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19 December 2023

**By E-mail**

Danusia Cameron  
Chair  
Australian Registrars' National Electronic Conveyancing  
Council (ARNECC)

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Dear Ms Cameron,

**Property Exchange Australia Limited | Interoperability Program**

We act for Property Exchange Australia Ltd (PEXA).

We have been instructed to write to you to state our client's concerns that the interoperability model currently being pursued by ARNECC is unworkable because it will encroach upon PEXA's intellectual property rights in its electronic conveyancing platform (PEXA Platform).

PEXA has sought to engage constructively with the interoperability program and will continue to do so.

However, ARNECC's announcement on 27 November 2023 in relation to interoperability work that must be undertaken by Electronic Lodgement Network Operators (ELNO) to effect an interoperable transaction is likely to result in an unjustifiable appropriation of PEXA's proprietary rights.

PEXA is a listed Australian technology company. Much of its value resides in its intellectual property that it developed and acquired over many years at enormous capital investment.

If the interoperability model is pursued and implemented such that PEXA's intellectual property is impacted, this could have drastic consequences for PEXA, its investors and stakeholders.

PEXA has related concerns with ARNECC's adoption of IPART's recommended RELNO Fee and Default RELNO surcharge as outlined in ARNECC's letter dated 30 November 2023.

**A. Background – The Interoperability Program**

We are instructed as to the following background matters.

- 1 PEXA is an Electronic Lodgment Network Operator (ELNO) and operates the PEXA Platform to effect electronic conveyancing transactions throughout Australia's States and Territories (subject to some exceptions).
- 2 PEXA was formed in 2010 by the Council of Australian Governments as part of its initiative to create a national e-conveyancing system for the Australian property industry. In 2018, PEXA was privatised with various States and other PEXA shareholders disposing of their shares in PEXA to a consortium of private investors. PEXA was listed on the Australian Securities Exchange in July 2021.

**Legislative framework**

- 3 The interoperability requirement introduced into the Electronic Conveyancing National Law (ECNL) by section 18A requires ELNOs to establish and maintain interoperability between different ELNs operated by different ELNOs.
- 4 Section 18A(1) of the Electronic Conveyancing National Law (ECNL) provides that:

*A person approved as an ELNO under section 15 must, in accordance with the operating requirements, establish and maintain interoperability between the ELN operated by the person and each ELN operated by another ELNO.*

- 5 The ECNL also provides for the Registrars (who will act in accordance with ARNECC's decision) to publish operating requirements in respect of the interoperability requirement. Section 22(2) of the ECNL provides, relevantly, that operating requirements may include provisions relating to the following matters:

*(c) interoperability, including, without limitation—*

*(i) requiring an ELNO to enter into agreements with other ELNOs with respect to interoperability, and*

*(ii) specifying matters to be dealt with, and standard provisions to be included, in those agreements, and*

*(iii) the resolution of disputes between an ELNO and other ELNOs relating to interoperability,*

*(c1) the technical and operational requirements for an ELN, including, without limitation, data standards and other requirements relating to interoperability, for example, data standards with respect to associated financial transactions,*

- 6 Interoperability is defined in section 3(1) of the ECNL:

*interoperability means the interworking of ELNs operated by ELNOs in a way that enables—*

*(a) a subscriber using an ELN (the first subscriber) to complete a conveyancing transaction that involves a subscriber using another ELN without the first subscriber having to be a subscriber to the other ELN, and*

*(b) the preparation of a registry instrument or other document in electronic form using data from different ELNs*

- 7 The Registrars' power to make operating requirements is delineated by the scope of section 3(1) of the ECNL.

