, and LEXTECH which has achieved category one approval as an ELNO, are commercial entities.
- 4.8 PEXA has historically performed some regulatory functions including whole of industry coordination of system change in collaboration with ARWG, and oversight of subscribers. With this change of PEXA to a fully commercial entity and the entry of a competitor, these functions need to move to an independent regulatory entity. Similarly, system risk management and stakeholder relations will need to be reconsidered in the light of this change.
- 4.9 The existing regulatory arrangements need to be explicitly identified for the future. While the arrangements for land titling purposes are robust and fit-for-purpose, the regulatory arrangements concerning financial settlement and competition (both horizontal and vertical) and the arrangements for revenue

offices need to be more clearly identified in an eConveyancing system no longer owned by governments.

Future Requirements

- 4.10 There is currently a view in the market that it is a reasonably simple process to operate an ELN, and we believe there is a lack of understanding of the complexities, risks and costs. While it is the responsibility of applicants to investigate and understand the requirements when applying for any government licence, we believe that a more overt statement of the full regulatory requirements and a simpler mechanism for enforcement of requirements will better protect the integrity of the eConveyancing system in the future.
- 4.11 The Operating Agreement between the ELNOs and the registrars is the key to commencing operations as an ELNO; registrars are the gatekeepers.
- 4.12 Category one approval is required before ELNOs can progress to category two approval and implementation of an operational system. Before this approval is granted it is important that the applicant provides evidence that it understands all the relevant regulatory requirements, and the likely costs and complexities of connections to and relationships with all participants in the system. This includes registrars, revenue offices, RBA, ASIC, ACCC and financial institutions.
- 4.13 Before an Operating Agreement for transfers is signed in any jurisdiction, all regulatory approvals should be obtained. This would include the following:
- Approval from RBA that financial settlement system proposed meets RBA requirements
 - Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments
 - Approval from all appropriate revenue offices
 - Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law
 - Confirmation from financial institutions that appropriate payment connections are in place
- 4.14 If registrars believed it was reasonable for new ELNOs to start with lodgement of stand alone registry documents, it may be possible to have a staggered start to operations with lodgement of single party transactions only. All regulatory approvals would need to be obtained before any transfers of titles commenced.
- 4.15 National regulators need to have their requirements recognised in the approval processes and the Operating Agreements. Suitable enforcement provisions and penalties for non-compliance need to be agreed.
- 4.16 The recommended revised approval requirements are described in more detail in section 6.0 of this report.
- 4.17 The national regulatory requirements for privacy are identified in the MOR but the additional jurisdictional requirements are not transparent. Where they exist, they form part of the confidential conditions in the Operating Agreements but need to be explicitly identified to the participants.

- 4.18 The regulatory requirements for legal practitioners and conveyancers are identified in the MPR and do not require specific changes. However, we do suggest that future certification of practitioners should require a reasonable level of competence in operating in an electronic environment and a good understanding of cyber security.
- 4.19 As discussed in section 5.0 of this report, the ECNL opened the way for competition but did not provide any regulatory guidance on the arrangements for competition. This is in contrast to the regulatory guidance provided for competition in clearing Australian cash equities in relation to the Australian share market.
- 4.20 The three national financial regulators (RBA, ASIC and APRA) and the ACCC carefully considered all of the issues associated with competition and developed the Minimum Conditions for Safe and Effective Competition. The regulations for competition in the eConveyancing environment similarly need to be agreed by the national regulators before any models of competition including interoperability are determined.
- 4.21 The technology environment has changed significantly since the IGA was signed and the system development commenced. In particular the cyber security environment has changed and the eConveyancing platform with its high value payments is a potential target. While to date losses have not been critical a strong focus on this issue will be required in the future. It seems likely that practitioners entering the land transactions will be most at risk, and ELNOs will need to continue to develop systems to minimise the risk. In addition, there will need to be a strong focus from the financial institutions to assist in developing better processes for entering and verifying bank details to alleviate risk.
- 4.22 For the future, regulatory guidance, governance and management of eConveyancing need to be more encompassing to achieve the original objectives of national consistency and industry efficiency identified in the national partnership agreement to Deliver a Seamless National Economy, the originating policy for eConveyancing.
- 4.23 The IGA records that in July 2008, COAG agreed that there should be a new single national electronic system for the settling of real property transactions in all Australian states and territories. The IGA will need to be reconsidered in the light of subsequent developments and current arrangements.

Proposed objectives

- 4.24 The national partnership agreement to Deliver a Seamless National Economy sought to assist in the achievement of the following outcomes:
- Creating a seamless national economy, reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions
 - Enhancing Australia's longer-term growth, improving workforce participation and overall labour mobility
 - Expanding Australia's productive capacity over the medium-term through competition reform, enabling stronger economic growth

- 4.25 Although stakeholders provided mixed feedback concerning the degree to which eConveyancing has reduced costs in the conveyancing market, it appears likely that benefits will improve over time as the transition costs are absorbed and take up of eConveyancing becomes more universal.
- 4.26 The degree to which unnecessary and inconsistent regulation has been reduced is uncertain. However, with the availability of sufficient resources for a national focus and the setting of a national agenda for improvement in those areas of priority for participants, it is likely that further progress can be made.
- 4.27 Conveyancing practitioners that are through the transitional stage and are handling a significant volume of transactions believe that their productive capacity has increased.
- 4.28 The proposed objectives for a comprehensive regulatory framework for the future that meets COAG aims include:
- Minimise risk to titles security
 - Minimise risk to financial settlement
 - Maximise service quality and industry and government productivity
 - Minimise cost (to consumers and taxpayers)
- 4.29 The governance framework to date has been not been coordinated in a systematic manner. While governance roles are assigned in the MOR and the MPR, they relate in the main to the land titling components of the system
- 4.30 Proposed objectives for a governance framework include the following:
- Establish a regulatory and governance body that works with all regulators and industry participants
 - Ensure all appropriate regulators are able to have input into governance of the eConveyancing system in an efficient and effective manner
 - Ensure the change process for industry is well managed and appropriate to industry capacity
 - Develop a national agenda and roadmap to address issues of importance to all participants including regulators, subscribers and ELNOs
 - Monitor and report on eConveyancing
 - Provide guidance and direction to ELNOs and participants on matters identified by regulators
 - Coordinate with regulators and industry on enforcement matters
- 4.31 Specific governance areas and options for the future are considered below.

Financial payments and settlement

Current status

- 4.32 The second reading speeches introducing the ECNL in jurisdictions named RBA and ASIC as financial regulators relevant to eConveyancing, but they are not specifically named in the MOR. We are uncertain whether the roles need to be identified in the ECNL as both regulators have their own legislation that identifies

their responsibilities, but the requirements for certifications from these regulators (and other relevant regulators) should be clearly identified in the MOR, referencing the relevant regulator. In the case of the RBA, we were advised this should be clarified to note the RBA's certification is in relation to the settlement arrangements between payments service providers that are members of a property settlement arrangement, rather than the property settlement arrangement itself.

- 4.33 The settlement model developed by PEXA, following the design work by NECDL, utilised the RBA's Reserve Bank Information and Transfer System to settle obligations between financial institutions that joined PEXA's property settlement arrangements. RITS is Australia's settlement system, which is used by banks and other approved institutions to settle the obligations that arise between them as a result of providing payments services to their customers. RITS would be an appropriate system for other ELNOs to use for extinguishing obligations between financial institutions that provide payments services as part of an ELNO's eConveyancing service. The RBA has confirmed that it is willing to talk to potential providers of eConveyancing services (potential ELNOs) to discuss payments settlement options through RITS in the context of the services the ELNO plans to offer.
- 4.34 The RBA describes the current Property Settlement Batch as follows: *The batch administrator, Property Exchange Australia Limited (PEXA Ltd), manages and submits to RITS batches of multilaterally netted interbank obligations arising from property transactions. Many such batches may be submitted to RITS in a given day. Funds are initially reserved in the ESAs of paying participants in the batch while title changes are lodged with the relevant land titles office. After acceptance of the title lodgement, PEXA Ltd will request settlement of the batch.*
- 4.35 DMC understands Sympli also proposes to use the RITS settlement system.
- 4.36 ASIC reviewed PEXA's payment process whereby a financial institution agrees to commit funds as instructed by their client to another financial institution or to other organisations or individuals and noted that PEXA "*had a robust system in place to manage mistaken payments, cooperation and returns*". It subsequently granted relief to PEXA from the requirement to hold an Australian financial services licence.
- 4.37 We are not aware of the details of Sympli's proposed payment process, but we understand it is proposed to be similar to PEXA's.
- 4.38 The current PEXA system utilises bank account details input by subscribers to process payment transactions which are often of very high value in a property transfer. The account number is not verified by the financial institution with an account name, and the onus is on the individual, and then the subscriber, to provide the correct number.
- 4.39 This is a significant additional risk from the previous use of bank cheques where names on cheques are matched with the account at the time of deposit. Currently there are no other techniques offered such as micro deposit validation (as used by PayPal) to validate before financial settlement occurs. Nor is there currently a requirement for ELNOs to assist in resolution where an incorrect payment occurs as the MOR do not address financial payments and settlements.

- 4.40 We understand that ASIC is considering what processes for regulation of ELNO eConveyancing payment systems may be applicable for the future.

Key issues

- 4.41 Currently no formal oversight by the RBA or ASIC is identified in the MOR, and the requirement to meet these regulators requirements for financial payment and settlement systems is not identified in the approval process to become an ELNO.
- 4.42 While any business requesting a government contract or licence should be fully aware of the regulatory requirements for the business they propose to enter, we note that some parties that have expressed interest in becoming an ELNO do not have experience in the management of high value electronic payments. These parties appear to have knowledge of the registrars' requirements for land titling transactions but not necessarily of RBA or ASIC requirements.
- 4.43 ARNECC does not have the necessary skills to provide oversight of the financial payment and settlement processes, and it was clear when the ECNL was introduced that registrars would not be the financial regulatory authorities.
- 4.44 Most stakeholders now believe that stronger financial governance and oversight is required. Key concerns are mistaken or fraudulent payments, and lack of efficiency in financial institutions in payment processing.
- 4.45 The Law Council of Australia has publicised its submission on the IGA Issues Paper on its website. We note the following *"the Law Council regards the regulation of financial settlement as a key part of the new regulatory framework"*.
- 4.46 Under the existing Operating Agreements there are no enforcement tools available to ensure high quality standards in financial payment and settlement. The Agreements have a power to direct but it is not clear that this power relates to financial systems.
- 4.47 We believe that the use of unverified bank account numbers to authorise payments is too great a risk for the individual buyer or seller. It creates a risk that was not present in the paper environment when bank cheques were used. We know from experience to date that misapplied or unapplied payments occur daily. Although the probability of this occurring for any one payment is low, the consequence is severe for the homeowner if the value of the payment is the purchase/sale price of the property.

Objectives

- 4.48 We have proposed the following objectives for financial governance standards and processes.
- Identified and published approval processes and standards set by financial regulators for ELNO financial payment and settlement systems that are fit for purpose
 - High rate of compliance by ELNOs with standards with regular review and recertification if required at an agreed time period
 - Improvement in performance and reduction in risk facilitated by regular consultation between the financial regulators and ARNECC, and protocols established for remedial action where required

- A national focus on safe, efficient and reliable financial systems, minimising risk to homeowners and providing clear statements of liability
- Availability of residential guarantee for homeowners and of dispute resolution protocols for professional developers and investors

Gaps

- 4.49 The current stated governance and regulatory framework is not clear on responsibility for establishment and governance of appropriate financial payment and settlement systems oversight.
- 4.50 The existing financial systems have been developed in single ELNO environment under government ownership. The implications in a commercial multi-ELNO environment need to be considered and managed. As discussed earlier, in designing systems that impact on citizens, Governments typically have a low risk appetite. The eConveyancing platforms are licenced by governments and in some cases are mandated. While commercial operators are able to minimise costs to drive profitability, in this environment it cannot be at the expense of additional risk for homeowners.
- 4.51 A governance process to ensure minimum standards to provide and maintain fit-for-purpose systems to guide current or future ELNOs does not currently exist. Such a process would need to be developed in consultation with financial regulators, ARNECC and ELNOs.

Options/Opportunities

- 4.52 The eConveyancing framework can leverage off existing regulators to provide expertise in addition to that provided by ARNECC. It already relies on the certifications provided by regulators responsible for certification of legal practitioner and conveyancers.
- 4.53 As the gatekeepers to the system ARNECC should receive advice from appropriate regulators on any directions to be given to ELNOs in relation to financial settlement. Consultation with financial institutions would also be beneficial in seeking system improvement and risk minimisation.
- 4.54 In the MOR, the RBA's role as regulator relevant for eConveyancing for the final financial settlement should be formally noted and some guidance material from the RBA could be included in the requirements for category one approval to be an ELNO.
- 4.55 The MOR should identify the appropriate process for certification of the financial payments system that sends instructions for settlement. Current discussions with ASIC (which reviewed PEXA system initially) should be progressed to determine the most appropriate process and the minimum standards. As a focus the standards should minimise any risk to homeowners.
- 4.56 The MOR should require ELNOs to continually assess and improve their financial systems having regard to any aspects that allow losses or inefficiencies to occur. In relation to the use of bank account numbers we note the changes regulated in the United Kingdom to match names with account numbers to minimise losses. Other techniques such as micro deposit validation may be useful.

- 4.57 Because the federal regulators have their own legislation, we are uncertain whether changes to the ECNL are necessary. If it is considered that changes to the ECNL are necessary then, by agreement with RBA, there should be direct reference to RBA legislation for regulation of financial settlement, and by agreement with ASIC, there should be reference to ASIC for determination of the process of regulation and certification of the payment system.
- 4.58 The following changes to the MOR are proposed:
- Modify the MOR to enact the above changes
 - Require ELNOs to have a mistaken/fraudulent payments code
 - Include direct reference to RBA as financial settlement regulator and include the requirement for ELNOs to have their settlement systems certified as fit-for-purpose by the RBA
 - Include direct reference to ASIC legislation for regulation of payment systems and include any regulatory requirements or processes specified by ASIC
 - Consider a requirement for ELNOs to develop a code similar to the ePayments Code to encompass mistaken/fraudulent payments
 - Consider developing a community of practice in eConveyancing to ensure identification of emerging threats and opportunities to improve systems to enhance consumer and subscriber protection
- 4.59 Refinements to ELNs and to financial payments and settlement processes are a matter of good governance rather than formal regulation. It will require regular assessment, as well as an immediate action plan when a major loss occurs. It is likely that the immediate action will be agreed with the registrar in whose jurisdiction the loss occurs.
- 4.60 A national focus on risk management and system improvement should form part of the ongoing oversight process to ensure ELNs remain fit-for-purpose in changing conditions. An annual agenda for management of risk in financial systems and efficiency improvements should be agreed with stakeholders and actions agreed with ELNOs and other stakeholders.

Stakeholder relations

Current status

- 4.61 There is currently no stakeholder relations committee for regular consultation between ARNECC and subscribers to the ELN (conveyancing practitioners and financial institutions), although there were regular meetings with stakeholders when the ELN was being developed.
- 4.62 While it is recognised that the ELNOs are also stakeholders they have individual relationships with registrars and there may be discussion in relation to contracts that are not in the public domain.
- 4.63 The IGA at 5.2.3. requires that the Parties agree to *“collaborate in good faith to ensure that all Stakeholders continue to be consulted in an effective manner in connection with the implementation and operation of the regulatory framework for National E-Conveyancing.”*

- 4.64 The IGA also noted that NECDL, the development body, was charged with *“liaising with all relevant Stakeholders in the creation of the System so far as practicable.”* (page 5). We note that its successor, PEXA, also played a key role in stakeholder consultation and engagement.
- 4.65 In the IGA - *“Stakeholders means those persons, organisations, groups or professions whose working procedures and/or conveyancing transactions will be impacted by National E-Conveyancing and includes NECDL.”* (page 8)
- 4.66 The ECNL does not specifically reference stakeholder consultation but it creates the MOR and the MPR which both reference consultation.
- 4.67 ARNECC stakeholder engagement policy and procedures provide a clear statement of ARNECC’s commitments, policy and procedures for including the conveyancing industry stakeholders and the participants in developing and maintaining the regulatory framework for completing conveyancing transactions electronically and driving take up of the electronic conveyancing environment.
- 4.68 It lists the following components:
- Commitment - ARNECC is committed to open, accountable, contemporary and responsive engagement in the best interests of all stakeholders and participants in the property conveyancing industry
 - Policy - ARNECC has adopted the seven COAG principles of best practice consultation
 - Procedures - ARNECC engages with industry stakeholders and participants through:
 - *Consultations it initiates itself*
 - *Forums and events arranged and conducted by industry*
- 4.69 Further to the stakeholder engagement policy, ARNECC’s charter allows it to establish working groups to provide it with advice and assistance:
- The Australian Registrars Working Group (“ARWG”), made up of land registry officers from each participating jurisdiction, is the principal source of advice and assistance to ARNECC
 - The Charter also states ARNECC considerations may be informed by any source of its choosing
- 4.70 The MOR provides the following requirements with respect to consultation
- In relation to change management ARNECC requires the ELNO to (page 6) *“communicate and consult on proposed changes with parties affected by the change”*
 - In relation to amendments to the Operating Requirements the following applies (page 62) *“Amendments with prior consultation - Any amendment to these Operating Requirements must be the subject of good faith consultation by the Registrar with the ELNO before the amendment comes into effect.”*
- 4.71 The MPR and guidance notes include compliance with participation rules, eligibility criteria, the roles of subscribers, general obligations, obligations regarding system security and integrity, amendment of participation rules, restriction, suspension and termination, compliance and prohibitions.

- 4.72 MPR Schedule 2 – Amendment to Participation Rules Procedure details both amendments with prior consultation and amendments without prior consultation.
- 4.73 The existing stakeholder consultation processes for changes to the MOR and MPR are transparent and thorough, with clear advice on how to participate in the process. In the most recent comprehensive process for the update from version 4 to version 5, 79 instances (for the MOR) and 19 instances (for the MPR) of stakeholders' feedback were summarised and published on the ARNECC website.
- 4.74 Current practice for changes to the MOR and MPR involves key stakeholder groups being invited to make submissions with all industry participants able to make submissions.
- 4.75 There is an identified complaints procedure which details the communication and investigation process to be followed in resolving complaints.
- 4.76 In accordance with its Stakeholder Engagement Policy, ARNECC conducts consultation with industry stakeholders prior to any substantive change to its publications.
- 4.77 Consultation is conducted on amended versions of:
- Model Operating Requirements (MOR)
 - Model Participation Rules (MPR)
 - MOR Guidance Notes
 - MPR Guidance Notes
 - Smartforms
- 4.78 Consultation is conducted by publishing Consultation Drafts of the relevant documents and setting a time period for submissions.
- 4.79 We note that in addition to nationally focused consultation, registrars in each jurisdiction have ongoing communication with stakeholders on an as required basis. Stakeholders have indicated they would like more face-to-face communication and consultation.

Key issues

- 4.80 The key issues relating to stakeholder engagement were identified from both the face to face interviews and the comments provided in the survey. Stakeholders look to ARNECC to make the arrangements for proper regulation of all aspects of eConveyancing.
- 4.81 Significant numbers of conveyancers and legal practitioners believe they have been required to deal with too many changes in a short period of time and have not had an obvious mechanism to raise these issues with ARNECC. Similarly, stakeholders want a process to identify their needs to ARNECC to ensure that appropriate information, training and assistance is available to industry as eConveyancing grows and develops.
- 4.82 Most stakeholders raised issues concerned with financial settlement practices such as money misdirected, and settlements delayed by financial services providers

- 4.83 Some stakeholders commented that a different governance structure is needed with people dedicated to understanding the industry. This was usually in reference to components of the industry other than land titling. Stakeholders with longer experience remembered that there was regular consultation with ARNECC representatives when eConveyancing was being developed and would like to see regular consultation again.
- 4.84 There may need to be different stakeholder groups for consultation. The financial institutions especially would like to see a national consultation process; in most cases conveyancing practitioners spoke of consultations within jurisdictions although they too reflected on the value of national consultation. Stakeholders requested a committee of representatives.
- 4.85 When asked in the survey - Which skills do you believe are required to provide effective governance and regulation of electronic conveyancing - the following comments were provided:
- *ARNECC is made up of the heads of Land Title Registries. Yet the decisions they are making are having fundamental and detrimental effects on the conveyancing profession and the Australian property market. There must be industry representation in ARNECC.*
 - *The current members understand how to get names on and off titles but don't seem to (sic) concerned with issues such as ELNO's being allowed to compete with conveyancers and lawyers offering consumers services direct. We are deeply concerned about this.*
 - *Understanding of the Conveyancing process from a practitioner viewpoint and listening to practitioner issues and experience.*
 - *Day to day operations of the people who do Conveyancing work. The people who use the system have been completely ignored. It's like someone who's never cooked designing a kitchen!*
 - *ARNECC is not represented by lawyers or conveyancers. The decisions and actions of ARNECC and government do not adequately consider or appreciate the full commercial impact of their actions on Victorian practitioners.*
 - *Most important: A hands on knowledge of Conveyancing itself, the process, what practitioners/conveyancers do and how any change impacts the day to day practice of the industry*
 - *Understanding the process from a practitioner point of view*
- 4.86 From the financial institutions the following skills were required:
- *Understanding stakeholders (change management)*
 - *Stakeholder and change management approach*
- 4.87 In summary, stakeholder engagement appears limited to consultation on substantive changes to eConveyancing framework documents. There is a perception that actions and decisions lack regard for non-titling matters to the detriment of industry productivity and consumer risk. Practitioners believe they have no obvious mechanism to feedback issues to ARNECC eg misdirection of funds, settlement delays, competition concerns, change fatigue.

- 4.88 Stakeholders want a process to identify their needs to ARNECC regarding information, training and assistance. They note that the regular consultation that was present during the establishment of eConveyancing no longer occurs and they believe that national consultation is needed to drive national consistency.
- 4.89 Stakeholders that responded to the survey included practitioners, financial institutions, revenue offices, property owners and integrated software providers.

Objectives

- 4.90 We have proposed the following objectives for stakeholder relations:
- Stakeholder input informs the eConveyancing agenda, roadmap and communication eg improving national consistency, lifting industry productivity, providing industry education
 - Consultation with stakeholders meets COAG principles
 - Regulators regularly seek input from stakeholders on changes to the environment and consider the impacts on eConveyancing and action required

Gaps

- 4.91 Conveyancers consider that ARNECC is not well informed when planning changes or further development of eConveyancing. In particular they believe that the change fatigue experienced by the industry due not only to changes in the eConveyancing environment but also other changes such as the Australian Tax Office new requirements for foreign buyers need to be taken into account when changes are proposed.
- 4.92 Stakeholders believe that changes to the current platform or changes to practice requirements should be agreed where possible with stakeholder representatives and priorities settled before changes are implemented.
- 4.93 There are no regular industry meetings with ARNECC to deal with industry issues and to develop a proactive agenda. In some instances, these issues may be matters that ARNECC can address directly but in other cases it may be that ARNECC facilitates a process with other parties such as the financial institutions or ELNOs for resolution. Stakeholders are asking for regular meetings.
- 4.94 Revenue Offices have no representation at ARNECC to identify their issues and to seek resolution. We understand that they are considering the form that future engagements with ARNECC and the ELNOs should take.

Options/Opportunities

- 4.95 The following should be considered:
- Establish a Stakeholder Committee with ARNECC members and stakeholder representatives nominated by industry including financial institutions and other regulators as appropriate, and agree an ongoing consultation process to develop a proactive agenda for eConveyancing improvement. The Committee's purpose could be to:
 - Consult with stakeholders and agree policies to address issues
 - Set objectives and monitor performance

- Encourage co-operation between ARNECC, ELNOs and other stakeholders in creating efficiency in the industry and ensuring the maintenance of secure and efficient platforms
- Establish regular engagement channels with stakeholders. These could be quarterly initially and be more frequent in time of significant change eg inclusion of a new ELNO or following a significant intrusion event.
- Publish a stakeholder engagement strategy with proposed frequency and scheduling. This should be refreshed annually and would be expected to decrease in frequency as the platforms mature.
- Consult with Revenue Offices to agree a suitable engagement forum

National consistency

Current status

- 4.96 National consistency and the resultant reduction in cost and complexity was a goal of the National Partnership Agreement for a Seamless National Economy, which gave rise to the IGA. However, although conveyancing practitioners have identified areas where they want improvements in efficiency and therefore costs, most operate in one jurisdiction and did not identify inconsistencies between jurisdictions as a significant issue.
- 4.97 When asked in the survey to rate business practices in terms of consistency across jurisdictions, the majority of practitioners rated the identified business practices as moderate consistency with VOI rated as high consistency (see Appendix I). In interview, some commented that national consistency was not important for conveyancers. In WA, consistency of operating hours was an issue as any settlement that gets unsigned close to RBA closing time (2pm in WA) is rolled over to the next day.
- 4.98 National consistency is important for participants that operate nationally particularly the financial institutions, although there are benefits in terms of reduced costs and complexities for ELNOs as well.

Key issues

- 4.99 Participants that operate nationally want a national framework to deliver a simple, consistent experience that is cost effective and operationally efficient for all participants.
- 4.100 Implementation of different business practices such as the National Mortgage Form and the requirements for transfers between spouses were considered inefficient. Revenue offices inconsistent stamp duty processes were identified and there did not seem to be a good understanding of the difficulty of expecting jurisdictions to harmonise stamp duty processes. Participants also raised the current inconsistencies in land policy frameworks and development processes across jurisdictions but again we believe that achieving harmony in these areas might come at a greater cost than can be saved through efficiencies and would be likely to require significant change to government policies and related legislation.
- 4.101 Participants with expectations for an approach that fosters a uniform regulatory approach among all Australian jurisdictions did not appear to be well informed of the changes that would be required in related legislation in each jurisdiction. The lack of any consultation mechanism where the practicality and viability of any proposed national consistency changes could be assessed has left participants somewhat frustrated at the perceived lack of progress. Stakeholders expressed concern about the lack of minimum service level requirements across all jurisdictions.
- 4.102 Responses to the NSW interoperability Directions Paper clearly identify participants concerns that without a national approach interoperability models would be different across the jurisdictions. They are concerned that the introduction of new jurisdictional variations will introduce cost and complexity, and that costs will increase with each different model. Most submissions stated

that participants wanted a national approach to consideration of interoperability models.

- 4.103 They also state that interoperability must deliver simple, consistent and cost-effective outcomes. We believe that it must also fit with national principles of good regulation and must not introduce any additional risk for homeowners.
- 4.104 There is an expectation that there should be a national consistency roadmap with priorities agreed by all stakeholders. Working groups with the appropriate skills should be tasked with the review of the issue and the development of potential resolution. Where the skills required to facilitate discussions in regulatory areas other than those covered by ARNECC, external facilitation skills may be required. This could include financial regulators, revenue offices, market regulators, privacy regulators, practitioner regulators etc. The working groups should determine the costs of any recommended approaches, and project schedules developed. Staff from the relevant regulators may also participate in the working groups.
- 4.105 Financial institutions note that agreed national consistency allows certainty which informs planning and investment. Without such certainty investment is more difficult. They also comment that without national design standards the interoperability model would be different across the jurisdictions. If there are no national standards costs will increase with each version.
- 4.106 Additional resources and a national approach are required to identify priorities and make progress towards national consistency. A body corporate reporting to ARNECC but with skills relevant to the wider regulatory environment beyond land titling would be a suitable mechanism to support the body of work and the focus required.
- 4.107 One stakeholder has requested a nationally consistent approach to additional Operating Agreement conditions, however we believe this is difficult to achieve as the Agreements need to work with existing legislative requirements which are likely to vary between jurisdictions. We agree that this would be worth exploring and we also believe transparency in the conditions will assist stakeholders understanding of other issues that are affected by these conditions eg privacy, price capping.

Objectives

- 4.108 We have proposed the following objectives for national consistency.
- Support the national take up of eConveyancing
 - Explore and promote consistent business practices nationally
 - Promote consistent governance frameworks and (where possible) regulation nationally
 - Measure and report efficiencies realised due to consistent processes

Gaps

- 4.109 As discussed above conveyancing practitioners did not have many areas identified for national consistency with the exception of WA, which wants the same business hours of operation as the eastern states. These are currently truncated due in the main to the RBA operating hours.

- 4.110 Participants with a national focus, mainly the banks and the ELNO(s) want consistent jurisdictional business practices where possible and the opportunity to help set the priorities to achieve this.
- 4.111 There are no nationally focused resources and no process to get ongoing feedback from stakeholders, and there are no timelines set for improvements in consistency issues identified.
- 4.112 While ARNECC can provide expert guidance on land titling matters, there are no clearly identified regulator(s) or guidance for non-title elements. It may be for these matters ARNECC establishes the forums and expert advisors are identified to manage the process.

Options/Opportunities

- 4.113 The following should be considered
- Develop and agree clear national consistency objectives and tasks
 - Identify potential quick wins to generate momentum
 - Utilise stakeholder working groups to drive streamlining initiatives
 - ARNECC to consider how it could encourage smaller jurisdictions to become active in eConveyancing
 - Develop participant consultation forum(s)
 - Allocate more resources to national consistent priorities (potentially from funds raised from users of the system)

Risk and liability

Current status

- 4.114 There are no overarching principles on the management of risk and liability in the eConveyancing environment – eg no additional risk to homeowners as a consequence of the electronic environment. The MOR and the guidance notes detail risk identification and management requirements focused on protecting the integrity of titles registers. To date there do not appear to be any recorded instances of fraudulent or mistaken entries on any of the Registries so that approach can be considered successful.
- 4.115 Where losses have occurred through fraud or mistakes, they have occurred in the financial settlement component of eConveyancing. While it has proven difficult to get definitive data on the quantum of losses, we understand it is a daily occurrence. Many stakeholders could cite instances of occurrence, and there have been some well-publicised cases.
- 4.116 We have also noted other instances of risk and loss through the use of payment systems similar to the eConveyancing payment system. These are covered under the Financial Settlement component of this section.
- 4.117 Previously PEXA was responsible for risk management, but with the shift in the environment from one ELNO to two, there is no regulator charged with managing system-wide/overall risk.

Key issues

- 4.118 The known risks to titles registers are well covered in the regulatory and governance framework in the MOR and the guidance notes, and obligations to manage risk are identified in the MPR. This is good governance. However, there are no requirements in the governance documents to manage the risks in the financial payment and settlement systems.
- 4.119 This has occurred because ARNECC manages the land titling components of eConveyancing but has no role in the regulation of the financial component.
- 4.120 We believe that there should be guiding principles on the management of risk and that the obligation to minimise any risk to homeowners should be paramount. ELNOs are either licenced or contracted by governments to deliver services that impact on homeowners. In the paper system homeowners were protected by the Torrens Assurance Funds and robust banking systems that included bank cheques. While bank cheques were not totally risk free, there were not many recorded instances of losses and banks shared the risk.
- 4.121 In the eConveyancing system a substantial component of the risk has been shifted to property owners and subscribers with the requirement for the use of unverified bank account numbers in the payments system.
- 4.122 No guidance is provided in the governance documents regarding accountability for financial settlement risk although RBA and ASIC were named as regulators in the second reading speech that introduced the ECNL to the parliaments of participating jurisdictions.

- 4.123 We know that cyber risk is increasing and is now a global risk. Constant assessment of the risk is needed as eConveyancing generally involves high value payments and present an attractive target.
- 4.124 Without an adequate residential guarantee, the consequences of failure of the financial payments and settlement system to the most vulnerable homeowners is severe.
- 4.125 We note there is an increased risk of repudiation and dispute if two or more ELNOs are involved in a transaction.
- 4.126 There needs to be appropriate risk frameworks and standards for financial payment and settlement, as there is for land titling. These could be established with the help of the financial regulators, or failing that, with independent and industry experts. We note that there appears to be a systemic risk with reliance on end user or subscriber entry of bank account details without any opportunity for verification of account numbers against account name.

Objectives

- 4.127 We have proposed the following objectives for risk and liability management.
- Ensure a robust risk management framework that includes financial settlement
 - Minimise financial and title risk for property owners in changing ELNO structures eg commercial ownership, multiple ELNOs, potential models of interoperability
 - Maintain confidence in government systems and processes
 - Assign risk to entities most able to manage and mitigate it

Gaps

- 4.128 As discussed above the current regulatory framework does not identify the risk management requirements on ELNOs for the financial payment and settlement systems. The risk management requirements need to be identified with the assistance of the financial regulators and independent or industry experts
- 4.129 The Regulatory framework does not clearly identify where liability will fall for mistaken or fraudulent payments and there is currently no requirement for ELNOs to assist with recovery. This is disadvantageous for homeowners who generally will not have the capacity to fund lengthy legal processes to establish liability. ELNOs will have strong relationships with the financial institutions and are best placed to immediately commence recovery action. ELNOs and financial institutions also have the greatest ability to prevent and detect mistaken payments and fraud.
- 4.130 The current regulatory framework does not consider risk with multiple ELNOs, but this risk would be increased with two ELONs involved in a transaction. The greater risk is likely to be in the financial payment and settlement system but the same may for true of mistaken or fraudulent information is used to update the land title registers.

