

Response to Issues Paper

Review of the Intergovernmental Agreement
for an Electronic Conveyancing National Law

Response date: 5 April 2019



Terms used in this response

ABA	Australian Banking Association
API	Application programming interface
ACCC	Australian Competition and Consumer Commission
ARNECC	Australian Registrars' National Electronic Conveyancing Council
COBA	Customer Owned Banking Association
ECNL	Electronic Conveyancing National Law
eConveyancing	Electronic settlement and lodgement
ELN	Electronic Lodgement Network
ELNO	Electronic Lodgement Network Operator
Financial institution	Whether as transaction participant or settlement facilitator
IGA	InterGovernmental Agreement for an Electronic Conveyancing National Law
MOR	Model Operating Requirements (and proposed here as National Operating Requirements: NOR)
MPR	Model Participation Rules (and proposed here as National Participation Rules (NPR))
NECDS	National Electronic Conveyancing Data Standard
PEXA	Property Exchange Australia Ltd (formerly National E-Conveyancing Development Limited)
Practitioner	Conveyancer or Lawyer
RBA	Reserve Bank of Australia
Representative Subscriber	A legal practice or conveyancing practice that has entered a Participation Agreement with PEXA
Responsible Subscriber	Defined in the MPR and typically the incoming mortgagee. This Subscriber is ultimately responsible for the lodgement case, lodgement instructions, fees and any requisitions
Subscriber	A party that has entered a Participation Agreement and met the eligibility criteria prescribed in the MPR. In PEXA Subscribers are either Representative Subscribers, financial institutions or other principals
Unsigning	Where a document or settlement schedule has been digitally-signed, but due to a change in data, is treated as not having been digitally-signed

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1. Introduction

PEXA is grateful for the opportunity to respond to Dench McClean Carlson’s *Issues Paper: Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law*, 13 February 2019 (‘the Issues Paper’). PEXA’s focus is to work with all relevant parties to deliver on what national eConveyancing was originally established to do – provide efficiencies to industry to enable better consumer outcomes through electronic conveyancing.

This document provides an outline of the substantive features for an eConveyancing regulatory framework that PEXA believes will deliver the optimal outcomes for industry (subscribers) and end-consumers. Further, PEXA provides discussion points on methods of regulator funding, regulatory model selection, optimal ELNO market structure for maximising consumer benefit (including implications for competition and interoperability) and the additional areas for governance raised in the Issues Paper.

We preface our views on the shape of the regulatory framework with a summary of the many achievements eConveyancing has made to date. These have been delivered through industry-wide collaboration and cooperation under the existing regulatory framework. This history of collaborative industry achievement underpins PEXA’s position on regulation, namely that the existing regulatory framework should be adjusted incrementally rather than overturned or radically altered. Any adjustments should be designed to ensure all ELNOs operate to similar high standards; to preserve and enhance the considerable advances that have been made in the digital transformation of the property industry; and to facilitate innovation that delivers industry and end-consumer benefits. PEXA is concerned about the impact to industry of imposing stringent regulation or a significantly greater regulatory burden, but instead supports a streamlined national regulatory framework with clearly defined objectives and appropriate safeguards.

2. Outcomes under the current framework

In establishing and advancing eConveyancing in line with the spirit set out in the IGA, the property industry, with the assistance of PEXA, has achieved a great deal in a short period of time, independent of the existing regulatory model. The key to this has been a consistent and sustained level of collaboration between PEXA and the broader property industry. We summarise the several notable achievements below, along with responses to feedback cited in the Issues Paper.

2.1 Consultation & collaboration

The present regulatory framework for eConveyancing considers the parties in a typical lodgement: ELNOs, financial institutions (as “Participants”), lawyers, conveyancers and the parties to a transaction (the “Clients”). This framework enables the authorisation, preparation, digital-signing, certification and lodgement of registry instruments. However, the existing regulatory framework does not govern the way in which an eConveyancing transaction is conducted or contractual obligations are effected.

In developing the platform for eConveyancing (both eLodgement and eSettlement), PEXA considered the many various inputs for a typical transaction and the parties identified in the framework. PEXA worked closely with all industry participants (including financial institutions and the RBA) to understand and address their individual requirements. On the basis of that consultation and collaboration, several complex and potentially contentious issues were resolved without the requirement for regulatory intervention. For example:

2.1.1 Development of mistaken payments framework

Mistaken payments include both unapplied and misapplied payments. That is, those that ‘go nowhere’ and those that are processed to the wrong account. A mistaken payments framework is included in PEXA’s Participation Agreements. PEXA and its subscribers have been able to agree a framework that provides for a level of cooperation where each will:

- Provide reasonable assistance, if it is within their power to do so;
- Provide notice of the error;
- Assist in the identification of the correct particulars;
- Assist with rectification or limitation of the error; and
- In the case of subscribers, meet the reasonable costs of recovery where the subscriber provided incorrect account details.

These actions are taken with the primary aim of providing consumers with a service that meets their needs.

2.1.2 Cybersecurity and fraud

Fraud is a particular concern given the increasing frequency and sophistication of cybercrime targeting the property industry. As an example, recent growth in business email compromises¹ has led to PEXA working closely with financial institutions (both operational and specialist fraud teams) to model scenarios and develop an extensive fraud contact matrix. As a result of this, practitioners now have a clearly defined path to follow if, after settlement, they become aware they have acted on false instructions. Notification as early as

¹ See page 57, paragraphs 5.48– 5.50 of the Issues Paper
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possible provides the relevant financial institution with the best chance to secure the relevant funds.

2.2 Feedback & support

PEXA has an overarching objective to develop capability to enable 100% of property transactions to be processed digitally, while continually enhancing the services it provides. In support of that objective, PEXA has engaged with industry participants to seek feedback on needs and preferences, and provided support to overcome barriers to progress. For example, PEXA engaged in nine months of consultation with financial institutions, the ABA and COBA on the move to settle commercial transactions where security is taken over real and personal property. The result was an agreed process to facilitate the exchange of documents, including bank guarantees, PPSA releases and original leases, which are required to complete a property transaction.

In addition, PEXA has responded to industry feedback by delivering enhancements to its platform and adding both additional systems and applications that extend beyond the minimum document capability required by the current regulatory framework, including:

- Simultaneous settlement capability;
- Self-service renewal of digital certificates;
- A projects platform to manage settlements of large-lot subdivisions;
- A marketplace to allow practitioners to choose services in a transparent format that promotes competition and innovation among service providers; and
- Applications to provide aggregated views of matters.

2.2.1 Training and support

PEXA has also invested in omni-channel communication, education and support systems that allow subscribers to engage with PEXA for each of transaction support, access to articles, facilitated peer support and virtual or in-person training, as acknowledged in the Issues Paper.² The PEXA Direct service has been offered to subscribers for many years at no cost. In addition, PEXA works with many peak bodies to co-educate and encourage practitioners to co-learn at their regional law associations.

Given the significant level of industry change associated with the introduction of eConveyancing, and the highly fragmented nature of the practitioner market, it is not surprising that the Issues Paper notes that some stakeholders are concerned about the level of training available (finding 1.13). PEXA has invested heavily in, and remains committed to, providing comprehensive training and invites any concerned subscribers to contact PEXA directly where gaps or issues are identified.

2.2.2 Security

PEXA has an obligation to provide a safe and secure environment in which property transactions can be conducted. However, security is the responsibility of every network participant. PEXA continues to invest in platform security and is focussed on building awareness and providing security-enhancing tools for network members. Well-received initiatives relating to security (see Issues Paper finding 1.12) include the following:

² The Issues Paper reports positive feedback from legal practitioners in relation to training (p 15). Paragraph 4.22 cites feedback on what's working well: system, ease of use, training, communication, reduced errors and time savings (p 39).

- Hosting a security forum to bring together industry and security experts to share information and identify avenues for assistance;
- Multi-factor authentication enhancements as reflected in PEXA's standard operating environment requirements and security policy, with which all subscribers are required to comply;
- Creation of PEXA Key as a secure communication channel between practitioners and clients to reduce reliance on unsecure email systems for sensitive instructions;
- Whitelisting for larger subscribers;
- A subscriber review process to assess subscriber compliance with PEXA's security policy; and
- Ongoing and significant investment in security each year (approximately 10% of total expenditure).

2.2.3 Enhancements

PEXA has developed a range of enhancements in response to specific industry feedback.

Lodgement instructions became a cause of concern as all subscribers in a workspace were initially required to sign them, but they would become unsigned each time an instrument was edited by any party. This resulted in some subscribers re-signing lodgement instructions more than 10 times in a transaction, creating inefficiencies. When subscribers made their concerns known to PEXA, PEXA collaborated with the land registries to limit the requirement to sign the lodgement instructions to the responsible subscriber only, which has greatly improved transaction efficiency.

PEXA also worked with the industry to develop transaction guidelines that are designed to improve transaction efficiency and eliminate identified pain points in the digital settlement and lodgement processes, and in particular reducing the incidences of unsigned. However, industry experience has revealed the need to further improve signing and reduce instances of unsigned, as reflected in the Issues Paper (p 16). Accordingly, PEXA will continue to engage closely with industry and relevant stakeholders involved in eConveyancing to address these concerns and improve efficiencies. The Issues Paper also cites criticism of financial institutions that change settlement figures resulting in unsigned (page 16), or entering payout figures later than expected (page 18)—an issue that also arises in paper transactions. Financial institutions are aware of and concerned about this criticism (page 21) but constrained by customer account arrangements. PEXA believes it can help to minimise these concerns through delivery of a suite of tools and capabilities for financial institutions to manage workflow, orchestrate interactions and automate interdependent tasks. In addition, PEXA is working to provide access to financial institution teams beyond mortgage operations, which will improve efficiency in the completion of settlement information. Finally, PEXA can now detect changes to a transfer while in edit mode. If a signed transfer is saved without changes, the document will remain signed. This technical change should prevent accidental unsigned.