***ARNECC's Approach to Implementation of Interoperability***

- 8 Sections 3 and 22 of the ECNL make clear that the object of interoperability is to facilitate:
- (a) an electronic conveyancing transaction to be completed between customers using two different ELNs without those customers needing to be subscribers of both ELNs;
  - (b) registry instruments and documents being created in such a transaction.
- 9 In each interoperable transaction, one ELNO will act as the responsible ELNO (**RELNO**) based on certain business rules. The RELNO is responsible for completing lodgement and financial settlement on behalf of the other ELNOs involved in the transaction. If the ELNO that should be the designated RELNO under the business rules does not have the capabilities to complete lodgement and financial settlement, the other ELNO will be required to complete lodgement and financial settlement and will be designated as the default RELNO (**Default RELNO**).
- 10 ARNECC has been pursuing an interoperability model whereby:
- (a) ELNOs must maintain the same levels of functionality for their own customers in interoperable transactions that the customer would enjoy in a non-interoperable transaction;
  - (b) in furtherance of its functional maintenance objective, on 27 November 2023, ARNECC announced the scope of data elements that must be shared by ELNOs in an interoperable transaction in order for each ELNO to maintain the same level of services to its customers;
  - (c) the Default RELNO will be entitled to charge the other ELNO a fee per transaction (**Default RELNO Surcharge**);
  - (d) ARNECC proposes to adopt IPART's recommendation to fix the Default RELNO Surcharge at \$6.20 per transaction.
- 11 The scope that ARNECC announced on 27 November 2023 that must be shared between PEXA and other ELNOs pursuant to the proposed operating requirements (**IOP Scope**) was provided to PEXA on 24 November 2023 and includes the following unique features of the PEXA Platform:
- (a) item 12 of release 2 (express refinance), a feature of the PEXA Platform which allows transactions to be marked "Express Refinance";
  - (b) item 13 of release 2 (attachment management), a feature of the PEXA Platform which allows users to upload a non-document attachment to a transaction workspace;
  - (c) item 14 of release 2 (trust account as source account), a feature of the PEXA Platform which enables trust accounts to be identified as source funds for the purpose of transaction settlement;
  - (d) item 15 of release 2 (linked lodgements), a feature of the PEXA Platform which enables other properties to be used as collateral in a particular transaction;

- (e) item 16 of release 2 (reconciliation of transactions between RELNO and PELNO), a feature of the PEXA Platform which enables reconciliation of applications of funds;
- (f) item 8 of release 3 (auto balance), a feature of the PEXA Platform which automatically recalculates line items in a workspace;
- (g) item 9 of release 3 (common indicators for transactions), a feature of the PEXA Platform which provides indicators to users of common requirements or agreements for settlements;
- (h) item 11 of release 3 (linked settlements), a feature of the PEXA Platform which allows users to use funds from one settlement in another settlement;
- (i) item 12 of release 3 (ATO), a feature of the PEXA Platform which allows parties to complete forms to enable withholding tax liability to be calculated; and
- (j) item 13 of release 3 (ELN source accounts), a feature of the PEXA Platform which allows a user to use PEXA's source account in a workspace;

(together, **PEXA Features**). Notably, the IOP Scope does not appear to include any bespoke features of the Symplic system.

#### **B. PEXA's Intellectual Property Rights**

- 12 PEXA is concerned that implementation of an interoperability model that requires each ELNO to an interoperable transaction to maintain consistent functionality for its own customers will require ELNOs to have to share a level of information (as is evident from the IOP Scope) that will inevitably impair PEXA's valuable intellectual property rights.
- 13 Set out below is an overview of PEXA's intellectual property in the PEXA Platform.

##### **Copyright**

- 14 PEXA owns the copyright granted under the *Copyright Act 1968* (Cth) (**Copyright Act**) in the PEXA Platform in the following respects.
- 15 First, the PEXA Platform is a computer software program that consists of underlying source code.
- 16 Pursuant to section 32 of the Copyright Act, copyright subsists in original literary works that have been published in Australia or created by persons or entities located within Australia.
- 17 Section 10(1) of the Copyright Act further provides that a "literary work" includes a computer program or compilation of computer programs. The expression "computer program" is defined as meaning "...a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result" (section 10(1) of the *Copyright Act*).
- 18 The PEXA Platform is a complex software program underpinned by computer code. As such, there can be no doubt that the PEXA Platform, including the PEXA Features comprises a "computer program" and is protected as a literary work under the Copyright Act.