Options/Opportunities

4.131 The following should be considered

- Development of an adequate minimum mandatory residential guarantee to mitigate the risk to the most vulnerable homeowners/consumers
- Specify insurance provisions to ensure timely resolution for homeowners irrespective of any dispute process undertaken between ELNOs/Subscribers
- Develop and agree clear liability rules to protect consumers and incorporate into MOR
- Develop a dispute resolution framework in discussion with stakeholders to minimise unnecessary dispute resolution through litigation
- Develop and implement a risk management framework that includes:
 - Identification of consumer and subscriber risks
 - The regulatory rules in place to manage the risks
 - An annual review process managed by the relevant regulators

Cybersecurity

Current status

- 4.132 One industry definition of cybersecurity is as follows – the approach and actions associated with security risk management processes followed by organizations and states to protect confidentiality, integrity and availability of data and assets used in cyber space. The concept includes guidelines, policies and collections of safeguards, technologies, tools and training to provide the best protection for the state of the cyber environment and its users.
- 4.133 In addition, information security is about maintaining the confidentiality, integrity, availability and non-repudiation of information.
- 4.134 For the eConveyancing system, cyber threats have the potential for material consequences including:
- Land information – unauthorised modification compromising titles integrity
 - Financial information – unauthorised modification resulting in misdirection of funds and financial loss
 - Transaction – disruption and delay of settlement resulting in emotional distress and financial loss
 - Personal information – misuse, interference, loss, unauthorised access, modification or disclosure breaching individual's privacy
- 4.135 In eConveyancing, information security is governed primarily through requirements imposed via the eConveyancing regulatory framework. State and territory government policy as well as industry standards may also play a role.
- 4.136 The MOR require the ELNOs to maintain a fit-for-purpose Information Security Management System ("ISMS") including a comprehensive subscriber security policy, together with additional prescriptive requirements.
- 4.137 The MOR Guidance Notes version 5 identify the adoption and implementation of the current version of AS ISO/IEC 27001 Information technology - Security techniques - Information security management systems - Requirements, and relevant associated standards from the AS ISO/IEC 27000 family of standards, as meeting this requirement.
- 4.138 From stakeholder consultations, it appears the main threats and losses occur through fraudulent (or mistaken) entry of financial account numbers via subscribers' user accounts.

Key issues

- 4.139 The MOR and MPR generally impose sensible minimum obligations on ELNOs and subscribers but need to go further, particularly to ensure robust cybersecurity at the subscriber level where security breaches and external attacks have occurred.
- 4.140 Looking ahead information security threats may be expected to grow as attackers become increasingly aware of the value of transactions processed on ELNs and attackers become increasingly sophisticated.

- 4.141 eConveyancing has become a piece of critical infrastructure with potential for economic damage resulting from a cyber-attack that reduces confidence in the platform.
- 4.142 The ISO standards required via the MOR are risk based and take into account the cost of controls when determining the treatment of risks, which could result in lesser standards for smaller ELNOs. This is unsuitable in the eConveyancing environment in the absence of residential guarantee. A system licenced or mandated by government should not transfer risk to homeowners.
- 4.143 In the shift to a multiple ELNO operating environment, cybersecurity requirements should to be revisited to avoid potentially reducing protections to the lowest common denominator

Objectives

- 4.144 We have proposed the following objectives for cybersecurity management.
- Minimum standards set for land and financial information security that is fit-for-purpose for ELNOs and subscribers
 - Achievement of a high rate of compliance by ELNOs and subscribers with standard
 - Achievement of a higher level of cybersecurity for subscribers with additional professional training and certification in cybersecurity
 - Security practices are adapted proactively in the face of emerging threats and opportunities to enhance protection

Gaps

- 4.145 The minimum stated standard (the relevant standard is identified in the MOR guidance notes) for ELNOs is risk based and permits a lesser standard for smaller organisations which is unsuitable in the eConveyancing environment as a government licenced or mandated system managing critical, high value transactions for homeowners. The risk could be mitigated if a suitable residential guarantee is provided.
- 4.146 Subscriber security practices have not developed sufficiently for the eConveyancing environment with its high value payments eg attempts to inject fraudulent destination bank account details via BEC have occurred.
- 4.147 There is a lack of system wide focus on cybersecurity and no skilled national resources to address the issue. While there are security obligations identified in the MPR, there are no identified security improvement programs for subscribers. We understand there is a significant gap in ongoing education in cyber security for smaller practitioners.
- 4.148 With the advent of the second ELNO there is no longer one entity that has a system wide view of security.
- 4.149 There are currently no specific powers (short of suspension which is impractical for ELNOs) to enforce compliance, and an appropriate penalty framework needs to be established.

Options/Opportunities

4.150 The following should be considered.

- Leverage off existing regulators and specialist bodies
 - Develop a relationship with the Australian Cyber Security Centre (ACSC) to keep pace with emerging threats
 - Provide a facilitator for the eConveyancing environment to enable the development of strategies to counter the threats
- MOR changes
 - Specify minimum required ELNO security requirements
 - Ensure all ELNOs have the robust security policies for subscribers (these will need to be consistent if reciprocal subscriber recognition is to be achieved)
- MPR changes
 - Consider requiring information security certification for practitioners eg professional development credits via the Victorian Legal Services Board

Change control

Current status

- 4.151 Until the introduction of a second ELNO late in 2018, ARWG had a sub-group called the Change Control Sub Group. This Group received notice of PEXA's proposed system changes and reviewed them to understand whether the changes would impact on any of the registrars or revenue offices. The group was comprised of representatives from both regulators. If the changes were considered not to impact on any of the regulators systems, PEXA was informed and the changes went ahead. If the changes impacted, they were sent to the relevant regulator for assessment and negotiation with PEXA if necessary.
- 4.152 This process ceased due to commercial confidentiality and intellectual property issues when a second ELNO received category two approval.
- 4.153 There is currently no formal change control process although PEXA is providing information regarding proposed system changes and scheduling to jurisdictions. A formal change process that coordinates proposed changes from multiple ELNOs and multiple regulators should be developed to enable orderly management of the eConveyancing system and potential impact on regulators' requirements.

Key issues

- 4.154 Currently ARNECC does not have an agreed process to consider complex change control matters that impact more than one connected regulator.
- 4.155 There is no obvious way for Revenue Offices to incorporate their priorities for change implementation and control into the eConveyancing system.
- 4.156 There are risks to orderly change management with the inclusion of additional ELNOs, and the complexity will increase with entry of additional ELNOs.
- 4.157 The affected regulators (registrars and revenue offices) need to consider the degree of complexity that is manageable when considering the number of additional ELNOs that can be accommodated. The eConveyancing system needs to be able to respond to regulators requirements without unduly holding up jurisdictions legislative programs. This is particularly important for revenue offices which are accountable for the management of significant revenue for jurisdictional budgets.
- 4.158 There will also be impacts on financial institutions connected to the ELNOs. They will need to be able to implement system changes (especially security upgrades) in a timeframe commensurate with the degree of risk represented.
- 4.159 These matters need to be considered as a matter of urgency to avoid the development of incompatibility between participants in the eConveyancing environment.

Objectives

- 4.160 We have proposed the following objectives for change control management.
- Provide a process for orderly change control for system availability and reliability

- Ensure that security updates occur as required
- Ensure that jurisdictions legislative requirements can be implemented in the legislators' timeline - both land titling and revenue collection
- Ensure that participants priorities can be appropriately accommodated
- Ensure that stakeholders are given time and training to accommodate any changes to industry practice

Gaps

- 4.161 As discussed above, currently there is no change control process
- 4.162 With the commencement of a second ELNO, the previous processes are no longer appropriate and new processes must accommodate additional complexity and commercial considerations in the multi ELNO environment.
- 4.163 On the government side there are no dedicated change control resources with a national focus for planning and management of system change.

Options/Opportunities

- 4.164 The following should be considered:
- Re-establish Change Control Sub-group with dedicated resources and a clear role statement to formally include revenue offices
 - The role should include negotiation with stakeholders to prioritise changes in an agreed order, or this could be retained by ARNECC in consultation with revenue offices
 - Develop confidentiality provisions to manage commercial and intellectual property issues
 - Consider technology solutions to help with management of less complex change such as API management
 - ARNECC should facilitate industry education for major changes and be cognisant of change fatigue

Auditing and monitoring

Current status

- 4.165 The Operating Requirements in each State and Territory require ELNOs that have been approved to operate to provide an Annual Report to the Registrar within three months of the end of each financial year.
- 4.166 The requirements with which ELNOs have to report on and/or demonstrate compliance within their Annual Report to the Registrar are set out under Category Three of Schedule 5 of the Model Operating Requirements and the respective Operating Requirements in each State and Territory.
- 4.167 ARNECC reviews the Annual Reports to the Registrar for continuing compliance of the ELNO with Operating Requirements on behalf of the Registrars in each State and Territory.
- 4.168 Each jurisdiction identifies the subscribers and the documents it requires for the audit process. The process incorporates:
- Random selection of subscribers
 - Random selection of documents
 - Targeted subscribers
 - Targeted documentation where feedback has identified a problem area
- 4.169 Each jurisdiction generates its own subscriber examination report and the statistics are consolidated for ARNECC to review. The results of the subscriber review are not shared with the ELNO(s) but subscribers that are deficient are contacted by the relevant jurisdiction representative to agree a compliance regime.

Key issues

- 4.170 The compliance requirements under the MOR are comprehensive. ELNOs need to report to each jurisdiction but all reporting requirements are not necessarily transparent to all parties.
- 4.171 The requirement for ELNOs to take actions on audit recommendations is clear in the MOR. There is a requirement for immediate action on essential recommendations.
- 4.172 The compliance requirements under the MPR are comprehensive for subscribers, but each jurisdiction requests information from relevant subscribers, and there is a lack of uniformity and process. While most practitioner subscribers operate within a jurisdiction, the lack of uniformity in assessment means that good practice outcomes and performance measurement cannot be readily shared. Compliance reports on subscribers are not shared with ELNOs.
- 4.173 The lack of agreed structure on feedback process on compliance reporting to conveyancing practitioners may also inhibit national benchmarking and improvement. The lack of statistically valid sampling leads to a lack of clarity in ensuring compliance examination is representative of industry performance

Objectives

4.174 We have proposed the following objectives for auditing and monitoring.

- Utilise information from audits at a national level to improve the performance of ELNOs and subscribers
- Recommend action against poorly performing or negligent ELNOs and subscribers
- Inform a risk management, identification and mitigation strategy refreshed annually

Gaps

4.175 There is no **national** focus on the use of information from audits to improve the performance of the eConveyancing systems.

4.176 There is no common set of metrics for measurement of performance and no thresholds set for regulator action (such as penalties) for poorly performing or negligent subscribers. While this is reasonable in the development stages of eConveyancing with a prime focus on educating rather than penalties, as the environment matures persistent poor performers must be adequately dealt with.

4.177 Each jurisdiction requests its own information and generates its own report. There is a lack of consistency between jurisdictions on subscriber report content which inhibits performance improvement initiatives.

4.178 While there are components of risk management with respect to land titling in the MOR and the MPR, there is no national approach to risk management, identification and mitigation strategies for the whole of the eConveyancing environment including multiple ELNOs, financial payment and settlement, market regulation, Revenue Office requirements and perhaps privacy and confidentiality.

Options/Opportunities

4.179 The following should be considered.

- Form a risk and compliance committee comprising ARNECC and external experts including:
 - An expert from the finance sector ideally from a financial regulator
 - An expert from the practitioner sector such as the Legal Practitioners' Liability Committee ("LPLC")
- Objectives for a risk and compliance committee may include:
 - Advising ARNECC (and other identified regulators) on the effectiveness of the risk management framework
 - Developing a national annual audit program and receiving the audit reports
 - Developing a risk management, identification and mitigation strategy that is refreshed annually
 - Supporting provision of accurate, relevant and timely information about risk

- Examining previous decisions to see how risk was managed as part of making those decisions
- Oversight of insurance programs to ensure appropriate coverage
- Monitoring the business continuity processes
- Developing and maintaining an appropriate risk culture that is embedded through the environment
- Contributing to the development of a performance improvement plan
- Developing agreed metrics and thresholds for regulator action for ELNOs and subscribers
- Providing advice on industry education requirements

Privacy

Current status

- 4.180 In eConveyancing, privacy is governed through privacy specific legislation (federal and state or territory) as well as requirements imposed via the eConveyancing regulatory framework. Due to the multiparty nature of eConveyancing, contractual arrangements also play a role in delivering effective privacy.
- 4.181 The handling of personal information in Australia is governed by legislation at both federal and state/territory level. The legislation aims to protect personal privacy by limiting the ways in which information can be used and managed. Generally, such legislation contains rules (expressed as privacy principles) that deal with how entities must use manage and secure personal information.
- 4.182 The Privacy Act 1988 (Cth) governs federal government agencies and some business entities.
- 4.183 Relevant state or territory-based privacy legislation governs state and territory government agencies. It may also apply to service providers contracted to government agencies. State or territory-based legislation (or similar administrative instruction in South Australia) may apply to private sector organisations. In seven jurisdictions this may be effected by inclusion of a requirement in the contract between the agency and contracted service provider.
- 4.184 Exceptions exist for public registers (such as titles registers) to allow release of some personal information but these may limit secondary use of data and information.
- 4.185 The MOR require that ELNOs comply with all applicable laws (including any applicable privacy laws and laws relating to document and information collection, storage and retention) and government policies notified to the ELNOs in writing.
- 4.186 ELNOs are also required to maintain confidentiality of all information provided to the ELNO in which the provider of the information would reasonably expect confidentiality to be maintained.
- 4.187 The MPR impose compliance with applicable privacy laws on subscribers and mandate the use of the Client Authorisation Form. The terms of the client authorisation include the following *“The Client acknowledges that information relating to the Client that is required to complete a Conveyancing Transaction, including the Client’s Personal Information, may be collected by and disclosed to the Duty Authority, the ELNO, the Land Registry, the Registrar and third parties (who may be located overseas) involved in the completion of the Conveyancing Transaction or the processing of it, and consents to the collection and disclosure of that information to any of those recipients, including to those who are overseas. For further information about the collection and disclosure of your Personal Information, refer to **the relevant party’s privacy policy.**”*

Key issues

- 4.188 Regulation of privacy is reasonably well covered in the eConveyancing regulatory framework. ELNOs are required to comply with both Federal and State or Territory privacy specific legislation with regulation by an associated information

commissioner or similar - noting that WA does not have privacy specific legislation. Large subscribers are required to comply with Federal privacy legislation.

- 4.189 The MOR and MPR reinforce to ELNOs and large subscribers that they must comply with privacy legislation. The Client Authorisation Form provides for consistent collection of consent to the use of personal information.
- 4.190 The MOR state that national privacy law applies to ELNOs but is silent on the additional protections offered by some state (or territory) legislation required by the relevant Operating Agreement.
- 4.191 There is some uncertainty for stakeholders about where complaints regarding privacy can be made. In interviews, stakeholders raised concerns about exploitation of client data for purposes other than executing the property transaction for which it was provided. More recently some questions have been raised regarding how handling of personal information would be properly managed in an interoperable operating regime.
- 4.192 There is a potential gap in the governance arrangements regarding subscribers' commercial information.
- 4.193 Stakeholders advise that not all jurisdictions are in a position to compel buyers and sellers to provide information required to meet the Australian Tax Office's third party reporting requirements. This is not necessarily an ARNECC issue or an issue for the eConveyancing regulatory framework.

Objectives

- 4.194 We have proposed the following objectives for privacy.
- Client personal data should be used solely for the purpose of completing the conveyancing transaction and updating appropriate government registers including revenue registers (and potentially the Australian Tax Office) – if there are other statutory requirements these should be defined
 - Privacy obligations of all eConveyancing entities handling personal data are clear and transparent – this includes ELNOs, subscribers and potentially 3rd party software providers
 - Performance of privacy obligations by eConveyancing entities are monitored and complied with
 - Establishment of formal privacy complaint process including information on navigation of existing privacy laws and identification of existing complaint processes

Gaps

- 4.195 The Client Authorisation Form and Participation Agreements do not clearly restrict the use of personal data solely for the purpose of completing the conveyancing transaction and updating government registers. In the Form a client is expected to review all privacy policies, however there are too many parties involved to expect a client to do this.
- 4.196 In the absence of a specific prohibition ELNOs could claim implied consent to secondary use of personal data, but subscribers have no choice but to supply

information including personal information. The privacy policies are very broad ranging and there is confusion about implied consent for marketing.

- 4.197 Some obligations to comply with jurisdictional privacy legislation are contained in confidential operating agreements which are not transparent to eConveyancing participants.
- 4.198 There is currently no power for a Registrar to apply a penalty for breaches of privacy legislation.
- 4.199 There are limited resources for complaints handling; complaints are to be sent directly to the chair of ARNECC. There are no guidance materials for subscribers or homeowners who may feel there has been a breach.

Options/Opportunities

- 4.200 The following should be considered.
- Leverage off existing regulators – Australian, State / Territory information commissioners
 - ECNL changes – clarify the power of the registrar to direct beyond eConveyancing operating requirements, provide for penalties for privacy breaches by ELNOs
 - MOR changes – add directions for certain actions, explicitly prohibit secondary use of client personal data, provide for penalties for privacy breaches by ELNOs, consider constraining use of subscriber commercial information
 - CAF changes – modify privacy collection statement to reflect use of the information provided solely to effect the conveyancing transaction and meet other government requirements
 - Operating Agreement transparency - publish relevant components so participants are informed about ELNO privacy obligations
 - Increase ARNECC resourcing to relieve chair of complaint handling and provide a more comprehensive educational service

5.0 COMPETITION MODEL

Current market structure – horizontal competition between ELNOs

- 5.1 Competition structures can be categorized according to the following:
- Perfect competition with zero barriers to entry
 - Monopolistic competition with medium barriers to entry
 - Oligopoly with high barriers to entry
 - Monopoly with very high to absolute barriers to entry
- 5.2 The four primary barriers to entry are:
- Resource ownership
 - Patents and copyrights
 - Government restrictions / regulations
 - Start-up costs (including network effects)
- 5.3 Government regulations are defined as a rule of order having the force of law prescribed by a superior or competent authority relating to the action of those under the authorities' control.
- 5.4 Requirements for licenses and permits may raise the cost of entry to a market creating a barrier, however government purchasers are entitled to regulate to acquire the products needed to fulfil statutory responsibilities. The barrier to entry created is a necessary component of having government products delivered by the business sector.
- 5.5 In the eConveyancing market products and services are primarily related to products that support statutory requirements. They are not products that can be innovated at will by ELNOs nor can a lesser version of the product be offered at a lower cost.
- 5.6 The table below summarise the main products and services from the eConveyancing system.

Product	Regulators
Registry updates	ARNECC
Revenue offices updates	Revenue Offices
Other payments	Various – local government, utilities
Financial settlement	RBA
Payment systems	ASIC and financial institutions
Services to subscribers	Mostly free market – ACCC

Comparative markets

- 5.7 When we consider the eConveyancing platform and service offerings we see it as similar in size and complexity to Australia's licenced stock market platform. It involves settlement payments regulated by the RBA, and ASIC is the regulator

for its payment system functionality. We consider the eConveyancing platform to be of similar economic importance to the wellbeing of Australians.

- 5.8 The eConveyancing platform has similar security issues to a stock market in that both are attractive targets for hackers. eConveyancing is of higher criticality to consumers than a stock market if failure occurs because it commonly deals with a family's total assets ie a house rather than a trade in a portion of an investor's stock portfolio. The risk and liability issues can be of greater consequence.
- 5.9 The eConveyancing market is of relatively small value for a contestable market. The annual value of fees is difficult to estimate but the highest estimate is approximately \$270M based on highest current pricing and potential transaction level. In comparison the Australian Stock Exchange ("ASX") clearing and settlement fees were \$105M. This is a relatively small value of fees in relation to value of transactions effected. These are estimated at \$600B per annum for the property market against \$900B per annum for the share market. The total capitalisation of the property market is approximately \$6-7T compared to \$2T for the stock market.
- 5.10 In both of these markets, quality of product and service and management of risk is much more important than any reduction in fees which are very low in relation to the value at risk in the transaction.
- 5.11 The eConveyancing platform has very high connection costs with its requirement for integrated connections with ten regulatory bodies ie five registrars and five revenue offices from the active jurisdictions. This will increase as other jurisdictions join. The platform must also offer a financial settlement system; currently this includes arrangements with the RBA. When connection to financial institutions is considered another 15 integrated connections may be required with the payment system reviewed by ASIC.

Factors impacting on eConveyancing market structure

- 5.12 Under the current regulatory framework, each ELNO is an independent entity that must provide a complete set of bundled services that include:
- Subscriber registration
 - Subscriber and third-party (eg user interfaces, APIs)
 - Title data retrieval from relevant land registry
 - Duty obligations verification from applicable revenue office
 - Document preparation process support
 - Document signing
 - Business rules application to ensure successful settlement
 - Financial payment and settlement instruction preparation
 - Property settlement orchestration that minimises risk of loss to parties involved
 - Financial payment and settlement services
 - Lodgment of documents with the relevant registry

- 5.13 An ELN has some natural monopoly like characteristics primarily attributable to two key factors. Firstly, there is the essential infrastructure like nature of the financial payment and settlement services which require extensive financial sector collaboration and investment to develop. It likely has sufficient capacity to process all transactions requiring associated financial settlement with little or no benefit to justify the costs of duplication.
- 5.14 Secondly, since an ELN has strong positive network effects, multiple ELNs fragment the network and reduce the value to subscribers who can only transact with a subset of other subscribers who are on the same network. Absent other factors, this tends to drive subscribers to the largest network.
- 5.15 The implicit recognition of these factors is arguably why, after extensive industry consultation that included financial institutions, land registries, revenue offices and practitioners, the IGA intention was to create a single national system. This contrasts with the multiple networks provided for in the ECNL.
- 5.16 We also note that while the bundled nature of the regulated ELN structure greatly simplifies many important elements including risk management and liability allocation, it fundamentally limits competition to a small number of entities capable of providing or procuring the complete set of services.
- 5.17 The current regulatory framework likely encourages inefficient duplication of essential infrastructure services that can be complex and costly to develop eg financial payment and settlement services. We observe that each of the Category One or Two ELNOs have declared an intention to build their own financial payment and settlement infrastructure. In addition, the need to connect to ten regulated functions (registries and revenue offices) creates complexity for the regulators. This is inefficient duplication that is difficult to manage effectively.
- 5.18 The bundling of services hampers competition in the supply of more contestable subscriber facing components eg user interfaces, registration, digital signatures.

Issues with current market structure

- 5.19 It appears that the transition from one national system to the decision to allow competition and additional ELNOs was reached without any consideration of the benefits, costs, complexities and risks (including liabilities) resulting from such a change.
- 5.20 In DMC's consideration of fit-for-purpose models that may be authorised or mandated by government, the highest consideration is in regard to benefits, costs and risks to the property buyer and seller. Consideration of these matters and associated complexities for subscribers (including financial institutions) and connected government entities has also informed our analysis.

No agreed ELN protocol to determine which ELN will settle and lodge multi-party transactions

- 5.21 The emerging multi-ELN environment where ELNs operate independently gives rise to the question of which ELN must be used when multi-party transaction participants are subscribers to different ELNs. Currently no protocol exists to determine which ELN will settle and lodge multi-party transactions.

- 5.22 In a response to the Issues Paper one practitioner has summarised the concerns in determining which ELN will be used to effect a multi-party transaction.
- *There will be great tension amongst conveyancers, lawyers and settlement agents if they need to mutually agree on which provider will be used for the transaction.*
 - *I believe neither party should have the right to compel the other to use a particular provider.*
 - *It should not be determined by agreement in a contract which is substantially organised by a third party who uses their persuasive powers for undeclared reasons to use one or the other provider*
 - *Practitioners should have the right to choose who they wish to engage for the service of effecting a settlement. This should not be decided by someone other than the practitioner.*
- 5.23 This is a complex issue to resolve. Any protocol arbitrarily places rights of some parties over others. There are disparate views in industry which have been identified both in our stakeholder consultations and in the NSW interoperability Working Groups. Currently only one ELN has document lodgment and financial payment and settlement capabilities in all active jurisdictions, and it may be some time before another ELN can offer these. Stakeholder engagement both in industry and regulators is essential to reach a broadly acceptable outcome.
- 5.24 Options to resolve this issue involve either:
- Establishing a protocol that determines which ELN will settle and lodge for any given multi-party transaction, or
 - Mandating the use of a single common settlement and lodgment facility – eg adopting an infrastructure ELN model or reverting to a single ELN
- 5.25 We note that resolution of this issue will influence the distribution of transaction fee revenue which will impact on competition. This needs to be carefully considered by the market regulator to ensure it meets competition law requirements.

Multi-homing

- 5.26 Under the current market structure, regardless of protocol, subscribers will need to multi-home ie they will potentially need to be subscribers to, and be competent to transact on, all ELNs operating in their market.
- 5.27 Further to the above concerns regarding determination of an ELN in multi-ELN, multi-party transactions, practitioners provided additional comments relating to the negative impacts of multi-homing
- *Then we have to learn another new system, let's just get one right*
 - *achieving uniformity across different interfaces and platforms*
 - *Learning duplicate systems, integration with existing systems, access to the transaction platform*
 - *It would seem inevitable that practitioners will have to be tooled up for all ELNO's as it will be outside the control of a practitioner as to which ELNO will host a particular settlement and to be able to transact at every*

opportunity, practitioners will have to maintain multiple platforms. Definitely do not want to see multiple ELNOs

- *Increase cost for practitioners in terms of training and subscribing to two platforms*
- *Work flow within your practices. Insurance risks to practitioners. Further identification processes. Cost to manage both systems, training costs etc*
- *as long as there are no duplicated systems that need to be operated individually*
- *Provided the platforms interact, if you have to all be on the same platform for a single transaction, that will be painful*
- *how will they work together? will you need multiple registrations?*
- *a requirement to participate in multiple ELNOs will add significant cost, reduce efficiency and detract from customer settlement outcomes*
- *Problems if they are not fully interoperable. Need to subscribe to more than one ELNO, obtain more than one digital signature, etc*
- *The attraction of a fast take up of PEXA was to move to one electronic way of working. Multiple ELNO's mean multiple processes which increases risk and cost*
- *practitioners having to use multiple systems*
- *Swapping between programs, learning different programs. Different pricing will make it difficult to quote*
- *More complexity and requirement to subscribe to multiple providers. Who will dictate what platform to be used?*
- *Conflict over which platform is to be used for each transaction, duplicated training, monitoring multiple systems, potentially different systems with different levels of service*
- *Maybe different workspace & therefore different things to learn, but if competition brings efficiency, I can't see why this would be a disadvantage*
- *More work, more time consuming, more prices, getting used to doing things differently again using a different program, overloading*
- *Complexity in having to subscribe to several ELNOs by all parties involved. The aim is to make it simpler for all involved and introducing more ELNOs would require more training and add complexity*

5.28 The current operating model in which multiple ELNs operate independently has significant implications for multi-party transactions:

- All participants in a given transaction must be subscribers to and complete the transaction on the same ELN
- Data entry, digital signing, lodgment and financial payment and settlement are conducted on a single ELN
- A protocol is required to determine the ELN to be used where participants cannot agree on which ELN to use

5.29 Therefore, participants would not always get to use their preferred ELN to enter data and sign documents. An exception exists where the subscriber may use preferred third-party software (eg practitioner software) to enter data if that third-

party software is integrated with the ELN used in a given transaction. In such cases the need for a subscriber to learn multiple user interfaces is significantly mitigated. The participant will still need to subscribe to the ELN used and sign documents on that ELN.

- 5.30 Similarly, settlement, payment and lodgement will not always be executed by a participant's preferred ELN, rather they would be determined on transaction by transaction basis according to a protocol.
- 5.31 Options to mitigate the impact on subscribers of switching ELNs on a transaction by transaction basis under this operating model are discussed in later in this section. They include cross-ELN recognition of digital signatures, cross-ELN recognition of subscribers and a number of interoperability options.
- 5.32 We note that no feasible options or models have been identified that allow participants to always have settlement, payment and lodgment executed by their preferred ELN. For the management of risk there must be one entity (ELNO) that coordinates payment and settlement and lodgment.

Transaction fees

- 5.33 Many practitioners expressed concerns about PEXA's monopolistic pricing power including perceived unconstrained price rises, which are ultimately borne by consumers. The original price charged by PEXA was set by comparison with the costs in the paper system it was replacing. We note stakeholders who raised concerns about pricing in interviews were unaware of the fact that PEXA price increases are capped at CPI (or less). This lack of awareness may, in part, be because the pricing constraint was historically contained in confidential operating agreements between the registrars and PEXA. The CPI limit was made transparent with its inclusion in MOR version 5 which came into effect in February 2019.
- 5.34 In the short term we believe that CPI cap on price increases is reasonable given the significant investment required to establish the system and the fair expectation of a reasonable risk adjusted return. However, in the long run we believe, absent other constraints, CPI increases will likely lead to super profits as technology will enable underlying costs to be reduced in real terms. Pricing reviews should be conducted on a regular basis, perhaps allied to contract extensions.
- 5.35 Effective competition, or the threat of effective competition, may also provide a constraining force on transaction fees.
- 5.36 We recommend that the pricing remain capped until there are at least three fully operational ELNOs as we don't believe a duopoly provides sufficient competition to ensure competitive pricing.

Product and service quality

- 5.37 Most practitioners who have conducted a large number of electronic transactions agree that the eConveyancing system has been successful, although many have requested further development and improvement.
- 5.38 A number of practitioners expressed a view that PEXA's front end software should be easier to use and better cater to the needs of the conveyancing process.

- 5.39 A few practitioners expressed dissatisfaction with PEXA's responsiveness to subscribers.
- 5.40 Competition between ELNOs has potential to further motivate innovation in products and customer service. Options to support competition between ELNOs are considered later in this section.
- 5.41 We note that there are also options available in a monopoly environment to support innovation and user responsiveness. For instance, a monopoly entity may voluntarily or be compelled to include user representatives within its governance structure such as is required for ASX. However, given there are currently two approved ELNOs such options are not presently relevant, and we have not discussed further in this report.

Cost impacts of competition

- 5.42 The approval of a second ELNO has raised impacts for a range of stakeholders who contribute to the network operation. The impacts include both costs and consumption of key resources to assist incorporating a new ELNO into the eConveyancing system.
- 5.43 Costs of competition in this environment are due in the main to the complexities associated with connectivity but are highly dependent on the model of competition chosen. The following impacts relate to the independent ELNs and interoperable ELNs models where backend infrastructure and connections are duplicated. They do not relate to the single ELN or infrastructure ELN models.
- 5.44 Financial institutions that play a role in facilitation of financial payment and settlement would incur costs if they were to establish and maintain connections to new ELNs. Recent submissions to both the IGA Issues Paper and the NSW Interoperability Directions Paper clearly identify concerns with increased costs attributable to additional financial institution connections.
- 5.45 We note also that all participating jurisdictions both registry bodies and revenue bodies incurred significant costs to connect to the first ELN. For some jurisdictions the costs to connect to the second ELN will again be substantial – both the development costs and the ongoing maintenance costs. The estimates from titles and revenue offices to connect to a new ELN range from a few hundred thousand dollars to five million dollars - most have indicated they intend to recover at least some of these costs from the ELNO requesting the connection.
- 5.46 Regulators will incur additional costs to regulate and manage the multi-ELNO environment. Additional costs include managing the complexity of change control in a multi ELNO environment.

Financial payment and settlement facilitation costs

- 5.47 Our stakeholder consultation identified that financial institutions had not yet recouped the initial costs due to the ongoing parallel processes (paper and electronic) and the higher than anticipated costs of the original introduction of eConveyancing.
- 5.48 They noted that the costs to implement and manage the required infrastructure and change management processes are significant. Whilst the costs may not be as high for future ELNOs due to the lessons learnt, they will still be substantial.

- 5.49 An indicative estimate of cost from a financial institution is total \$6.0m (set up) and at least \$234k support costs to get a minimum operational system (less automated than PEXA). Cost items include the following:
- Need to access another system, bulk issuing of accounts
 - Need to set up new system on ID platform to manage access
 - Need to build new payments functionality
 - Need to build reconciliations functionality
 - Need technology support for the new system - initial onboarding of system plus ongoing support costs
 - Need digital certificates plus ongoing support costs
 - Need to set up new software in house
 - Train all users on the new ELNO
 - Update all workflow tools to identify the settlement ELNO
 - Business as usual support costs are large because of the need to run two completely different processes for the one outcome
 - Procurement, vendor management and legal costs to set up and run a new system
 - Assuming that all transaction types (ie discharge, mortgage, transfer) will be available day one on the new ELNO
 - Assuming just onshore users
 - Assuming no automation or integration – so manually keying in everything to new system
- 5.50 Generally commercial entities are required to demonstrate a return on investment through a robust business case development, however financial institutions commented that the majority of the benefits of eConveyancing will be achieved with one ELNO.
- 5.51 It is difficult to see how financial institutions could achieve a net benefit through connecting to a second ELNO, even allowing for price competition, although this is dependent on the service offerings from new ELNOs to financial institutions. From our discussions with financial institutions it seems likely that they will need to recover the costs of connection from any new ELNO.

