

PEXA

Response to Question 1 (Hansard page 48):

The Hon. WES FANG: Before I start some questioning, I just wanted some clarity on an answer that you gave to my colleague Ms Abigail Boyd. What was the date that PEXA was privatised? I believe you said 2018. I just wanted to confirm: Was it 2018 or 2019?

ELIZABETH WARRELL: I believe it was first privatised in 2018.

The Hon. WES FANG: I think the plan to privatise was 2018. I think it wasn't privatised until 2019. Are you sure that it was 2018? I believe 1 January 2019 was the privatisation date.

CLARE GILL: My understanding is it was 2018, but we can confirm the exact date with you.

Answer:

PEXA, along with its assets including its intellectual property, was sold in a trade sale to a consortium made up of Link Group, the Commonwealth Bank of Australia, and Morgan Stanley Infrastructure Inc.

The privatisation process, via trade sale, took place in 2018. The successful offer was announced to the market by PEXA in November 2018. The sale was completed on 16 January 2019.

PEXA

Response to Question 2 (Hansard p50)

The Hon. SUSAN CARTER: I'm curious about the data and technical standards that you have provided for a fee to the National Electronic Conveyancing Data Standard. What proprietary intellectual property was contained in that material that you made available?

DAMIEN MANUEL: If you think about it, in the early days when PEXA was meeting with all the titles officers and all the revenue officers, it had to come up with a standard in terms of that communication, so protocol. Effectively, that protocol is now owned NECDS Ltd. That's the protocol that all nodes need to abide by for transacting or pushing information.

The Hon. SUSAN CARTER: What was the fee that you charged for that?

DAMIEN MANUEL: The fee that we're currently being charged by any NECDS or the fee for them to buy?

The Hon. SUSAN CARTER: The fee for them to buy that information.

DAMIEN MANUEL: It was roughly \$100,000 a month over a period of 1½ years, from memory. It was about 1.6 or 1.9.

The Hon. SUSAN CARTER: It's a licence fee per month or it was a total fee paid?

DAMIEN MANUEL: A transfer of IP fee.

The Hon. SUSAN CARTER: Can you on notice provide the exact figure and the exact payment details?

DAMIEN MANUEL: Sure.

Answer:

PEXA transferred ownership of the NECDS Data Standards to NECDS Co. for \$1,940,000, to be paid in an initial \$40,000 installment, and 19 subsequent monthly payments of \$100,000.

PEXA

Response to Question 3 (Hansard page 50)

The Hon. SUSAN CARTER: Was that a licence for copyright material or a sale of confidential information? What was it?

DAMIEN MANUEL: It was a transfer of the intellectual property of that data standard.

The Hon. SUSAN CARTER: Sorry, but what type of intellectual property were you claiming in that? Copyright or trade secrets?

RUSSELL COHEN: We'll have to take that on notice and get back to you. It predates me in my time at PEXA. We'll provide the Committee with that information.

Answer:

The sale of the NECDS Data Standard was a sale of all intellectual property rights NECDS Co.

The contract of sale defines Intellectual Property Rights as having the meaning in the Operating Requirements and includes any method of working or process in relation to the compilation, recording or administration of those Intellectual Property Rights.

PEXA

Response to Question 4 (Hansard page 51):

CLARE GILL: My understanding is that we actually did get it valued by an independent business, which valued it at well over \$20 million. We provided it at a far greater discount to ensure that there was a national data standard. It wasn't provided at the value that it was provided by an independent third party.

The Hon. SUSAN CARTER: Can you provide that valuation on notice as well, please?

CLARE GILL: Yes.

Answer:

PEXA obtained an independent valuation of the NECDS Data Standard intellectual property from KPMG. The valuation stated that total market value of the NECDS IP Assets between \$20 million to \$30 million, with a point estimate of \$25.2 million.

PEXA

Response to Question 5 (Hansard page 52):

RUSSELL COHEN: There's a letter from ARNECC to PEXA which speaks specifically about functional equivalence.

Ms ABIGAIL BOYD: If we could see that, that would be very helpful.

Answer:

On 27 November 2023, ARNECC's former Interoperability Program Director wrote to representatives of PEXA confirming the scope, timeline and guiding principles of the Interoperability Program. A copy of this email and its attachments is attached.