- 19 Second, the user interface of the PEXA Platform is a separate artistic and literary work in which PEXA owns copyright.<sup>1</sup> The arrangement, combination, layout, design and text comprising the PEXA Platform user interface is also protected from reproduction as a copyright work.
- 20 Copyright gives PEXA the exclusive right to carry out various acts in relation to works, including to reproduce, adapt or publish the works.<sup>2</sup> For example, the right to reproduce the software code in developing a user interface or providing a service is one of PEXA's exclusive rights that it is solely entitled to exploit as an incident of its copyright. Similarly, the right to reproduce the user interface features, or a substantial part of those features in a qualitative sense, is a further exclusive right held by PEXA under the Copyright Act.
- 21 Copyright will be infringed not only by exact copying, but by the taking of a 'substantial part' of a copyright work. Whether a substantial part has been copied depends much more on the quality than on the quantity of what has been taken. The degree of originality of the part taken from the original work will also be relevant to whether a substantial part has been taken and copyright infringed.

#### ***Confidential Information – Trade Secrets***

- 22 In addition to copyright, the technology and 'know-how' that underpins the PEXA Platform and the PEXA Features is highly confidential to PEXA.
- 23 Confidential information and trade secrets are protected in circumstances where:
- (a) the information or 'know how' is secret, in the sense that it is not widely known or publicly available;
  - (b) the information has been developed over time after the expenditure of significant time, capital investment and in the application of skill and ingenuity;
  - (c) PEXA takes and enforces measures to protect its confidential information underlying the PEXA Platform through confidentiality and secrecy arrangements with employees and contractors engaged to work on the platform;
  - (d) the information and 'know-how' underpinning the PEXA Platform is intrinsically valuable and would be valuable to a competitor or other interested party.
- 24 In these circumstances, PEXA also maintains that the combination of its back-end features and functionality of its ELN platform is highly confidential. Once that information is disclosed to a competitor, the intrinsic value of that information would be inevitably lost.
- 25 For this reason, PEXA has been cautious about disclosing the PEXA Features, the source code and their inter-related functionality to any competitors through the interoperability program.

#### ***States' recognition of PEXA's Intellectual Property Rights***

- 26 In addition to the matters outlined above, the States expressly recognised, represented and warranted that PEXA held and owned all of the intellectual property rights in features of the PEXA Platform at the time PEXA was privatised.

<sup>1</sup> See for example *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* [2021] FCA 809 at [224]-[227].

<sup>2</sup> Copyright Act, s 31.

- 27 The privatisation transaction was effected through a Share Sale Agreement dated 5 November 2018 between LMC Bidco Pty Ltd, PEXA and the other persons described in Schedule 1 thereto (SSA).
- 28 Pursuant to the SSA, the Sellers (which included various States) gave warranties in clause 7.1(a) that each of the Business Warranties were true and accurate. The Business Warranties included a series of asset and intellectual property warranties in clauses 5.4 and 5.5 of Part B of Schedule 4 to the following effect:
- (a) the assets owned by each Group Company comprise all the assets necessary for the continuation of its business as carried on as at the date of this agreement; and
  - (b) the Group Companies own or use pursuant to binding licence agreements, all Intellectual Property Rights necessary to conduct their business as then conducted.
- 29 The Sellers satisfied LMC Bidco Pty Ltd and PEXA of the truth of these warranties by, among other things, providing copies of various Intellectual Property Assignment and Licence Deeds. Those Deeds made clear that all intellectual property necessary for PEXA to operate would be owned by PEXA.
- 30 In due diligence, the Sellers made further representations regarding PEXA's intellectual property. The Sellers represented that the copyright in the PEXA Exchange software and other applications forming part of the PEXA ELN had been assigned to PEXA. They represented that all intellectual property developed by in-house employees is also assigned to PEXA.
- 31 Many of the PEXA Features were developed by PEXA more recently. Again, PEXA owns all of the intellectual property (whether copyright or trade secrets) associated with those features.