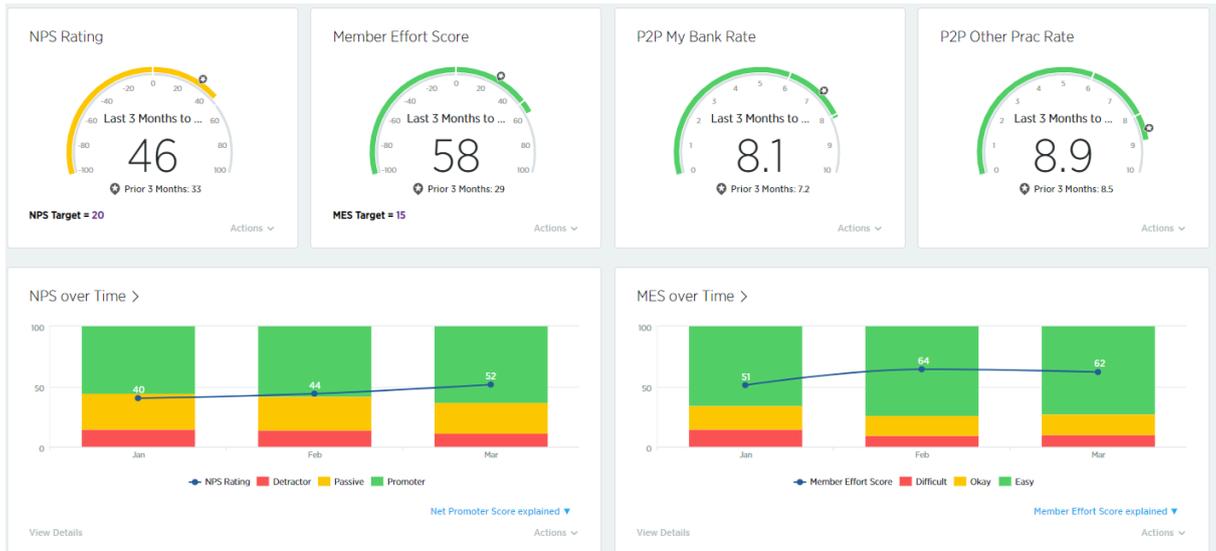


Figure 1: PEXA's NPS and MES over past three months

PEXA has invested heavily to ensure a positive user experience. PEXA's Net Promoter Score³ reflects increasing levels of satisfaction with the PEXA experience. Any revisions to the regulatory framework should continue to encourage and enable improvements and enhancements to meet industry and end-consumer concerns and requirements.

2.3 Integration

Though the regulatory framework did not contemplate integration with users' software solutions,⁴ PEXA included such integration through APIs as part of its core offering. This provides subscribers with choice and flexibility in their interactions with the PEXA platform, and allows practitioners to continue to operate in familiar environments while populating PEXA workspaces.

In developing PEXA's Participation Agreement, PEXA considered how best to enable practitioners to access PEXA via conveyancing software in compliance with the regulatory framework. As a result, a practitioner can only access workspaces via a software provider's platform if the practitioner has first registered with PEXA.

Not all providers make use of all of PEXA's APIs on offer. Some of the reasons for this have become clearer over recent months. Below are examples of incomplete take-up of APIs.

Feedback cited in the Issues Paper noted two-way communication would be of benefit (page 23). Software providers are already able to access a 'retrieve workspace summary' API that allows a user to get data from PEXA into their own software, in addition to being able to pass data to PEXA. Several software providers currently make use of this API.

Similarly, the Issues Paper (page 24) notes that practitioners work on two screens, one to use the conveyancing software and one to display settlement progress in PEXA. However,

³ PEXA's NPS is over 40. For explanation of what is considered a good score, see for example: <https://customergauge.com/what-is-a-good-net-promoter-score?>

⁴ Until version 5 published in December 2018. The recent changes mean integration arrangements will now be more transparent with integration terms published on PEXA's website.

PEXA notes that these manual monitoring efforts can be reduced if software providers access the notifications capability on offer, but this is yet to be taken up by providers.

PEXA continues to extend and enhance its integration efforts. PEXA has 16 live integrators and 13 projects in progress with software providers, law firms and financial institutions (all targeted for completion by June 2019). PEXA continues to deliver new APIs to the market and recently delivered a conversation capability. Later in 2019 PEXA intends to introduce additional options for document creation (alongside the existing 'create discharge document'). In addition, PEXA will continue to enhance its APIs for their lifetime, in alignment, where appropriate, with changes to the PEXA Platform. PEXA will also continue to provide communication and notifications of changes and releases, and is developing an API portal to enhance the onboarding experience for integrators and improve outcomes in both development and testing. All these initiatives remain core business for PEXA and are independent of the regulatory framework.

PEXA supported the most recent changes to the MOR with respect to the development of integration terms via class and type of integrator and on an equivalent basis. This is consistent with PEXA's established approach. PEXA has also worked extensively with financial institutions and ARNECC on the changes to the regulatory framework required to support synthetic users.

2.4 Development of DVP settlement model

Though settlement is contemplated in the IGA and referred to briefly in the MOR, the 'how' of settlement is not part of the existing regulatory framework nor is it included in a national standard for eConveyancing. PEXA therefore designed its own settlement model following extensive consultation with the industry and relevant regulatory bodies.

As electronic settlement cannot rely on the bank cheques that are used in paper-based conveyancing, PEXA's financial settlement model requires funds to be contributed from a known and registered account. A practitioner can use its own statutory trust account or the PEXA Source Account if it does not have one.

Every practitioner trust account regulator (in active jurisdictions, the ACT and Tasmania) has been briefed on the PEXA settlement model and the reports PEXA produces support practitioner compliance with reporting obligations.

For practitioners to use their own statutory trust accounts, PEXA requires the financial institutions holding those accounts to integrate their systems with PEXA and accept payment instruction files from PEXA in respect of those accounts. In other words, the financial institution acts as facilitator rather than participant in these cases.

When a financial institution acts as participant in eConveyancing, it is typically a lender advancing funds toward a refinance or purchase and requiring security for that loan in the form of a mortgage. As a participant, the financial institution may be a subscriber or represented by a subscriber. The loan funds can be advanced in various ways, depending on the arrangements of the financial institution: via a lawyer's trust account, via the financial institution's own account at the RBA, via another financial institution's RBA account (subject to suitable arrangements), or via an account held at an integrated financial institution (similar to a practitioner's trust account).

A financial institution can also facilitate settlement, even when it is not a party in a workspace (i.e., not an incoming or outgoing mortgagee). It could be an ESA Holder (where another institution is the ESA User), or an integrated financial institution that another subscriber banks with (whether the other subscriber is a practitioner operating a trust account or a financial institution operating a settlement account).

Some financial institutions act in both roles, some are facilitators only (they have no mortgage operations) and some are participants only (relying on other financial institutions to facilitate movement of funds).

PEXA notes feedback in the Issues Paper around the varied timing for receipt of funds (page 44). Funds being processed to an account at an integrated financial institution are generally received shortly after settlement, whereas those directed to other financial institutions are subject to normal bank clearing times.

Once RBA settlement occurs, the funds are held on behalf of the vendor by the financial institution (as facilitator). At this point, the purchaser is generally on title and the legal owner of the property (or, having satisfied the contractual obligation for payment, will have a beneficial interest if there is a delay in lodgement). Following settlement, the financial institution holding the funds on behalf of the vendor disburses those funds to the vendor (and other recipients, such as the outgoing mortgagee, the revenue office for stamp duty, etc.). Disbursement to the vendor occurs without the involvement of or instructions from the purchaser (i.e. it is analogous to a representative of the vendor holding a bank cheque and depositing it for them).

To enable the settlement steps of funds reservation and funds settlement at the RBA, PEXA is a member of the Reserve Bank Information and Transfer System (RITS) and subject to the RITS regulations.⁵ PEXA must comply with these regulations and maintain RITS membership, and continues to work with the RBA in relation to settlement matters. For example, PEXA has worked closely with the RBA on the requirements for orchestrated settlements in PEXA (including the introduction of a reservation of funds function); the development of PEXA's contractual documents (in describing settlement arrangements); the development of authorising forms; and ongoing amendments to contracts when changes impact settlements. PEXA also engages with the RBA on design measures to support system resilience.

PEXA supports a regulatory framework that enforces strict standards in regard to settlement capabilities. PEXA's capability in this regard was designed, developed and delivered without the need for regulatory intervention and in the interests of providing a superior solution to the industry and end-consumers.

2.5 Requirements & guidelines

The existing regulatory framework contemplates the actors in a conveyancing transaction (ELNO, financial institution as participant, lawyer, conveyancer) but does not detail who does what in a transaction, or what subscribers' needs are. PEXA has consulted extensively and worked closely with industry on the orchestration of interdependent actions. This is an ongoing task for all industry participants as the industry transitions toward 100% digital property transactions.

⁵ <https://www.rba.gov.au/payments-and-infrastructure/rits/user-doc/pdf/regulations.pdf>

Various factors (such as payout figure entry) can contribute to the late completion of tasks. Late completion by one party can contribute to delays in another participant's completion of tasks in the same workspace. However, factors outside the workspace are also relevant. For example, the Issues Paper notes that customer spending accounts linked to home loans can alter payout figures until the day of settlement (page 21). In paper transactions this may require amendments to cheque directions and consequent delays,⁶ with practitioners often caught between an incoming lender requiring cheque directions one day prior to settlement and a discharging mortgagee providing a payout figure on the morning of settlement. In a PEXA transaction, changes to an account balance on the morning of settlement can be managed and settlement can proceed on the scheduled date.

Increased transparency is a natural consequence of conducting a PEXA transaction—all parties now have greater visibility of each other's preparations. This is a transformation the industry needs to come to terms with in a digital environment.

PEXA has worked extensively with the industry on guideline development and with financial institutions on guideline compliance. In response to observations at page 59 of the Issues Paper, PEXA notes that financial institutions receive monthly reports on guideline adherence and PEXA works with institutions to identify and track areas for improvement. Results on a range of metrics from February 2019 include:

- 84% of outgoing mortgagees entered payout figures before 10 am on the day of settlement;
- <70% of incoming and outgoing proprietors responded to conversations within tolerance of guidelines;⁷
- <75% of incoming and outgoing mortgagees responded to conversations within tolerance of guidelines;
- Invitation responses within guidelines ranged from 70% for practitioners roles to 75-79% for mortgagee roles; and
- Only 16% of incoming proprietors enter the total funds required to settle within the guideline of five business days before settlement (this is commonly not entered until one day before settlement).