Land registry and revenue office cost impacts

- 5.52 In parallel to the IGA review, the NSW Premier commissioned IPART to investigate and report on an appropriate pricing regulation framework for the provision of electronic conveyancing services in NSW.
- 5.53 We reviewed the Issues Paper released by IPART and the submissions received in response. There are further consultation processes to be completed and IPART expects a report to be published later this year.
- 5.54 IPART are also considering whether NSW taxpayers should fund the cost of government entities connecting to new ELNOs and maintaining the connection. We note comments from stakeholders in submissions to IPART as follows:

- *All cost savings to NSW LRS resulting from electronic settlement services were available to LRS under its previous technology platform, which only connected PEXA*
 - *The desire of the NSW government to facilitate competition in the ELNO market has required incremental investment by LRS that does not realise any additional savings other than those that would have been available to LRS under the previous platform*
 - *We (ORG NSW) consider Revenue NSW should charge ELNOs based on a form of cost recovery. This should incorporate some or all of the costs of connecting a new ELNO and to support on-going maintenance of the ELNO service. Best practice principles for cost recovery should be applied, including avoiding cross-subsidies, ensuring transparency and accountability, and undertaking industry consultation from time to time. This will give current and potential ELNOs greater confidence in the reasonableness of specific cost recovery arrangements*
- 5.55 These comments tend to suggest that there is not support for governments to bear the cost of new ELNOs.
- 5.56 We believe it would be sensible for the costs of connection (both upfront and ongoing) to be formally quantified so that potential ELNOs could develop a clearer understanding of the likely investment needed to build a complying system.
- 5.57 The conclusion appears to be that public sector monies that are expended to support a business sector investment should be recouped from the business. Similarly, it appears likely that the financial institutions will also need to recover the costs of additional connections to new ELNOs.

Costs of regulation increase

- 5.58 Functions previously conducted by the single ELNO eg coordination of changes across the system now exceed the sphere of influence of one ELNO and need to shift to a central body. Resources for managing such functions need to be funded.
- 5.59 We believe the costs of competition are significant and should be considered in the regulation of competition.

Complexity increases with competition

- 5.60 The complexities of eConveyancing increased with the introduction of a second ELNO. The connection costs increase the resource requirement for entry and operations for both ELNOs and the connected parties. This requires management of complex change control issues given the number of connections.
- 5.61 The diagrams below demonstrate growth in complexity (for regulator and financial institution connections) from one to three ELNs when backend infrastructure and connections are not shared - ie independent ELNs and interoperable ELNs models. Each ELNO develops its own Settlement Facility ("SF") which is payment integrated with each of the financial institutions (currently 15) that facilitate financial payment and settlement.

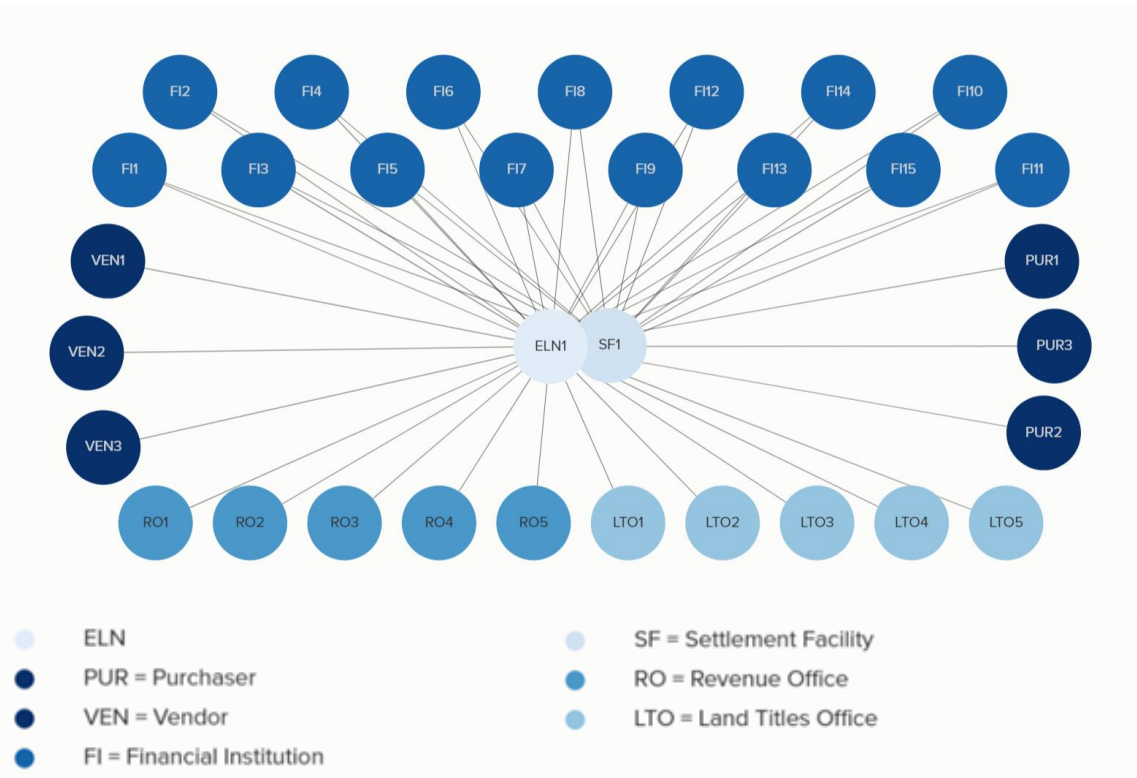


Figure 10 - Connection complexity with one ELN

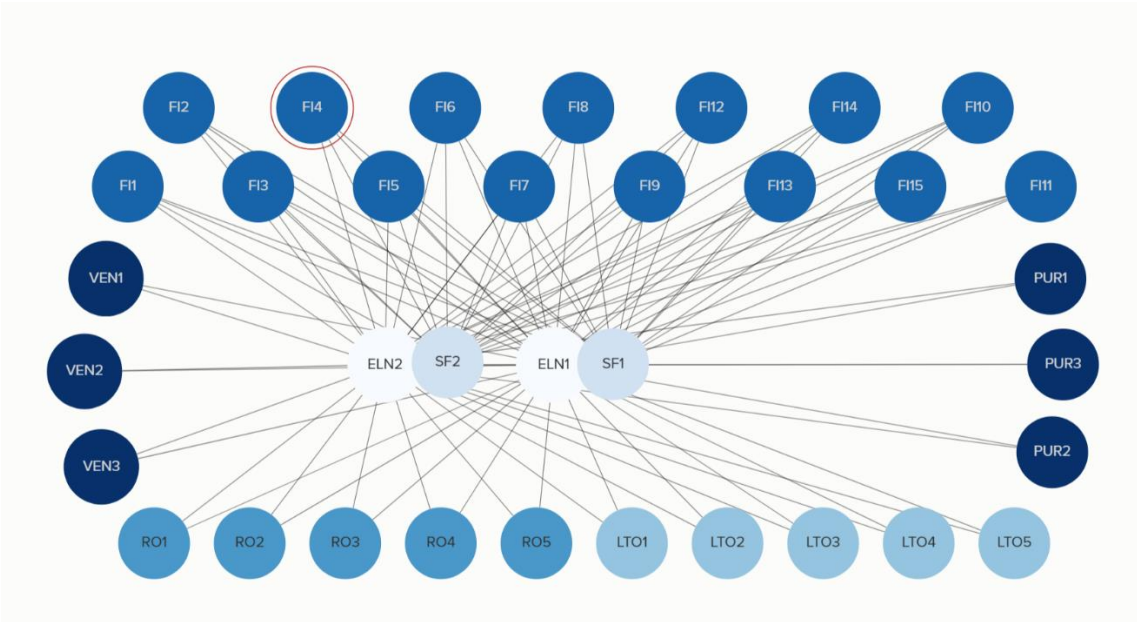


Figure 11 - Connection complexity with two ELNs

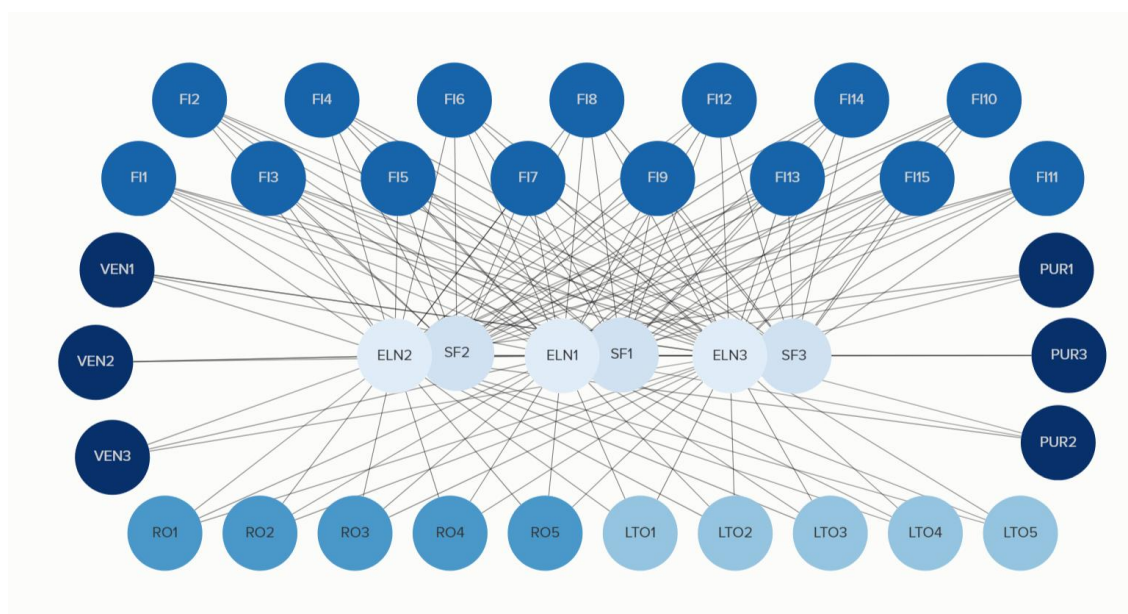


Figure 12 - Connection complexity with three ELNs

- 5.62 ELNOs are required to connect to ten statutory authorities (registrars and revenue office) and the initial ELNO is also connected to 15 financial institutions.
- 5.63 With only one ELNO the change control process was facilitated by the Change Control Sub-Group (“CCSG”) of ARWG with PEXA sharing its roadmap for future changes and details of changes for review prior to implementation. ARWG would review these changes and either endorse the changes or refer the proposed changes to government entities which were likely to be impacted.
- 5.64 With the addition of a second ELNO this review process has ceased due to commercial confidentiality issues. No formal change control process has been developed for a multi-ELNO environment. This exposes the connected parties to risk.
- 5.65 Government stakeholders have commented that they do not want legislative programs held up because of an inability to implement changes in a reasonable timeframe. Financial institutions have technology release cycles to upgrade functionality and security and may need to implement critical security upgrades at short notice.
- 5.66 Robust formal change control will be needed to ensure that ELNOs synchronise releases or ensure backward compatibility with all connected parties.
- 5.67 Complexity increases with interoperability because of the uncertainty about where the mistake occurs in failed transactions and where the liability falls. Absent effective directives under the operating agreement, in cases of significant loss it is possible that ELNO focus shifts from using best endeavours to recover funds to assigning liability to the other ELNO.
- 5.68 A further complexity arises within the conveyancing industry when parties seek to determine which ELNO platform to use.

- 5.69 We cannot find any evidence that the complexities discussed above were considered at the time the decision was made to depart from the IGA intention for one national system.

Regulatory intervention - competition

- 5.70 The hurdle for regulatory intervention is not simply that a problem exists, and a regulatory solution is available, but that as required by COAG policy regulatory intervention should only occur where it is demonstrated that it will result in a net benefit (see below).
- 5.71 Put simply the benefits must outweigh the costs to establish a case for regulatory action before addressing a problem. Furthermore, adopting the option that generates the greatest net benefit for the community could include taking no action.

Principles of Best Practice Regulation

COAG has agreed that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:

1. Establishing a case for action before addressing a problem
2. A range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed
3. Adopting the option that generates the greatest net benefit for the community
4. In accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:
 - a. The benefits of the restrictions to the community as a whole outweigh the costs, and
 - b. The objectives of the regulation can only be achieved by restricting competition
5. Providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear
6. Ensuring that regulation remains relevant and effective over time
7. Consulting effectively with affected key stakeholders at all stages of the regulatory cycle
8. Government action should be effective and proportional to the issue being addressed

Relevant models of competition

- 5.72 In considering the competition issues in the eConveyancing market we have reviewed the work done by the national regulators to consider competition in the stock market. The stock market is the most functionally similar and presents similar risks and complexities. It is also similar in the relatively low level of contestable fees (\$105M pa stock market and \$270M pa eConveyancing) and the relatively high value of the transactions managed by the platforms (\$2T against \$6-7T). We believe this is the most relevant model for comparison with eConveyancing.
- 5.73 Given the introduction of the ability to approve a second ELNO in the ECNL without consideration of competition model and issues, the eConveyancing

program has been left without any guidance regarding the regulatory arrangements required to enable competition. The current push for interoperability, while it may benefit competition, introduces new risks and liability issues and has no regulation to guide governments in its implementation in a safe and effective manner

- 5.74 We note that the Council of Financial Regulators (“CFR”) and ACCC have considered these issues in depth in relation to competition with respect to the Australian Stock Exchange (“ASX”). CFR are the most relevant qualified regulators that should determine the regulatory requirements for competition and interoperability in eConveyancing, assisted by the Australian Competition and Consumer Council (“ACCC”) and with input from ARNECC and the revenue offices. We recommend that they be requested to undertake this work for eConveyancing. We consider the eConveyancing platform to be of similar economic importance to the wellbeing of Australians, especially when all property transfers use the system.
- 5.75 The CFR and ACCC have investigated and reported on the minimum safe conditions for effective competition in relation to Australia’s stock market. Their reports also consider the issue of interoperability. We believe that the eConveyancing platform when fully implemented has the potential to have a similar impact on Australia’s financial health as the share market – especially if risks are not well managed and losses occur. The risks and costs associated with competition and multiple ELNOs and the necessary regulatory arrangements do not appear to have been considered at the time competition was enabled in the ECNL.
- 5.76 We believe the greater risk in eConveyancing lies in the financial systems space rather than the land titling space. These do not appear to have been given much attention in the current investigations on interoperability. We note the ABA’s view expressed in its response to the NSW Interoperability Report, *“Financial settlement risks are significant to the Australian property owner and in magnitude significant to the Australian economy (page 4).”*
- 5.77 We consider that the work done in reviewing the competition issues (including interoperability) for the stock market could be leveraged to develop the regulatory framework for competition in the eConveyancing market. The framework should include the minimum conditions for safe and effective competition.
- 5.78 We note that the regulators attempted to establish the regulatory framework before competition commenced. This included the minimum conditions for safe and effective competition
- 5.79 Minimum conditions (of potential relevance to eConveyancing) were identified to include:
- Rigorous supervision against the Central Counter Party (“CCP”) (currently ASX) standards and other requirements under the Corporations Act
 - Ex ante wind-down plans
 - Arrangements for regulatory oversight in a multi-CCP environment
- 5.80 It also noted that the settlement model applied in a multi-CCP environment should seek to preserve the efficiencies of the prevailing settlement model at the time a competitor emerged, while:

- Minimising financial interdependencies between competing CCPs in the settlement process
 - Facilitating appropriate default management actions
- 5.81 Additional conditions included:
- Access to securities settlement infrastructure on non-discriminatory, transparent, fair and reasonable terms
 - Appropriate interoperability arrangements between competing cash equity CCPs
- 5.82 We suggest that the national regulators should consider adopting a similar process and consider the work done to date in this IGA Review, the work done by the Working Groups in the NSW interoperability process, and the outcome of the IPART pricing review regarding costs of achieving interoperability.
- 5.83 We recommend that any investigation by the national regulators involve consultation with the affected regulators. These are the registrars and revenue offices currently actively using eConveyancing, and others that may be likely to progress in the near future. We note that to date there has been no comment from the registrars and revenue offices on whether the proposed model of interoperability effectively delivers the statutory products required from the system. It is also important that all identified subscribers in all active jurisdictions are able to provide their views on competition and interoperability.
- 5.84 We also note regulator and financial institutions concerns with complexity of change management with increasing numbers of connected ELNOs.
- 5.85 We recommend that there be a two-year moratorium on the issue of any further approvals for ELNOs. We believe this will give the national regulators time to determine the regulatory arrangements that should apply and may allow an efficient operating model to emerge that will address the issues raised by practitioners regarding the inefficiency in needing to learn two systems and the reluctance to be told what ELN they must use.
- 5.86 Having regard to the work to be done by the national regulators to develop the regulatory framework, we propose the following objectives to be considered by regulators in determining regulatory and governance arrangements for competition including any potential models of interoperability (if any) in the eConveyancing market.
- Minimise risk to titles security
 - Minimise risk in financial settlement
 - Maximise service quality and industry and government productivity
 - Minimise cost (to consumers and taxpayers)
- 5.87 One stakeholder has commented that these objectives “place a thumb on the scale for the status quo of ELNOs operating as closed networks”.
- 5.88 However, we do not think it is impossible to develop an interoperability model that will minimise risks to titles security and financial payment and settlement. We believe this is likely to be at the shallowest depth of interoperability. This is discussed further in this section under the heading ***Depth of interoperability drives complexity, cost, risk and liability.***

- 5.89 We believe that minimising risk is an essential consideration in the regulation of this infrastructure that underpins confidence in the property market. We also believe there would be a reputation risk to governments that mandate or licence a system that does not have a focus on minimal risk.
- 5.90 The last two objectives listed above would appear to be reasonable objectives for any competition model that would further the aims of the National Partnership Agreement to Deliver a Seamless National Economy.
- 5.91 From the investigations to date the benefits from implementing an interoperable system may not be certain and the costs, complexity, risks and liabilities are not yet defined. No cost/benefit analysis has been undertaken. If an interoperable solution is preferred then an in-depth analysis to better understand the costs, risks and likely outcomes is warranted.
- 5.92 We have discussed later in this section the issues associated with vertical integration in the market and identified the concerns expressed by practitioners. It is important that the regulatory arrangements for vertical competition are also considered by the national regulators before adverse outcomes eventuate.

Potential benefits of competition

- 5.93 Competition in eConveyancing would be expected to provide a number of benefits to conveyancing participants in line with broad expectations that an effective competitive market structure is most likely to expand Australia's productive capacity.
- 5.94 Many practitioners expressed a view that competition will reduce prices and increase innovation and user responsiveness.
- 5.95 Subscribers seek the benefits of easier to use software and better customer service. Where these benefits are realised through competition and they result in improved productivity of subscribers, in the long run consumers may benefit from lower practitioner and lender fees (although we note that transition costs have been high and to date may not have been recovered).
- 5.96 We are unable to identify any benefits to governments of multiple competing ELNOs.
- 5.97 There are no identified benefits to financial institutions attributable to their roles as financial payment and settlement facilitators, although this could depend on particular service offerings from ELNOs.

Lower transaction fees

- 5.98 Effective competition would be expected to lead to a reduction in transaction fees charged by ELNOs in the longer term. It is reasonable to expect that these lower fees incurred by subscribers, provided they are not offset by other costs of competition, may result in a reduction in fees paid for conveyancing by property buyers and sellers.
- 5.99 The direct benefit of price competition in eConveyancing transaction fees to property buyers and sellers is very small. Australian homeowners on average buy and sell a property every 10.5 years. The existing PEXA fee of \$112 (assuming each transaction involves both selling and buying) translates to \$224

per 10.5 years or \$21 per annum. It is unlikely that homeowners would want to accept a greater risk for this very small potential benefit.

- 5.100 Competition may provide some reduction in fees however as discussed below increased costs and complexity are significant.

Increased innovation and responsiveness

- 5.101 Other benefits of competition may include the opportunity for greater innovation which may lead to increased practitioner productivity. Assuming full take up of eConveyancing, this may provide either improved margins for the industry or opportunities for price reductions for buyers and sellers. Competition also allows choice of supplier for practitioners.
- 5.102 Practitioners have expressed a desire for choice of supplier and believe that the availability of at least two suppliers will result in suppliers becoming more responsive to their needs.

Potential cost implications of competition

Costs for ELNOs and industry (including regulators and subscribers)

- 5.103 The cost impacts of competition have been considered earlier in this section, but we summarise them here for comparison with benefits.
- 5.104 We have considered two broad roles of eConveyancing stakeholders. The first is as facilitators that include land registries and revenue offices, and financial institutions in their roles in payment settlement.
- 5.105 The second role is as subscribers - practitioners and mortgagees.
- 5.106 Facilitators are unlikely to derive significant benefit from competition. They have already invested significant funds in the establishment of the first network to derive a level of benefit from it. No additional benefits have been put forward for facilitators to connect to a second network, but this would require additional investment of cash and resources. It would also result in maintenance of redundant infrastructure and increased change control complexity.
- 5.107 Costs incurred by facilitators that do not yield any additional benefit are ultimately a cost to taxpayers or consumers. Most facilitators have indicated that a new ELNO must either pay the facilitator's costs of connecting to the new ELN or provide some alternate commercial incentive to connect.
- 5.108 Stakeholder feedback indicates that apart from the one-off costs of connection, there are significant ongoing costs for the maintenance and management of separate ELN connections.

Cost of complexity

- 5.109 Earlier in this section, the additional complexity resulting from multiple ELNOs was discussed. This comes at a significant cost and may result in additional risks.

Risk and liability

- 5.110 Participants are unlikely to face increased risk and liability in an environment where ELNs operate independently. This would increase in an interoperable ELN

environment and would need careful consideration, and is likely to increase the cost of insurance assuming suitable insurance products are available.

Current barriers to effective and efficient competition

5.111 Feedback from stakeholders and our analysis has identified the following specific barriers to effective and efficient competition between ELNOs:

- Network effects drive subscribers to largest platform
- Switching costs faced by subscribers
- Cost to establish a settlement facility
- Costs to connect to land registries and revenue offices

5.112 These barriers are described in the following paragraphs.

Network effects drive subscribers to largest platform

5.113 An industry definition of a **network effect** is the effect that an additional user of a good or service has on the value of that product to others. When a network effect is present, the value of a product or service increases according to the number of others using it.

5.114 In contrast subscribing to a platform with relatively few users provides no value if all other participants to the transaction are not subscribed to the competing platform. This provides a powerful incentive for users to subscribe to the platform with the most subscribers.

5.115 In the current eConveyancing environment, where practically all existing subscribers are users of the incumbent platform and very few are subscribers of a competing platform, it means the incumbent platform is highly valuable to subscribers because they can execute multiparty transactions eg transfers that involve other subscribers.

5.116 This presents a challenge to potential new ELNOs where even if better service and lower prices are offered it may not be sufficient to overcome the network effect and attract new subscribers.

5.117 Ultimately, if new entrant is successful in attracting a significant market share, the fragmentation of the market decreases value for all subscribers who can no longer transact with all other subscribers. In this scenario, in order to transact, subscribers are forced to multi-home.

Switching costs faced by subscribers

5.118 Even if subscribers see value in switching to an alternate ELN, they face switching costs including direct cash costs as well as consumption of their time.

- Time costs – sign up, VOI, learning new system
- Cash costs – VOI, digital signature

5.119 Where the subscriber needs to multi-home in order to process multi-party transactions, they face ongoing costs of maintaining proficiency in, and digital signatures for, multiple systems. Digital signatures currently cost up to \$200 pa per user per ELN.

Cost to establish a financial payment and settlement facility

- 5.120 Financial payment and settlement facilitators are unlikely to derive significant benefit from competition. They have already invested significant funds in the establishment of the first ELN. No additional benefits have been put forward for facilitators to connect to a second network but would require additional investment of cash and resources. Maintenance of redundant infrastructure and increased change control complexity further add to overall operating costs.
- 5.121 One response to the NSW draft interoperability report between ELNOs highlights the cost impacts of infrastructure duplication:
- *It is not clear if the proposed environment will definitively result in reduced costs and complexity for consumers. If a multi-ELNO market results in duplication of existing infrastructure, or a complex new environment in a central hub (e.g. a “new payments” environment), it is possible that the total cost of the system would increase, with the subsequent likelihood that consumers end up bearing the impact of these increased costs of complexity.*
 - *Transitioning to a multi-ELNO framework could be costly for ... members. For example, a solution requiring new business rules and controls and, most importantly, new payment gateways or pipes, is costly.*
 - *E-settlement payment gateways are bespoke and not standardised, as are other payment gateways. One major bank reported spending more than \$10 million to build their eConveyancing payment solution. The new framework and at least 2 models discussed in the working groups would require financial institutions to build and maintain payment pipes to all operating ELNOs, regardless of whether the financial institution utilises that ELNO for eConveyancing.*
- 5.122 We note that whilst this was raised in the context of interoperability, this cost arises as a direct consequence of infrastructure duplication rather than interoperability. It is an issue that applies equally to the current environment or an interoperable environment.
- 5.123 We understand that many financial institutions have indicated that a new ELN must either pay the facilitator’s costs of connecting to the new ELN or provide some alternate commercial incentive to the facilitator to connect.
- 5.124 There are approximately 15 financial institutions directly integrated to facilitate financial payment and settlement of the current system. With the expected cost of payment integrating each institution potentially up to several million dollars, establishing a completely new payment and settlement facility could foreseeably cost tens of millions of dollars.
- 5.125 Fundamentally we see three ways that this issue might play out:
- Access to the financial payment and settlement infrastructure is shared between all ELNs avoiding duplication
 - New ELNs find innovative ways to materially reduce the cost of establishing the necessary payment and settlement infrastructure eg by adapting an existing payment and settlement system for eConveyancing assuming they meet the regulatory requirements of RBA and ASIC

- New ELNs fail to secure the necessary funds and/or commercial arrangements to establish the necessary payment infrastructure and duplication is avoided but the ELNO cannot fulfil its obligations under the MOR

Costs to connect to land registries and revenue offices

- 5.126 Land registries and revenue offices are also unlikely to derive significant benefit from competition. They have already invested significant funds in the establishment of the first ELN. No additional benefits have been put forward for them to connect to a second network but it would require additional investment of cash and resources. Maintenance of redundant infrastructure and increased change control complexity further add to overall operating costs.
- 5.127 Costs incurred by land registries and revenue offices that do not yield any benefit are ultimately a cost to taxpayers. Most have indicated that a new ELN must either pay the land registry and revenue office costs of connecting with the new ELN.

Options to reduce barriers and support competition

- 5.128 In identifying options to support competition between ELNOs we considered feedback from stakeholders as well as our own analysis of the current market model.
- 5.129 The options are mapped with a qualitative assessment of their impact in reducing the barriers in the following table.

Table 1 – Impact of options on reducing barriers to competition

Option	Barrier			
	Network effects	Switching costs	Payment & settlement facility costs	Land registry and revenue office costs
Interoperability	High	Moderate	-	-
Cross-ELN digital certificate recognition	Moderate	Moderate	-	-
Cross-ELN subscriber recognition	Moderate	Moderate	-	-
Common user interface across ELNs	Moderate	Moderate	-	-
Combination of Cross-ELN digital certificate & subscriber recognition and common user interface	High	Moderate	-	-
Access to an existing eConveyancing payment and settlement platform on fair and reasonable terms	-	-	High	-
Integration hub that connects ELNOs with land registries and revenue offices	-	-	-	High
Access to API and data standards for land registries and revenue offices connections	-	-	-	Moderate
Reduce variation in API and data standards across land registries and across revenue offices	-	-	-	Low

Interoperability

- 5.130 The IGA Review scope included consideration of what, if any, regulation is appropriate to support a competitive ELNO market and the interoperability of ELN systems. During the initial consultation phase stakeholder views on interoperability were sought.
- 5.131 In the IGA Review Issues Paper we highlighted the criticality of ensuring that before any interoperability model was adopted, the benefits, costs, complexity, risk and liability were considered and resolved.

NSW Government work on interoperability

- 5.132 During the IGA Review consultation a separate process was commenced by the NSW Government that included:
- Initial discussion with NSW industry stakeholders at a meeting on 4 December 2018
 - Publication on 6 February 2019 of the Directions Paper on proposed eConveyancing interoperability regime in which the NSW *“Government’s in-principle decision is that interoperability between ELNOs should be mandated in NSW”* was set out and a timeline set *“for the work required to achieve interoperability in NSW in the second half of 2019”*
 - Receipt of submissions from stakeholders in response to the Directions Paper.
 - Technical and regulatory Working Groups were established in NSW *“to provide industry and government stakeholders with a forum to present their views and provide their expertise on this complex topic”*
 - Publication of the Draft Report on Interoperability between ELNOs by the Working Groups’ chair, Dr Rob Nicholls, that summarises the discussions and outcomes of two industry Working Groups on interoperability between ELNs
 - Receipt of submissions from stakeholders in response to Draft Report on Interoperability between ELNOs
 - Joint working group meeting on Monday 15 July 2019 to discuss the Draft Report on Interoperability including areas of consensus and disagreement
 - At the time of writing the final report was not yet published
- 5.133 Given the extensive time commitment of stakeholders to the NSW process, it was agreed with ARNECC that it was impractical for the IGA Review to engage the same stakeholders on interoperability. Instead the IGA Review team independently observed the NSW process:
- Attending the Hon. Victor Michael Dominello MP’s (Minister for Finance, Services and Property) forums on 4 December 2018 and 14 February 2019
 - Observing (via teleconference) the initial technical and regulatory Working Groups meetings on 27 March 2019
 - Reviewing material posted on the Working Groups’ document hub including:
 - Directions Paper
 - Discussion papers prepared by Working Group chair and secretariat

- Reports and presentations by third parties eg insurance, security etc
- Draft Report on Interoperability
- Stakeholder responses to the Directions Paper, discussion papers and Draft Report on Interoperability
- Working Group meeting minutes
- Observing (via teleconference) the final joint Working Groups meeting on 15 July 2019 during which the draft Report on Interoperability was discussed

5.134 We reviewed the submissions to the Directions Paper. Stakeholder feedback from the Paper is provided below.

- *The current interoperability design and timeline could result in millions of dollars in increased costs as the banks will need to create and maintain payment gateways to each ELNO and build them in record time*
- *Testing will be rushed, resulting in many significant “use cases” not being thoroughly tested before the system becomes operational, with the likely result of larger numbers of delayed settlements and the possibility of increased fraud and incorrect settlements*
- *Many settlements will also need to default to paper at the last minute if we learn that a settlement type is not possible in an interoperable environment under the design*
- *An effective system for true interoperability (interoperability for all participants) is essential for a market that has two or more ELNOs*
- *While recognising the potential benefits to the community of a competitive ELNO market, there are however, complex issues, risks and costs associated ...there is a need for in-depth analysis with participants to develop national interoperability options that deliver simple, consistent and cost-effective consumer outcomes*
- *We have concerns around the development of multiple and/or complex interoperability models across jurisdictions increasing complexity, inefficiencies and costs*
- *It would be preferable if any interoperable solution was nationally agreed at the outset. If NSW adopts an independent approach, it must be adaptive to a nationally agreed interoperability solution.*
- *Another guiding principle should be to minimise risk and cost*
- *The impact of any model chosen and how costs might be absorbed or passed on must be a key consideration, given the capital expenditure likely to be required*
- *Specific mention should also be made to security, in the sense of secure interoperable connections and the overall security of the system*
- *Considers interoperability to be a non-negotiable feature of the future of the eConveyancing market*
- *Recognises concerns with regard to identifying liability in multiple ELN environments where fraudulent activity is discovered*
- *The regulator and governance framework must ensure stakeholders can easily identify who is liable for the losses occasioned by such fraudulent activity, when discovered in one or both environments*

5.135 We recognise the very high degree of difficulty developing an interoperability solution for eConveyancing and commend the Working Groups, chair and secretariat on the efforts to date.