#### C. Problems with ARNECC's Interoperability Model

- 32 PEXA has previously raised concerns about the interoperability model being pursued by ARNECC as follows:
- (a) ARNECC's insistence that ELNOs maintain a standardised customer experience for both interoperable and non-interoperable transactions is problematic;
  - (b) the non-core features comprise special tools and customer enhancements developed by PEXA, and in which PEXA owns intellectual property rights;
  - (c) the requirement to ensure that the functionality of these non-core features is not compromised in an interoperable transaction imposes requirements that go beyond the scope of the interoperability requirement in section 18A of the ECNL; and
  - (d) the maintenance of the non-core features developed by PEXA in the interoperability requirements may result in anti-competitive outcomes.
- 33 PEXA's concerns with the interoperability model are further outlined below.

#### *Scope of Interoperability*

- 34 The meaning of interoperability in section 18A of the ECNL is to be determined by reference to the subject matter, purpose and context of the legislation.

- 35 The second reading speech for the Bill introducing section 18A in the NSW Legislative Assembly included the following comments:<sup>3</sup>

*What is interoperability? Interoperability, in this sense, refers to a connection between ELNOs' back-end systems for the exchange of conveyancing transaction data. The exchange of data allows a customer connected to one ELNO to engage in a conveyancing transaction with a subscriber to a different ELNO of their choosing. Interoperability is used in other industries to manage what is called a "network effect", which is a market where the value of a provider's service increases with the number of users of the service.*

- 36 Further context to the concept of 'interoperability' is provided by the Intergovernmental Agreement for an Electronic Conveyancing National Law Final Report dated 18 December 2019 (IGA Review Report).

- 37 The IGA Review Report explained that interoperability was intended to address two issues:<sup>4</sup>

- *Multi-homing – subscribers potentially need to register with, obtain a digital signature from and use, each ELNO – the impact on the subscriber may be significant depending on the cost, of both time and money, to multi-home*
- *Network effects barrier – to reduce the likelihood of having to multi-home subscribers may tend to gravitate to the ELN with the most subscribers, potentially inhibiting effective competition*

- 38 Having regard to those objectives, the IGA Review Report also recognised the risks associated with implementing a greater depth of interoperability than necessary, including risks associated with unnecessary exchange and collection of data, technical complexity, and constraints on innovation.<sup>5</sup> As to constraints on innovation, the IGA Review Report expressly noted that:<sup>6</sup>

*Constraining innovation of presentation (user interface) and internal ELN processes greatly limits the ability of an ELN system to enhance subscriber productivity*

- 39 PEXA is concerned that attempts to ensure functionality is not diminished for users of a particular ELNO in an interoperable transaction will require the exchange of a significant amount of confidential data and know-how (so as to enable the other ELNO to facilitate the maintenance of that functionality in the first ELNO). Such a requirement will be detrimental to innovation because:

- (a) the requirement to exchange such data and information will enable (indeed encourage) competing ELNO's to replicate the functionality they are facilitating rather than develop their own bespoke features; and
- (b) ELNO's would be required to exchange valuable confidential know-how as a consequence of the interoperability framework thereby creating a disincentive to invest in development and innovation.

- 40 Recognition of those risks led the IGA Review Report to recommend that interoperability be implemented at "the shallowest depth".<sup>7</sup> The IGA Review Report therefore defined interoperability as no more than "...the ability of two or more ELNs to exchange

<sup>3</sup> Parliament of New South Wales, Legislative Assembly Hansard, 15 February 2022.