PEXA continues to work with industry to minimise delays. PEXA is best placed to track industry trends and areas for improvements, which will always evolve at a faster pace than regulation can, using data from both sides of the market to design and deliver platform and experience enhancements.

In 2019, PEXA will seek industry support to upgrade the existing guidelines to standards to drive greater efficiency in workspace collaboration and settlement execution.

2.6 Costs & efficiency

The Issues Paper includes stakeholder feedback on fees and increases in direct costs, and reports a view that eConveyancing is yet to deliver the full potential of efficiency benefits to practitioners (page 16). For most practitioners (and the industry as a whole), full efficiency

⁶ PWC's Digital Property Report 2015 found that one in five settlements paper settlements were delayed and the median delay was seven days.

⁷ Respond to conversation in less than 8 hours, unless this is within two business days of settlement, in which case, less than 4 hours.

and other benefits of eConveyancing will only be achieved when paper conveyancing is eliminated.⁸ As each of the five active jurisdictions is at a different stage of digital take-up, full efficiency benefits are not being realised on a consistent basis. However, PEXA remains confident that the value proposition of eConveyancing is sound where eConveyancing is the dominant delivery channel.

⁸ This is confirmed in Deloitte's *Impact of eConveyancing*, 2018
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3. Future regulatory model

Given the achievements to date under the existing model, PEXA's view is that the basic framework (ECNL, MOR and MPR) should be retained but should be national (ECNL, **NOR** and **NPR**), without derogation and with retention of a mechanism for the states and territories to propose rule changes.

National eConveyancing exists because industry realised that state-based models for eConveyancing could not deliver the transformative efficiencies that a national reform can. Introducing state-based variances in the operating requirements or participation rules is likely to deliver no benefit to the economy or consumers. Such variances may, however, introduce cost and complexity, particularly for cross-jurisdictional transactions and industry participants that operate nationally. The regulation of a nationally consistent scheme will likely impose a lower cost burden on the industry and ultimately on end-consumers.

In addition, PEXA does not believe that there is a requirement to provide further regulatory oversight of industry participants specifically for eConveyancing, beyond the existing regulatory framework. Similarly, existing regulation (for example, national privacy, corporations, consumer, competition and payments/banking regulation) need not be duplicated for eConveyancing.

In PEXA's view, moderate adjustments to the regulatory framework will deliver the consistency needed to achieve the intended national economy benefits. PEXA proposes:

- Clear articulation of a national objective for eConveyancing;
- Establishment of a Ministerial Council responsible for eliminating derogations over time (with no new inconsistencies introduced);
- Establishment of a national rule-setting entity;
- Separation of the rule-setter and rule-enforcer (the regulator);
- Support for both the rule-enforcer and rule-setter from existing bodies with capabilities broader than lodgements and land titling; and
- Inclusion of Revenue Offices as essential components in the eConveyancing framework.

Registrars would continue to enforce the rules in their respective jurisdictions, unless Registrars choose to incorporate a national rule-enforcement body. PEXA believes there may be significant efficiency in the national (as opposed to state-by-state) enforcement of the MOR. Whichever jurisdictional option selected, PEXA believes strongly in the need to separate the rule-setter and the rule-enforcer.

3.1 Case study: national energy market framework

PEXA believes Australia's regulatory framework for the energy market is a useful case study for the approach to eConveyancing. While the industries themselves are quite different, as are the companies who participate in both industries, the higher level parallels are worth exploring. Like eConveyancing, the energy market needs to balance national networks and schemes with specific, state-based requirements and legislation (in conveyancing these requirements include state-based land titles legislation). To achieve this, the energy market has a clearly defined overarching objective: to deliver the best consumer outcomes, against which all rules and rule changes must be assessed.

The Ministerial Council on Energy (MCE) is the national policy and governance body for the energy market. MCE reports to COAG on the operation of the energy market intergovernmental agreement and any proposed amendments. While responsible for the national energy policy framework, governance and institutional arrangements for the market and the legislative and regulatory framework, it is not directly engaged in the day-to-day operation of the market or the conduct of regulators.

Regulators include the rule-setter, the Australian Energy Market Commission (AEMC), and the rule-enforcer, the Australian Energy Regulator (AER). AEMC is responsible for developing national rules, which must be applied uniformly absent a derogation in the application law that allows a departure. AER is the national rule enforcer, responsible for regulation and compliance. This separation of powers provides checks and balances and protects against conflicts of interest.

The other major element of the regulatory framework is the Australian Energy Market Operator (AEMO), which provides security advice and information. Previously a government entity known as NEMCO, AEMO was incorporated to provide market participants with representation. Its members are appointed by Ministerial Council and comprise regulators (60%) and market participants (40%).

3.2 Proposed framework details

eConveyancing brings together various parties who oversee different aspects of the process. Each overseer plays an important individual role, though none have the experience or remit to perform the work of the others. Therefore PEXA proposes a regulatory model that reflects the nature of the eConveyancing environment.

PEXA proposes a governance framework for the overseeing of the national eConveyancing market that is modelled on that of the national electricity market.

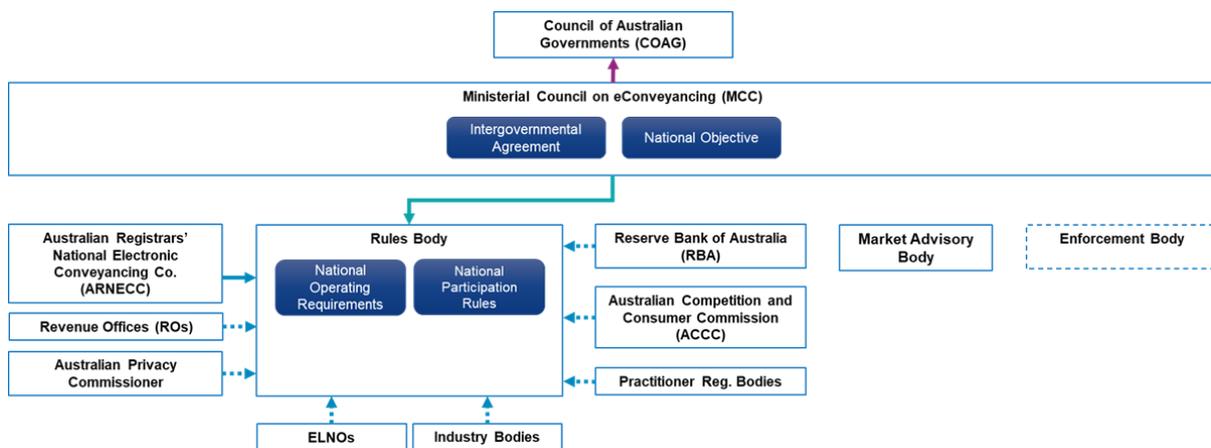


Figure 2: Proposed regulatory framework

PEXA describes the nature and responsibilities of each element of the proposed framework below.

3.2.1 Ministerial Council on eConveyancing (MCC)

The MCC comprises Ministers from each state and territory signatory to the IGA. It is responsible for setting an agreed national eConveyancing objective and ensuring any existing inconsistencies are eliminated over time and no new inconsistencies are introduced. It is not engaged directly in the day-to-day operation of the eConveyancing market or the conduct of regulators. In the absence of a specific council for eConveyancing, this role could be performed by a COAG council, such as the Council of Financial Federal Relations.

The National Partnership Agreement to deliver a seamless national economy contemplated the states and territories working jointly with the Commonwealth to implement a coordinated national approach to electronic conveyancing. The merits of including the Commonwealth in a revised IGA should be considered, given the national economy objective for eConveyancing, the relationship with the central bank and the reliance on existing national regulation.

3.2.2 National eConveyancing Objective (NCO)

The NCO is the test against which all rules are set and enforced. It builds on and reinforces the spirit and substance of the original IGA, adding a stronger national consistency objective to benefit consumers. Consumer benefits can be promoted by including objectives:

- To promote efficient investment in national eConveyancing services;
- To promote safe and efficient national eConveyancing; and
- To reduce the risk of fraud and error in national eConveyancing.

Section 3.4 of this document provides the rationale for a clear, agreed and enforceable national objective.

3.2.3 Rule Body

The Rule Body is the incorporated, rule-setting entity in the model, which is separate from the regulator (the rule-enforcer). Membership comprises representatives from each jurisdiction that is a signatory to the IGA. Representation covers all government interests (revenue offices as well as Titles Registrars). It is important that membership is equal between jurisdictions, so that smaller jurisdictions have an equal voice. The possibility of Commonwealth representation under a revised IGA warrants discussion (given the national economy objective, liaison with national regulators and relationship with the central bank).

All rules are set in accordance with the NCO. The Rule Body maintains a nationally consistent ECNL (supporting the MCC), NOR and NPR.

The Rule Body may seek advice and guidance from:

- ARNECC with respect to rules relating to lodgements and land titling;
- Market Body with respect to matters extraneous to lodgements and land titling (e.g. rules relating to cybersecurity);
- Existing regulators to confirm the ELNO achieves minimum standards in areas extraneous to lodgement (e.g. privacy, settlement, corporations, competition, profession regulation).

3.2.4 ARNECC

ARNECC provides guidance to the Rule Body on matters relating to lodgements and receives compliance submissions from ELNOs. It also considers applications for new ELNOs.

3.2.5 Market Advisory Body (Market Body)

The Market Body is an incorporated representative body with membership from the Rule Body and the industry. This model has been tested in the energy market, where AEMO membership is 60% regulators and 40% market participants. Representation in the Market Body should also include revenue offices.

The Market Body's operational functions relate to change management, training, education, security guidance and liaison with peak bodies. Many of these functions are now performed by ARWG, a sub-committee of ARNECC, with inputs from ELNOs. This body may also look at timing and sequencing (industry guidelines).

Alternatively, ARNECC could continue to perform these operational functions with appropriate inputs from private operators, revenue offices, ELNOs and peak industry bodies.