5.136 Their discussions have served to raise the collective awareness of those participating stakeholders to the critical and challenging issues that must be carefully navigated. These issues need to be resolved if a solution that can deliver desired benefits and avoid introducing unacceptable complexity, risk and cost is to be developed. As one stakeholder wrote in their response to the draft Report on Interoperability:

- *This has been immensely beneficial to our understanding of the risks and associated opportunities interoperability brings...The workshops have highlighted the significant issues that must be identified, assessed and resolved before a model can be decided...what the workshops have demonstrated is that the issues are far greater, farther reaching and more complex than first appreciated. None of the issues raised to date have been adequately addressed, let alone resolved.*

5.137 In submissions to the draft Report on Interoperability and during the final joint Working Group meeting, stakeholders expressed the following views on interoperability:

- **No clear problem statement and objectives from which a full option set can be generated and evaluated – from some stakeholders**
 - *The ... recommends that a clear understanding of the problem(s) interoperability is designed to solve be clearly outlined, along with the mapping of minimum regulatory and technical requirements. The outcome of such a discussion, should then be used to develop models that a) solve the problem, b) provide cost and business efficiencies, and c) to not increase risk outside of what would ordinarily be acceptable.*
 - *Interoperability solutions were presented in the absence of any articulated problem statement, specification or requirements gathering, or interoperability design workstreams.*
 - *Facilitating competition through interoperability in the ELN marketplace may ultimately only achieve a duopoly that is less efficient, prone to greater risk, more costly and counterproductive to the intentions of the original COAG Agreement to have an effective national electronic conveyancing platform. To this end, further assessment of interoperability and its competitive advantages must be undertaken.*
 - *interoperability among ELNs is premature because no case has been made that there is a justifiable need for regulatory intervention to ensure competition, and it is premature because a case is yet to be made that interoperability is the best available solution to achieve that purpose*
 - *interoperability will promote effective ELNO competition in a market which would otherwise tend to favour the incumbent through network effects*
- **Any model for interoperability must be national** - with one exception, all stakeholders expressed the strong preference that, if any model for interoperability is adopted, that it be national
 - *As we have noted on many previous occasions, any model for interoperability among ELNOs should fit within a nationally consistent framework for eConveyancing.*

- *The interoperability solution must be a national solution*
- *The ... continues to maintain the firm belief that ARNECC must take responsibility for adopting, facilitating and regulating national outcomes for electronic conveyancing. With outcomes from the Intergovernmental Agreement (IGA) still pending it is envisaged that any final Paper representing the views or conclusion of the NSW interoperability working groups would serve as a resource for ARNECC.*
- **No agreement on a preferred model**
 - *choice of model for interoperability should inform and be informed by an analysis of the risk, liability and insurance issues, which are likely to be different for different models*
 - *the ... supports further investigation of the 'infrastructure' model as it potentially has lower costs, risks and complexity... The infrastructure model will be more efficient to implement, requiring less industry effort and, because payment pipelines don't have to be replicated, it will require less time and lower cost to build*
 - *time has passed for an infrastructure model. ... would support either of the 'direct connection' models of interoperability (Model 2 or 3)*
 - *Of the two implementation approaches presented, a bi-lateral model is the only feasible one at this time*
 - *Prefers existing integration offering*
 - *Underpinning the model should be the two key factors of achieving process efficiencies and cost efficiencies*
- **Achieving interoperability in the second half of 2019 is not agreed**
 - *We reiterate that a timeframe that provides for implementation of a multi-ELNO environment prior to the end of 2019 is unrealistic.*
 - *the aggressive timeframes presented by the NSW Government should be reconsidered and more appropriate timeframes, reflective of the complex nature of the matters at hand, and the consideration and time required for appropriate due diligence to be carried out, should be pursued.*
 - *... agrees that this could be achieved by the last quarter of 2019 and emphasises the urgency of achieving interoperability to promote ELNO competition given the mandating of e-Conveyancing in various states across Australia*
 - *As a matter of due process, and to ensure the best consumer outcomes are achieved, we think it is critical that all relevant stakeholders are consulted and given adequate time to contribute in a carefully considered and meaningful way.*
- **Cost benefit analysis is required**
 - *The draft report contains a relatively superficial consideration of the costs of interoperability for stakeholders including consumers, the banking sector and other participants, in relation to the facilitation of interoperability and the different models that are under consideration.*
 - *Further work...should include...further analysis of different models, including consideration of cost*

- *The ... strongly advocates that progress toward a final interoperable solution, in the event a preferred model is identified, will require a significant independent “cost benefit analysis”.*
- *A robust cost-benefit analysis of each proposed interoperability model must be performed before any model is agreed. Alternative market models may need to be considered if there is not enough net benefit to consumers derived from the currently proposed models, once costs have been determined.*
- **Risks have not been adequately assessed**
 - *does not, in our view, adequately assess the risks of a multi-ELNO interoperable environment for consumers, financial institutions and to the reputation of the eConveyancing system generally.*
 - *The review to date has failed to evaluate or in any way acknowledge the impact and real risk of interoperability on settlements. The independent risk assessment undertaken by Kinetic IT does not appear to include in its scope one of the most critical elements in any property transaction – financial settlement*

Risks of interoperability

- 5.138 We considered the following risks posed by interoperability.
- 5.139 The introduction of additional ELNOs as information intermediaries in a transaction further complicates the determination of liability in the event of error or fraud. In this environment a property owner impacted by fraud is poorly placed to determine which party among practitioners, ELNOs and banks is at fault.
- 5.140 In cases of significant loss, it is possible that ELNO focus shifts from using best endeavours to recover funds to assigning liability to the other ELNO. This introduces a new risk in the recovery of losses by property buyers and sellers that is especially critical where the losses are significant.
- 5.141 When one ELNO only is involved in the transaction experience has shown that the ELNO has worked cooperatively with the banks and the registrar to promptly recover and return the funds. This enabled the affected vendor to progress their next transaction.
- 5.142 Given many ordinary Australian homeowners have most of their wealth in their homes, they would likely face severe financial hardship in the event of error or fraud unless there are mechanisms in place to ensure near immediate resolution. Action through courts would take too long and be costly. We think it is incumbent upon government to ensure effective resolution mechanisms are in place.
- 5.143 Following the earlier hacking incidents, PEXA introduced a very limited Vendor Guarantee which provides some assistance to resolve incidents, but this alone is inadequate.
- 5.144 If one ELNO is less diligent than another in management of its subscribers' performance the increased risk impacts not only that ELNO's transaction but, in the case of interoperable transactions, also impacts on the other ELNO increasing its risks.
- 5.145 Aspects of the MOR relating to privacy will need to take into account that interoperability will allow ELNO subscribers sensitive client data and transaction

information to be shared with commercial entities with which they have no formal agreements in place.

- 5.146 Regulators, from both registries and revenue offices, have raised with us the complexity and risk associated with change control when additional ELNOs are added to the mix. Revenue offices in particular do not want their Parliaments restricted in their revenue raising priorities and scheduling to be adversely impacted because not all components of the eConveyancing system can respond to change requests in a timely fashion. Resolution is made more difficult if one ELN can accommodate the change and the other cannot. In an interoperable system, this may result in failed transactions. We note this issue of change control has not yet been satisfactorily addressed in the current environment of standalone ELNs.
- 5.147 Financial institutions have also expressed a similar concern with respect to security upgrades and consequent risks if ELNs cannot accommodate these changes when needed.

What problems could interoperability address?

- 5.148 From our engagement with stakeholders and our analysis we see two emerging issues that interoperability between ELNs can potentially address.
- Multi-homing – subscribers potentially need to register with, obtain a digital signature from and use, each ELNO – the impact on the subscriber may be significant depending on the cost, of both time and money, to multi-home
 - Network effects barrier – to reduce the likelihood of having to multi-home subscribers may tend to gravitate to the ELN with the most subscribers, potentially inhibiting effective competition
- 5.149 The extent to which interoperability helps address these issues is highly dependent on the model chosen and details of its implementation.
- 5.150 As noted previously some stakeholders have stated that a clear problem statement was not developed, potential overlooking solutions that deliver greater net benefit. The following problem statement offer by one stakeholder would serve as a useful basis for an agreed industry problem statement:
- *In a multi-ELNO market, subscribers want to continue to transact efficiently and securely while only subscribing to the ELNO(s) they choose*

What is interoperability?

- 5.151 Broadly speaking, interoperability is the ability of two or more components or systems to exchange information and to use the information that has been exchanged.
- 5.152 In eConveyancing, we define interoperability as the ability of two or more ELNs to exchange information and use the information to complete a multi-party transaction.
- 5.153 The draft Report on Interoperability provides a description of the intent of interoperability.
- *Interoperability would allow a consumer (e.g. a vendor) through a subscriber (e.g. a lawyer or conveyancer) connected to one ELN to engage in a*

conveyancing transaction with another consumer (e.g. a purchaser through a subscriber connected to a different ELN). As a conveyancing transaction can involve many parties, interoperability could potentially enable each party to use a different ELN in the same transaction.

5.154 We note there are frequently four or more parties to a property transfer transaction including:

- Subscriber representing the vendor
- Subscriber representing the purchaser
- Subscriber representing the outgoing mortgagee
- Subscriber representing the incoming mortgagee
- Financial institution(s) facilitating payment for the various subscribers

5.155 The complexity, costs and risks of an interoperable solution are highly dependent on its design.

Depth of interoperability drives complexity, cost, risk and liability

5.156 As participants in the NSW interoperability Working Groups have recognised, developing an interoperability solution can become complex very quickly. Several key issues have emerged from their work including:

- Division of roles and responsibilities between ELNOs
- Risk and liability allocation
- Technical implementation
 - Complexity of data exchanged
 - Standard versus bespoke APIs
 - Data standards
 - Scalability to 3 or more ELNs
- Consents and authorisations
- Potential for Innovation

5.157 From our analysis we believe that the depth of interoperability is a critical factor that impacts on most of the above issues.

5.158 In this section we consider and contrast the issues at the shallowest depth of interoperability with those resulting at an increasing depth of interoperability.

5.159 We contend that as depth of integration increases so too does the complexity with adverse consequences for ELNO role clarity, risk and liability allocation, technical implementation, complexity and cost.

5.160 At the shallowest depth of interoperability, issues are most likely to be minimised.

- Simplest, clearest division of roles
 - Non-lodging ELN passes data input from its subscriber(s) to the Lodging ELN
 - Lodging ELN provides visibility of minimal workspace data to Non-lodging ELN needed by Non-lodging ELN subscriber(s)

- Lodging ELNO completes and processes the entire transaction as if all subscribers are its own
- Simplest, clearest risk and liability allocation
 - Non-lodging ELNO risk and liability confined to faithfully passing basic information between its subscriber and Lodging ELN in a timely manner
 - Lodging ELNO assumes risk and liability for all other aspects
 - More likely to be insurable based on similarity to existing arrangements between PEXA and practice management software providers
- Lowest technical complexity
 - All authoritative data resides on the Lodging ELN - the Non-lodging ELN reads/writes data provided by its subscribers directly from/to the Lodging ELN via API
 - Minimal set of structured data is exchanged via API between ELNs eg name, title ref, bank account details, transaction status etc resulting in low technical complexity
 - All processing proceeds on the Lodging ELN in the same manner as it would if no other ELN were involved including document preparation, payment instruction preparation, property settlement orchestration, financial payment and settlement, and dealing lodgment
 - All subscribers (including those from any Non-Lodging ELN) sign documents in the Lodging ELN
 - Scales readily – little additional complexity even when more than two ELNs involved in the transaction
- Consents and authorisations
 - Non-lodging ELN subscribers must consent to use of Lodging ELN and have a digital signature that can be used on the Lodging ELN
- Lowest constraint on innovation
 - By minimising the quantity and complexity of data shared and using the simplest mechanism of storage and exchange, the degree to which multiple ELNs are coupled is minimised
 - This provides maximum freedom for ELNOs to innovate how the information is presented, processed and stored

5.161 As depth of integration increases, issues will most likely be increasingly exacerbated. We note the following scenario shares significant commonality with the models explored by the NSW Working Groups.

- ELNO roles become intertwined
 - Two or more ELNs exchange and hold a shared set of data and unstructured data
 - Two or more ELNs obtain data from subscribers, registries and revenue offices, then process that data, prepare documents and facilitate signing of documents
 - Requires more complex rules to determine roles and responsibilities
 - One ELN prepares and facilitates financial payment and settlement and lodges documents (including those prepared by other ELNs) with the

registry - alternately, if settlement and lodgment components are lodged in parts by multiple ELNs, role complexity increases even further

- Increasingly overlapping and complex allocation of risk and liability
 - Each ELN responsible for many small components of a transaction that may vary depending on the roles that each ELNs subscribers fill in a given transaction
 - The large number of interfaces between components makes risk management and liability allocation increasingly complex
 - Resolution of liability in the event of failure is increasingly unclear, difficult, time consuming and costly – likely resulting in an unsatisfactory outcome for all parties
 - Increasing risk that participants become uninsurable
- Increasing technical complexity
 - Data is synchronised across both Lodging and Non-lodging ELNs with increased risk of data inconsistency
 - Unstructured data (eg signed documents) in addition to structured data (eg name, title reference, bank account details) is exchanged via APIs between ELNs resulting in increasing technical complexity
 - Processing proceeds in parts across both ELNOs before reassembly with increased potential for incompatible data eg different versions of document prepared by one ELN compared to that expected by the other ELN
 - Subscribers sign documents in their respective ELN
 - Scales poorly - becoming much more complex when more than two ELNs are involved in the transaction
- Consents and authorisations
 - Non-lodging ELN subscribers must consent to use of Lodging ELN
- Increasing constraints on innovation
 - Increasing the quantity and complexity of data shared and using complex mechanisms of synchronisation, increases the degree to which all ELNs are coupled
 - This increasingly restricts the ability of ELNOs to innovate how the information is presented and processed eg process steps must match across ELNs, versions of documents exchanged must remain in lockstep or backward compatibility must be maintained between ELNOs
 - Constraining innovation of presentation (user interface) and internal ELN processes greatly limits the ability of an ELN system to enhance subscriber productivity

5.162 Based on the above conceptual analysis we believe that, if interoperability is to be pursued, then the shallowest version of interoperability should be investigated first because it will more likely address the target problems in the simplest way with fewer issues. We think this will potentially lead to a quicker, lower cost and more sustainable implementation than is likely with deeper integration.

5.163 One apparent shortcoming of the shallowest interoperability approach is the need for a Non-Lodging ELN subscriber to sign documents in the Lodging ELN

platform. In our view the advantages of the shallow approach significantly outweigh this inconvenience to subscribers, however we think that this inconvenience could be addressed in a manner that is seamless to the Non-lodging ELN subscriber through a combination of:

- Cross-ELN subscriber recognition (discussed later in this section)
- A technology solution whereby the signing is completed by the subscriber within the Non-lodging ELN user interface, however it is actually executed by the Lodging ELN and preserves the completeness of Lodging ELN role and liability

5.164 While we think the above analysis offers a rationale for exploring a shallow integration approach next, we certainly do not want to understate the challenges in developing an interoperability solution that delivers a net benefit to consumers and subscribers whilst effectively resolving the substantive issues of complexity, cost, risk and liability.

Next steps in interoperability

5.165 Interoperability has proven to be a complex challenge and we are not recommending any immediate solution. We have provided our view that the shallowest interoperability approach provides the best chance of developing an acceptable model with reasonable costs and risks.

5.166 We recommend that the national regulators be asked to develop the minimum conditions for safe and effective competition for eConveyancing noting that it may be possible to leverage off the existing work done on the stock market regulatory review.

5.167 It is important that the regulators in each jurisdiction (registrars and revenue offices) are consulted to ensure any proposed models meet their requirements. It is also important that issues of liability for governments and homeowners are resolved.

5.168 We believe it would be useful to consider the work done to date in this IGA Review, the work done by the Working Groups in the NSW interoperability process and the outcome of the IPART pricing review. Additional consultation on interoperability with participants in all active jurisdictions will be necessary.

5.169 The stakeholder feedback clearly identifies that a national view is required; they do not want different competition and interoperability solutions in different jurisdictions.

Separation of concerns - interoperability and infrastructure access

5.170 In the IGA Review Issues Paper we identified three high level operating models for interoperability including an Infrastructure ELN which was distinguished from the other models in that the Infrastructure ELN shared its financial payment and settlement facilities, as well as registry and revenue office connections.

5.171 In this report we note we have separated these two concerns

- Interoperability discussed above which seeks to address the issues of multi-homing/network effects

- Infrastructure access arrangements discussed later in this section which seek to avoid inefficiencies of duplicating infrastructure

5.172 We think this simplifies discussions about interoperability and makes it clear that the issues regarding duplication of infrastructure, most notably of financial payment and settlement services, should be addressed whether ELNs operate independently or interoperate.

Cross-ELN digital certificate recognition

5.173 In the eConveyancing environment, each user has a digital identity established. Importantly this involves an ELNO, or an identity agent, verifying the identity of the subscriber and issuing a digital certificate registered to subscriber. Where the subscriber is an organisation the subscriber may request additional digital certificate for additional users that need to digitally sign documents in the ELN.

5.174 The legal recognition of this digital identity and the use of the associated digital certificate to digitally sign documents allows transactions to be executed by a user without the need for execution of documents using wet signatures.

5.175 In a single ELN environment each user only had one such identity and digital certificate, however in a multi-ELN environment there is potential for a user to have multiple digital certificates – ie one for each ELN.

5.176 Managing additional digital certificates for an individual may result in unnecessary cost and lost time for subscribers and ELNOs. Each additional identity requires that subscribers go through the VOI process and have a new digital certificate issued. The VOI process costs subscribers around \$50 plus a few hours of their time, digital certificate costs vary up to \$150 pa (plus \$350 account setup) along with the administrative overhead of monitoring their expiration and managing their renewal.

5.177 There are currently two accredited providers of digital certificates used in eConveyancing – Digicert and PEXA. Digicert certificates are open and may be used on any ELN but are more expensive (~\$150 /year/certificate + \$350 account setup). PEXA certificates are closed and only available for use on the PEXA ELN but are cheaper (~\$50 /year/certificate).

5.178 PEXA subscribers currently have a choice to purchase and use a closed PEXA signature or an open Digicert certificate. It would appear Sympli subscribers only have the open Digicert certificate available to them.

5.179 A single digital certificate to represent a single subscriber across multiple ELNs has a number of benefits:

- Reduces network effects
 - Supports alternative to interoperability – Combined with a use of a common front-end user interface, helps hide differences experienced by subscribers when using a different ELN
 - Supports interoperability – Facilitates a more seamless subscriber experience if “shallowest interoperability” solution (discussed earlier) is implemented
- Reduces switching costs incurred by subscribers
 - Eliminates the need to obtain a signature for each ELN

- 5.180 Therefore, in a multiple ELNO environment (with or without interoperability) we see open digital certificates as preferable to closed digital certificates because they reduce subscriber friction and support ELNO competition.
- 5.181 Given there is a market option available that allows participants to use a single digital certificate, it could be considered reasonable to abstain from any regulatory change. In such a scenario, we note that the subscriber switching friction persists and this favours the incumbent over new ELNOs.
- 5.182 The regulator could also consider mandating the use of open digital certificates whereby all ELNOs are able to rely on all digital certificates. This would simplify matters for subscribers. It would require that PEXA either, take action necessary to obtain the necessary accreditation and make their digital certificates open, or cease providing digital certificates.
- 5.183 The shift to open digital certificates (voluntary or mandatory) would likely result in higher digital certificate costs given the currently available open certificates are more expensive compared to the existing PEXA certificates (which we assume for cost reasons) are held by the majority of practitioners. If PEXA chose to offer open certificates, the costs of obtaining the necessary accreditation would possibly be passed through to subscribers in the form of increased digital certificate pricing.

Cross-ELN subscriber recognition

- 5.184 ELNOs are required to undertake several checks before registering a subscriber on their ELN. These checks are necessary to help reduce risk in the eConveyancing system, however they cost time and money for the subscriber and the ELNO.
- 5.185 In a single ELNO environment these checks occurred once for each subscriber, however in a multi-ELNO environment, under the current regulatory framework, these checks must be repeated for each ELNO the subscriber registers with. We note that in the multi-ELNO environment subscribers must potentially register with all ELNOs because the protocol that determines the ELN to be used for a given transaction dictate which ELN the subscriber must use.
- 5.186 One fundamental issue here is that the current requirements will drive wasteful repetition of identical subscriber checking processes.
- 5.187 Another is that in a multi-ELN environment, subscribers do not ultimately control which ELN executes the settlement and lodgment of the transactions they participate. In such instances and where eConveyancing is mandated they are not entering into a participation “agreement” by choice with an ELNO but rather they are mandated to do so.
- 5.188 We suggest ARNECC consider developing a process that allows subscribers to register once in the eConveyancing environment. This would include:
- Ensuring subscribers need only complete the registration process once
 - Clarifying roles and responsibilities eg of entities that register subscribers versus those that rely on the proper registration of subscribers
 - Developing a common participation agreement with input from subscribers and ELNOs.

- Developing a common subscriber register accessible by all ELNs
 - Use of cross-ELN recognised digital certificates (discussed earlier)
- 5.189 These changes would be expected to deliver two key benefits. Firstly, in reducing the friction faced by participants using the eConveyancing system in an environment with multiple ELNOs. Secondly, they would support competition by reducing the switching cost faced by participants when switching between preferred ELNOs.
- 5.190 We anticipate issues will arise during the redesign that will need to be carefully considered and resolved, particularly those pertaining to liability allocation that arise from any changes in ELNOs roles and responsibility. For instance, if a subscriber is registered as a result of the registering entity's error or omission, and that subscriber subsequently causes loss in a transaction. What is the responsibility and liability of: the registering entity, the ELNO who executed the settlement and lodgment (but did not register the subscriber)?
- 5.191 Further consideration will need to be given to how existing subscribers, who are virtually all PEXA subscribers, could be transitioned to any new regime. If they are to be given eConveyancing wide recognition, who should take responsibility for their registration? PEXA registered them and accepts its current responsibilities and liabilities which are limited to transactions it executes – It could be argued that it is not reasonable for PEXA to bear any liability where other ELNOs rely on registration PEXA completed without regard to third party reliance. Further these subscribers have signed up to PEXA under a specific participation agreement and consideration would need to be given as to if that agreement could and should be modified – the most expedient way to resolve these matters may be for each subscriber to be re-registered through a redesigned process that provides for cross-ELN subscriber recognition.
- 5.192 A mechanism for establishing and maintaining a common register of subscribers would be required. The development of such a mechanism would need to have regard for the benefits and costs of alternatives identified. The register could be hosted by single entity (eg ARNECC, one ELNO), or distributed across entities (eg registrars, ELNOs).

Common user interface across ELNs

- 5.193 In the single ELN environment subscribers only needed to learn one user interface. The emergence of a multi-ELN environment under the current framework will mean subscribers have to switch between different ELN user interfaces on a transaction by transaction basis ie they will have to multi-home.
- 5.194 If a subscriber has access to a common user interface across all ELNs, then it may use that same interface for all transactions and avoid the need to learn multiple systems.
- 5.195 We have identified four ways a subscriber could access all ELNs via a common user interface and outlined them below. They are:
- Third-party user interface (eg practice management software) that integrates with all ELNs
 - Each ELNO user interface populates other ELNO workspaces via APIs
 - Standard user interface that each ELNO builds and maintains

- Standard user interface that regulator builds and maintains

Third-party user interface (eg practitioner software) that integrates with all ELNs

- 5.196 Several third party (typically practice) software vendors already integrate with both ELNs to varying degrees in the current market. Vendors which offer complete integration with both ELNs (subject to the completeness of ELN third party APIs offered) are able to provide their customers with a common user interface across ELNs.
- 5.197 We note that third party software vendors are not, and cannot be, compelled to integrate with all ELNs. However, it would appear reasonable to conclude that, if switching user interfaces is a significant pain point for subscribers, then software vendors may be motivated to integrate to remove this pain point.
- 5.198 While it is possible that the market addresses this issue without any regulatory intervention, we believe the regulator should consider requiring that all ELNs provide adequate APIs for third-party access. It would further simplify and reduce the cost of third-party development if a core set of essential ELN APIs is standardised across ELNOs.

Each ELNO user interface populates other ELNO workspaces via APIs

- 5.199 In this option the subscriber always uses the interface of their preferred ELN.
- 5.200 Like the previous option, while it is possible that the each ELNO could populate all other ELN via bespoke APIs, we believe it would further simplify and reduce the cost of ELNO development if a core set of essential ELN APIs is standardised across ELNOs.
- 5.201 We note that this option is essentially the same as the shallowest version of interoperability discussed earlier in this section under the heading of Interoperability.

Standard user interface that each ELNO builds and maintains

- 5.202 ARNECC could require that ELNOs build and maintain a standard user interface. It would remain open to ELNOs to build and develop another, differentiated user interface.
- 5.203 Development of an effective user interface that satisfied the needs of subscribers is a major undertaking in itself. Add to this the complexity of reaching some form of consensus across ELNOs and industry participants and we think the likelihood of any process yielding an effective solution is low.
- 5.204 Development of a standard user interface is likely to be very costly and potentially more than each ELNOs proprietary user interface development. We note that every ELNO would incur these costs and they would likely flow to consumers. It would also consume significant industry and regulator resources.
- 5.205 Given the high cost and consumption of resources with a low prospect of useful outcome we do not recommend further consideration of this option. It has been presented here for completeness.

Standard user interface that regulator builds and maintains

- 5.206 Governments could let a contract for the development of standard user interface. This would leverage ELNO APIs for third-party use.
- 5.207 The same challenges with designing the standard user interface, described in the previous option above, are present in this option.
- 5.208 For similar reasons the development is likely to be very costly, although only one interface would be built rather than one per ELNO.
- 5.209 Again, given the significant cost and high consumption of resources with a low prospect of useful outcome we do not recommend further consideration of this option. It has been presented here for completeness.

Conclusion – API standard for third-party integration

- 5.210 A common requirement for the two feasible options above is that ELNs having sufficient and, ideally standardised, APIs for third party integration.
- 5.211 ARNECC could consider requiring all ELNOs to provide a standardised set of APIs that allow third parties the ability to populate the ELNO's workspace.
- 5.212 The development of an API standard could involve all ELNOs and interest third-party software vendors, with the ARNECC playing a role as facilitator and arbitrator.
- 5.213 One possible way to fast track the development of this API standard would be to base them on relevant PEXA APIs, subject to a suitable agreement being reached with PEXA. The potential benefits of leveraging PEXA's existing APIs include:
- Proven solution that has been developed, tested and operational over an extended period to date, and over a wide range of transactions
 - Software vendors already integrated with PEXA do not need to reintegrate
 - PEXA would not need to duplicate their API offering
- 5.214 We note that MOR version 5 introduce the requirement for Integration in section 5.5. However, this requirement does not specify any minimum functionality so could not be relied for the purposes described above without modification.

Access to an existing eConveyancing payment and settlement platform on fair and reasonable terms

- 5.215 Earlier in this section we highlighted the cost impacts of competition faced by participants as the industry transitions from a single ELN to multi-ELN environment. Significant costs, both upfront and ongoing, are incurred by financial institutions in the duplication of financial payment and settlement infrastructure. There are 15 financial institutions that facilitate financial payment and settlement in eConveyancing and the potential costs to establish a new bespoke payment service may run up to several million dollars for each institution.
- 5.216 Given financial institutions have not identified any additional benefits (to their customers or themselves) of duplicating this infrastructure, they would be unlikely

to be able to justify a business case for such expenditure. Absent other commercial incentives provided from a new ELNO that at least meet the costs, it follows that financial institutions would be unlikely to duplicate the infrastructure.

- 5.217 We have also discussed how this issue can be viewed as a potential barrier to the entry of new ELNOs. We see that market participants may lower and overcome the barrier by finding lower cost solutions eg by adapting existing payment and settlement systems to meet the regulatory requirements for eConveyancing payments.
- 5.218 However, unless the duplication of financial payment and settlement yields a material benefit it remains inefficient at an industry level to duplicate existing infrastructure where that infrastructure has capacity to meet industry demand. In this context an obvious solution is for industry to share the use of the existing infrastructure.
- 5.219 We think that the current regulatory framework when applied to the multi-ELN environment tends to encourage duplication of essential payment and settlement infrastructure, likely to the detriment of industry efficiency and/or effective ELNO competition.
- 5.220 Therefore, we suggest that consideration be given to establishing a regulatory backed access regime for financial payments and settlement infrastructure. In its response to the IGA Review Issues Paper the ACCC indicates why regulation for access may be required and outlines the models generally applied:
- *In markets with large entrenched operators from which a new entrant requires access or connecting services, it is the ACCC's experience that the relative bargaining power of the parties is unequal, which is not conducive to fair and reasonable commercial negotiations. Regulatory models to solve this problem generally take two overarching forms: upfront requirements, and negotiation with a regulatory backstop of arbitration. Upfront requirements are preferable where measures should be implemented consistently across an industry. However negotiation, with recourse to arbitration, provides more flexibility to market participants and may better accommodate new and emerging markets and new products.*
- 5.221 The availability of such an access regime lowers the barrier to entry for new ELNOs by lowering start-up costs. It encourages shared use of essential infrastructure but does not preclude other innovative solutions where the benefits justify any costs. We note there remain other matters that a new ELNO would need to resolve to operationalise payment and settlement services even if they access existing infrastructure eg an ELNO would need contractual arrangements in place with all financial institutions for payment instructions prepared by the ELNO to be accepted and executed.
- 5.222 Another way to share the existing infrastructure is for an industry standard to be developed that all financial institutions and ELNOs adopt. This would be efficient in the short term if it were substantively based on the existing financial payment and settlement infrastructure, however there may be intellectual property rights that need to be considered.
- 5.223 Further, development of industry standards for payment platforms can take several years. We believe the introduction of a regulatory backed regime could be implemented in a timelier manner and yield similar or potentially greater benefit to competition.

Integration hub that connects ELNOs with land registries and revenue offices

- 5.224 Similar to duplication of financial payment and settlement infrastructure, duplication of connections to land registries and revenue offices by additional ELNOs introduces cost and complexity without additional benefit to the land registries or revenue offices.
- 5.225 Additional costs to land registries and revenue offices that are recoverable are likely to be passed on to ELNOs and potentially reduce efficiency in eConveyancing (unless they are offset by competition driven efficiencies). Any costs that are not recoverable are ultimately born by the taxpayer.
- 5.226 Perhaps more importantly, some government participants have indicated that they believe change control in the current direct connection model is not sustainable beyond two or three ELNOs.
- 5.227 We are not supporting the creation of a new monopoly hub provider in the eConveyancing environment but one option to mitigate these complexities is to use an existing hub (eg PEXA), or a new government owned hub, to connect ELNOs with land registries and revenue offices. If the hub were simply a direct pass through, then the benefit to land registries and revenue offices would be small or negligible. They would still need to test the messaging with each ELNO initially and when changes occur.
- 5.228 However, there may be efficiencies gained where a hub operator takes over responsibility for testing and integration with each of the ELNOs. Each land registry and revenue office would only need to integrate with the hub, materially simplifying the complexity for land registries and revenue offices, resulting in a more sustainable operating model for them.
- 5.229 An integration hub operator cannot deliver these services at no cost, but it is reasonable to expect the operator would bring some efficiencies of scale to testing and integration such that the overall cost is lower with the hub than without. In these circumstances the start-up cost to ELNOs could be lower.
- 5.230 We think ARNECC and the Revenue Office eConveyancing Sub-Committee could consider establishing an integration hub. Such a hub might be developed under contract with a third-party provider. Given PEXA has established, tested and operationalised connections with all land registries and revenue offices active in eConveyancing it would be logical to consider it as a potential hub.

Access to API and data standards for land registries and revenue offices connections

- 5.231 Stakeholders noted intellectual property rights issues impacted access by new ELNOs to API and data standards for land registry and revenue office connections. This potentially delayed development and integration work of new ELNOs.
- 5.232 Restrictions that prevent a prospective ELNO from accessing, reviewing and ultimately using the API and data standards act as a barrier to competition. We think it is important for industry efficiency that these standards are accessible to, and used by, all ELNOs in establishing and maintaining connections with land registries and revenue offices.

5.233 We understand that ARNECC is taking steps to make ensure the API and data standards for land registry connections are made accessible. Similarly, we understand from the information provided to the NSW interoperability meeting by Revenue NSW that the Revenue Office eConveyancing Sub-Committee is seeking to make the API and data standards for revenue office connections accessible.

Reduce variation in API and data standards across land registries and across revenue offices

5.234 Stakeholders comment that variation adds cost, however jurisdictional legislative requirements limit the ease of developing common APIs and data standards.

5.235 To the extent it is feasible, reducing jurisdictional variation in API and data standard can help improve the efficiency of eConveyancing. It simplifies the development and maintenance of systems for ELNOs and potentially creates opportunities for land registries and revenue offices to leverage the work of their peers in other jurisdictions.

5.236 We have not conducted an in-depth analysis of jurisdictional variation but note that the Revenue Office eConveyancing Sub-Committee was established, in part, to make dealing with revenue offices nationally consistent within the limitations of legislation.

Current market structure – vertical competition

5.237 ELNOs are in a position of substantial market power which derives from the regulatory framework that, for a large segment of the conveyancing market, mandates use of an ELN to settle real property transfers and lodge dealings with land registries. This requires that participants directly and indirectly provide ELNOs with sensitive information about their businesses and customers

5.238 ELNOs have access to substantial information about subscribers' businesses. This includes:

- Number of transactions
- Geographic area of operations
- Indicative information on number of employees
- Ability to estimate income and potentially profit
- Details of customer names
- Identification of customer size

5.239 This means that ELNOs will be able to assess the value of practitioners' businesses and general competition law may not effectively prohibit them from using this information for acquisition or competition.

5.240 We note that changes intended to address these concerns were introduced in MOR version 5. ARNECC provided a rationale for the changes in its September 2018 stakeholder briefing as follows:

- *In response to concerns that an ELNO could potentially operate with an unfair competitive advantage, a separation framework was proposed for an ELNO wishing to offer upstream or downstream services within the same*

entity that holds the ELNO licence. The ECNL does not preclude an ELNO from offering additional services, or choosing to establish a separate company in which to supply competitive services, and under the proposed separation framework, it can do this but must comply with the separation requirements. The revised drafting for Separation is a balance between the need for some controls on an ELNOs conduct while still allowing them the flexibility to structure their operations.

5.241 However, it appears these changes heightened conveyancing practitioners concerns that ELNOs will be in a position of market power and will seek to take over conveyancing businesses.