<sup>4</sup> IGA Review Report at [5.157].

<sup>5</sup> IGA Review Report at [5.169]-[5.170].

<sup>6</sup> IGA Review Report at [5.170].

<sup>7</sup> IGA Review Report at [5.169], [5.171].

information and use the information to complete a multi-party transaction".<sup>8</sup> The "shallowest interoperability" approach is reflected in the text of the ECNL.

- 41 There is no indication in the text of the ECNL that there must be a consistency of user experience (ie no loss of functionality) for customers of a particular ELNO whether or not they are participating in an interoperable transaction.
- 42 In these circumstances, PEXA is concerned that the IOP Scope released by ARNECC, if adopted in the operating requirements, will go beyond the authorising provisions.
- 43 The power of the Registrars to make operating requirements under section 22(2) of the ECNL is limited by reference to the interoperability requirement in section 18A of the ECNL.
- 44 If the PEXA Features are included in the operating requirements, there is a real risk that those operating requirements will be *ultra vires* section 22(2) of the ECNL and vulnerable to being set aside as invalid.
- 45 The PEXA Features included as part of the IOP Scope are not necessary to complete an e-conveyancing transaction as contemplated by section 18A of the ECNL. Rather, their inclusion in the IOP Scope appears to be in furtherance of ARNECC's approach to interoperability whereby it "...must maintain or enhance the customer experience in keeping with the capability and experience of the Electronic Lodgment Network chosen by the customer."<sup>9</sup>
- 46 ARNECC's functionality requirement is not only an unjustified addition to the concept of interoperability in the ECNL, but will hinder competition, innovation and data security.
- 47 Firstly, an ELNO will be disincentivised from investing in innovation and differentiating its ELN platform from competitors (to improve user experience) in circumstances where it will be subsequently compelled to share those enhancements with its competitors to facilitate the maintenance of functionality for its own users in interoperable transactions.
- 48 Secondly, interoperability will become increasingly complex, adversarial and uncertain because maintaining uniformity of user experience will require continual monitoring and sharing of platform enhancements between ELNOs. That process will be complex and challenging, as has been the case to date.
- 49 Thirdly, interoperable transactions will be more costly because the requirement to maintain functionality for customers (regardless of whether they are participating in an interoperable transaction or not) will increase the technical complexity of ELNs and transactions, involve duplication and will result in correspondingly higher costs.<sup>10</sup>
- 50 Fourthly, maintaining functionality in interoperable transactions will increase cybersecurity risks. The requirement to replicate features such as the PEXA Features necessarily involves a greater and more extensive exchange of data between the two ELNs.<sup>11</sup> The exchange of data, and greater complexity, increases the risks associated with cybersecurity breaches.

#### ***Infringement of Intellectual Property Rights***

- 51 As matters stand, PEXA is concerned that the inclusion of the PEXA Features in IOP Scope would purport to compel PEXA to disclose and make available its intellectual property to competing ELNOs.

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<sup>8</sup> IGA Review Report at [5.161].

<sup>9</sup> Statement published by ARNECC and emailed to PEXA by Mr David Backley on 27 November 2023.

<sup>10</sup> IGA Review Report at [5.170].

<sup>11</sup> IGA Review Report at [5.170].