3.2.6 Enforcement Body

The Registrars are responsible for enforcing the national rules—the ECNL, NOR and NPR in the relevant state or territory, unless Registrars prefer to incorporate a national rule-enforcing body. The notion of making this a single national regulator is worth further exploration given the efficiency and consistency benefits this offers.

3.3 Interplay with existing regulation & liaison with other regulators

The Registrars have capability and expertise in relation to regulation of titles, as stated in the Issues Paper. However, the Issues Paper also reports feedback that the regulatory requirements around eConveyancing are broader than those in place today (page 30). In PEXA's view, any revision of the regulatory framework to provide broader regulatory coverage should not layer duplicate regulation over existing regulators' functions.

PEXA agrees with the Issues Paper finding (paragraph 1.26) that the eConveyancing framework should cover compliance with all existing regulatory requirements. It may be possible to achieve this by developing a new reporting obligation for ELNOs in which an annual report could identify existing regulation and standards (e.g. privacy, settlement, security) that are relevant to their operations and provide certification of compliance. This could be supported by ARNECC or the Market Body liaising with existing regulators, as noted in the Issues Paper (paragraph 5.19, page 54), which states that ARNECC can require assurance in relation to a licensed ELNO's legislative and regulatory compliance, and can access other regulators' skills and expertise to achieve this. Liaison with or contribution from the other state Registrars and the revenue offices would also be necessary in this solution.

3.3.1 Stakeholder council or advisory group to support ARNECC

PEXA proposes a stakeholder advisory council to provide advice to the Market Body (or ARNECC if the Market Body option is not selected). As noted above, ARNECC can access others' skills and expertise to ensure an ELNO is correctly claiming regulatory and legislative compliance. Although existing regulation exists for conveyancing and settlements, an advisory council and liaison with other regulators will allow ARNECC to broadly cover eConveyancing obligations.

The advisory council should support development of any revised subscriber obligations and include an industry representative body such as the Electronic Conveyancing Group or its constituent members.

3.3.2 Revenue Offices (ROs)

Revenue Offices (ROs) and Commissioners of State Revenue play a critical role in the ongoing implementation of national eConveyancing. Their role and obligations should therefore be clearly articulated in a revised regulatory framework.

While ROs are not regulators for lodgements, they do govern assessments of duties, which is an essential prerequisite for all transfers of land instruments. They may also support development of the framework provisions relating to stamp duty and have an interest in ensuring the integrity of the network and each transaction.

ROs should be responsible for moving toward consistent processes in stamp duty to realise the efficiencies identified in the original IGA. At present, differences include:

- The assessment model in each state;
- The technical model for verification between PEXA and the relevant Revenue Office system; and
- Arrangements for payment of duty at settlement (to a Revenue Office or practitioner trust account).

3.3.3 Reserve Bank of Australia

In PEXA's view the eConveyancing framework should not regulate settlement except to say any system must be fit for purpose or be certified as appropriate. Settlement generally should be the province of the transacting parties, the ELNO, the financial institutions as facilitators, and the RBA.

The RBA is responsible for governance of the RITS regulations. PEXA meets RBA standards by definition while it maintains RITS membership.

The RBA may assess financial settlement solutions as being fit for purpose (or confirm the ELNO is a complying member of RITS) and provide advice on financial settlement if required.

3.3.4 Australian Privacy Commissioner

The Australian Privacy Commissioner may provide guidance on provisions around the collection and use of personal information and data breaches.

3.3.5 Australian Competition and Consumer Commission (ACCC)

The Issues Paper suggests the regulatory framework should consider how to address market regulation, including pricing, vertical integration and unfair competition, which fall under the aegis of the ACCC and competition law. The ACCC has advised that reliance on competition law alone in eConveyancing would have limitations in terms of market regulation (Issues Paper, page 54).

Version 5 of the MOR (21 December 2018) provides for structural separation, price controls and equal access for integrators, to be enforced by eConveyancing regulators. However, ARNECC is not equipped to establish or enforce market arrangements, and has provided limited guidance on the new requirements. A revised regulatory framework should ensure the regulator is sufficiently resourced to ensure compliance with market regulations.

Version 5 of the MOR provides ELNOs may only increase prices in line with CPI. However, by agreement with industry PEXA price increases are already capped at CPI.⁹ It is the new obligations for structural separation and consequential definitions that will be the catalyst for a review of PEXA's current pricing structure.

In addition to capped increases, PEXA's prices are nationally consistent and applicable to all users regardless of volume, with no minimum use requirement.

PEXA's consistent pricing across large and small volume subscribers is markedly different from the pricing of other services in conveyancing, such as information brokerage and the sale of title searches. Some practice management providers require practitioners to enter lock-in contracts, or spend a minimum amount on monthly searches. Prices for title searches can vary widely for customers of the same provider, depending on the discounts negotiated by each, with no transparency about the prices others might be paying.

Any change to the regulatory framework should in PEXA's view preserve the pricing transparency PEXA has established. Transparency provides better consumer outcomes and promotes competition on value rather than creating a race to the bottom on price.

3.3.6 Practitioner regulators

At present, the MPR specifies eligibility criteria and obliges practitioners to comply with the jurisdictional rules in conveyancing work. Practitioner regulators have provided conflicting advice on who is able to digitally sign registry instruments in each practice. Consideration of whether signing an instrument is legal work and who can perform legal work has resulted in various applications from the relevant regulators, with some practitioners required to follow different rules and processes from their counterparties.

The Issues Paper suggests the regulatory framework should consider how to address professional certifications and ELN practice requirements. Including practitioner regulators in an advisory council could provide more consistent guidance on provisions relating to professional certifications and qualifications to undertake legal work.

Practitioner regulators are also relevant to consideration of the use of trust monies. As members of an advisory council, they could provide expert guidance in relation to consistency or inconsistency in the language or application of trust account rules. PEXA has engaged with each regulator and is aware of some minor variations in the way trust monies are treated across jurisdictions (for example, for conveyancers in NSW there is no concept of 'power money'¹⁰ as a form of trust money).

Practitioner regulators typically consider complaints by clients and claims by clients against the fidelity fund. In PEXA's view, any provision in the revised regulatory framework relating to complaints and dispute management should consider the potential for overlay with schemes and funds already administered by profession regulators.

3.4 Rationale for a clear national eConveyancing objective

PEXA has no state-based interests; it is national by intent and design, in line with the objectives of the IGA, and heavily reliant on the continued cooperation of the states to achieve its purpose and objectives. PEXA is bound to a national framework, operates and

⁹ And certain allowable pass-throughs.

¹⁰ Power money is a form of trust money, where the practitioner is given power to deal with money for another person.

innovates pursuant to national standards, and is obliged to roll out its capability to all jurisdictions and provide settlement functionality that is national in nature.

The Issues Paper notes that PEXA's development of a national eConveyancing platform has generated efficiency benefits (page 6). However, the objective to establish a framework that facilitates national eConveyancing has not been fully achieved. As feedback to the Issues Paper points out, it is possible for one jurisdiction to pursue options unsupported by the others (page 30).

If all parties work towards different goals in eConveyancing, the likely result will be fragmentation and uncertainty, declining investment, added costs for participants and erosion of trust in eConveyancing. An overarching and binding national eConveyancing objective (NCO) would provide market participants with certainty, given rule-setting and any changes to rules would be tested against the NCO. At the same time, the existence of the NCO would not deny Registrars flexibility in exercising their statutory powers.

The Issues Paper observes, based on feedback, that business practices have not been standardised (page 26), resulting in inefficiencies and cost consequences for the ELNOs (and, as PEXA understands from subscribers, the broader industry). The development of the National Mortgage Form is a prime example of inconsistencies introduced well after the IGA and the creation of the national law.

3.4.1 Options to enforce national rollout

As noted in the Issues Paper (page 6), the full benefits of eConveyancing will not be achieved until all participants are using the national platform. This extends to all potential subscribers, including those in jurisdictions where eConveyancing has not yet been implemented.

Finding 1.22 in the Issues Paper refers to lack of enforcement options if an ELNO fails to complete its national rollout (in a reasonable timeframe). However, a rollout cannot commence until the jurisdiction in question opts-in and commits to a technical development project. Both the ELNO and the relevant land registry (and indeed the revenue office, where applicable) must be willing and able participants.

PEXA is committed to a national rollout to all jurisdictions. PEXA's nationally operating subscribers have said they want this functionality too. PEXA is in discussion with the three remaining jurisdictions and expects to roll out to the ACT in 2020.

Maximum timeframes and enforcement options are only useful if they bind both ELNOs and other parties to the IGA. A national objective should therefore include a commitment by jurisdictions and ELNOs to implement eConveyancing within a reasonable timeframe (and no later than a specified date).

On finding 1.23 in the Issues Paper, PEXA agrees that it would be unfair for its subscribers in larger states to subsidise smaller jurisdictions if another ELNO's subscribers were offered substantial discounts because it did not invest in smaller jurisdictions.

In PEXA's view, national operations should continue to be a condition of entry for new ELNOs. Such a condition would reflect the spirit of the IGA. A category 2 approval from ARNECC should include an obligation to apply for a licence in all jurisdictions that have adopted eConveyancing within a reasonable timeframe.

At Key Finding 1.23 (page 7), the Issues Paper cautions that:

“[It] may be that ELNOs choose to operate only in the large jurisdictions that generate a profit for the costs involved in set up. Depending on how the market develops, there may not be even two operators in each jurisdiction. When we compare this market with the telecommunications market, we note that the Australian Government pays one operator to meet Universal Service Obligations for services that cannot be delivered on a commercial basis.”

PEXA operates (or intends to operate) in all jurisdictions and is working to support the electronic lodgement of all instruments (100% digital capability). If a new entrant ELNO could cherry-pick only the most profitable jurisdictions,¹¹ it would provide them with considerable competitive advantage. An alternative if national operation were not a condition of entry would be to subject ELNOs to a levy that would fund Universal Service Obligations in less profitable or unprofitable jurisdictions.

3.5 Other areas of governance for consideration

If the regulatory framework is to be expanded to address areas outside of lodgement, the regulator itself may need to be expanded to include parties beyond the Registrars, as outlined below.

3.5.1 Cybersecurity

Cybersecurity touches on conveyancing practice (including but not limited to lodgements) and is not the province of Registrars alone.