5.242 Submissions in relation to the Issues Paper included the following practitioner comments:

- *For the conveyancing profession, the matter of an ELNO or related entity acting as a representative or subscriber is of gravest concern and one that must be addressed in full as a matter of priority*
- *The changes to the MORs Version 5 have unsettled conveyancers who are not convinced that the changes will prevent ELNOs from competing with them*
- *We agree with 6.27 that the rules in the MOR for ELNOs operating in a wider market need to be reviewed by a qualified economic Regulator in the near future to ensure that they are clear and there is no abuse of market power*
- *Enforcement powers and procedures would need to be developed*
- *As the system is no longer government owned and governments are mandating...the Governments now need to ensure these for-profit entities are sufficiently regulated to not drive out competition, not drive up costs, and not reduce independent representation for consumers dealing in property*
- *eConveyancing platforms ... must be restricted in full from competing with Conveyancers and Legal Practitioners in any manner ...*
- *We must not rely on general anti-competitive laws to try and stop such behaviours - by then it is too late, too costly and too uncertain - there must be specific, legislated restrictions imposed*

5.243 A summary of comments is that separation conditions in MOR 5 have not sufficiently addressed practitioner concerns.

5.244 In the ACCC's submission in response to the Issues Paper:

- *The ACCC agrees that vertical integration by ELNOs into related parts of the supply chain has the potential to raise concerns in this industry. We agree with the need identified at paragraph 6.27 for rules that are clear and ensure no abuses of market power.*
- *The ACCC's preferred regulatory structure is complete vertical separation between an ELNO and downstream providers, as it removes the incentive to discriminate on both price and non-price terms. However, if an ELNO is permitted to vertically integrate to offer downstream services such as conveyancing services, then it is necessary to have in place robust functional separation requirements or ring fencing.*

- 5.245 We recommend that the rules in the MOR for ELNOs operating in the wider market be reviewed by a qualified economic regulator (eg ACCC) in the near future to ensure they are clear and there is no abuse of market power.

6.0 APPROVAL PROCESS AND PROPOSED CHANGES

- 6.1 The existing approval process is well designed and comprehensive for the land titling component of eConveyancing. It references the need to obtain appropriate licences and regulatory approvals but only specifically identifies the regulatory approval from each registrar to provide and operate an ELN, prior to commencing operation in that jurisdiction.
- 6.2 It does not specifically reference the requirement to seek approval from each revenue office to provide and operate a system to meet revenue office requirements.
- 6.3 It does not identify to potential applicants the requirements that must be met to offer a financial settlement system that is regulated by the RBA.
- 6.4 Similarly, ASIC is not referenced as the regulator responsible for the payment and financial services system.
- 6.5 There may also be a requirement to get agreement from ACCC that the market approach and the separation plan are in accordance with national competition law.
- 6.6 The current approval process is in four parts as follows:
 - Category One – when applying for Approval and on renewal of Approval
 - Category Two – before commencing operation of the ELN and on renewal of Approval
 - Category Three – as part of the Annual Report to the Registrar and on renewal of Approval
 - Category Four – as the Monthly Report
- 6.7 Of these, the first two relate to approval to operate as an ELNO. The information that is required to apply for category one approval is as follows:
 - ABN and GST registration
 - Corporate registration - ASIC registration certificate plus company search not more than 30 days old
 - Properly empowered - Constitution and other constituting documents
 - Good corporate character and reputation
 - Principals, directors and officers of good character
 - Employees, agents and contractors of good character
 - Governance - Corporate governance model - Best practice governance
 - Financial resources - Audited financial statements and reports for the last two Financial Years - Sufficient financial resources
 - Technical resources - Technical capability document - Sufficient technical resources
 - Organisational resources - Organisational structure - Sufficient organisational resources
 - Widespread use - Business Plan

- National system and minimum documents - Business Plan
- Licences and regulatory approvals specified, obtained and current
- Business Plan
- Separation Plan (if applicable) – independently certified as compliant with the requirements
- Functionality – covered in the application to become an ELNO

6.8 The information that is required to apply for category two approval is as follows:

- Updates documents from Category one approval (listed in the paragraph above) as required
- Insurance - Certificate of currency for the insurance required under Operating Requirement 4.7.2, Compliance with requirements in Operating Requirements 4.7.4 & 4.7.5
- Pricing policy
- Integration - Compliance with the requirements of MOR 5.5
- Initial testing - Test Plan
- System security and integrity - Information Security Management System (ISMS) certified fit for purpose
- Vulnerability assessment and penetration testing undertaken and actioned
- Mitigate risk - Risk Management Framework (RMF) independently certified fit for purpose
- Minimum system requirements: Adaptability - Compliance with requirements in Operating Requirement 10.1(b)
- Business continuity and disaster recovery - independently certified fit for purpose
- Change management framework
- Subscriber registration process
- Subscriber insurance - Documented process to ensure current Subscriber insurance obtained and retained
- Participation agreement
- Subscriber review process
- Transition plan

6.9 Neither of these approvals assess whether ELNOs have a suitable financial payment and settlement system. We see this as a significant gap because experience demonstrates that the financial risk has been greater than the land titling risk.

6.10 In addition, the approval process does not allow input from the revenue offices and we believe their approval should be required before transfers are allowed.

6.11 We note that Category One approval requires applicant ELNOs to demonstrate that the necessary licences and regulatory approvals are specified, obtained and current however it does not identify any minimum set except approval of the relevant registrar. While it may not be possible to get RBA, ASIC and ACCC

indicative approval at this stage, it would be essential for applicants to demonstrate that they understand these regulatory requirements and have an adequate plan in place to meet and fund development of a compliant system. We suggest that the national regulators be asked to provide some guidance material that applicant ELNOs can review in preparing their application.

- 6.12 A business plan is required as part of the approvals which must include at least:
- Demonstrated understanding of the Australian property conveyancing market in each jurisdiction
 - Summarised market research undertaken to determine the most effective service delivery model
 - Description of your service delivery model, including the customer base and expected market penetration nationally and by Jurisdiction
 - Timings for the development of operations and delivery of particular services and facilities and the anticipated means of servicing different classes of Subscribers
 - Projections of Subscriber take-up and sensitivity analysis, outlining the assumptions made and the implications of all likely outcomes
 - Intended actions to achieve planned Subscriber take-up, overall and by market segment
 - Descriptions and estimates of the economic benefits realisable by each class of Subscriber.
- 6.13 When a new ELNO is entering the market it necessarily engages with a number of government and private entities in order to establish its platform. These entities have indicated that new ELNOs consume significant resources from their organisations when they engage and, even where direct costs are recovered, other priorities in their organisations are adversely impacted.
- 6.14 To avoid wasteful consumption of resources from these entities, it is imperative that new ELNOs have a realistic understanding of the costs and adequate financing in place to deliver their business plan. We recommend the business plan requirements include evidence that costs are understood, and adequate finances are in place, including those costs to meet all regulatory requirements. It may be sensible to provide the information to the identified national regulators and the appropriate revenue office(s) to get their assessment on whether the financial allowance made is adequate.
- 6.15 To address further these gaps in the approval process we recommend the regulator include further requirements for Category Two approval:
- Approval from RBA that financial settlement system proposed meets RBA requirements
 - Approval from ASIC
 - Approval from all appropriate revenue offices
 - Approval from the ACCC that the business plan and approach accord with national competition law

7.0 FUTURE ORGANISATION MODELS FOR REGULATION, GOVERNANCE AND MANAGEMENT

Current status

- 7.1 The ARNECC regulatory model was created within the IGA at Part 6 Formation, composition and operation of ARNECC, and Part 7 Functions of the ARNECC. Its role was to facilitate the implementation and ongoing management of the regulatory framework for national eConveyancing.
- 7.2 The principal functions of ARNECC included:
- Advise on any proposed changes to the ECNL
 - Provide authoritative advice about matters relating to national eConveyancing
 - Ensure that, as far as is practicable, business practices with respect to national eConveyancing are consistent when implemented in each jurisdiction
- 7.3 In particular, ARNECC was to develop for the registrars:
- One nationally agreed set of Australian Registrars' Operating Requirements for ELNOs
 - One nationally agreed set of Australian Registrars' Participation Rules to be applied by ELNOs
 - Any jurisdiction specific provisions in either the Operating Requirements or Participation Rules
- 7.4 ARNECC was to monitor the operation of and make any amendments it considered necessary to the Australian Registrars' Operating Requirements or the Australian Registrars' Participation Rules.
- 7.5 It is able to establish sub committees to advise on particular subject areas. It is not liable for the regulation or operation of any additional services provided by an ELNO (ECNL section 40).
- 7.6 Although the IGA identified the requirement for financial payment and settlement systems, it did not give any indication about how this will be regulated. However, the second reading speeches introducing the ECNL identified the RBA and ASIC as the relevant financial regulators. As noted by one stakeholder, the Commonwealth regulates banking and finance, not the states and territories.
- 7.7 Similarly, the IGA stated that eConveyancing would provide the ability to “Settle financial transactions, including the ability to pay disbursements, duties, and tax”, but the role of the revenue offices is not identified in the regulatory framework documents
- 7.8 The governance model to date has been effective in the establishment of the land titles component of eConveyancing that is robust and well regarded. Although stakeholders seek further efficiency gains, they believe the implementation has been successful citing the following:

- *Electronic settlement process is quicker and the elimination of the need to book a time with the banks and physically attend settlements is a major efficiency*
 - *Vendor receives funds faster and the ability to transfer funds to other parties eg Council rates rather than generating cheques*
 - *Immediate lodgement of caveats and other documents*
 - *Fewer errors at settlement in relation to documentation*
 - *Nearly all transactions have gone through securely with much less fraud perpetrated than in the paper system to date*
- 7.9 The components of the system that ARNECC is not regulating have not been as well managed. Regulatory guidance for the financial payments and settlements process and market regulation has not been explicitly stated. Although PEXA was established under regulatory guidance from RBA and ASIC there has been no ongoing review of the risk associated with the payment systems used, and oversight of practices when flaws have appeared. The RBA monitors and reports on the volume funds settled by PEXA as a batch administrator in the RITS.
- 7.10 The use of unverified bank account details to authorise high value payments has not been reviewed by the regulators, and the subsequent failures are handled by PEXA and the banks on an as needed basis. Analysis might suggest that the use of unverified bank account numbers is not fit-for-purpose in the payments system in the long run and this component of the process should be redesigned. ELNOs have not been required to develop an ePayments code but considering the amount of money at risk ie the value of a house, this matter needs careful consideration by a regulator.
- 7.11 Revenue offices have contracts with ELNOs but have no defined path to have their requirements considered in the process for approvals of ELNOs, or to have ongoing governance of matters such as change control.
- 7.12 The lack of sophistication in some practitioners with respect to cybersecurity has to date not resulted in changes to regulators certification requirements for practitioners. Practitioner regulators should consider this requirement especially in mandated jurisdictions where paper settlement is no longer available.
- 7.13 The current model with ARNECC operating as a Council does not have the remit or the necessary skills and resources to provide appropriate regulation and governance.
- 7.14 Future organisation models for effective regulation, governance and in some cases management eg national consistency agenda, require more resources to ensure a robust system for the future. With the addition of more ELNOs and potential interoperability arrangements, resource requirements will increase further.

Possible models

7.15 We have analysed the following options to determine which is most likely to deliver a suitable framework for the future.

- Base Option 1 - ARNECC as is or with additional resources
- Option 2 - New Corporations Law company with skills and resources to ensure cooperation with national regulators
- Option 3 - New national regulator
- Stakeholder proposed Option 4 - Jurisdictions regulate competition
- Stakeholder proposed Option 5 – Ministerial Council

Option 1 Status Quo
<p>Description</p> <p>This is the existing model with registrars from jurisdictions that are party to the IGA as the main regulatory body, meeting monthly. ARWG is an operational support group that was managing system change control and co-ordinating compliance reporting and monitoring for a national view. It also addressed other matters referred by ARNECC.</p> <p>The contract with the ELNOs is the mechanism for management of the ELNOs and subscribers; it is currently mainly used for management of the titling function.</p>
<p>Advantages</p> <ul style="list-style-type: none"> • Has titles expertise • Has achieved a successful implementation of electronic lodgement • Provides government administration expertise and understanding of administrative law • Experience in fraud management • Has delivered cost reduction to governments and subscribers (full benefits not yet realised) • Relatively simple to implement with appropriate funding • Low costs to government
<p>Disadvantages</p> <ul style="list-style-type: none"> • Land titling focussed – does not consider other regulators requirements eg financial payment and settlements, revenue offices, market regulation, practitioner and privacy regulators • Significant shortcomings in financial regulation and market regulation • Insufficient collaboration with Revenue Offices and their requirements are not fully integrated • Lacking a strong national focus and some gaps in voluntary collaboration developing • This lack of a national focus makes pursuing a national agenda and national stakeholder consultation difficult – process is dependent on collaboration with no independent nationally focussed pool of resources - all come from jurisdictions • Inefficient process to agree national issues for investigation eg no dedicated resources to analyse and develop position papers for consideration by ARNECC or other appropriate regulator • Insufficient funding for full regulation and governance – dependent upon contributions from registrars' administrative units • No dedicated operational resources eg for complaints, change control, subscriber and ELNO monitoring • No resources for national consistency • No clear responsibility for implementation planning • No clear national role for the governance and management of risk, audit and compliance, technology and cybersecurity

Option 1A Status Quo with additional resources

Additional Advantages

- Ability to acquire greater capacity for national planning and issues resolution in
 - Financial regulation
 - Market regulation
 - Risk, audit and monitoring
 - Stakeholder engagement
 - Technology and cybersecurity
- Additional resources for development of a national agenda including national consistency and industry efficiency

Additional Disadvantages

- Source of funding will probably mean a new charge on consumers, subscribers and ELNOs as governments are unlikely to fund to the level needed

Option 2 New Body Corporate

Description

It is intended this would be a Corporations Law company with a board that would include registrars from the participating jurisdictions.

It would comprise a small unit of staff with a national focus, and a suitable budget to let contracts for specific components of work agreed by the Board as eConveyancing develops eg emerging issues in cybersecurity.

It would develop a forward national agenda to work on issues identified by stakeholders as of most importance to them and would communicate regularly with peak bodies on the interests of members.

Titling expertise would still be provided by jurisdictions; external regulators would provide guidance and direction on financial and market regulation matters. The body would facilitate discussions and develop directions for ELNOs to accord with national and state and territory law. It would liaise with practitioner regulators and privacy regulators.

A constitution would be developed perhaps modelled on an existing body owned by governments.

Advantages

- Will provide a group of resources with a national focus
- Will have the ability to act on matters in accordance with its constitution
- Ability to
 - Own, maintain and sell IP
 - Receive income collected by jurisdictions from eConveyancing users for governance purposes
 - Act nationally on matters other than titling
 - Collaborate with regulators, potentially including secondments from regulators
 - Negotiate with ELNOs on complaints / mistakes / national improvement
- Would be able to subcontract expert resources in matters other than titling
- Would be able to negotiate policy positions with jurisdictions to prepare position papers with recommendations for ARNECC's consideration
- Would have a focus on regular collaboration with Revenue Offices, other State and Territory regulators and national regulators
- Would have regular engagement with stakeholders both national and within jurisdictions on identified issues
- Would be able to manage a nationally consistent framework for enforcement implementation with jurisdictional contract party agreement
- Relatively simple to implement with appropriate funding

Disadvantages

- Some jurisdictions may not allow statutory officers to be board members
- Could not act on titling without agreement from jurisdictions
- Could not alter ELNO contract arrangements without agreement from jurisdictions
- Cost – more costly than status quo – unlikely to be further funded by government, would need to receive revenue from eConveyancing users and beneficiaries

Option 3 National Regulator
<p>Description</p> <p>This could be a new national regulator or an existing regulator with modifications to its enabling legislation and provision of extra powers</p> <p>It is likely to be a government body.</p> <p>It would need to have skills in all governance areas of importance to eConveyancing or be able to contract for these skills as required.</p> <p>Interaction with jurisdictional land titling responsibilities is uncertain but could have separate contracts with ELNOs for non-titling matters including financial payments and settlement, market regulation and performance improvement and industry efficiencies. The regulator could also manage price capping and pricing reviews.</p> <p>There does not appear to be any existing regulator that is a good fit for all aspects of eConveyancing.</p>
<p>Advantages</p> <ul style="list-style-type: none"> • Would have the ability to act on matters in accordance with its enabling legislation • Ability to <ul style="list-style-type: none"> ○ Collect revenue ○ Act nationally on matters other than titling ○ Negotiate with ELNOs on complaints / mistakes / national improvement • May be able to own, maintain and sell IP • In collaboration with other national regulators, could deal with financial and market regulation • Could work collaboratively with other regulators on matters such as privacy and practitioner regulation • May be able to implement enforcement with contract party agreement
<p>Disadvantages</p> <ul style="list-style-type: none"> • No suitable national legislation • Funding uncertain and ability to impose levies on jurisdiction taxpayers unclear • State and Territory rights and obligations regarding land and revenue collection matters are unlikely to be ceded or referred to Federal Government • No identified federal body to assume responsibility • Likely to be a long and difficult implementation • Likely to result in split responsibility for different components of eConveyancing • Likely to be very costly in comparison with other options

- 7.16 The following models were proposed by stakeholders and although we do not recommend them, we have included a description and brief analysis for stakeholders to consider.
- 7.17 We are happy to receive comment back from stakeholders on these proposed alternatives as well as feedback from the DMC option set.

Stakeholder proposed Option 4 Jurisdictions Regulate Competition
<p>Description</p> <p>This model would expand registrar powers to address competition and continue ARNECC process dealing with operational rules.</p> <p>The NECL would be amended to expand the powers of the registrars to regulate a competitive market by amending the MORs to explicitly cover competition and consumer issues.</p> <p>It may also amend the NECL to clarify the authority to regulate financial matters.</p> <p>ARNECC's role either could be limited to operational issues or it could fulfil a consultative role when consumer or competition issues have national implications.</p>
<p>Advantages (Stakeholder identified)</p> <ul style="list-style-type: none"> • Creates within each jurisdiction a regulator for eConveyancing with the range of skills and legal powers required to regulate across the titling, competition, consumer and operational issues. • Avoids jurisdictional boundary issues that would arise if titling remained at State level but responsibility for competition and consumer issues or eConveyancing sits at the national or trans-jurisdictional level (as in Model 3). • Focuses the requirement for national consistency on operational issues and allows scope for individual action in each jurisdiction on consumer and competition issues, acknowledging that there are likely to be important market differences between jurisdictions
<p>Disadvantages (Stakeholder identified)</p> <ul style="list-style-type: none"> • Risks inconsistent decisions on non-operational issues not otherwise justified by differences in a jurisdiction • There is not a neat division between operational issues (which remain ARNECC's development responsibility) and competition and consumer issues (which would be dealt with by each registrar) • Does not solve problems with ARNECC decision making in relation to operational issues • Expanding the registrar's role to cover competition and consumer issues may overlap with other regulators (e.g. the ACCC), although other industry-specific regulators co-exist with the ACCC • Expanded role may not be consistent with the character and nature of the registrar role as "keeper of titles", although land titles office private concessions are already driving the registrars in this direction • Requires amendment of the ECNL

Stakeholder proposed Option 5 Ministerial Council
<p>Description</p> <p>This proposes a Ministerial Council on eConveyancing to manage the IGA and promote national objectives.</p> <p>The model also includes a new rule making body which seeks advice and guidance from (ARNECC, revenue offices, RBA, ASIC, ACCC, Australian Privacy Commissioner, Practitioner regulator bodies, Market advisory body) in establishing national rules.</p>
<p>Advantages (DMC identified)</p> <ul style="list-style-type: none"> • Strong national focus with national objectives established by Ministerial Council • Incorporates all relevant regulators • Incorporates industry representation (through Market advisory body)
<p>Disadvantages (DMC identified)</p> <ul style="list-style-type: none"> • Unlikely to gain necessary commitment to establish a Ministerial Council • Statutory office holders such as registrars cannot cede decision-making to another entity such as the rule making body • Extensive process and overhead for a relatively small market estimated at up to \$270M pa in fee revenue (not profit) • High cost of implementation, and predicated on use of scarce resources ie Ministers

Survey respondent views

- 7.18 In the stakeholder survey conducted as part of this review process, respondents were asked who should be responsible for regulating ELNOs and were given the following choices:
- ARNECC
 - ARNECC supported by a new skills-based entity
 - A new independent regulator
 - An existing independent regulator (please identify)
 - Other (please specify)
- 7.19 In Appendix I Survey results (at paragraph A1.33), it is noted that respondents' opinions were divided as follows:
- 26% New independent regulator
 - 20% ARNECC supported by a new skills-based entity
 - 17% ARNECC
 - 5% Existing independent regulator
 - Other 4%
 - 28% Don't know
- 7.20 The next question asked if respondents would support the establishment of an entity reporting to ARNECC to regulate the eConveyancing environment. The results at A1.34 demonstrated that more than 50% of respondents support the

establishment of such an entity with the balance either unsure (31%) or against the idea (16%).

Views from submissions to the Issues Paper

- 7.21 Some stakeholders preferred the concept of a new national regulator (Option 3) to oversee all aspects of regulation but recognised the difficulties of implementing such a solution. The most problematic issue is that State and Territory rights and obligations regarding land matters (both Registry Office and Revenue Office) are unlikely to be ceded or referred to Federal government.
- 7.22 They therefore agreed that Option 2 may be the possible solution but noting that the new body would need to be thoroughly resourced with the skills required to provide expert advice to ARNECC and to be able to operate in a timely manner. They noted that appropriate and adequate funding is needed to facilitate this role.
- 7.23 One stakeholder proposed *“the appointment of a national supervisory body rather than a regulator. A national supervisory body should have limited, but sufficient authority to mandate standards for implementation and drive the establishment of a national system. This body should also have the authority and resources to resolve efficiency and business process issues across jurisdictions.”*
- 7.24 We see the same difficulty of implementation for this proposal in that States and Territories are unlikely to cede powers to the Federal government, and it would limit the effectiveness of any such body if it was unable to influence the land titling components of eConveyancing.
- 7.25 It would also require some power to influence ELNO operations in relation to financial regulation and market regulation as currently the main mechanism used is the contract/operating agreement/licence with registrars. Although national regulators could take action against ELNOs if they were transgressing against national law, it is a cumbersome legal process to do so. Utilising the existing contracts with appropriate changes to the MOR and the contracts would be an efficient process.
- 7.26 There were some stakeholders that believe all legislation relating to land and land development should be national rather than jurisdiction based. Since this would require changes to the constitution, we believe it is well outside scope for the IGA Review.

Funding

- 7.27 Unsurprisingly most of the participants in eConveyancing believe that they should not pay to fund regulatory oversight, governance, national consistency, and business efficiency. Most participants believe that they have invested heavily in either money or resources to get the system up and running and were not offering to invest further.
- 7.28 However, PEXA noted that *“parties that gain benefit from the regulatory framework should fund it. These would include all ELNOs, private operators and each state, and may include others with industry or framework changes in future. In PEXA’s view, ELNOs should bear 50% of the cost of regulation, and the states and territories should contribute the other 50%.”*

- 7.29 We agree that all participants have invested significantly, and it is a tribute to that investment and resource commitment that the system is running effectively.
- 7.30 For the future participants are requesting that the system not just be regulated with minimal resources, but that there be a national focus on business development in the eConveyancing environment to improve business efficiency and deliver benefits to the industry participants. We think this is a sensible objective and while industry participants can identify and help resolve many of the issues themselves (eg delays causing settlement roll overs) it will also require some committed resources that are focused on these agreed issues.
- 7.31 The amount of funding required will depend on how large the body of work is to achieve the desired outcomes. Lessor funding means the work will proceed at a slower pace; higher funding will mean that the benefits can be achieved faster.
- 7.32 It may be sensible to set the funding level for a three-year period with a review after two years to determine whether the level is matching requirements.
- 7.33 In the longer term all participants will benefit from effective regulation, governance and business improvement. Therefore, all groups should contribute to funding including:
- Property buyers and sellers
 - Subscribers
 - ELNOs
 - State and territory governments
- 7.34 We suggest the funding could be raised from:
- A small charge on property buyers and sellers collected by ELNO and appearing as a disbursement on conveyancing invoices
 - A charge on subscribers meeting the direct costs attributed to oversight of their operations
 - A charge on ELNOs meeting the direct costs attributed to oversight of their operations
 - Continued contributions from state and territory governments
- 7.35 We will develop an estimate of the total amount of funding required when feedback from this draft report is received.

Recommended option and funding model

- 7.36 We recommend Option 2 New Body Corporate as the preferred model to ensure all regulatory areas, national and state and territory based are appropriately addressed in the future regulation and governance of eConveyancing.
- 7.37 We recommend that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and perhaps subscribers meeting the direct costs attributed to oversight of their operations.

8.0 STAKEHOLDER FEEDBACK

- 8.1 DMC consulted with stakeholders primarily through face to face interviews and where that was not possible via teleconference. The consultative record listing stakeholders interviewed, and submissions received in response to the Issues Paper is provided at Appendix II.
- 8.2 Where the relevant parties have agreed we have published these submissions on our website with this draft Report.
- 8.3 Feedback was also received via a stakeholder survey. The full results of the survey are provided in Appendix I.
- 8.4 In the tables below, we have summarised the feedback received from stakeholders during the interviews (mainly during September to December 2018) and identified their issues.
- 8.5 As noted previously the consultation with stakeholders occurred before the release of MOR version 5. Therefore, some of the stakeholders' concerns listed below may not now accurately reflect stakeholders' view of the MOR.

Legal practitioners

Implementation	
Change management	<p>The industry change management process is more complete in jurisdictions that have mandated some or all transactions</p> <p>In other jurisdictions there is more concern about complexity of the task of moving to the electronic environment</p> <p>Stakeholders report some settlements are harder to do in the eConveyancing system (eg transfer between spouses)</p> <p>Higher volume organisations report the workload has increased for the senior practitioners who sign transactions because of the screen monitoring time required to deal with unsigned and re-signed transactions</p> <p>Stakeholders noted the high-profile fraud of \$1M that occurred in June and many recognise that they will need to upgrade security systems and practices</p> <p>Concern about the set-up of conveyancing factories</p>
Successes	<p>Some stakeholders report the eConveyancing system has resulted in quicker turnaround and settlements</p> <p>Stakeholders report fewer lost titles</p> <p>Easier financial settlement with no bank cheques (less cost)</p> <p>Ease of lodgement was considered a success</p> <p>Stakeholders report some progress on the National Mortgage Form</p> <p>No identified issues with PEXA downtime</p> <p>Good training support from ELNO</p>
Lessons learned	<p>Stakeholders report that the variations across jurisdictions create uncertainty and result in loss of productive time</p> <p>Stakeholders comment that there needs to be consistency between rules and enforcement compared to the paper system – mortgagees had to provide information one day prior in paper</p>

	<p>system and in the eConveyancing system they are only providing the same information at the last minute</p> <p>Losses through mis-keying bank details have been reported by many stakeholders</p> <p>There are trust account matters including the use of the PEXA source fund that need to be resolved – stakeholders noted that trust laws are jurisdiction-based not uniform</p> <p>Lack of resources and skills in the financial services providers was seen as an issue</p> <p>ELNOs should provide a residential guarantee</p>
Pricing	<p>Stakeholders report that pricing was set early in the development of eConveyancing with oversight from NSW</p> <p>It was developed to compete against paper, and it was set to recover some of the costs of set up</p> <p>Some stakeholders report that their direct costs have increased, and they then must justify the additional PEXA fee as well</p>
Cost versus benefits	<p>Some stakeholders report that whilst there are some time efficiencies, there has been additional workload requirements shifted to practitioners, particularly with the requirement for dual processes, resulting in higher overall direct transaction costs</p> <p>Most stakeholders report new time inefficiencies continually watching for settlement and re-signing when the other party un-signs – this contrasts with the paper environment when a packet was signed the day before settlement and the authoriser did not need to see it again</p> <p>Stakeholders report that financial services providers changing settlement figures close to settlement cause these inefficiencies</p> <p>Stakeholders believe PEXA has not sold the benefits of the system to legal practitioners</p>
System complexity	<p>Some stakeholders have made comments of concern about the security risks that have been experienced and will continue to increase in the future</p> <p>Some stakeholders noted that form handing is better in the electronic system especially mortgage forms</p>
Interoperability	<p>Stakeholders want transparency on costs</p> <p>The proposed interoperability model needs to be understood before agreeing to it</p> <p>A number of stakeholders have commented that they don't want multiple systems, citing training requirements for larger organisations</p> <p>Some stakeholders suggested a common front end would be desirable but believed risks would be difficult to assign in full interoperability</p>
Competition	<p>Some stakeholders believe it is a mistake to have competition that is not real</p> <p>Most stakeholders are in favour of competition, provided there are no additional costs and no additional risks or liabilities</p> <p>Competition needs to be fair to the existing ELNO and any new entrants</p>

	Stakeholders are concerned that the IGA requirement to allow non-discriminatory access to participants engaged in the property conveyancing market may not be transparently addressed
Regulatory framework	
Success	<p>The national system is up and running successfully in five jurisdictions</p> <p>Nearly all transactions have gone through securely with less fraud perpetrated than in the paper system (however there have been significant losses reported by stakeholders through mis-keying bank account details)</p> <p>Good training materials and support have been available to support take up</p>
Limitations	<p>ARNECC is insufficiently resourced to resolve all matters in a timely manner</p> <p>ARNECC does not have all the necessary skills needed to manage the market and wider industry environment created</p> <p>ARNECC needs to be able to direct ELNOs and to apply fines and penalties if necessary</p> <p>The ECNL has failed to regulate the financial settlement function and a number of stakeholders have commented that there needs to be a financial regulator</p> <p>Initially the consultation process was good, but the MOR consultation process is not progressing well</p> <p>Action is needed on poorly performing subscribers – negligence should lead to warnings and education and suspension if necessary</p> <p>The competitive environment needs regulation and control – if not ARNECC then who?</p> <p>ACCC should be responsible for regulation of the market particularly while there are monopoly or duopoly characteristics</p> <p>Most stakeholders believe ARNECC is independent</p>

Conveyancers

Implementation	
Change management	<p>The change process is not complete, and the industry is finding the changes required from both eConveyancing and the Australian Taxation Office (“ATO”) difficult to accommodate in a compressed timeframe. The ATO has been imposing significant and complex tax collection duties on conveyancers.</p> <p>Many conveyancers work in small firms without significant numbers of support staff and do not have sufficient spare capacity to deal with multiple concurrent major system changes.</p>
Successes	<p>eConveyancing has been successful in relation to the following</p> <ul style="list-style-type: none"> • Electronic settlement process is quicker and the elimination of the need to book a time with the banks and physically attend settlements is a major efficiency • Vendor receives funds faster and the ability to transfer funds to other parties i.e. Council rates rather than generating cheques • Immediate lodgement of caveats and other documents • Training and support from other conveyancers and industry bodies • Fewer errors at settlement in relation to documentation <p>Some stakeholders report increased convenience of being able to settle “anytime, anywhere”.</p> <p>Mandating has meant conveyancers came on board more quickly.</p>
Lessons learned	<p>Consistency achieved in business practices across jurisdictions not important for conveyancers</p> <p>Ensuring proper training on systems is provided when moving to eConveyancing is important for the jurisdictions not yet using eConveyancing</p> <p>Each jurisdiction is at a different point of implementation. In the jurisdictions where mandating of eConveyancing has occurred it has allowed the conveyancers to focus on the one settlement process</p> <p>In those jurisdictions which have not mandated, stakeholders still need to manage both the paper based and electronic settlement business process</p> <p>Implementing the different transaction types over time has allowed time to learn the system and each transaction type</p> <p>Many conveyancers expressed frustration that the banks rely on settlement rollover rather than being ready to settle at the agreed time and date</p> <p>They also believe the banks now leave the advisement of the payout to the last minute</p> <p>This requires last minute changes by the conveyancer and re-signing</p> <p>Reserve Bank of Australia (“RBA”) operating hours are inequitable for WA settlements</p> <p>Conveyancers want quick resolution of matters involving missing money – they don’t believe property buyers and sellers can be subject to a long wait</p>