- 52 The updated IOP Scope merely lists the PEXA Features but does not explain ARNECC's intended requirements or what is expected from PEXA in any detail. PEXA had agreed in its communications with Mr David Backley (ARNECC's interoperability manager) that Mr Backley would engage with Sympli to identify the detail of the scope requirements (see email from PEXA to Mr Backley dated 14 November 2023). Mr Backley did not respond to that email and the IOP Scope has been released by ARNECC without any of the requested detail.
- 53 Subsequently at the Interoperability Industry forum held on 12 December 2023, Mr Backley clarified that ARNECC's objective is that, although the user experience in each ELNO will be different, the user experience between interoperable and non-interoperable transactions within a chosen ELNO should be the same so that the PEXA Features must operate consistently in PEXA transactions and in interoperable transactions.
- 54 Under this approach, PEXA's valuable intellectual property rights are put at risk. As was made clear by bank representatives and Sympli's CEO Philip Joyce at the 12 December interoperability forum, for the PEXA Features to operate consistently in interoperable transactions, PEXA would have to disclose to Sympli significant detail about the data it requires and (as Mr Joyce put it) "...the relevant time and sequence protocols" to operate those features collaboratively with Sympli. Essentially PEXA would need to disclose to Sympli the ingredients it needs, including the relevant triggers and sequencing, from which it would be relatively easy for Sympli to replicate PEXA's technology.
- 55 This creates serious risks of copyright infringement by:
- (a) substantial reproduction of the PEXA Features in any competing ELNO user interface;
  - (b) substantial reproduction of PEXA's underlying software program where a competitor is given access to PEXA's Platform and required to facilitate maintaining functionality to achieve a standardised user experience for PEXA customers.
- 56 If a competitor is given access to and then reproduces the substance of the PEXA Features on its ELN platform, the competing ELNO will likely infringe PEXA's copyright in the user interface to the PEXA Platform.
- 57 In addition, if PEXA is compelled to disclose the data and elements that underpin the functionality of the PEXA Features to competing ELNOs, such disclosures may involve the appropriation of PEXA's confidential information and know-how. Once disclosed to a competitor, the value of PEXA's confidential information would be irreparably damaged.
- 58 Sections 18A and 22 of the ECNL cannot be sensibly read as authorising the appropriation of PEXA's (or any other ELNOs) intellectual property rights inhering in its ELN platform.
- 59 First, to the extent the operating requirements (a piece of delegated State legislation) purport to intrude upon PEXA's (or any other ELNOs) copyright granted under the Commonwealth Copyright Act, the operating requirements will be inoperative to the extent of that inconsistency. An inconsistency for the purposes of section 109 of the Constitution will exist where a State law detracts from rights created by Commonwealth

legislation or impairs the enjoyment of such rights.<sup>12</sup> An inconsistency can arise from the practical effect of State law on rights created by federal legislation.<sup>13</sup>

- 60 If sections 18A and 22(2) of the ECNL did purport to authorise interference with copyright, they would detract from rights granted under the Copyright Act and would be ineffective.
- 61 Second, it is presumed that legislation is not intended to interfere with vested property rights unless clear and unmistakable language is used.<sup>14</sup> As a practical matter, that means that where a statute can be construed in multiple ways, a court will select the construction which does not involve interference with property rights.<sup>15</sup>
- 62 Accordingly, the operating requirements should be read in such a way that they do not impair vested proprietary interests, including under the Copyright Act.
- 63 Third, the compulsory disclosure of the PEXA Features to competing ELNOs is contrary to the warranties and representations of ownership of the intellectual property in the PEXA Platform given the by States when PEXA was privatised.

#### **Default RELNO Surcharge**

- 64 For similar reasons explained above, the imposition of a Default RELNO Surcharge on PEXA as recommended by IPART would involve the compulsory licensing of the PEXA Platform, including the copyright inhering in the platform.
- 65 In addition, PEXA does not consider that the process undertaken by ARNECC is an appropriate one for the calculation of the Default RELNO Surcharge.
- 66 The Default RELNO Surcharge is payable in circumstances where the Default RELNO is required to provide a service to the other ELNO(s) and their customers by making its ELN available to the other ELNO(s) and their customers.
- 67 ARNECC has sought advice from IPART as to the amount of the Default RELNO Surcharge. PEXA disagrees with the approach adopted by IPART to determining the Default RELNO Surcharge.
- 68 More fundamentally, PEXA objects to ARNECC's intended process for adopting the Default RELNO Surcharge whereby the IPART recommendation would be imposed without affording PEXA (or other affected ELNOs) a clear mechanism to dispute it.
- 69 PEXA considers that the access regime model in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) is an available, applicable and appropriate model for determining the fair and reasonable terms of access to a service such as the PEXA Platform.
- 70 PEXA considers that the PEXA Platform involves the provision of a "service" within the meaning of section 44B of the CCA with its ELN being the relevant "facility".
- 71 The PEXA Platform meets the declaration criteria for a service under Part IIIA of the CCA including for the following reasons:

<sup>12</sup> *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, [32] (The Court); *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136; *Dao v Australian Postal Commission* (1987) 162 CLR 317, 335 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ); *Western Australia v Ward* (2002) 213 CLR 1, [667]-[668] (Callinan J).

<sup>13</sup> *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322, [203] (Gummow J); *Bell Group NV v Western Australia*, [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

<sup>14</sup> *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at [40]-[42].

<sup>15</sup> *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at [43].

- (a) the premise of the interoperability requirement would promote competition amongst ELNOs;
  - (b) PEXA could meet the foreseeable demand in the market; and
  - (c) the PEXA Platform is of national significance given its history and privatisation.
- 72 Part IIIA of the CCA is the appropriate legislative regime for determining the terms on which PEXA should be required to provide access to its ELN to other ELNOs and their users. To the extent that State legislation, or regulations made under State legislation, purport to establish a different inconsistent regime for such access, the legislation may be invalid to the extent of the inconsistency.
- 73 Further, the principles governing appropriate terms for access to a service are set out in the Competition Principles Agreement. Section 44M of the CCA requires that any State access regime conform to those principles – an access regime that does not so conform will be declared to be not an “effective access regime”.
- 74 These principles include:
- (a) the provider of a service should negotiate directly to reach agreement on the terms of access with a third-party seeking access;
  - (b) if negotiations are unsuccessful, an independent body should be appointed to resolve the dispute; and
  - (c) the dispute resolution body should take into account the factors listed in clause 4(i) of the principles, including the owner's legitimate business interest and investment in the facility, and the cost of providing access.
- 75 By contrast, the approach taken by IPART and adopted by ARNECC:
- (a) is directly contrary to the negotiate-arbitrate model required under Part IIIA of the CCA (finding that “direct price control” is preferable);<sup>16</sup> and
  - (b) did not take into account actual costs of developing the PEXA Platform (instead applying IPART's estimated costs for the development of a hypothetical “efficient ELNO”).<sup>17</sup>

#### D. Way Forward

- 76 PEXA is concerned that the model of interoperability being implemented by ARNECC goes beyond the concept of interoperability contained in the ECNL, is likely to infringe PEXA's intellectual property rights, and is creating complexity and legal risks. This has led to the adoption of an IOP Scope that includes a number of features that go beyond interoperability as contemplated by the ECNL.
- 77 PEXA invites ARNECC to engage in a constructive dialogue regarding the extent and nature of the operating requirements, especially as they relate to the PEXA Features, to ensure that those requirements do not impinge upon PEXA's intellectual property rights and lead to legal dispute and delays to implementing a workable interoperability model.
- 78 PEXA remains ready and willing to engage with ARNECC to implement interoperability and promote the policy objectives that it seeks to promote (noting that PEXA believes

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<sup>16</sup> IPART Report at 16.

<sup>17</sup> IPART Report at 48, 52-53.

that there are better ways to achieve these objectives in the interests of industry stakeholders and have written separately to ARNECC on this point).

- 79 However, PEXA is duty bound to protect its intellectual property and other proprietary rights in the PEXA Platform and the interests of its shareholders and stakeholders. If the interoperability model pursued by ARNECC and the IOP Scope threatens to jeopardise those interests, PEXA will need to take steps to protect its rights.

Yours sincerely  
**Arnold Bloch Leibler**

**Justin Vaatstra**  
Partner