As maintaining an appropriate level of cybersecurity and preventing fraud are industry obligations, a revised regulatory framework should incorporate minimum standards, such as prohibiting sub-integration, or requiring the use of business grade email systems. The MPR does not prescribe a level of cyber insurance or protections for subscribers (or their clients). Instead, its provisions focus on the integrity of the ELN. However, subscribers necessarily collect sensitive information such as clients’ personal details and identity documents, and the security of that information is determined by the security of the subscriber’s own systems. The integrity of the network as a whole is therefore a necessary consideration in the regulatory framework.

Financial institutions have suggested that security (as well as timing and sequencing) should be managed by a central regulator (Issues Paper, page 22). PEXA concurs and, based on experience as the only ELNO that has completed multi-party transactions, believes security practices should be informed by an advisory council (potentially the Market Body) made up of regulators and market participants, including ELNOs.

PEXA believes responsibility for developing and distributing information about perceived risks and preventative practice should be shared (Issues Paper, page 50). This information could be developed collectively (e.g. by the Market Body) and should be cross-promoted by industry bodies.

On the question of who should take action when a subscriber’s security practices are inadequate (Issues Paper page 51), PEXA believes that this should be the regulator. In addition, ELNOs should be obliged to report issues with security practices to the regulator. In

¹¹ PEXA notes the NSW Directions Paper on interoperability suggests at page 10 that in future, ELNOs may be permitted to do this: “service models could emerge in which a provider specialises in a particular subset of transactions or in parts of transactions.”

determining what action to take, the regulator may seek advice from the Market Body or equivalent.

The regulator may demand remedial activity on the part of the subscriber, supported by education and guidance (e.g. from the Market Body). For more serious lapses, suspension of a subscriber may be the appropriate outcome, in which case the regulator would direct all ELNOs to suspend.

Where a breach is so fundamental that the subscriber is failing to exercise a minimum duty of care, the eConveyancing regulator should also report the matter to the profession regulator.

As noted in the Issues Paper (page 58), regulation going forward should consider current cybersecurity issues and be flexible enough to cater for inevitable advances in cybercrime.

3.5.2 Monitoring and reporting

PEXA believes the regulator should assume responsibility for auditing both ELNOs and subscribers, with no additional obligations on ELNOs to audit. The regulator will require appropriate expertise and resourcing if that is the case.

PEXA notes reports from the NSW Office of the Registrar-General in relation to subscriber compliance with MPR obligations, which show around 15% of NSW subscribers are non-compliant. PEXA suggests that training from a central body to support improved compliance across the industry.

3.5.3 Guidance, sanctions and enforcement

The regulator will require resourcing to deliver guidelines and compliance support as a necessary precondition to enforcement. PEXA notes that guidance on MOR version 5 was not available for consideration until the requirements were live, meaning there was no avenue to work through queries before the guidance was published.

PEXA agrees that enforcement options are appropriate in the framework and, as stated at Issues Paper finding 1.27, the regulator should have options available to it for sanctions. PEXA notes the substantial feedback (e.g. Issues Paper page 20) on the requirement for enforcement options and penalties for ELNOs. The suggestion is that, without the prospect of sanctions or enforcement, PEXA will choose to 'break the rules'. For the record, PEXA's compliance has been robust; it has been materially compliant with all aspects of the framework; and has self-reported all detected variances and remediated them promptly. In short, PEXA has been willingly compliant, regardless of the threat of sanctions.

PEXA believes it is also important to introduce tiered enforcement for subscribers. Suspending and/or terminating subscribers would be a very strong sanction in jurisdictions where eConveyancing is mandated, as a subscriber unable to access the eConveyancing platform would in effect be unable to work. PEXA believes that options for warnings and education should exist alongside options to suspend and terminate. If the regulator deems suspension or termination appropriate, all ELNOs should be notified and obliged to suspend or terminate the subscriber.

3.5.4 Risk and liability: financial settlement and title integrity

The risk management objective of the current eConveyancing framework is that eConveyancing should not create a greater risk of fraud or error overall than paper conveyancing (MOR 9.2). Consideration should be given as to whether this remains an appropriate comparison with the decline of paper conveyancing. Registrars have oversight of risks to the integrity of the register, practitioner bodies and their insurers have responsibilities in relation to practitioner behaviour which affects conveyancing risk. PEXA (and any other ELNO) through Participation Agreements and subscriber and user authentication assist in the management of such risks.

As Registrars have no responsibility or power over financial settlement in paper or under the ECNL, it has fallen to PEXA in consultation with the RBA and financial institution facilitators in PEXA's financial settlement system to negotiate and implement appropriate risk management rules and controls for financial settlement.

The future state regulatory scheme could deal with financial settlement, however, rule-making by the Rule Body must involve the RBA (and perhaps ASIC) with input from financial institutions that facilitate the settlement system. Enforcement in relation to financial settlement needs to involve consultation with the RBA (and perhaps ASIC) and financial institutions and cannot be left solely to ARNECC or the Registrars. Where concerns relate to potential losses from settlement, the regulator should be advised by the advisory council or the Market Body. Financial settlement liability extends well beyond the existing scope of the Registrars and involves the operations of both ELNOs and subscribers.

An investment in property will represent a significant proportion of the wealth of most Australian homeowners and it is essential that any eConveyancing settlement solution incorporates:

- Effective risk prevention and mitigation mechanisms for fraud and error;
- Clear and efficient liability allocation rules which allocate liability to those who can prevent or minimise these risks at the lowest cost; and
- Dispute resolution mechanisms which are timely and effective and which support and reinforce the risk mitigation and efficient liability allocation goals.

PEXA's contractual frameworks deal with mistaken payments and liability allocation. PEXA's Participation Agreements and subscriber training support risk prevention and mitigation by subscribers and PEXA. PEXA continues to develop frameworks in collaboration with industry as fraudulent activity affecting the property industry increases.

On Issues Paper finding 1.18, collaborating on missing payments, PEXA has existing mistaken payment arrangements, with financial institutions which so far have worked well in seeing financial institutions being able to freeze and recover mistaken payments provided subscribers advise PEXA quickly of an error or fraud. However, it is expected that these arrangements will be difficult to translate to an interoperability model where the ELNO arranging settlement may not have a direct relationship with the subscriber giving payment instructions and may not directly receive those instructions or any report of error or fraud.

A new regulatory framework may seek to deal with mistaken payments and frauds, including provisions for cooperation between parties and, potentially, an industry-agreed process for resolution. Outside of PEXA's processes, no frameworks exist that address all the unique

requirements of eConveyancing in this area. The payments code has mistaken payment recovery rules for consumer EFT payments and the New Payments Platform is developing rules for this issue. But unlike an EFT payment, funds transferred as part of a PEXA settlement do not identify the sender. This complicates any returns process, as the financial institution cannot confirm the identity of the party responsible for the payment instructions.

3.5.5 Personal Information, privacy and consent

PEXA complies with the federal Privacy Act 1988 and, to the extent they apply to eLodgement transaction information, with state and territory Information Privacy Acts in relation to personal information, including the requirements for data breach reporting. These requirements are supplemented by the MOR, for example in relation to maintaining a fit for purpose Information Security Management System (clause 7.1), data integrity (clause 7.4), data breach notification (clause 7.11), retention and use of Land Information (clause 19).

Through its Participation Agreements, PEXA requires subscribers to comply with the subscriber security policy and relevant privacy laws (including in relation to client information) and to notify clients of PEXA's privacy policy. These obligations are included in PEXA training of subscribers and are part of the subscriber's ongoing compliance obligations.

Through these obligations on subscribers, their end-user individual clients *should* be made aware of how their personal information is handled by the subscriber and PEXA and government agencies in an eConveyancing transaction. But PEXA has no direct visibility of what privacy disclosures are made by subscribers to clients. The only document which clients must see is the Client Authorisation Form (CAF). As PEXA has said previously, more could be done in the CAF to disclose to clients how their personal information will be used and disclosed. But the CAF is a prescribed document in the MPR and such changes must be made by ARNECC and Registrars.

PEXA does not know what privacy consents, disclosures and uses are made of client information by other parties such as practitioner practice software providers.

The new regulatory regime could usefully consider whether clients are being appropriately informed of and, where relevant, are consenting to all uses and disclosures of their personal information when that information is *mandatorily required* to be provided to subscribers in order to engage in an eConveyancing transaction - and then is disclosed to third parties such as ELNOs and other practitioners and practitioner software providers. Notwithstanding, the ability of clients to voluntarily provide information for other purposes to subscribers, ELNOs and third parties in accordance with applicable privacy laws would not be affected.

3.5.6 Avoiding unnecessary E-conveyancing regulatory control over personal and business data provided to ELNOs

A revised regulatory framework for eConveyancing must carefully define the circumstances as to when and which personal information or business information of subscribers, clients and financial institutions becomes subject to regulatory control as land information.

The current regulatory system uses an overbroad and likely ultra vires definition of "Land Information" in version 5 of the MOR which is the basis for a number of regulatory controls over the use of such information.

“Land Information” is defined to mean information provided by the Land Registry or information used to complete electronic Registry Instruments or other electronic Documents to be Lodged at the Land Registry.

Land Registries are entitled to assert some control over information which they provide (the first part of the definition) but not over information which is used to complete electronic Registry Instruments or other electronic Documents to be Lodged (the second part of the definition). The second part of the definition would include information like the names of the vendor and purchaser and mortgagees and it is not credible to think that Land Registries can assert control over the use by ELNOs or others of information which is not derived from the Register and is commonly used in a range of contexts apart from the Register. For example an ELNO may have collected the name of a vendor, purchaser or mortgagee in a range of contexts other than for the purpose of completing Registry Instruments or Electronic Documents.