Pricing	<p>Many believe prices are too high and are concerned about monopoly pricing – in discussions some stakeholders confirmed that they did not understand that pricing is capped in the agreement with ARNECC</p> <p>Some believe government is getting a benefit and should reduce statutory fees</p>
Cost versus benefits	<p>Conveyancers in jurisdictions with low take up believe that they have achieved little benefit mainly because they still prepare documents for both paper and electronic settlement</p> <p>Conveyancers where eConveyancing has not yet started believe they will not make gains in the short term but will in the longer term</p> <p>Conveyancers that do all their settlements electronically have identified time savings as a consequence</p> <p>As discussed above the banks late changes mean that conveyancers must do additional work reducing the benefit of eConveyancing</p> <p>Conveyancers note that most delayed settlements occur on the same day</p> <p>Conveyancers find it inefficient and time consuming to be “tied to the screen” to be sure a settlement goes through on time without needing to be re-opened</p> <p>In one jurisdiction that doesn’t use settlement agents and where only one cheque is drawn, conveyancers believe the benefits will not match costs, but they believe the banks might achieve benefits</p>
System complexity	<p>Most conveyancers that use the system regularly find it relatively easy to use and some are very positive about the system attributes and ease of use</p> <p>One jurisdiction commented that conveyancers are good at adapting to change</p>
Interoperability	<p>Conveyancers that want interoperability want it to be seamless, and they want to know how this will work ie what the model will look like</p> <p>They do not want a system where they must register for, learn and use different interfaces to multiple ELNs due to the impact on their productivity</p> <p>They see challenges around multi-platform integration and have concerns about fault and liability if things go wrong</p> <p>They want the risk issues addressed before a model is chose</p>
Competition	<p>Generally, in favour of competition especially if it leads to cost reduction and improved service, however conveyancers express concern that ELNOs will compete against them</p> <p>Conveyancers believe that ELNOs should be prohibited from offering conveyancing services</p> <p>Most (although not all) are not supportive of competition without interoperability</p> <p>However, some are prepared to learn two different systems but state that rules would be needed to establish who will choose the ELNO</p> <p>Most seem to favour the purchaser’s representative choosing the ELNO</p>

Regulatory framework	
Successes	<p>The national system is up and running successfully in five jurisdictions</p> <p>Nearly all transactions have gone through securely with much less fraud perpetrated than in the paper system to date</p> <p>Training materials and staff have been available to support take up</p>
Limitations	<p>ARNECC is insufficiently resourced to resolve all matters in a timely manner</p> <p>ARNECC does not have all the necessary skills needed to manage the market and wider industry environment created</p> <p>More technical skills and resources are needed</p> <p>ARNECC needs the power to regulate if ELNOs do the wrong thing</p>

Financial services providers

Implementation	
Change management	<p>Stakeholders have commented that the change management aspect of the move to eConveyancing was a much greater than anticipated</p> <p>It was very costly and time consuming with system development, maintenance and retaining of staff requiring substantial resource commitment</p> <p>Ongoing system changes are a significant change management task in their own right</p> <p>Most stakeholders have not yet recovered the costs of the change to eConveyancing</p>
Successes	<p>The system allows for jurisdictional differences to be managed automatically through form changes and this is seen as an efficiency benefit</p> <p>There has been a substantial reduction in the use of bank cheques which has been beneficial</p> <p>There has been a reduction in the resources required for settlement</p>
Lessons learned	<p>Running two systems in parallel (paper and electronic) means all the anticipated efficiencies haven't been realised as the stakeholders need to prepare for both scenarios; they often don't know in advance which system will be used</p> <p>Electronic signing has been a limited benefit, however the differing legislation across the jurisdictions has meant additional legislative change would be required to achieve the full benefit</p> <p>Stakeholders get criticised for being slow to provide final figures or for changing them on the day of settlement - complications when customers have multiple linked accounts mean that settlement amounts can change unexpectedly</p>
Pricing	<p>Pricing did not appear to be an issue with stakeholders</p>
Cost versus benefits	<p>Stakeholders report they have not yet recouped the initial costs due to the ongoing parallel processes (paper and electronic) and the higher than anticipated costs of the original introduction of eConveyancing</p> <p>The costs to implement and manage the required infrastructure and change management processes are significant</p> <p>Whilst they may not be as high for future ELNOs due to the lessons learnt, they will still be substantial</p> <p>Some stakeholders must be able to demonstrate a return on investment through a robust business case development</p>
System complexity	<p>The stakeholders' infrastructure requirements to link into additional ELNOs are not insignificant and will need to be considered</p> <p>The stakeholders quoted initial costs of connecting to an ELN of between \$10M and \$30M</p> <p>Stakeholders believe the technical requirements to achieve financial settlement with multiple ELNOs are able to be achieved, but the legal and liability model is not clear</p> <p>It is likely to be highly complex and needs to be developed in detail</p>

Interoperability	<p>Stakeholders will not support interoperability without a clear and detailed model that addresses risk and liability</p> <p>Stakeholders do not want to maintain more than one system, and they comment that training staff for more than one system would be costly and inefficient</p> <p>One indicated that it does not intend to connect to new ELNs and expects interoperability of ELNs will obviate the need for separate connections</p> <p>Stakeholders commented that the standards would need to be consistent across ELNOs in order to manage updates etc</p> <p>A clear understanding of responsibility/liability and risk is essential for interoperability</p>
Competition	<p>The stakeholders reported that in principle they support more competition in the eConveyancing marketplace if there isn't the requirement for them to interact with more than one system</p> <p>The stakeholders have commented that they will consider additional ELNOs on their individual merit and the associated business case(s) before committing to invest to build connections</p> <p>Stakeholders are not supportive of an environment where there are different systems in different jurisdictions</p>
Regulatory framework	
Success	<p>The stakeholders reported that ARNECC have done a good job to get a system up and running despite the challenges they face</p> <p>Stakeholders recognise that ARNECC is a collaborative group and believe they have achieved a good outcome considering the limits of that model</p>
Limitations	<p>Ongoing inconsistencies in implementation and requirements across jurisdictions impact the stakeholders, particularly the national operators</p> <p>Stakeholders need national standards particularly for security, timing and sequencing requirements and believe that this information should be managed by central organisation/regulator</p> <p>A clear roadmap by jurisdictions to enable stakeholders to plan for changes would be of benefit</p> <p>ARNECC needs access to greater capability and skills to manage its responsibilities outside title regulation</p> <p>ARNECC needs to develop a regulatory framework that encompasses all the necessary regulatory powers</p>

Software houses

Implementation	
Change management	<p>Most stakeholders reported a good or satisfactory level of support from PEXA</p> <p>Little interaction with Sympli has occurred to date</p> <p>Some stakeholders found PEXA very collaborative and some found the relationship difficult to manage</p> <p>One stakeholder reported the removal of about 400 roles (including settlement agents) with the operation of PEXA settlements – this represents an efficiency gain for the industry</p> <p>It was noted that PEXA offered paid sponsorships that assisted in defraying the costs of the change</p>
Successes	<p>eConveyancing is up and running and reasonable levels of integration between practice software and PEXA have been achieved</p> <p>This has led to a reduction in the requirement for re-keying information, reduced risk of errors and reduced document handling</p> <p>Some stakeholders report that their software has the ability to create a workspace in PEXA which is a benefit for their clients</p> <p>One stakeholder appears to have achieved a high level of integration with its product, but it only operates in one of the jurisdictions</p> <p>This integration is highly regarded by its customers - it would like still more capability for both input and output into its system</p>
Lessons learned	<p>A timetable of system releases and implications would have allowed smoother integration with stakeholders' own platforms and packages</p> <p>Integration has been a focus with PEXA however it is mostly one-way integration at this stage (information can get pushed into PEXA but not pulled out into stakeholder platforms) - two-way communication would be of benefit</p> <p>Some stakeholders reported limitations with PEXA platform which limits full integration</p> <p>Stakeholder report only preliminary discussions with the Sympli team to date</p> <p>Sympli has not yet specified requirements for the development of APIs, so stakeholders have been unable to determine strategies with respect to integration</p>
Pricing	<p>Some stakeholders have expressed concerns that PEXA will drive prices down in the sector, potentially driving downstream service providers from the industry – leaving PEXA controlling prices in the long term</p>
Cost versus benefits	<p>Integration has incurred costs, but most stakeholders see this as development costs rather than additional outlay</p> <p>One stakeholder reported recouping termination expenses through the sponsorship agreement with PEXA – this assisted the downsizing associated with moving to eConveyancing</p> <p>Another stakeholder found that the costs of integrating were offset by the PEXA sponsorship payments</p>

System complexity	<p>Different stakeholders had different experiences</p> <p>Initial integration with PEXA was via a spreadsheet then a move to APIs for sponsored stakeholders</p> <p>Full integration is not able to be achieved at present - workstations still need an additional monitor displaying the PEXA browser to monitor settlement/lodgement progress, while the main monitor allows users to continue to work</p> <p>Stakeholders believe security issues will become more complex as the system(s) become more complex, noting that the highest risk will be at the weakest point in the system and this needs to be considered and managed</p>
Interoperability	<p>There is a belief that a comprehensive definition of interoperability is yet to be detailed and therefore the pathway to interoperability is not able to be planned</p> <p>One stakeholder expressed concern about the impact interoperability would have on the complexity of the financial settlement process</p> <p>Another stakeholder commented that the financial settlement space needs stronger regulation</p>
Competition	<p>Stakeholders believe that true competition is many years away even with the recent approval of Sympli and are unsure what the environment will look like due to PEXA's significant first mover advantage</p> <p>There is concern PEXA will move into the information reseller market with a substantial competitive advantage</p> <p>Stakeholders believe that PEXA plans to move strongly into the downstream markets of products and services necessary to complete a property transaction, including verification of identity tools, title search products and eContracts</p>
Regulatory framework	
Success	<p>ARNECC has been able to oversee the start of eConveyancing and the system is now successfully operating in five of the seven jurisdictions that have signed the IGA</p>
Limitations	<p>ARNECC is believed to be powerless and lacking the required skills to regulate this complex environment (noting that all interviewees accept that title regulation is well handled and is not included in this statement)</p> <p>Multiple respondents commented that the regulatory framework should have been sorted earlier, as now the rules are unclear and the required controls are not in place</p> <p>Lack of clear regulation has made it very difficult for software houses to plan strategically</p> <p>Stakeholders believe that there should be some form of national regulation.</p> <p>An issue to consider is that software developers move quickly in response to customer needs, and government moves slowly - governance and regulation arrangements need to consider this industry requirement to support innovation</p>

Revenue offices

Implementation	
Change management	<p>Some stakeholders would like the revenue office voice to be heard more</p> <p>Stakeholders believe that NSW is the most advanced at developing revenue office Messaging Standards (“ROMS”)</p> <p>jurisdictions are at different stages of the implementation process</p> <p>One stakeholder reports being satisfied with PEXA change control processes</p> <p>One stakeholder reports mandating has had little impact on the revenue office</p>
Successes	<p>One stakeholder reports the revenue office has not directly benefited, but whole of government has benefitted</p> <p>One stakeholder commented that the revenue office receives payment more quickly in the eConveyancing system</p>
Lessons learned	<p>One stakeholder notes the change request process is driven by the ELNO</p> <p>One stakeholder believes revenue office requests are not being dealt with in timely manner by the ELNO</p> <p>Stakeholders believe change control needs to be centralised with ARNECC to drive and prioritise</p> <p>Some stakeholders believe they and ARNECC are out of step</p> <p>Revenue offices now have a subcommittee to jointly discuss issues across jurisdictions</p> <p>Stakeholders believe that ownership of revenue office data/API standards needs to be resolved and this has been a key topic at recent Tax Commissioners meeting</p>
Pricing	No comments from these stakeholders
Cost versus benefits	<p>Costs to connect to first ELN have been significant</p> <p>Costs can be recovered from PEXA through the trading agreement, one jurisdiction has done this, but other revenue offices haven't to date</p> <p>Costs to connect to new ELNs will be charged to the ELNOs</p>
System complexity	<p>For some stakeholders the system integration with PEXA is light touch – verification of tax amount only</p> <p>Some stakeholders want standards for revenue office integration with all ELNs</p> <p>Each new ELNO adds costs to revenue offices to implement and maintain (testing each release with each ELNO, worse if API is not standard)</p> <p>Suggestion to improve - better coordination of changes with other jurisdictions and/or through central body eg ARNECC</p>
Interoperability	<p>Stakeholders believe interoperability will increase cost and complexity</p> <p>Some stakeholders believe this is a limited issue for revenue offices</p> <p>One stakeholder is moving to a hub model to accommodate multiple ELNOs</p>

Competition	Stakeholders believe multiple ELNOs will result in more complexity for the revenue offices and will result in more charges to ELNOs for additional work by the revenue offices
Regulatory framework	
Success	Stakeholders believe the MOR and MPR are working
Limitations	<p>Some stakeholders believe ARNECC needs a stronger framework to govern ELNOs</p> <p>Some stakeholders believe penalties are needed to fill the gap between no enforcement action and suspension or termination of an ELNO</p> <p>Stakeholders believe the risk/liability model must be resolved</p>

ELNOs and Applicant ELNO

- 8.6 There are two operating ELNOs – PEXA which has built the existing system with input from the land titles registrars and the revenue offices from participating jurisdictions, and Symply which has recently been approved and has quite recently completed its first transactions, lodging a Priority Notice in Queensland and a caveat in Victoria in December 2018.
- 8.7 LEXTECH has received approval for Category 1. This means that it has fulfilled the Category 1 requirements under the MOR which include production of documents to establish the bona fides of the organisation.
- 8.8 Before LEXTECH can commence operation of the ELN it has to complete the requirements of Category Two which include system requirements to meet registrar requirements.
- 8.9 Comments from this group had similarities to other stakeholders:
- Change management - one noted that significant resources were committed to engaging practitioners and getting them started in the system - including telephone and in field support staff
 - Successes - the existing eConveyancing platform has effective collaboration, security and settlement functionality enabling electronic document lodgement and financial payment and settlement
 - Lessons learned:
 - Open standards would reduce barriers to new ELNOs
 - ARNECC is not a national regulator but a committee of jurisdictional regulators – objectives such as national consistency may be difficult to achieve
 - One identified that business practices have not been standardised as was originally intended
 - Central body needs to own and maintain data standards
 - Pricing - original fees set in competition with paper - increases are limited to CPI - new entrant proposes pricing 15% to 50% cheaper than current pricing
 - Costs versus benefits:
 - *Deloitte's 2018 Impact of e-Conveyancing highlights that the benefits of e-Lodgements are realisable when dual process is no longer an issue*

- *As more transactions are conducted, greater benefits are delivered*
- *One entity believes that the costs and benefits of eConveyancing are not shared equally across the industry participants*
- Interoperability:
 - *May increase complexity and risk*
 - *Costs and benefits of different ELN configurations (one, two or many, end to end or interoperable) should be evaluated to achieve the best overall consumer outcomes*
 - *Interoperability models need to be defined sufficiently in order for appropriate technical, legal and risk considerations to be evaluated*
 - *One thought workspace interoperability enables benefits of competition for regulators, homeowners, practitioners and connected authorities*
 - *Another had a preference for independent ELNOs operating on separate platforms*
 - *The third believes it is necessary to consider both the ultimate benefit to the consumer and cost and that the technical concept needs to be detailed so that legal, technical and risk considerations can be evaluated*
- Competition - ELN competition will improve services, reduce cost and reduce the level for regulation required
- Regulatory framework success:
 - *There was a general view that ARNECC had done a good job to date on land titling matters*
- Regulatory limitations:
 - *There are gaps in regulation that ARNECC has not addressed*
 - *Regulation of eConveyancing needs to extend beyond e-lodgement*
 - *one commented that eSettlement is not governed under the regulatory framework under the IGA*
 - *The general view is that ARNECC does not have sufficient resources*
 - *One commented that the title "ECNL" creates confusion in the market as it is concerned with eLodgment not eConveyancing*
 - *One identified the need for a regulator that will regulate all aspect of eConveyancing*
 - *One had the belief that there is inadequate risk management because ELNOs can choose their own auditors, however we note S 16.1 (a) of the MOR state "before an Independent Certification is given by an Independent Expert, the ELNO obtains written approval of the Registrar to the proposed Independent Expert"*

Registrars

8.10 Whilst there was some consistency in feedback from the registrars, there was some variability depending on their current level of take up in eConveyancing.

8.11 The current level of involvement in eConveyancing varies as follows:

- Jurisdictions that have mandated eConveyancing (at least for some specified lodgments if not all) (NSW, SA, VIC and WA),
- Jurisdictions that are actively engaged in eConveyancing but have not mandated (QLD)
- Jurisdictions that are not actively engaged in eConveyancing (NT and TAS).
- One jurisdiction which is not yet a party to the IGA (ACT)

8.12 A summary of feedback is as follows:

- Change management:
 - *Some identified the provision of training to practitioners as successful in addressing skills gap and the different level of resources available in jurisdictions impacted on the individual jurisdictions ability to support industry change*
 - *Some jurisdictions saw the existing committees that support ARNECC as important change management groups and believed they should be retained*
 - *Industry reluctance to change has been identified and needs to be managed*
- Successes:
 - *The collaborative relationship between jurisdictions has been successful to date particularly in achieving a working eConveyancing system*
 - *One jurisdiction identified improvement in titles efficiency and no frauds to date in the electronic environment*
- Lessons learned:
 - *Registrars don't cover all the requirements of regulation in the eConveyancing environment - they don't have the experience and don't have the resources*
 - *Some jurisdictions believe it is tactically better to let the larger jurisdictions pave the way*
 - *Ensuring a national approach to data standards is key*
 - *Differences across jurisdictions continue to limit the amount of consistency which can be achieved*
- Pricing:
 - *Jurisdictions generally support the existing capped price model; some believe price control is necessary and should be in accordance with national law through ACCC, and ELNOs must present a transparent pricing policy*

- *Conveyancing fees in Queensland are lower than other jurisdictions so there are concerns about PEXA fees – practitioners and end users are price sensitive*
- Costs versus benefits – the size of the jurisdiction and its current electronic lodgement position drives the opportunity for the benefits to be realised
- Interoperability - No jurisdictions have agreed an interoperability model or approach although one is a strong supporter of interoperability and has commissioned an investigation into potentially suitable models
- Competition:
 - *Three of these jurisdictions have privatised their land registries and a fourth is in the process of a partial privatisation/commercialisation - these jurisdictions are operating in an increasingly commercial environment*
 - *Most jurisdictions are supportive of a competitive ELNO marketplace*
 - *Two jurisdictions questioned what additional benefits a second ELNO would offer compared with the cost of connection between the ELNO and the government agencies*
- Regulatory framework success – the development work is nearly complete, and eConveyancing is up and running, ARNECC has worked hard to establish the framework
- Regulatory limitations:
 - *Individual jurisdictions are free to pursue the most suitable options even if not supported by all*
 - *The regulatory framework for titling is good but regulatory requirements are broader - regulation beyond land titling is a function for which ARNECC does not have the appropriate skill set*
 - *ARNECC is under resourced and overburdened – updating and monitoring MOR and MPR are requiring large resources*
 - *Recurrent revenue through the registry is no longer an option for three jurisdictions therefore regulatory funding must be achieved through alternate means*

Verification of Identity (“VOI”) providers

8.13 One VOI provider was interviewed and one other responded to the survey. A summary of feedback is as follows:

- Face to face verification will become more critical for trusted identity verification into the future due to the emergence of technology that allows video to be forged - ie an individual being identified using a video chat could present as someone else and be undetectable to the verifier
- Suggest adoption of national standards for identity verification, eg the Trusted Digital Identity Framework (“TDIF”)
- Observation that a portion of participants don’t understand what reasonable VOI steps are

ACCC

- 8.14 We have had a number of discussions with ACCC regarding future regulatory and governance frameworks.
- 8.15 These discussions and its submission to the Issues Paper have covered:
- Pricing
 - Vertical integration including separation and non-discrimination
 - Competition and interoperability
 - Powers to direct and to apply penalties – enforcement powers
 - Dispute resolution
 - Limitations of ACCC powers
 - Market regulation resources to assist ARNECC or any new governance body
- 8.16 ACCC's comments to date are further discussed in section 5.0
- 8.17 ACCC's submission to the Issues Paper is published on its website and on the DMC website.

9.0 RECOMMENDATIONS AND OPTIONS FOR IMPROVEMENT

Draft recommendations

No	Recommendations
1	<p>We recommend that the appropriate national regulators ie the Council of Financial Regulators (“CFR”) and ACCC be requested to develop the minimum conditions for safe and effective competition for eConveyancing leveraging off the work done in relation to the ASX.</p> <p>We recommend that any investigation by the national regulators involve consultation with the affected regulators. These are the registrars and revenue offices currently actively using eConveyancing, and others that may be likely to progress in the near future.</p> <p>We recommend they consider the work done to date in this IGA Review, the work done by the Working Groups in the NSW interoperability process, and the outcome of the IPART pricing review regarding costs of achieving interoperability. Further consultation should occur with identified subscribers in all active jurisdictions and the financial institutions that facilitate payment and settlement.</p> <p>We recommend that there be a two-year moratorium on the issue of any further approvals for ELNOs while the national regulators develop the minimum conditions and interoperability models are assessed against in accordance with those conditions.</p> <p>Paragraphs 5.72 to 5.80</p>
2	<p>We recommend the establishment of a new corporate body to provide nationally focused skills and resources, and that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and perhaps subscribers meeting the direct costs attributed to oversight of their operations.</p> <p>Paragraphs 1.23 and 7.0</p>
3	<p>We recommend changes to the category One approval process for applicant ELNOs so that business plan requirements include evidence that costs are understood, and adequate finances are in place, including those costs to meet all regulatory requirements and payment connections to financial institutions.</p> <p>It may be sensible to provide the information to the identified national regulators and the appropriate revenue office(s) to get their assessment on whether the financial allowance made is adequate.</p> <p>Paragraph 6.14</p>
4	<p>We recommend that the approval process include further requirements for Category Two approval including:</p> <ul style="list-style-type: none"> • Approval from RBA that financial settlement system proposed meets RBA requirements • Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments • Approval from all appropriate revenue offices • Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law • Confirmation from financial institutions that appropriate payment connections are in place

No	Recommendations
	It may be appropriate that these are separated into a new Category Two (A) Paragraphs 2.23, 4.13, Section 6.0
5	An enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach. Paragraphs 2.23, 4.10, 4.15, 4.46, 4.149, 8.15
6	A national agenda and roadmap should be developed through consultation with stakeholders to identify and prioritise issues for examination to improve efficiency and national consistency where possible. Paragraphs 3.27, 3.28 and 4.113
7	The regulatory framework for financial payments and settlement should be documented and the governance processes for annual audit and monitoring established in consultation with the national regulators, RBA and ASIC. Paragraphs 4.52 – 4.60
8	ARNECC should facilitate engagement with other regulators to ensure an efficient regulatory process for ELNOs and other regulators. Paragraph 2.22
9	A system-wide change control process should be developed to coordinate system change and manage priorities and risks between ELNOs, registrars, revenue offices, financial institutions and any other connected entities. Paragraphs 4.8 and 4.164
10	We recommend that the rules in the MOR for ELNOs operating in the wider market be reviewed by a qualified economic regulator (eg ACCC) in the near future to ensure they are clear and there is no abuse of market power. Paragraph 5.245
11	We recommend that eConveyancing pricing remain capped until there are three or more fully operational ELNOs and competition is assessed as effective. Paragraph 5.36
12	Conditions in contracts between ELNOs and governments should be made public if they impact on conveyancing practitioners and their clients. Paragraph 1.17

Draft options for improvement

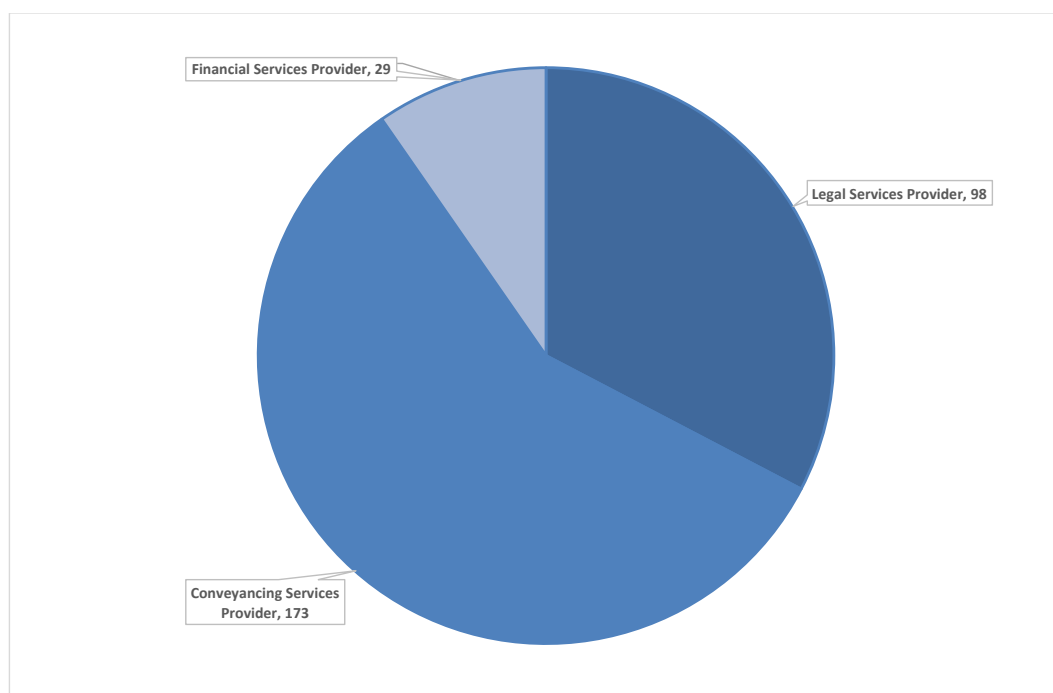
No	Options for improvement
1	Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process. Paragraph 3.11 and 5.237 – 5.245
2	Consider establishment of a Stakeholder Committee with ARNECC members, stakeholder representatives nominated by industry including financial institutions and other regulators as appropriate, and agree an ongoing consultation process to develop a proactive agenda for eConveyancing improvement. Paragraph 4.95
3	Establish stakeholder consultative processes for coordination of industry wide changes and for industry input into the implementation plan for those changes. Paragraph 3.14
4	Consider developing a system wide risk management framework including risk mitigation strategies such as minimum mandatory residential guarantees, insurance provisions to ensure timely resolution for homeowners, clear liability rules to protect consumers, a dispute resolution framework. Paragraph 4.131
5	Stakeholders operating nationally want jurisdictional variations that drive high operational complexity, risk (including missed settlements) and cost for no consumer benefit, to be considered and harmonized where possible. Paragraph 3.26
6	Consider forming a risk and compliance committee comprising ARNECC and external experts to review audit results on a national basis and to develop improvement programs – the committee could also consider regulator action for ELNOs or subscribers that fail agreed thresholds. Paragraph 4.179
7	Consider developing formal consultative arrangements with federal government cybersecurity experts to enable development of strategies to counter threats Consider whether future certification of practitioners should require a reasonable level of competence in operating in an electronic environment and a good understanding of cybersecurity. Paragraphs 4.18, 4.150 and 7.12
8	Consider developing a process that allows subscribers to register once in the eConveyancing environment. Paragraph 5.188
9	Consider developing a privacy regime for eConveyancing that clearly identifies requirements, identifies a complaint process and provides for penalties for privacy breaches. Paragraph 4.200
10	ARNECC could consider requiring all ELNOs to provide a standardised set of APIs that allow third-parties the ability to populate the ELNOs workspace. Paragraph 5.211

APPENDIX I SURVEY RESULTS

- AI.1 An online survey was developed based on the stakeholder interview issues list and the early findings from the initial series of interviews including the key issues which began to surface.
- AI.2 The survey link was distributed to all stakeholders who were interviewed with the request that it be further distributed to interested parties. The link was also distributed to the complete ARNECC stakeholder email list. Peak Bodies were asked to distribute the link to their members.
- AI.3 The link was circulated on 9 November 2018. At 18 February 2019, 339 respondents had completed the survey and the results from this survey are analysed in the following graphs and charts.

Respondents backgrounds and jurisdictions

- AI.4 The following graph represents the background of 88.5% of the respondents.



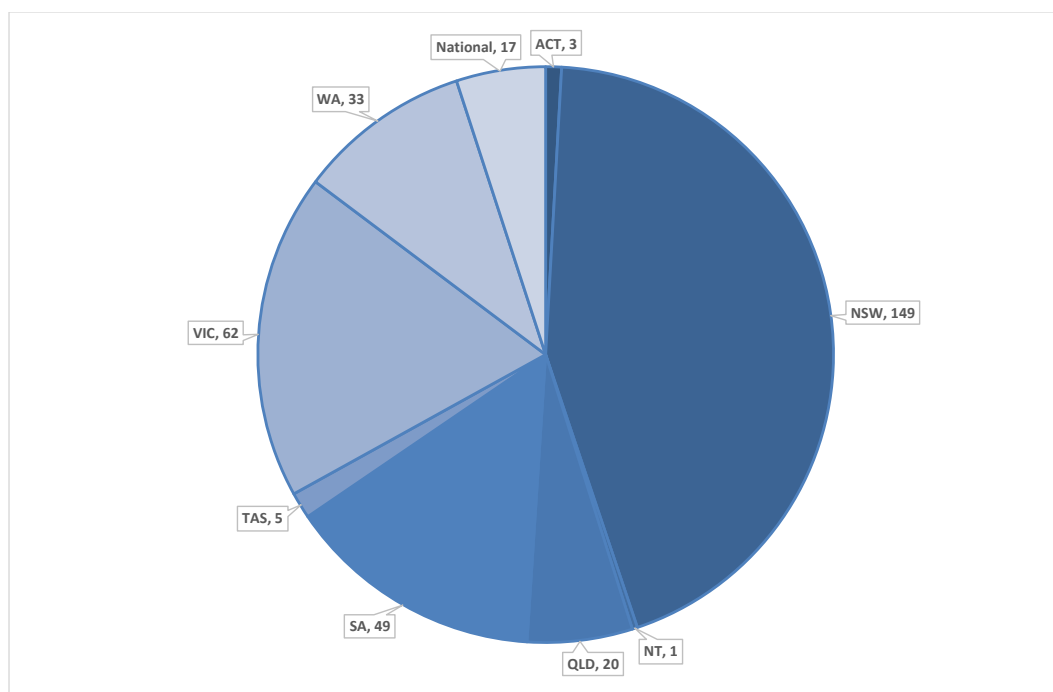
- AI.5 The remaining responses came from the following:

Type	Responses
ELNO – In progress	1
Government Policy entity eg Treasury	7
Land Titles Regulator	6
Peak Body	5
Private Registry Operator	2
Other (please specify)	18

9.1 Those who responded as “other” nominated themselves as follows:

- Software provider
- Local Government entity
- NSW regulator
- Private individual
- Australian Registrars’ Working Group (“ARWG”) member
- VOI provider
- Real Estate Agent
- Revenue Office
- Information Broker
- Property developer
- Information and Settlement Services Provider
- Developer
- ARWG Member
- Principal Subscriber

AI.6 The responses by jurisdiction are presented in the following chart.

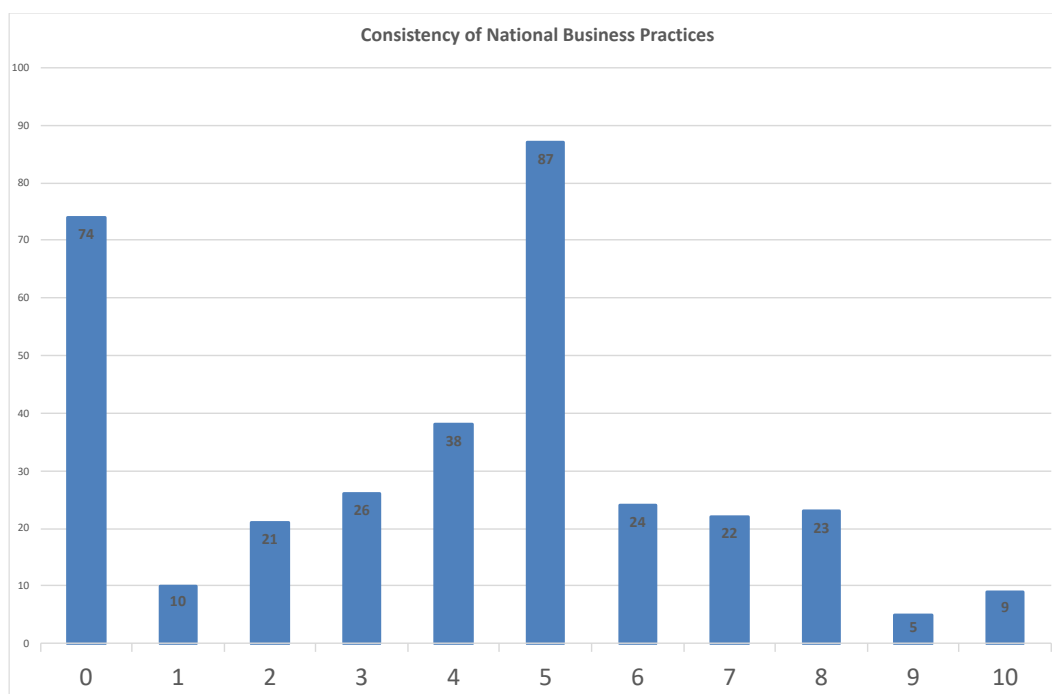


Survey Format

AI.7 The survey was divided into two sections, the first relating to implementation of electronic conveyancing and the second relating to governance and regulation.

Implementation

AI.8 The respondents were asked whether they believe the national business practices have become more consistent across jurisdictions since the commencement of electronic conveyancing in Australia on a 0-10 scale where 0 represents no change, 5 represents some change and 10 represents significant change.