Under the current regulatory regime, Land Registries assert control over the use of Land Information (as broadly defined) in several ways including the following:

- MOR clause 7.5 – ELNOS must store all Land Information on computers in Australia.
- MOR clause 19.3 imposes a range of significant restrictions on use by ELNOs of Land Information. The purpose of the restrictions appears to be to prevent ELNOS from competing with Land Registries in the production of title information services. That purpose is understood but it is achieved by the first part of the definition of Land Information. The second part of the definitions is so broad that clause 19.3 would prevent an ELNO using the name of a vendor or purchaser or mortgagee or financial institution to contact them, for example in relation to an alleged mistaken funds transfer, even if they had given the ELNO privacy consents to do so (where applicable).
- The Victorian Agreement to operate an ELN regulates ELNOs offering a Value Added Service and clause 2.1.2 defines that to mean “any product or service that is in addition to the ELNOs core function of facilitating Conveyancing Transaction *which is developed by the ELNO using Land Information*” (emphasis added).
- The NSW Approval to operate an ELN in NSW requires the consent of the NSW Registry to an ELNO developing Value Added Services (products and services in addition to core function of facilitating Electronic Conveyancing Transactions) *if the product or service will use Land Information*.

But a vendor or purchaser or mortgagee or financial institution or subscriber may provide information to an ELNO with a consent to use that information for other ELNO products and services supplied to that person. Simply because that information may be used to produce Registry Instruments or Electronic Documents does not give Land Registries the power to veto any other use of the information nor take away the rights of purchasers, vendors or mortgagees to determine on what basis they provide their information to ELNOs and what if any consents they give to other uses.

The same applies to commercial information provided by businesses to ELNOs. Just because it may find its way into a Registry Instrument or Electronic Document to be lodged does not give Land Registries a right of veto over other uses of the information which an ELNO agrees with the business on commercial terms.

Much business data in PEXA's platform is subject to additional contractual obligations which extend beyond the provisions of the MOR. Where businesses consent on commercial terms to use of their data by PEXA for certain purposes, the regulatory framework should not interfere with that use.

If interoperability is introduced and that involves the exchange of client and subscriber information between ELNOs, the relevant privacy consents and permission to use confidential information will need to be amended to permit such exchange.

If a hub operator is involved in any interoperability that is introduced, the MOR rules concerning data security, location, retention, data breach notification, compliance with privacy laws and so on should apply to the hub operator. Privacy consents and consents to use confidential information will need to be extended to the hub operator's necessary uses of information but not further.

Settlement data will need to be preserved but this can be done by the settling ELNO and does not need to be held by the hub operator or Registrars.

3.5.7 Policy development

PEXA believes that the Market Body should support consultation on and development of policy and legislative change related to eConveyancing, which draws on input from its expert members, including PEXA. PEXA has demonstrated commitment to industry transformation and has significant experience and success working in collaboration across the industry. Without input from PEXA, the risk is that policy fails to recognise issues including system capability, business processes, established technology roadmaps and capacity.

3.5.8 Disputes and complaints management

At present there is no avenue for the external escalation of disputes. PEXA supports the introduction of an appropriately structured and resourced external complaints body. This should not be in the Registrars' remit, given a complaint may be related to settlement, technology or other areas broader than lodgement, and the Registrar's own system may be a contributing factor to the particular complaint.

In developing the regulatory framework, it is important to understand that issues often arise outside the ELNO, which, as the face of the network, is often assumed to be at fault. For example, if a third party system goes down today, the assumption might be that it is PEXA's fault even though the PEXA platform is still up (and consistently exceeds availability targets in the MOR). Clients are frequently wrongly advised that delays are due to PEXA.

With so many moving parts in a transaction, as well as parties and systems with orchestrated and interdependent obligations, the underlying cause of a complaint could rest with a combination of parties or processes. Registrars should not play a role in determining liability where the cause of a failure is disputed and may in fact rest with a Registrar's own systems. The potential for overlap with profession regulators must also be considered.

3.5.9 Business process matters

The Issues Paper (page 15) notes that inconsistency between jurisdictions creates inefficiency and uncertainty. PEXA supports the development of a mechanism to address these matters. In PEXA's view the scheduling and analysis required would be best

undertaken by the operational advisory body, which would then advise the regulator on requirements.

PEXA notes the view of some financial institutions that security, timing and sequencing should be centrally managed (the Issues Paper, page 22). Having the Market Body develop standards for sequencing and timing may address concerns around unsigned and inefficiencies.

3.5.10 Technology frameworks & data standards

3.5.10.1 Network resilience

The Issues Paper (page 15) notes that legal practitioners had no identified issues with PEXA downtime. PEXA is required under the MOR to ensure the platform is 99.8% available in core hours and 99% in non-core hours. In the past 12 months, PEXA was available 99.96% in one month, 99.94% in one month and 100% in all other months.¹²

However, PEXA transactions require interactions with external systems, which can result in delays. Measures implemented to improve whole network resilience include an ability to digitally sign (unchanged) instruments on the scheduled day of settlement and an automated 'lodgement override', both to address the situation of a land registry system being unavailable. In lodgement override scenarios, settlement proceeds as scheduled, with lodgement re-attempted until the land registry system can be reached.

In PEXA's view, changes to the regulatory framework should consider dependencies on third party (beyond ELNO) systems and whole network reliability.

3.5.10.2 National eConveyancing Data Standard

The National eConveyancing Data Standard (NECDS) provides for interactions between ELN and LTO platforms. PEXA developed and currently maintains the NECDS. At present PEXA provides access to entrant ELNOs under licence at no cost other than a contribution to maintenance.

The future model for NECDS maintenance is currently under development. PEXA believes that, as a minimum, core data structures should be national with no jurisdictional variation and no deprecation of core data structures should occur via the application of business rules. All Land Registries and ELNs should apply the latest version (subject to minor tolerance of 1-2 versions) and be able to accept all in-train transactions by applying the previous version.

PEXA and ARNECC are currently discussing NECDS future governance and funding.

3.5.10.3 Technical frameworks

It is appropriate that ELNOs choose their own technical frameworks and select the best technology for their organisation to develop and support. The NECDS covers integration elements, including some technical framework elements, to ensure that integration occurs.

If interoperability via data integration between ELNOs or a central hub is introduced, consideration will have to be given to technical standards, frameworks and liability arrangements for all ELNOs to support the integration.

¹² <https://www.pexa.com.au/pexa-dashboard>

3.5.11 Change management

System change is emerging as a critical issue in the progress of eConveyancing. New ELNO entries and registry privatisations will make the change management task more complex. In addition, revenue offices should be active participants in the change process. PEXA believes that ARNECC should coordinate with revenue offices and bring them into the fold.

PEXA agrees that a central body could coordinate changes with interdependencies between ELNOs, land registries and revenue offices (Issues Paper, page 25), provided ELNOs retain the flexibility to innovate and prioritise. As change management is essentially operational in nature, it could reside with the Market Body rather than the regulator.

Any change management framework should support all parties' ability to upgrade applications independently with (ideally) no integrated party forced to co-ordinate upgrade timing to maintain capability in the market. The change management framework should be designed to keep situations where this is not achievable (e.g. in infrastructure upgrades) to a minimum. It would hobble innovation if functional changes were limited to co-ordinated/integrated release requirements between parties.

An example relevant to both business process and change management, PEXA and registries together must make transfers between spouses consistent in all states.

Changes that are internal to an ELN (user experience, workflows, etc.) should not be subject to industry oversight or joint change management controls. How the ELN responds to market demands and "change management" is an opportunity for competitive differentiation. A revised framework should ensure PEXA can continue to improve its platform at the pace it considers appropriate (taking into account the need to respond to stakeholder needs and regulatory requirements).

PEXA notes financial institutions' need for a clear change roadmap for planning purposes (Issues Paper, page 22).

3.6 Ongoing industry collaboration

As discussed, the considerable advances already made in eConveyancing are the result of PEXA-led, whole-industry collaboration. PEXA believes that it is vital that PEXA continues to iterate, innovate and collaborate to deliver further benefits for the industry and end-consumers. The unprecedented level of collaboration seen today among financial institutions, and more recently with practitioners and their peak bodies, must also continue as new issues arise.

Several remaining pain points are to some extent functions of the different requirements of participants in a conveyancing transaction, rather than of eConveyancing itself. These won't be solved by regulation alone, but require ongoing consultation and collaboration, as well as tools to improve interactions between transaction participants.

Issue-specific working groups established to jointly problem solve and set the strategic agenda for eConveyancing have clearly revealed the absence of an industry standard in settling property transactions. Every financial institution and practitioners across the jurisdictions operate differently. The enormous progress made in the face of this challenge is a tribute to the collaborative endeavours across the industry.

With increasing maturity, the industry is looking to revise guidelines to become 'standards'. PEXA is continuing to work closely with industry to create these with a view to delivering the best outcomes for the end-user.

4. Funding the regulatory framework

Under the model proposed by PEXA, the elements of the regulatory framework to be funded are:

- ARNECC;
- Rule Body (the rule-setting entity);
- Market Body (the operational body); and
- Regulator Body (if a national regulator is preferred).

The 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%.

Regulation fees should not be transaction-volume-based, given the fixed cost nature of the regulatory function. In other words, each ELNO should contribute an equal share of the total 50%, regardless of the volume of transactions on its platform.

The regulatory framework should be sufficiently resourced, with capability to develop rules, provide guidance and education, and administer operational requirements, as well as enforce rules. Ability to flex annual contribution values based on ARNECC/regulator activities must be incorporated into the model.

That said, funding should be proportionate given the primary area for regulation is eLodgement and regulators are already in place for conveyancing, legal work, lending and settlement. The cost of regulation should be justifiable against the cost of presenting instruments for electronic lodgement, as the market cannot justify the cost of regulation against the whole cost of property transactions.

5. Market structure & interoperability

PEXA supports competition that delivers genuine consumer benefits. PEXA agrees with the conclusion in the Issues Paper that any competition in the eConveyancing market needs to deliver meaningful consumer benefits, and should not erode existing risk and liability profiles (page 60).

The Issues Paper suggests that a property purchaser would choose the ELN to use in a multiple ELNO market with no interoperability, and that this would be written into the contract of sale. However, PEXA believes the choice should be made by a subscriber (one of two lawyers/conveyancers or one of two financial institutions) rather than the vendor or purchaser. This is consistent with feedback on page 19 of the Issues Paper suggesting selection by the purchaser's subscriber. A property purchaser is not a subscriber and may not have engaged a subscriber by the time they sign a contract.

In a multiple ELNO market, with or without interoperability, a decision will likely be needed on which ELNO will conduct the lodgement in each transaction. In theory, a land registry could accept a lodgement case in counterparts but this would require changes to five existing land registry systems, adding significant cost that would ultimately be passed on to end-consumers and potentially changing risk profiles.

The Issues Paper states that each participant will be free to choose which ELN it uses under interoperability (p 63). In PEXA's view this choice is overstated, as PEXA noted in its submission to NSW's Directions Paper on Interoperability:

"While consumer choice will be offered with regard to the ELN that is used for part of a transaction, this choice will be removed with regard to the ELNO that will ultimately execute the transaction. ... This is where the notion of choice becomes problematic as, regardless of which ELNO a subscriber chooses, the ELNO actually used for lodgement and settlement will be determined by an agreed protocol with no subscriber input. In other words, Subscribers will be unable to select an ELNO on the features most likely to be important to them—for example, the reliability of lodgement execution, the security and/or speed of the settlement solution, the availability of same-day funds under the settlement model, or the orchestration of lodgement and settlement, including any resilience measures built into the execution, among others."

5.1 Interoperability models

PEXA outlines below its:

- View on the desired principles for any model of interoperability;
- Preference in relation to the models put forward in the Issues Paper; and
- Response to the models in the Issues Paper.

Much of the material in this section draws on PEXA's response to NSW's Directions Paper on Interoperability, which has been provided to Dench McClean Carlson.

5.1.1 Restatement of principles

PEXA outlined in its response to the NSW Directions Paper the principles it believes should be considered in determining an interoperability model:

1. Interoperability should not increase the risk of fraud or error in conveyancing transactions, relative to the risk for transactions conducted in a stand-alone ELN;
2. Any interoperability in relation to financial settlements should be by agreement by all impacted parties nationally. Financial settlement interoperability should not be the subject of a mandate by any state or Registrar given the broad impact on financial services;
3. Interoperability should promote competition and innovation by allowing ELNOs to compete on features including, but not limited to price. In a sensitive technology-driven market like eConveyancing, competition on quality and innovation is likely to be significant to subscribers;
4. Interoperability should not increase costs to consumers;
5. Interoperability should not negatively impact the user experience, including through additional risk and/or complexity;
6. Interoperability should preserve the existing benefits of choice in relation to practice management software (or integrated software provider), without duplicating the functions that integration already provides; and
7. The model of Interoperability proposed must be consistent with [national] principles of good regulation.

A principle relating to ELNOs' areas of operation could be added to this list. At paragraph 6.46, the Issues Paper suggests some ELNOs may elect to operate in selected jurisdictions only (as determined by establishment costs) or to offer only a subset of documents. As outlined in section 3.4.1, PEXA believes ELNOs should operate nationally. Allowing new entrants to cherry pick the most profitable jurisdictions would put them at a competitive advantage to PEXA. If ELNOs are not obliged to operate nationally, they should be subject to a levy used to fund Universal Service Obligations in less profitable or unprofitable jurisdictions.

A rigorous cost-benefit and risk analysis of interoperability needs to take all these considerations into account. However, PEXA notes there is a prospect that, in some states at least, Model 1 as outlined in the NSW Directions Paper may be sustained for some time if a second ELN does not commence operations in those jurisdictions.

5.2 Interoperability preference

PEXA would prefer ongoing integration with conveyancing software providers to deep interconnection with another ELN.

The Issues Paper suggests that ELNOs should use a common front-end (p 16) if, presumably, there is no interoperability and subscribers want to be able to transact easily in each ELN. This can be achieved by continuing to allow workspace population from familiar software environments. However, a common back-end would be necessary in an interoperable environment, given the requirement to match capability, meaning differentiation is more possible on front-end features.

While PEXA intends to build for one interoperability model, the states are likely to implement in stages. In states with no second ELNO, Model 1 will apply by default. PEXA strongly believes that separate state-based interoperability solutions should be avoided, though different states may choose whether or not to allow interoperability. If a revised regulatory framework does not require a state to enforce interoperability when it approves the entry of a new ELNO, some states may see multiple ELNs operating independently

(model 2). PEXA, which already operates in five jurisdictions and will operate nationally, may need to operate in line with three identified models simultaneously:

1. Model 1 in the states where only PEXA operates (until other ELNOs are approved);
2. Model 2 in the states that do not wish to implement interoperability or where interoperability has not commenced; and
3. One unified interoperability model in others.

Selecting one unified interoperability model will deliver the greatest benefits to the industry and end-consumers. The model should be developed consistent with the principles outlined earlier, without detracting from network security, increasing the risk of fraud or error, or detracting from platform operations or development. PEXA believes Model 4, the infrastructure ELNO (as described in PEXA's response to the NSW Directions Paper), best fits that description. This model allows PEXA to maintain its platform design and operations, with other ELNOs able to integrate to PEXA in the same way that software providers do. This would be more efficient and deliver a competitive market enabling differentiation on value-adding front-end features.

PEXA must be able to continue to work collaboratively with stakeholders as it has done over the years and to respond to subscribers' requirements and arrangements.

5.3 Comments on analysis in the issues paper

5.3.1 Cost of multiple connections

The costs of connection referred to in paragraph 6.38 of the Issues Paper (page 72) are likely to be integration costs for institutions facilitating settlements rather than costs for every lender seeking to lodge a mortgage. Accordingly, the costs cited in relation to Model 2 are more likely to be necessary for Model 3.

Where ELNs operate independently (Model 2), each may develop a different settlement model and innovate in relation to the connections it will require and the facilitators it will rely upon. It follows that the cost to facilitate settlement estimated for Model 2 (page 82) may be less than that for Model 3 (though the costs to connect to LRs and ROs will be consistent for Models 2 and 3).

A financial institution seeking to lodge mortgages may choose to use one or multiple ELNs, but any interoperability model that requires one ELNO to execute instructions captured in the other ELNO will require the same connections to the same facilitators. For example, if a practitioner in a PEXA settlement banked with XYZ Bank and was drawing funds for a settlement from their trust account, ELNO2 could only execute the settlement if it were able to instruct XYZ Bank to move the funds from the trust account. It is therefore necessary to consider not only the cost implications of developing the same connections, but also the timing implications if all ELNOs were required to develop them prior to interoperability (as described in Model 3).

5.3.1.1 Alternative ELN in the event of catastrophic ELN failure

Paragraph 6.47 of the Issues Paper suggests that interoperability offers the prospect of an alternative ELN in the event of a 'catastrophic failure'. This suggestion is also referenced in the table setting out key observations for Model 3 (p 83). However, while interoperability

might offer increased resilience in the event of permanent or long-term failure, it would have no value as a resilience measure to counter a (much more likely) temporary failure.

As PEXA stated in its response to the NSW Directions Paper:

“[We] believe ... [the proposed models] impair system resilience via the introduction of additional dependencies and failure points for conveyancing transactions. It is not the case that if one ELN were ‘down’ or unavailable, Subscribers could complete their preparations in the other ELN. In Sympli’s model, Subscribers to one ELN can only interact with the other ELN via the interoperability connectors. They cannot log-in to the available ELN and perform tasks. Instead, if one ELN is ‘down’, Subscribers in the other, reliable and available ELN, are also unable to transact, given the requirement for actions to be completed by other participants.

The case for resilience is also questionable when PEXA’s availability is typically 100% per month, with unavailability of other systems (including Land Registry systems for example) contributing to transaction interruptions.”

5.3.1.2 Cost-risk-benefit analyses

Rigorous quantitative and qualitative analyses are required to understand the real costs, risks and benefits associated with each proposed interoperability model and viable alternatives to them.

The Issues Paper identifies risks associated with interoperability. These include the risk that new entrant ELNOs will choose to cherry-pick the largest, most profitable markets (pages 7 and 61) and data security risks across multiple ELNOs (page 60):

“Most property settlements will be upwards of \$500K, and consumers may only buy and sell property a handful of times during their life. The opportunity to save \$50 will not recompense consumers if the financial settlement process (or the land title registration process) leads to additional risk. The risk and liability issues should be clearly considered when any ELNO is approved as well as if and when any interoperability models are considered.”

The NSW Government is advocating a particular model of interoperability, but the Issues Paper reports at Key Finding 1.16, page 6:

“To date ELNOs have not identified a detailed model for interoperability but there will be additional risks and vulnerabilities with multiple parties involved in transactions. It is possible that information will be moving between two different eConveyancing systems and two different financial settlement systems. The party (or parties) liable for the risk needs to be clearly identified before any transactions occur in an interoperable system.”

Overall, the Issues Paper cautions that any “solution must not compromise security of title nor increase financial settlement risk” (p. 66). It concludes: “We do not believe that any decision to adopt an interoperability model should be made until the risks, liabilities and costs are properly identified and agreed between the ELNOs and the governments” (p. 73); and, given “the benefits from implementing an interoperable system are not certain and the costs significant, if an interoperable solution is preferred then an in-depth analysis to better understand the total cost and likely outcomes is warranted” (p. 73).

PEXA supports these conclusions.

5.3.1.3 Contestability

The core objective of the national eConveyancing system is to achieve greater efficiencies than would be possible in a paper-based system, enabling cost savings to be passed on to end-consumers. As the Issues Paper states (Key Finding 1.8, page 6): “The original intent of electronic conveyancing was to improve efficiency and reduce costs in the industry and in government. This has been made possible with the building of a successful eConveyancing platform.” The Issues Paper goes on to note (Key Finding 1.11, p.6): “Our consultations and observations include good reports and few concerns with the system currently delivered by PEXA.”

While the Issues Paper canvasses the possibility of interoperability, it observes at Key Finding 1.15, page 6:

“Most conveyancing practitioners support competition and have welcomed the recent preliminary entry of a second ELNO, Sympli, into the market. Most conveyancers and legal practitioners do not want to learn two systems but there is significant uncertainty about what an interoperability model would look like.”

It adds at Key Finding 1.20, page 7:

“It is not clear that two ELNOs will create a contestable market in the longer term. The costs of developing a system that is safe, secure and ensures land title integrity are not insignificant, so it is possible that only a duopoly will be created.”