AI.9 Thirty-seven respondents rated the consistency of business practices as high (scoring 8, 9 or 10) and indicative verbatim comments are provided below:

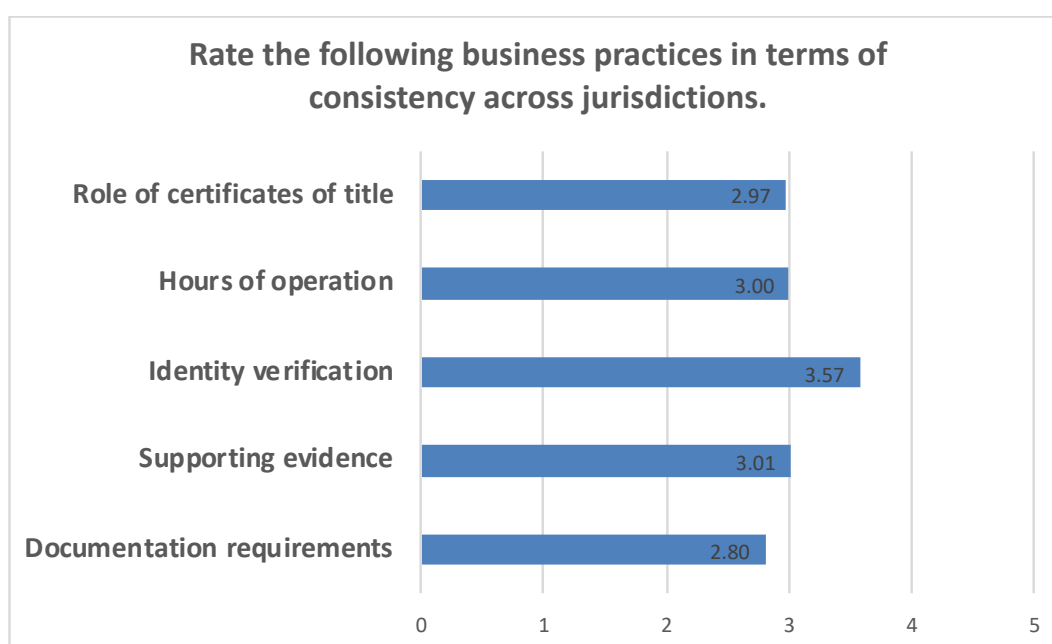
- *New policies eg. VOI, Right to Deal, Client Authorisation have been aligned for the electronic environment. Existing requirements eg CT/paper lodgment requirements remain misaligned.*
- *No matter where the lenders operations are based they have to know the PEXA system.*
- *The entire conveyancing process is unrecognisable from 5 years ago (other than the Contract of Sale). The disruption has been significant.*
- *VIC, NSW & SA have become all electronic by using PEXA*
- *WA has had to make some significant changes to settlement preparation with PEXA vs paper. Changes to VOI, mortgage discharge payment and also financial statement preparation and notification to banks.*
- *Where there is an electronic settlement and a client has a simultaneous / linked settlement in another State, the funds transfer is a lot easier than waiting for cheques to clear.*
- *NSW practices have been enforced on SA practitioners for the sake of continuity*
- *Mortgages are all the same*
- *Some changes have been implemented to align practices across states*

- *PEXA has provided a much more consistent approach to conveyancing*
- *Yes, nationally similar regarding mortgages*

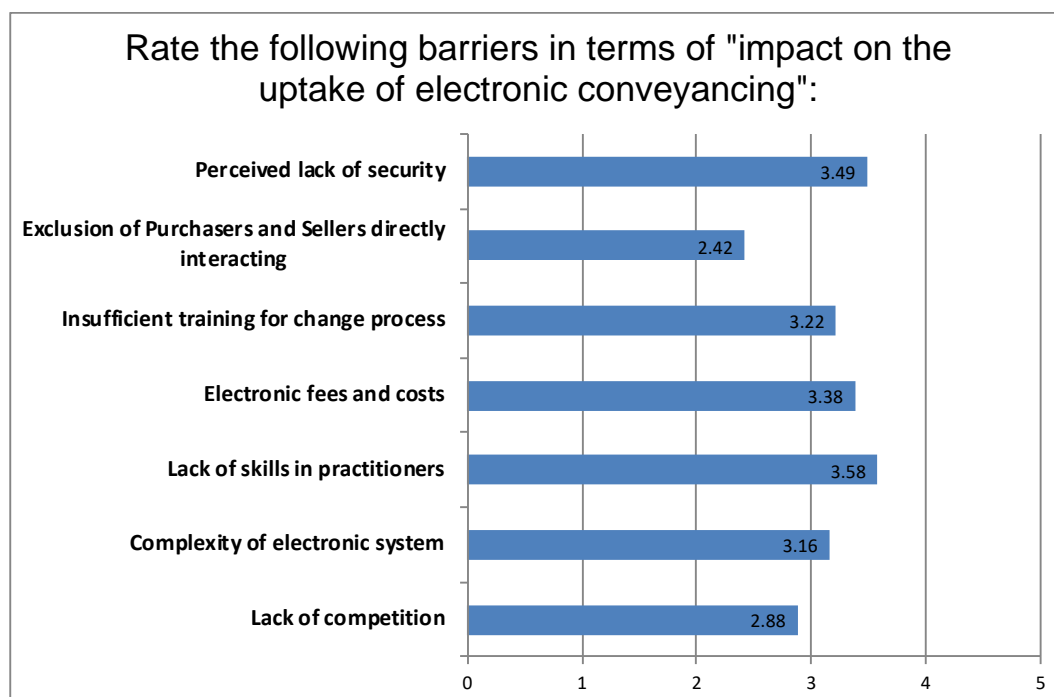
AI.10 The issues noted by respondents on consistency of business practice included the following:

- Restrictions of state-based legislation on individual jurisdiction requirements
- Inconsistencies in the rollout timeframes across jurisdictions
- Different stakeholder requirements as some only operate in one jurisdiction whilst others operate across jurisdictions
- Some stakeholders' reluctance to change
- The complexity of communicating across such a large stakeholder group, many stakeholders reported that they are unaware of what is occurring outside their jurisdiction

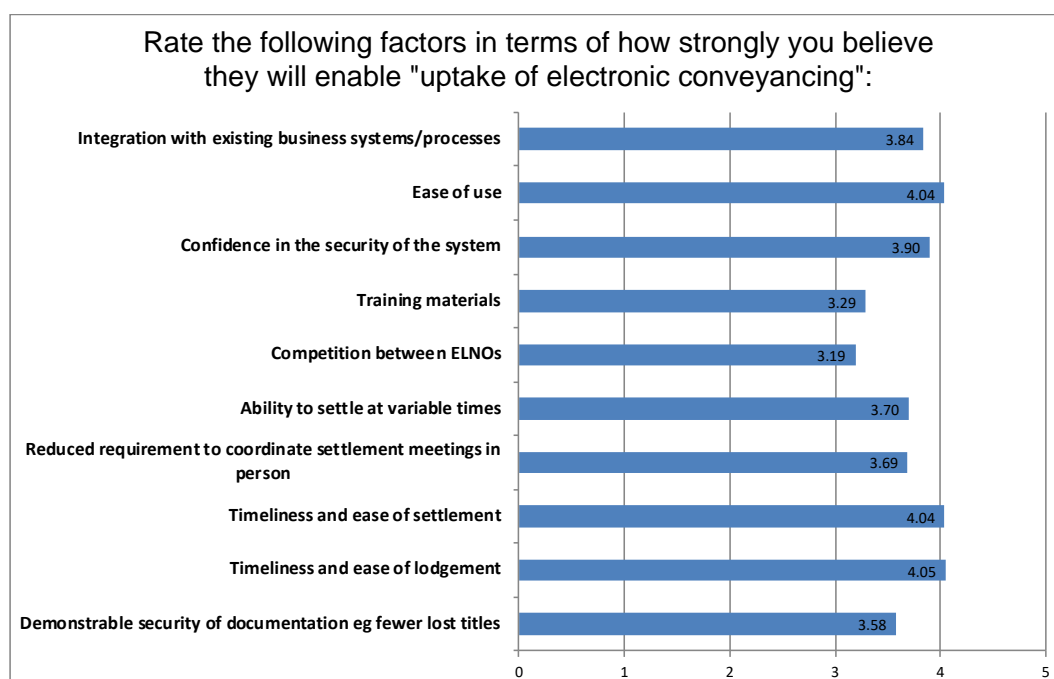
AI.11 When specific business practices were scored for consistency the respondents rated most practices as moderate consistency (a score of 3) except for identity verification which was approaching high consistency (a score of 4).



AI.12 Some of the potential barriers to take up of electronic conveyancing were identified for comment and five of the seven scored between moderate and high in terms of impact on uptake.



AI.13 Some of the potential enablers of uptake were identified for comment and all scored above moderate with some between high and very high.

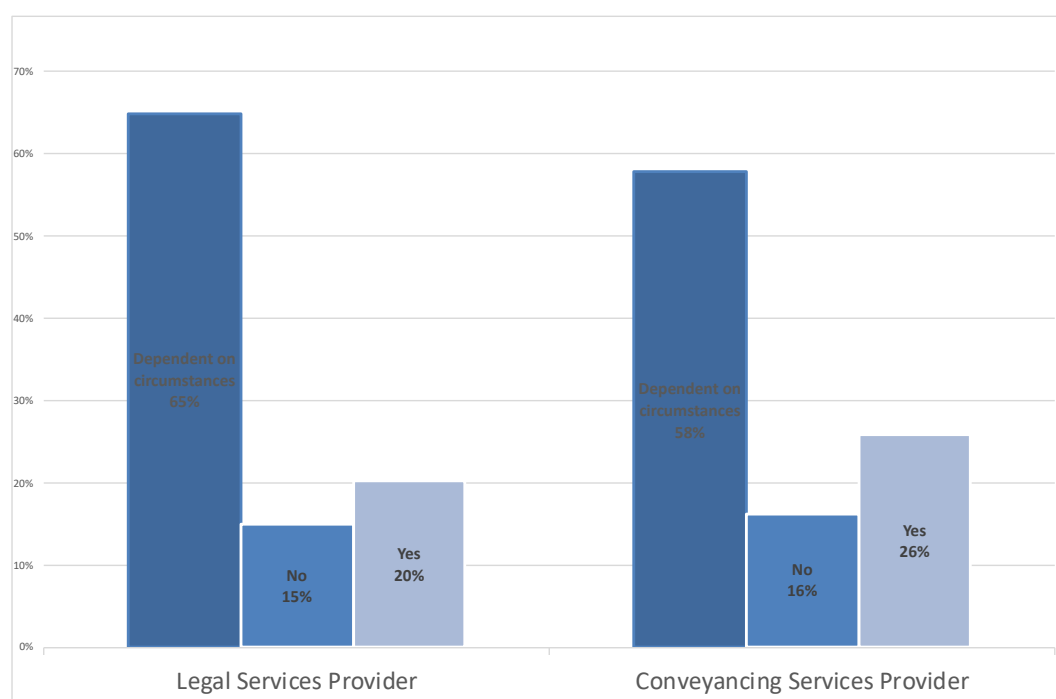


AI.14 Most practitioners who responded to this survey are current PEXA subscribers. The following table represents the legal service providers and the conveyancing service providers and their response to the question:

“Are you currently a PEXA subscriber?”

Jurisdiction	No	Yes
ACT	0	2
NSW	10	115
NT	1	0
QLD	1	10
SA	8	31
TAS	3	1
VIC	3	47
WA	3	25
National	1	6
Total	30	237

AI.15 When asked if they are prepared to work across multiple ELNOs, 20% of legal practitioners and 26% of conveyancing practitioners who responded to the survey replied in the affirmative. The majority are still unclear and have reserved their response until they have a better understanding of how multiple ELNOs will operate. However, 15-16% are not prepared to work across multiple ELNOs at this stage.



AI.16 Respondents were asked to comment on the advantages or disadvantages to having multiple ELNOs.

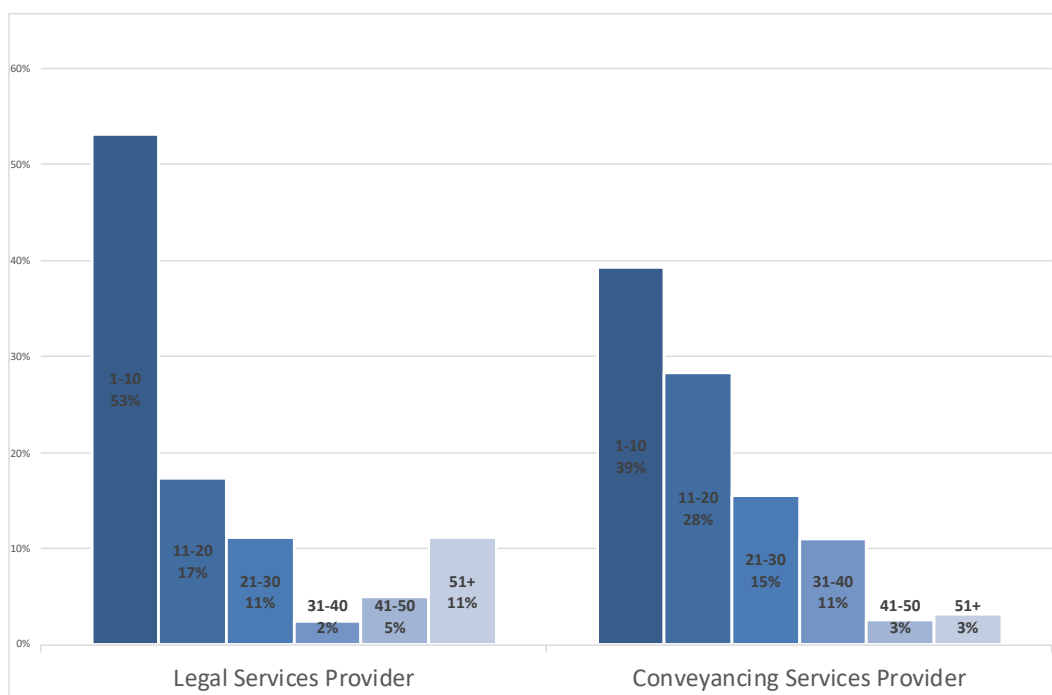
AI.17 Identified advantages included:

- Competition and its impact on price, quality and innovation
- Increased fairness as removal of monopoly
- Redundancy

AI.18 Identified disadvantages included:

- Issues about which ELNO to use and how it is decided
- Increased complexity with more than one system
- Requirement to be able to operate in more than one system
- Currently still learning first system
- Need for effective regulatory oversight
- Many comments that interoperability is essential if there are multiple ELNOs
- Risk of confusion
- Risk of increased costs with multiple systems
- Risk of decreased security

AI.19 The following table demonstrates the number of respondents who are current PEXA subscribers and who have completed transactions on PEXA. For those who selected yes for both, the number of transactions completed on average per month is shown and the trend between legal services providers and conveyancing service providers is similar.



AI.20 The survey respondents were asked to identify what has worked well and what hasn't worked well to date in the implementation of electronic conveyancing across Australia. There were a substantial number of comments which were analysed to identify themes.

AI.21 Themes identified in the working well category included:

- A working system
- Communication
- Ease of lodgement/settlement
- Training and support provided
- Less time requirements
- Less errors
- Mandating
- Time saving

AI.22 Below we have provided a range of indicative verbatim comments from the stakeholder feedback to illustrate the themes identified.

- *The fact is has actually worked is a positive, despite the frustrations at times. When it works well it is enjoyable by staff*
- *PEXA as a platform works well. Its (sic) the broader implications we are deeply concerned about.*
- *apart from it being stressful at first and the banks not ready to sign off on pexa we find it very good*
- *The removal of physically attending settlements. The speed of registration and funds transfer to vendors.*
- *When the mandate came in, it meant we all moved to one system rather than part paper, part electronic, which did help streamline my in office processes as i only had to focus on the one Settlement System*
- *Mandatory dates. This has forced people to move over into the digital workspace which has far less errors and has increased visibility of all parties.*
- *Education from AIC, Land Victoria Bulletins and State Revenue Office updates. PEXA have worked well with all three also.*
- *If all goes well, vendor receives cleared sale funds, purchsaer (sic) settled and registered same day. No longer need to get documents/bank cheques to different destinations, figures can change & be rectified on morning of settlement much easier than in the past*
- *There has been plenty of training and support available. Setting a date and sticking to it has made it easier to plan for and work towards, and staggering the transition to ELNO with different transaction types rather than just all at once has allowed us time to learn each type separately.*
- *Ease of system to use for all parties involved.*
- *Less time (generally) spent on hold to banks and having to send endless documents that get lost in their system.*
- *Less chance of errors at settlement, banks no longer lose titles, cleared funds on same day, settlement packets no longer need to go to a city settlement agent*
- *Ability to get same day settlements on without requiring cheques to be prepared and agents physically attending settlement, change to payment*

directions close to settlement without impacting on settlement, not having to prepare paper settlement packets - reducing time and cost.

- *Save a lot of time and no need to worry about paper Transfer with unacceptable signatures or incorrect names on paper cheques.*
- *well it definitely helps having all the pexa direct specialists out training us and making everything easier to use*
- *Immediate registration and dispersal of proceeds*
- *rebooking of settlement when settlement does not occur on time*
- *Law Society of NSW seminar training*
- *clear explanation of mandatory deadlines, circulars from Office of Register General, Law Society and PEXA updating on the changes happening.*
- *ELNO funded training & sundowners*
- *PEXA have been very supportive and adaptive*
- *Less issues with requirements not being met at settlement itself*
- *Most things we can do on PEXA are great.*
- *Getting paid immediately enables sending the client's report out quicker. No letters to council and water board paying rates shortens post-settlement time.*
- *Ability to conduct matters from desktop*
- *Faster registration for purchasers, cleared funds for vendors immediately, almost immediate registration of documents.*
- *Pre checking and acceptance of documents and quick cr issuing once settlement is completed*
- *PEXA's ability to deliver functionality as well as training and support*
- *Simplification of settlement process & ability to interact quickly with relevant parties.*

AI.23 Themes identified in the **not** working well category included:

- Issues reported by conveyancing and legal service providers with the financial services providers such as:
 - Final figure confirmation late in the process
 - Changing dates
 - Communication
- When only one side is using electronic conveyancing
- Inconsistent timetable of rollout
- Slow take up by some professions
- Security
- Costs
- A few issues with system speed
- A few issues with PEXA interactions

AI.24 We have provided a range of indicative verbatim comments from the stakeholder feedback to illustrate the themes identified.

- *I see our highly experienced conveyancing clerks too often frustrated with connection, comms, lost settlement slots, etc*
- *Banks, at times, being cause of delay. Practitioner's understanding of what is mandated to be electronic versus paper.*
- *Volume/development conveyancing, increase in data entry, increase in time taken to complete development and volume work, increase likelihood of human errors, integration with the SRO in Vic in particular and complex duty*
- *Some of the banks have not trained their staff well enough. There are still lots of issues with the banks requirements for paper documents and the inability to understand the conveyancing process*
- *No repercussions for parties not meeting a settlement on the accepted date and time. Settlement date and time should be able to be accepted where a party has outstanding (sic) tasks*
- *When PEXA has issues, it causes a world of issues for practitioners, causes purchasers to be sitting in trucks and overall causes a lot of stress that did not exist in the paper world. The Banks not having proper process in place prior to the implementation means that settlements continuously roll over causing additional works and purchasers to incur additional removalist fees for sitting in the trucks longer than they should have. The banks need to be held accountable to such delays but they are not*
- *The lack of responses or production of payout figures from the banks and or their representatives*
- *Banks not cooperating and not completing their requirements within sufficient time. Always relying on a roll-over rather than settling at the due time.*
- *Lack of mandatory Education. Why? I am transacting on PEXA daily, and have no comfort if the other practitioner is educated or winging it with the PEXA prompt notes to settle the property for my client.*
- *Parties not accepting settlement and completing documents in a timely manor (sic) which in turn precludes us from completing our documents eg: verification of stamp duty on a purchase. Also the lack of care for clients with settlements being delayed due to parties not completing and signing documents in time.*
- *Well where can i start - constant roll-overs with no accountability by any subscriber who fails to sign off or complete a workspace in time for the original settlement date. Lack of responsibility by banks; lack of competition; insufficient regulations; lack of consistency between EC and legislation*
- *There being no regulations guidelines or time frames implemented to avoid all being done on the day settlement is due*
- *Financial Institutions staffing and training around PEXA. The banks seem to have split their team up into paper or electronic which meant that they didnt (sic) have enough staff across both platforms causing delays and issues. That is more a financial institutions issue rather than an electronic conveyancing issue though.*

- *Vendor representatives leaving input of data to last minute resulting in additional work to chase up issues to get matter to settlement*
- *Banks are refusing/failing to do everything that is necessary in a matter until seconds before settlement is due, causing matters to constantly be pushed out. This is not necessary and not good enough*
- *Having to be tied to your computer to ensure settlement goes through. It is not even possible to leave your computer when the matter is in ready/ready as I have had several occasions when this has been tripped and required signing again. This makes our lives very inflexible as opposed to the paper settlements.*
- *BANKS - no certainty of what time settlement will take place which leaves clients paying removal truck fees. we are constantly having to ring the banks on the day of settlement to get them to commit*
- *Practitioners refusing to deal in the electronic workspace due to their perceptions. Practitioners using PEXA as a communication tool instead of a settlement tool.*
- *Banks failing to enter financial information until the last minutes Complexity of PEXA – not intuitive nor as straightforward as it could be*
- *Many practitioners are still reluctant to take up this way of conveyancing. A lot of practitioners are nervous about incorrect account details being inserted into the workspace and no means of cross checking within the system*
- *Slow and late action taken by lending institutions when providing payout figures, entering source funds, signing off on documents etc*
- *Difficulties in dealing with banks. Limitations for any dealings which are complicated. IT issues impacting on signing. Requirement for practitioners to certify correctness of transactions such as Transmission Applications which represents a shifting of risk from the Land Registry to the user and is undermining the principles of indefeasible title*
- *dealing with the banks on Pexa. Bank staff are not trained properly, can't answer questions, don't respond in a timely manor (sic) and leave all matters relating to settlement too close to the settlement time resulting in numerous settlements not completing on time.*
- *does not cover all transactions, keeping up to date with mandatory deadlines, no longer having a pexa support specialist.*
- *lack of communication from bank, no penalty for bank delays, no ability for the vendors deposit funds to be loaded into the work space by vendors agent or legal representative*
- *The banks setting the rules and guidelines to suit themselves without consideration for other parties in the workspace. Also the attitude that if settlement does not happen at the scheduled time then it can simply "roll over". This means more time spent unnecessarily.*
- *difficulties when the situation is not your usual transaction, practitioners unsure what to do, our PEXA direct specialist never calls us back*
- *Banks and lending institutions complying with tasks in a timely manner, often forcing settlements to roll over*

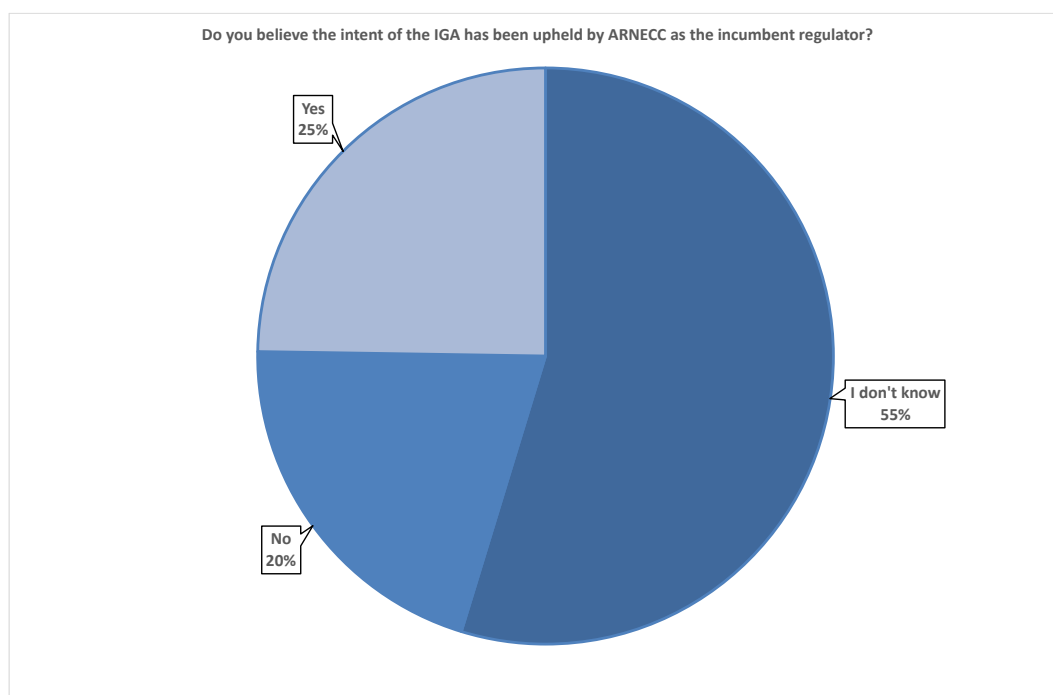
- *Tendency on the part of some parties, particularly mortgagees, to leave everything until the last moment. The system is intended to be able to have workspaces signed off well in advance of settlement time. Practitioners lose considerable valuable time having the check and recheck workspaces for mortgagee input before things can be signed off.*
- *Time for disbursing is taking too long, settlement completes quickly but disbursing can take several hours, this causes vendor practitioners to withhold keys when settlement has occurred but their client funds haven't disbursed; Lenders are finalising to late, up to 5 minutes before settlement time leaving practitioners having to monitor the workspace all day, this ties practitioners' time; Lenders knowing they can change times on the day of settlement instead of trying to meet the agreed time, this has caused some clients to pay removalist waiting fees while their Bank pushes settlement to a later time slot; Lenders do not use the conversation tool, ignore conversations or not answer at all; Lenders not completing shortfall funds yes or no until the last minute or not at all; security and media reporting of incidents has frightened some clients.*
- *Not all transactions are standard. Hard to navigate simultaneous and multiple settlements Misleading information about timing of lodgements - this seems in some instances to be a manual process with LRS NSW. Some settlements register same day and some don't. Lack of training around the types of documents and how you can create and lodge in PEXA - ie Caveats and Withdrawals of Caveats Lack of training around Priority Notices and how to create, lodge etc What is the process once a matters (sic) starts the settling process and then stalls. What should we be advising a client as to how long to wait for a settlement to occur. We have no control as to how long or short the settlement timing is. It does not appear to be standard timeframe. What is affecting this??*
- *Inability to ensure practitioners register and use electronic conveyancing - lack of training of some practitioners/time consuming in getting parties to attend to outstanding matters*
- *Difficult to get an urgent answers when an issue arises on settlement day from PEXA but mainly from the banks. The banks need to train their staff more regarding potential issues that can arise and how best to rectify the problem.*
- *Cord Consents not being updated Banks not updating funds available etc until 15 minutes before settlement having to be accessible in front of the computer waiting on everybody to do their parts in a paper settlement this is all done the day before and you can work your day around the fact everything has been done. You cannot leave the signing to anybody in the office you must be available at all times in front of a computer with the dongle*
- *Financial Institutions complying with guidelines set and completing tasks in a timely manner, this needs to be addressed as a matter of URGENCY. This will slow down the uptake and of practitioners*
- *Lack of staff that the Banks have on their PEXA teams, there is not enough staff to respond to conversations in a timely manner in accordance with the PEXA guidelines especially on the day of settlement. Due to the lack of Bank response, trying to contact PEXA has become more difficult on the phone because you are on hold for a considerable amount of time and is often urgent for the reason you are contacting them.*

- *Banks non-responsive on PEXA (no perceived time saving benefit), additional workload on day of settlement (monitoring PEXA workspace), lack of flexibility certain transactions (stand alone transfer, simultaneous/linked settlements)*
- *Too complicated, too expensive, too time consuming and not structured to handle "non-routine" transactions.*
- *It is confusing, costly and adds to the stress of the workplace.*
- *Different state title offices having too much optionality, decision making is not aligned across the country, very inconsistent, and not aligned to becoming digital fast.*
- *Banks not doing what is required or having a clear understanding of what is required. We work to a legal contract date, and most banks think they can just change a date - in some cases to a week later, because they can. Banks need to get this right for this system to work successfully.*
- *Banks leave everything to last minute, giving less certainty for clients, never know until the booked time if it will settle or not whereas in paper we knew when the bank was ready*
- *Lack of certainty in compliance with laws and lack of preparation for mandatory changes*
- *Divergent approaches to what can be processed electronically, mandatory dates and everything in between in each e-conveyancing enabled State. Differing service levels from PEXA, very bullish approach and they are lacking in discretion regarding clients and transactional confidentiality.*
- *Practitioners have been expected to embrace this system, and have been expected to pay for training. No incentives to adopt because it is not overwhelming better than the existing system. Banks have failed to provide a better service to the industry.*
- *The financial settlements in a sale and purchase, the continual need to monitor PEXA significantly affects a lawyer's ability to run a practice, attend meetings etc especially on days when there are settlements. Inability to access PEXA on mobile devices is major issue especially when as a trust account signatory I need to authorise a financial settlement. The need to be available significantly affects my productivity. As PEXA currently operates, my practice may have to employ an extra person to monitor PEXA. Time involved in a standard conveyancing transaction has increased significantly and hence cost to the client.*
- *More time spent and worries about security.*

Governance and Regulation

- AI.25 Respondents were asked to rate their understanding of the current governance and its associated documents on a 0-10 scale where 0 is none, 5 is fair and 10 is very good.
- AI.26 The result of an average of 5 demonstrates a fair understanding of the current governance arrangements.

AI.27 The responses to the following question, however, demonstrate that more than 50% of respondents are unaware whether the intent of the IGA has been upheld by ARNECC in its role as the regulator (see chart below).



AI.28 A subsequent survey question asked whether ARNECC has sufficient power to regulate the environment.

AI.29 Responses to this question vary by respondent type, demonstrating a variation in perception across the industry.

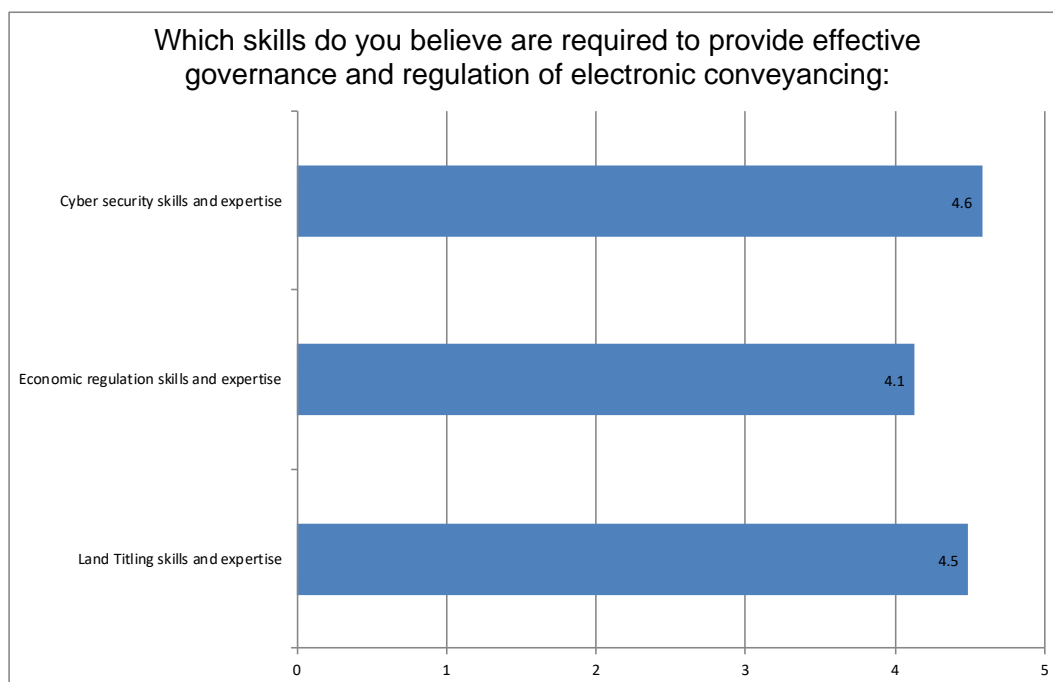
AI.30 Few of the financial services providers believe ARNECC has sufficient powers to regulate the environment. Other respondents are mostly unsure or do not believe ARNECC has sufficient power.

AI.31 The next question asked respondents how well ARNECC is resourced, Respondents also demonstrate a level of uncertainty within the industry, particularly at the practitioner level.