This leads the Issues Paper to infer (Key Finding 1.21, page 7) that the national eConveyancing system is likely: “It is likely that price control will be needed for the foreseeable future given that some jurisdictions have mandated the use of electronic conveyancing for some or all transactions and others may follow.”

The Issues Paper concludes (analysis of issues 5.25, page 55): “We consider it is unlikely that robust competition will occur immediately with two ELNOs and it is likely that price caps and price reviews will be required for some time if not indefinitely.”

PEXA agrees with this analysis and the conclusions reached and notes that PEXA’s price increases are already capped at CPI.

5.3.1.4 Security

PEXA agrees that rigorous standards are crucial for any eConveyancing system. As PEXA stated in its response to the NSW Directions Paper:

“The focus on network safety and security is paramount and as an industry we should strongly resist any proposal that seeks to compromise this. PEXA has an unwavering focus on protecting consumers, practitioners, banks and other participants in the system and a significant proportion of PEXA’s total annual expenditure is allocated to security.

“PEXA’s recent report into integration and third party risks (performed by an independent professional services firm) pointed to organised crime as the most likely to attempt to commit fraud and other criminal acts in eConveyancing. Well funded “bad actors” are likely to target the weakest ELN, if that ELN can be used to attack the wider

network. The security and quality of the network as a whole will only be as good as the worst code and testing regime of the weakest ELN.

“[The Issues Paper] ... cites the potential governance areas to be addressed in relation to security (page 8). Confirmation of adherence to a minimum standard may be an appropriate prerequisite before any ELNO is asked to interoperate. The details of this standard and how it is to be applied and governed must be properly assessed and agreement reached before an interoperability model is selected.

“Overall, the additional risk in an interoperable environment is not small and security must be carefully considered. It will be essential to demonstrate that the proposed interoperability model does not increase security risks.

“Both the bilateral and hub models require a level of two-way data synchronisation, the implications of which are not explored in the Directions Paper. PEXA believes data synchronisation as proposed will be extremely challenging, leading to inconsistent data held and processed by ELNOs.

“The case for consistent data synchronisation via API technology is weak, given the network must, according to the CAP theorem¹³ compromise between availability and consistency of data. The eventual breakdown of the distributed data architecture models as predicted by the CAP Theorem will negatively impact conveyancing transactions and consumers.

“The lodging ELN (not any other ELNO or a hub) must always be the database master, as is the case with the APIs PEXA has developed to support integration with practice management software. Security is assured because PEXA tests that the user is authorised to transact before granting access. When PEXA is the lodging ELN in a competitive ELNO environment, our existing APIs should be utilised. We compile all the data required to execute lodgement and settlement. No other platform is required to host an entire copy of all workspace data. Instead, integrated systems provide the data necessary to complete documents on behalf of a party to a transaction. Only the required data is shared and no duplication is required. This is a far safer proposition than full data synchronisation.

“Further, full data synchronisation would require competing ELNOs to have identical capabilities. For a second ELNO to receive and process data from the first, it must be able to replicate the first’s features.”

5.3.2 The telecommunications analogy / understanding the ELNO market

PEXA believes that eConveyancing cannot be modeled on telecommunications. As PEXA stated in its response to the NSW Directions Paper:

“We believe the problem of data synchronisation has not been adequately addressed, in part because the Directions Paper proposes an analogy to everyday use of mobile telephones. Telecommunications service providers do not authenticate the identity or authority of callers or senders or recipients of email or other messages nor do they

¹³ Where a system of distributed databases can only provide two of the following three guarantees: consistency, availability and partition tolerance. Partition tolerance allows for partial network failure and will necessarily be part of the design: without partition tolerance, if one part of the network fails, the network cannot continue to operate. Therefore, the actual compromise is one between data consistency and availability.

check the integrity or accuracy of message content – all of that risk lies with the sender and recipient. That is why people don't conduct conveyancing by email. In eConveyancing the parties are cooperatively building the elements of a significant financial and property transaction where the ELNOs have significant responsibility for authenticating party identity and authority and integrity of data and signatures in a secure environment with controlled access.

Telephone calls and email allow for data loss as a matter of design, so the analogy minimises the importance of the data exchange, integrity and compilation components of eConveyancing. While an email needs only to be composed and sent, and is susceptible to interception and substitution with fraudulent content, eConveyancing data must be verified, consistent, certified and accurate before it is presented to the Registrar.

The analogy of eConveyancing to telecommunications breaks down very quickly.

We would propose that the ELNO market has far more in common (albeit is not identical to) the equities clearing and settlement market, where the risks and complexities of interconnection are well understood. Even so, the clearing and settlement work performed by the ASX in share trading is less complicated than a conveyancing transaction and the volumes cleared per day are almost five times those cleared by PEXA. However, as the ASX itself has noted, while the legislative framework allows for multiple operators to clear Australian cash equities, the approach has not been adopted in Australia (or in any other country)."

5.3.2.1 Risks and liability

With reference to the table at page 86 of the Issues Paper, while PEXA agrees that involving multiple ELNOs in a transaction will always increase risk and complicate liability allocation, PEXA believes that the risk is higher for Model 3 than Model 4. Under the latter, PEXA would seek to rely on its existing protocols and arrangements for integration with software providers, where security is assured because PEXA tests authorisation to transact before granting access. In this model, all parties would contribute to one shared workspace (via whichever ELN they choose to use). It would not require each ELN to operate a separate workspace and exchange data in an attempt to synchronise information in the workspaces.

Finding 1.17 in the Issues Paper suggests ELNOs can assess liability between them. However, as PEXA stated in its response to the NSW Directions Paper:

"Fault may lie with the Subscriber's ELNO, another ELNO, that Subscriber or another Subscriber or a client or the financial settlement manager, the interoperability hub (if there is one) or a bank or other third party or some combination of these. To make the Subscriber's ELNO bear the cost of paying while fault allocation is resolved and the risk of trying to later recover from these other parties is unfair. Unless ORG is suggesting trying to tie in all of these parties (not just ELNOs) to a contractual liability allocation scheme, the paying ELNO takes on:

- the risk that it may not have a legal claim against a remote party like a client of its Subscriber or a client of the other ELNO's subscriber or a bank or the hub operator;
- the risk of time and cost in pursuing any claim it does have; and

- the risk that the party responsible does not meet any judgment ultimately obtained against it.

“Furthermore, an ELNO with more Subscribers and better security and procedures takes on the moral hazard of claims caused or contributed to by an ELNO with fewer Subscribers and worse security and procedures.

“The principles state that if it is not readily apparent which ELNO is at fault, there should be a pre-established root cause analysis (RCA) which can be quickly deployed to determine fault. The Discussion Paper then states that if the result is not agreed between ELNOs there should be an expeditious, efficient and independent dispute resolution process capable of dealing with disputed questions of fact and law. First this assumes that liability is only being allocated between ELNOs but as noted above many parties may bear or share fault. Secondly, the RCA proposal in the Directions Paper implies a liability framework that is very simple and explicit by role regarding who is responsible and accountable for what in the relevant workspace. This is overly simplistic – fingers will be pointed at the lodging ELNO, then the ELNOs whose data was synchronised, then the hub operator, then a Subscriber, then a client, then back again up the chain. An independent dispute resolution process capable of dealing with disputed questions of fact and law to allocate liability among all these parties and others will rarely be expeditious.

“Any liability framework needs to be acceptable to all parties.”

5.3.2.2 Settlement orchestration

In relation to settlement orchestration, as PEXA states in its response to the NSW Directions Paper:

“PEXA believes that one ELNO could issue financial settlement instructions. PEXA does this today. However, it does this on behalf of the principals in the settlement transaction. If one ELNO performs this function, it would not do so ‘on behalf’ of other ELNOs, who are also facilitators, not participants. This would be difficult without significant changes to contractual and potentially technical constructs.

“All financial settlement executions must be completed by an entity with the appropriate contractual authorisations. Any ELNO executing a settlement does so on behalf of the participants to a transaction and the financial institutions used by those participants (whether for the practitioner or themselves as principal). Agreements and authorisations from all parties must be in place. This will require significant engagement across the entire financial institution Subscriber base (not just the major banks).

“PEXA cannot independently agree to new arrangements for financial settlements as we cannot undermine our existing contractual framework or our obligations to Subscribers. Ensuring Delivery versus Payment (DVP) (payment at the time of exchange of title, pursuant to which, no party has custody of funds and title at the same time) remains a component of the arrangements that has already been identified as critical to industry and to the RBA. It is clear that industry will not tolerate separation of the lodgement and settlement functions in the usual course of a transaction.

“In exceptional circumstances, DVP is not preserved if an external system (for example a Land Registry) is unavailable. PEXA has introduced resilience features to ensure

transactions are able to be completed on the scheduled date wherever possible. Industry will need to consider additional resilience measures which may be required in an interoperable environment as part of any proposed changes.”

Moreover, the recovery of mistaken payments will be further complicated under Model 3, where one ELNO may execute settlement instructions captured in the other.

6. Conclusion

Since the signing of the IGA in 2011, industry has made extraordinary progress towards realising the transformative vision of eConveyancing, delivering many benefits of this digital transformation for Australia.

The success of eConveyancing until now is a testament to the collaboration of stakeholders across Australia. Without this collaboration and the significant investment of time, resources and capital by governments, financial institutions, practitioners and others, the eConveyancing reform wouldn't be the success it is today.

This is a pivotal moment for eConveyancing, with governments faced with critical decisions. Governments, regulators, ELNOs, subscribers and the broader community must decide which vision of eConveyancing they wish to support and pursue. Reforms that strengthen the national character of the regulatory model will continue to provide ELNOs and subscribers with the certainty required to invest in realising this important national reform. A fracturing of national consistency in the regulatory model risks reverting to the inefficient and unworkable model of state-based eConveyancing – the very impetus for the original IGA that is now under review.

In considering a model of interoperability, PEXA believes that a rigorous cost-benefit and risk analysis needs to be conducted at a national level.

PEXA believes that these are all important issues that need to be considered to achieve an optimal framework, in order to enable the best consumer outcomes.

PEXA will be pleased to meet with Dench McClean Carlson, if required, or to provide further information or clarification on any aspect of this paper.