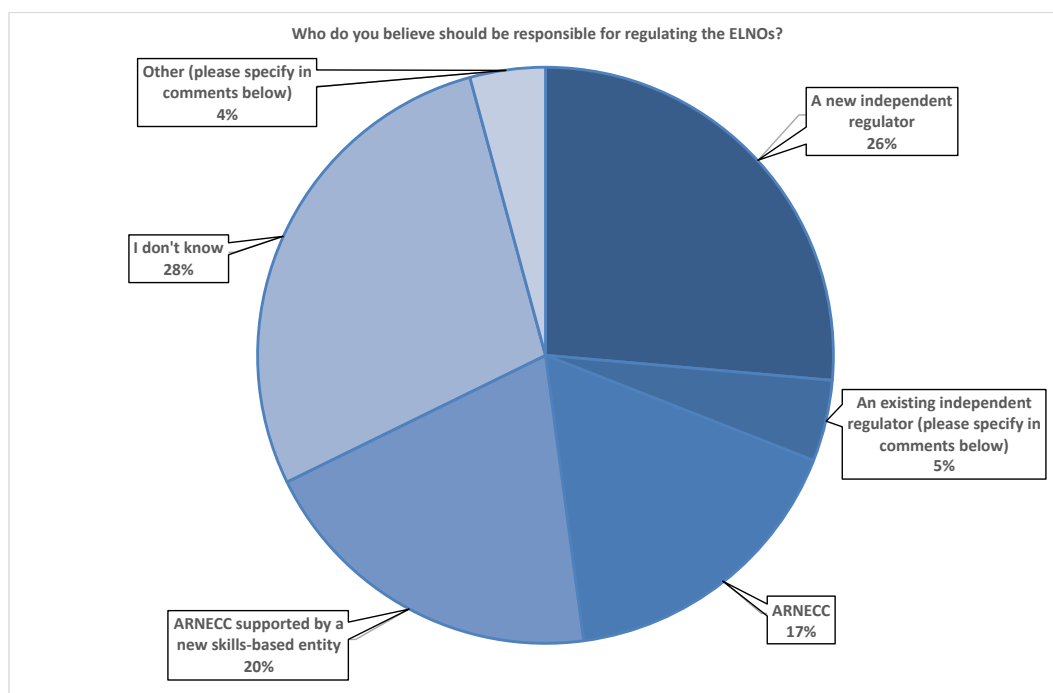
Do you believe ARNECC is sufficiently resourced to regulate the electronic conveyancing environment?

Response	Count
Don't know	184
No	90
Yes	33

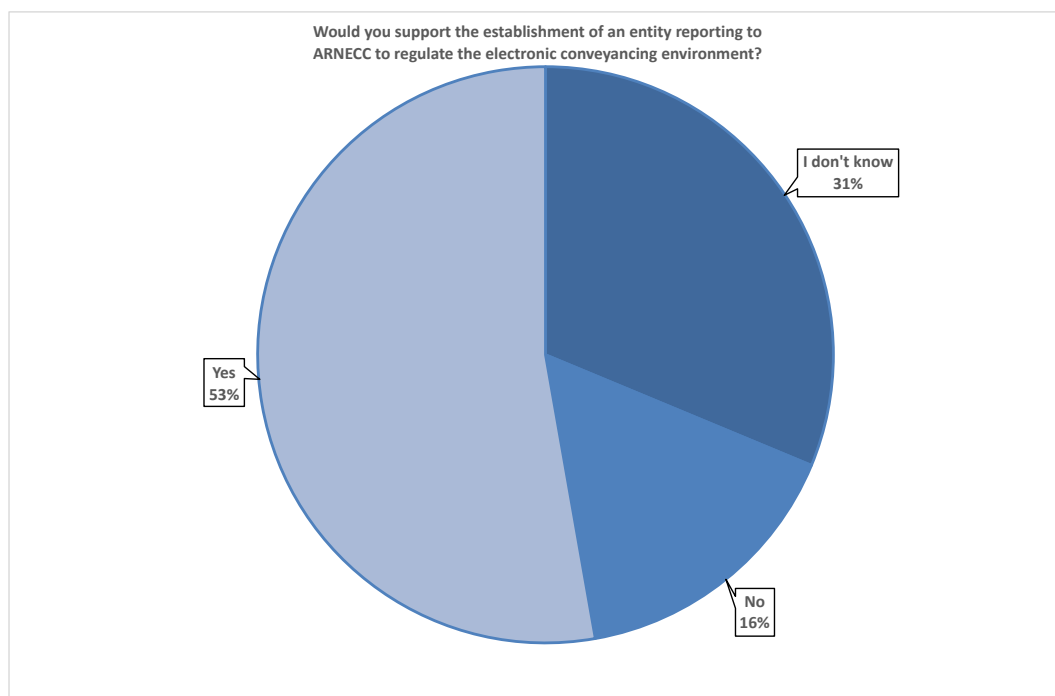
AI.32 Respondents were asked to rate skills for effective governance and regulation of eConveyancing on a five-point Likert scale where 1 is not important and 5 is very important. The responses show that all three skills are considered important to very important.



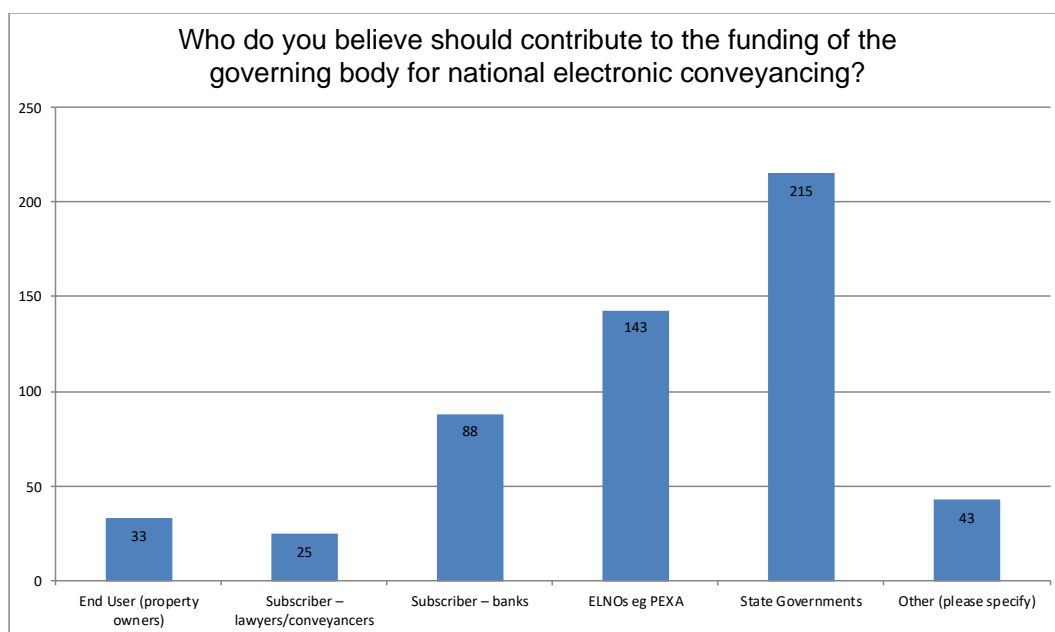
AI.33 When asked who should be responsible for regulating ELNOs, respondents' opinions are divided.



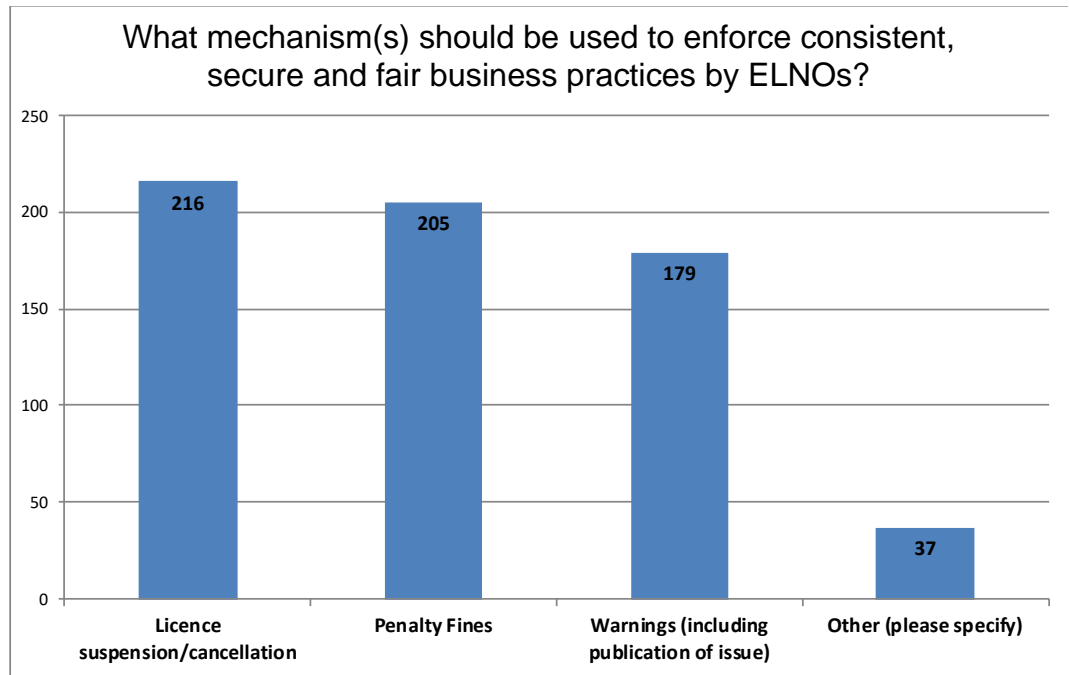
AI.34 However, as can be seen in the chart below, more than 50% of respondents support the establishment of an entity reporting to ARNECC to regulate the eConveyancing environment, with the balance either unsure (31%) or against the idea (16%).



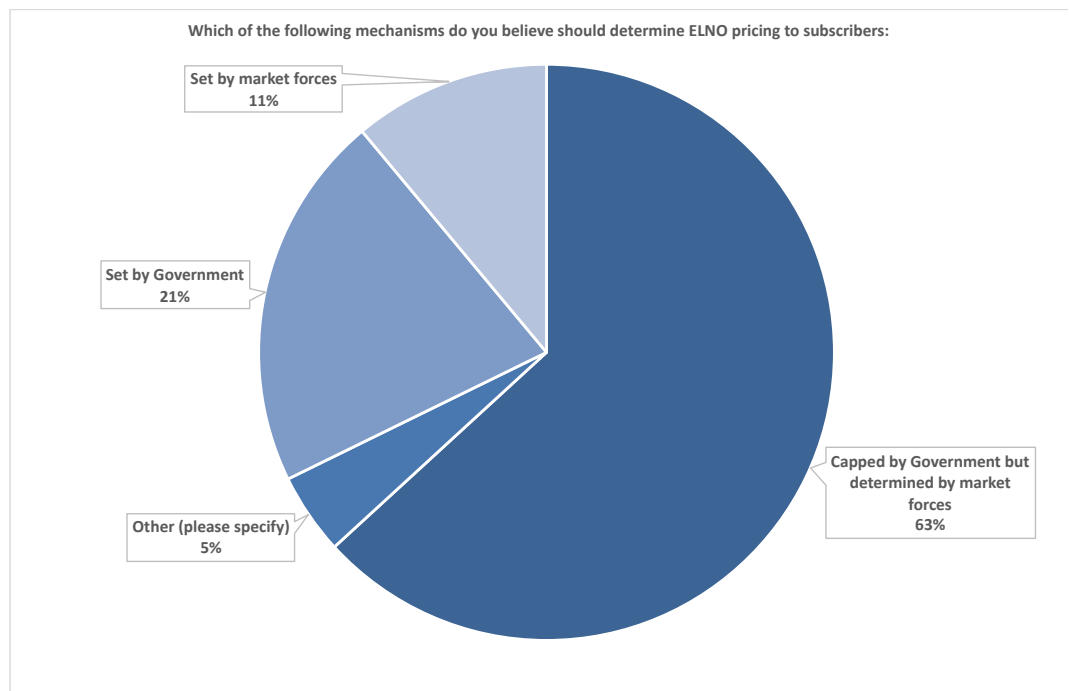
AI.35 Respondents were asked who should contribute to the funding of the governing/regulatory body. There is an emphasis on funding by states and territories as the source. Other suggestions included a combination of the suggested sources or added in the federal government as an option. A number of comments noted that the end users will end up paying irrespective of where the funding is applied.



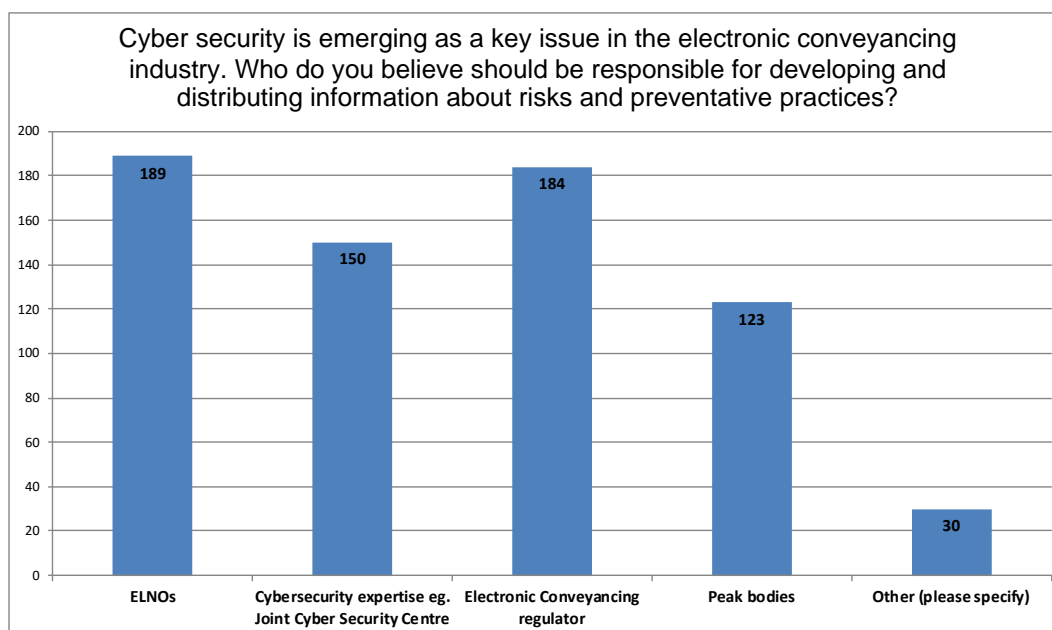
AI.36 There was support for all proposed enforcement mechanisms for ELNOs with some suggesting a mix of all proposed.



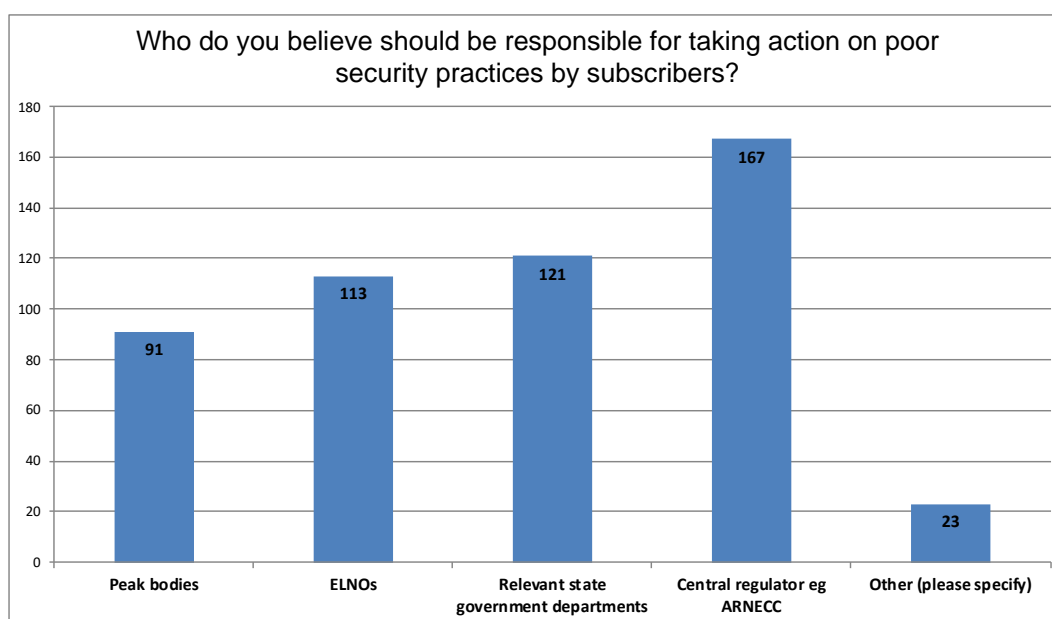
AI.37 Government capping of ELNO pricing is strongly supported with the price then determined by market forces. Those who selected other tended to suggest the price be bound by CPI increases.



AI.38 Cybersecurity has been raised as an increasing area of risk requiring attention. The following responses demonstrate that there is support for a number of different information sources.



AI.39 In terms of managing poor security practices, the following responses demonstrate that stakeholders believe that more than one of the industry bodies has responsibility for taking action on subscribers with poor security practices.



APPENDIX II CONSULTATIVE RECORD

All.1 This section records the substantive meetings with stakeholder. In addition, we had ongoing discussions for clarification and to test options with regulators, ELNOS and other interested parties.

Post Issues Paper release consultative record

Stakeholder	Jurisdiction	Date
Hon. Victor Michael Dominello MP's (Minister for Finance, Services and Property) NSW forum on interoperability – second meeting - IGA Review members as observers	NSW	14/2/19
NSW Interoperability Working Groups Observed (via teleconference) the initial NSW interoperability Technical and Working Group meetings	NSW	27/3/19
Tegan Lemm, A/Senior Lawyer - Credit, Retail Banking and Payments, Financial Services Group, ASIC Fleur Grey, Senior Specialist - Credit, Retail Banking and Payments, Financial Services, ASIC (TBC) Jennifer Lyons, Senior Specialist (Acting) Credit, Retail Banking and Payments, ASIC	National	2/4/19
Paul McKee, Digital Duties Program Manager Operations Division, State Revenue Office VIC	VIC	18/4/19
Robert Goncalves, Director, eConveyancing, ORG NSW	NSW	29/4/19
ARNECC Members IGA Review Workshop	National	16/5/19
State Revenue Offices Commissioners eConveyancing Committee Mark Rogers, Director Duties and Grants, Office of State Revenue, Queensland Treasury Martina McMahon, Queensland Treasury Paul McKee, Digital Duties Program Manager Operations Division, State Revenue Office VIC Matthew Nowell, Manager Products and Channels, Duties, Revenue NSW Chris McMahon, Director Group 2, Office of State Revenue WA Apologies Simon McKee, Chair eConveyancing Committee and Deputy Commissioner, Office of State Revenue, Queensland Treasury Tom Colmer, Revenue SA	National	14/6/19
Sympli David Wills, CEO Joanne Tseng, Head of Legal	National	27/6/19
PEXA Amy Gerraty, General Manager, Regulatory Affairs Peter McDonald, Partner, Allen & Overy	National	1/7/19
NSW Interoperability Working Groups	NSW	15/7/19

Stakeholder	Jurisdiction	Date
Observed (via teleconference) the final NSW joint Technical and Operations Working Group and Regulatory Working Group, following release of draft		
Cristina Cifuentes, Commissioner with ACCC	National	16/7/19
LEXTECH / Purcell Partners (Teleconference) Chris Ailwood, Consultant	National	22/7/19

Issues Paper submissions received

All.2 The IGA Issues Paper was publicly released on 14 February 2019 with comments due by 29 March 2019. Due to other consultative processes being run at the same time a number of respondents requested an extension to the close date for comments. These requests were granted, and the close date was extended to mid-April.

All.3 We received responses to the Issues Paper from the following stakeholders

Stakeholder	Jurisdiction	Date
Purcell Partners - LEXTECH	National	28/2/19
Conveyancing practitioner (anonymous)	-	22/3/19
Registrars (2 jurisdictions)		27/3/19
ACCC	National	27/3/19
Sympli	National	29/3/19
LEAP	National	29/3/19
AICWA	WA	29/3/19
AICVic	VIC	29/3/19
Conveyancing and legal practitioner (anonymous)	-	29/3/19
Queensland Law Society	Queensland	1/4/19
AICSA	SA	2/4/19
Victorian Legal Services Board and Commission	VIC	4/4/19
Surveying & Spatial Sciences Institute SA Land Surveying Committee	SA	5/4/19
State Revenue Office, Victoria (verbal feedback)	VIC	18/4/19
PEXA	National	6/4/19
Law Council including NSW Law Society, Law Institute of Victoria and Queensland Law Society	National	9/4/19
ABA	National	10/4/19
NSW Government including registrar	NSW	8/5/19
Sympli – Further comments	National	20/6/19

Pre Issues Paper release consultative record

Stakeholder	Jurisdiction	Date
ARNECC Members IGA Review Commencement	National	20/9/18
PEXA Open Day	National	20/9/18
Ian Ireson, Chief Executive Land Use Victoria - registrar	VIC	27/9/18

Stakeholder	Jurisdiction	Date
Jane Allan, Deputy Registrar		
Jean Villani, WA – Registrar of Titles Shirlene Allen, ARNECC Support Officer	WA	27/9/18
Marcus Price, CEO, PEXA Justin Schmitt, CTO Laurie Grantfield	National	9/10/18
Purcell Partners – LEXTECH Simon Purcell, Director -Principal Shauna Dunne, Head of Operations Devesh Chauhan, Business Transformation Manager Neil Fairbairn, Information Technology Chris Ailwood, Consultant	National	11/10/18
Australian Institute of Conveyancers (VIC Division) Jill Ludwell Chief Executive Officer General Manager, Ann Kinnear	VIC	11/10/18
PEXA Cybersecurity Symposium	National	12/10/18
Office of the Registrar General Jeremy Cox, Registrar General Danusia Cameron, Director, Contracts and Regulation Robert Goncalves, Director, eConveyancing Angeline Antony, Senior Lawyer, eConveyancing Christina Garas, A/Snr Lawyer	NSW	22/10/18
Karen Smith, General Counsel and Deputy Secretary - Governance Group, DPC Paul Miller, Consultant	NSW	23/10/18
NSW Land Registry Service Adam Bennett, Chief Executive Officer Nicole Graham, General Counsel Eamon Mooney, General Manager, Dealings	NSW	23/10/18
Philip Gardner, Deputy Secretary Commercial – Treasury Charlotte Alexandra, Director of LPI Transition Process	NSW	24/10/18
Australian Institute of Conveyancers (NSW Division) Chris Tyler, Chief Executive Officer Carolyn Booth, Conveyancer	NSW	24/10/18
David Wills, CEO, Sympli Kim Barnard, COO	NSW	24/10/18
Jim Laouris, Registrar-General and Public Trustee for the Northern Territory	NT	25/10/18
Australian Institute of Conveyancers (NT Division) Trevor Scherpig, President	NT	25/10/18
ARNECC	National	30/10/18
Katherine Galang, Senior Treasury Analyst Blake Seerey-Lester, Treasury Linda Keeshan, Premiers	QLD	31/10/18

Stakeholder	Jurisdiction	Date
Liz Dann, Executive Director, Registrar of Titles, Registrar of Water Allocations Stephen Grice Marie Vidas Vanessa Watson	QLD	31/10/18
Westpac Bank Craig Hetherington Ashley D'Cruz	NSW	1/1/18 & 2/11/18
Matt Dunn, General Manager, Policy, Public Affairs and Governance QLD Law Society Matt Raven, Partner, Gadens and Chair of QLD Property Law Committee	QLD	1/11/18
Justin Schmitt, PEXA CTO Marty Karpowicz, Product Owner Another (to be confirmed)	VIC	8/11/18
Australian Institute of Conveyancers (SA Division) Rebecca Hayes, CEO	SA	12/11/18
Graeme Jackson, Registrar-General Jenny Cottnam, Deputy Registrar-General (Registrar-General from January 2019) Angie Nguyen, eConveyancing Specialist Ray Moore, Manager ICT and Innovation	SA	12/11/18
Theo Kadis, Chair of the Property Committee, Law Society of SA	SA	12/11/18
Greg Raymond, Director Budget & Performance, Department of Treasury & Finance	SA	13/11/18
Julie Holmes, A/Commissioner of State Taxation Tom Colmer, Manager, Projects and Business Support	SA	13/11/18
Hayley Gossert, A/Manager Intelligence, Compliance & Strategy (for Paul Bertram, Deputy Commissioner Consumer and Business Services)	SA	13/11/18
Land Services SA Brenton Pike, Chief Executive Officer Steve Wilden, Business Transformation Manager	SA	13/11/18
Jean Villani, Registrar Diem Scantlebury, Assistant Registrar/ Digital Lodgement Consultant Brad McBride, ARWG Richard Gell, Manager Business Capability Susan Dukes, Commissioner	WA	14/11/18
Australian Institute of Conveyancers (WA Division) Dion Dosualdo, CEO Fran Andrews, President	WA	14/11/18
Gary Thomas, Property Law Committee, Law Society of Western Australia	WA	15/11/18

Stakeholder	Jurisdiction	Date
Phil Payne, A/Director Property Industries, Department of Mines, Industry Regulation and Safety	WA	15/11/18
Chris McMahon, Director Group 2, Office of State Revenue	WA	15/11/8
Ian Gilbert, Previously ABA	National	19/11/18
Kevin O'Callaghan, Chief Executive Officer Victorian Land Registry Services	VIC	20/11/18
Ian Ireson, Registrar Jane Allan, Deputy Registrar	VIC	22/11/18
Peter Unkles, Industry Pursuits Lead, Australia Post	VIC	22/11/18
Martin Hoffman, Secretary, Department of Finance, Services and Innovation Jeremy Cox, Registrar General Teleconference	NSW	23/11/18
CBA Dan O'Neill, Acting Executive General Manager Group Operations Enterprise Services Steve Braithwaite Suzanne Turnbull	National	23/11/18
Chris McKenna, Environment Policy, Department of the Premier and Cabinet	QLD	26/11/18
Sympli roadshow	VIC	26/11/18
NAB Yumo Wang, Senior Associate, Regulatory Strategy & Affairs, NAB Alicia Crossett, Lead, Customer Settlements Kim Guilfoyle, Senior Legal Counsel – Consumer Greg Airns, Lead, NAB Servicing Gary Forrest, Head of BCO Servicing	National	29/11/18
Paul Broderick, Commissioner of State Revenue	VIC	29/11/18
ACCC Michael Eady, Director Infrastructure Regulation Division David Barrett, Analyst Adele Teh, Analyst	National	30/11/18
ABA Jerome Davidson, Policy Director, Australian Banking Association Conference call with representatives from the following banks <ul style="list-style-type: none"> • Westpac • Bank Australia • Suncorp • Commonwealth Bank of Australia • Macquarie • Bank of Queensland 	National	3/12/18

Stakeholder	Jurisdiction	Date
<ul style="list-style-type: none"> St George National Australia Bank My State Bendigo and Adelaide ANZ 		
Hon. Victor Michael Dominello MP's (Minister for Finance, Services and Property) NSW forum on interoperability – first meeting IGA Review members as observers	NSW	4/12/18
Jeremy Cox, Registrar	NSW	4/12/18
ACT Land Titles Office Tim Pearce, Project Manager, Land Titles Office Fred Arugay, Senior Manager, Customer Coordination and Licensing and Registrations	ACT	4/12/18
NSW Law Society Michael Tidball, CEO Richard Harvey, Chair Property Law Committee, Tony Cahill, Member Property Law Committee, Greg Channel, Member Property Law Committee Gabrielle Lea, Policy Lawyer	NSW	5/12/18
Revenue NSW Julie King, Director Duties Mark Smith, Client Engagement Manager, Property Revenue Group Operations	NSW	5/12/18
Land Titles Office Craig Pursell, Deputy Recorder of Titles Stuart James, Senior Business Analyst Anit Yan, Information Technology Stuart Fletcher, General Manager	TAS	7/12/18
Simon McKee, Deputy Commissioner, Office of the Commissioner, Office of State Revenue, Queensland Treasury	QLD	7/12/18
Joe Italiano, CEO, C Solutions Setts Plus	WA	11/12/18
Paul Psaltis, General Manager, Smokeball	National	11/12/18
David Wills, CEO Sympli	National	12/12/18
Law Council of Australia Philip Argy, Expert Member Michael James, ACT Law Society Matthew Raven, Queensland Law Society David Clarke, Law Society of Western Australia Mark Swan, Law Society of New South Wales Gabrielle Lea, Policy Lawyer	National	13/12/18
Amanda Baker Program Director, Electronic Settlements	National	14/12/18

Stakeholder	Jurisdiction	Date
SAI Global Property		
Kathy Constan, Co-Founder, Director, LodgeX	National	14/12/18
Peter Maloney, CEO, GlobalX	National	18/12/18
Sympli David Wills, CEO Matthew Brown, Consultant	National	5/2/19
Australian Institute of Conveyancers (Tas Division) Debbie Hutton, Secretary Erin Sims, President Teleconference	TAS	7/2/19

APPENDIX III MOR AND MPR DESCRIPTIONS

AIII.1 Below is a summary of the matters covered in the MOR and the MPR.

Model Operating requirements

AIII.2 The MOR version 5 are a uniform set of requirements determined by ARNECC that are promulgated by the registrars as Operating Requirements for ELNOs to comply within their jurisdiction which take effect 25 February 2019.

AIII.3 They are accompanied by Model Operating Requirements Guidance Notes containing advice published by ARNECC on behalf of all registrars to assist ELNOs in complying with the MOR.

AIII.4 Version 4 of the MOR was in operation during the consultation process and we note that stakeholders may not have had the opportunity to provide us with feedback on the changes in version 5. We would welcome any additional comment on version 5.

AIII.5 The MOR include:

- ELNO eligibility criteria – legal status, character, financial resources, technical resources, organisational resources and insurance
- Operation of the Electronic Lodgment Network (“ELN”) – encourage widespread industry use, national system and minimum document capability, general obligations, ELNO service fees, integration and separation requirements
- Initial testing requirement before commencing operation
- Obligations regarding system security and integrity - information security management system, access to ELN, security of ELN data, protection of land information, digital certificate regime, verifying digital signing, verifying no alteration, notification of jeopardised conveyancing transactions, obligations in relation to notification of compromised security item, data breach notification, cloud service
- Security and integrity of titles register
- Risk management
- Minimum system requirements functionality - data standard, apply registrar’s business rules, services to enable assessment of integrity, ability to un-sign digitally signed documents, document templates, presentation following completion of financial settlement, presentation following duty payment or commitment, land registry fees handling
- Minimum performance levels
- Business continuity and disaster recovery management
- Change management framework
- refusal to accept subscriber, maintain subscriber and user register, evidence of subscriber insurance and verification of identity, participation agreement and participation rules, training, review of subscribers and suspension or termination, ELNO must restrict, suspend or terminate subscriber if directed by registrar, consequences of restriction, suspension or termination, the ELNO must not be a subscriber

- Compliance monitoring and reporting - monitor compliance, demonstrate compliance, inability to give a no change certification, when to demonstrate compliance, demonstrate compliance at any time, provision of further information, notice of non-compliance and remedy, remediation of non-compliance, remediation of serious non-compliance, ELNO may provide certified copies of original documents
- Independent certification
- Compliance examination
- Reports
- Data and information obligations – retention, generation and retention of transaction audit records, use, provide information to subscribers, intellectual property rights
- Registrar's powers - suspension or revocation of ELNO's approval
- Business and services transition- transition plan, minimum requirements of a transition plan, implementation of transition plan

AIII.6 The schedules to the MOR cover insurance, performance levels, reporting requirements, additional operating requirements, compliance examination procedure, amendment to operating requirements procedure and subscriber identity verification standard.

AIII.7 Each registrar in participating jurisdictions has a contract with the ELNOs that incorporates the MOR and adds conditions relevant to each jurisdiction.

Model Participation Rules

AIII.8 The Model Participation Rules ("MPR") are a uniform set of rules determined by ARNECC that are promulgated by the registrars as Participation Rules for the subscribers to an ELN to comply with in their jurisdiction.

AIII.9 They are accompanied by MPR Guidance Notes containing advice published by ARNECC on behalf of all registrars to assist subscribers in complying with the MPR.

AIII.10 The MPR include:

- Compliance with participation rules
- Eligibility criteria – ABN, status, character, insurance
- The roles of subscribers - subscriber as principal, responsible subscribers, subscriber as trustee and partnerships, subscriber as Attorney
- General obligations - ensure user compliance, keep subscriber system details complete and up-to-date, client authorisation, right to deal, verification of identity, supporting evidence, compliance with laws and participation rules, compliance with directions, assistance, protection of information, information, no assignment, mortgages, conduct of conveyancing transactions
- Obligations regarding system security and integrity - protection measures, users, user access, signers, digital certificates notification of jeopardised conveyancing transactions, revoking authority, compromised security items, certifications

- Amendment of participation rules
- Restriction, suspension and termination - comply with directions relating to restriction of access or use, suspension at direction of registrar, termination at direction of registrar, rights and obligations on suspension, termination or resignation, further steps by subscriber
- Compliance

AIII.11 The schedules to the MPR cover additional participation rules, amendment to participation rules procedure, certification rules, client authorisation forms, compliance examination procedure, insurance rules, suspension events, termination events and suspension and termination procedure, verification of identity standard, identity agent certification.

Compliance

AIII.12 The registrars that are members of ARNECC and utilise eConveyancing undertake a range of compliance monitoring and enforcement activities. These activities include:

- Compliance examinations of ELNOs and subscribers to an ELNO as provided for in the ECNL
- Compliance assessments of ELNO applicants on application and prior to their being approved to operate
- Annual reviews of ELNOs while they are approved to operate including:
 - Certifications by ELNOs and by independent experts (approved by registrars) engaged by ELNOs
 - Compliance monitoring generally of ELNOs and of subscribers
- The purpose of these activities is to maintain the integrity of title registers and community trust in the process of conveyancing in each State and Territory.