The attachment *Key Guiding Principles for interoperability*, dated 16 November 2023, notes that the second 'guiding principle' was "maintains or enhances the customer experience in keeping with the capability and experience of the ELN chosen by the customer." It also states that fourth 'guiding principle' was "Interoperability must allow for innovation."

On 8 May 2025, ARNECC provided PEXA with the Terms of Reference for the Functional Requirements Review. A copy is attached.

The Terms of Reference state:

"The purpose of this review is to identify and define a full list of functions, along with data elements to be exchanged, including as applicable any related rules and requirements (e.g. sequencing, triggers, pre- and post-conditions), which are **required in order to achieve the equivalence between interoperable and standalone Electronic Workspaces as required by OR 5.7.7 and the Principles.**" (page 2, emphasis added.)

From: [Elizabeth Muhlebach](#)
To: [Thomas Hansen](#); [Bryan Mundy](#)
Subject: FW: Scope & Guiding principles
Date: Monday, 27 November 2023 9:30:35 AM
Attachments: [image001.png](#)
[I-OP Scope Final 24-11-2023.pptx](#)
[Key-Guiding-principles-as-approved-by-ARNECC-002.pdf](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image007.png](#)
[image008.png](#)
[image009.png](#)

Elizabeth Muhlebach (she/her)
General Manager, Regulatory Affairs



Tower 4, Level 16, 727 Collins Street
Docklands VIC 3008

T +61 3 7002 4500 **W** pexa.com.au

Proudly located on Wurundjeri Country



From: David Backley

Sent: Monday, November 27, 2023 8:18 AM

To: Kim Rosewall ; SMITH Steve (ATS) ; Elizabeth Muhlebach ; George Polus ; Joanne Tseng ; Jroni George ; Malcolm Wickett ; Milad Mashhour ; Mo Atwa ; Naveed Shah ; Prerak Parikh ; Rosey Perez ; Staffan Flodin ; Tane Wilson ; Wayne Davidson

Cc: Danusia Cameron ; Sarita Walpola

Subject: [External]Scope & Guiding principles

This email is from an external sender. Please be CAUTIOUS with links and attachments.

PMG members

As per our discussions at the last two PMG meetings I am writing to all members copy, ARNECC chair setting out the currently approved ARNECC position with respect to the following aspects of the Interoperability program:

- Scope
- Timeline
- Guiding principles

The following statement with respect to scope was published on the ARNECC website:

ARNECC Statement

Scope for interoperability releases settled ARNECC is pleased to announce that the scope for the interoperability releases has now been settled. The scope refers to the data elements that must be shared by Electronic Lodgment Network Operators (ELNOs) in an interoperable transaction in order for each ELNO to offer services to its customers. A guiding principle of the interoperability project is that it must maintain or enhance the customer experience in keeping with the capability and experience of the Electronic Lodgment Network chosen by the customer. The ARNECC Interoperability Program team has undertaken considerable work to determine the scope,

including in-depth consultation with key stakeholders. Following its announcement of the interoperability release timetable in July 2023, ARNECC conducted a series of stakeholder consultation workshops, where it continued to work closely with ELNOs Property Exchange Australia Limited (PEXA) and Sympli Australia Pty Ltd (Sympli), as well as industry more broadly, to determine the appropriate scope for the interoperability releases. ARNECC has now concluded this process. Specific details of the data elements constituting the scope have been shared with the ELNOs and will be shared with other integrating parties as necessary. ARNECC would also like to thank stakeholders for providing valuable feedback on Consultation Draft 7.2 of the Model Operating Requirements. ARNECC is currently considering this feedback with a view to updating the regulatory framework to include deadlines by which interoperability capability must be developed. ARNECC is also undertaking detailed work with the ELNOs and other stakeholders on Day 2 project planning, so key project milestones can be fully understood and the work of the many participants in the reform can be brought together. ARNECC thanks stakeholders for their continued efforts and support in this important competition reform. ARNECC has approved key guiding principles for the interoperability reform, which are available here: [Interoperability - ARNECC Date: 16 November 2023](#)

The scope referred to in the statement is the scope contained in the document distributed at the recent program workshop in Melbourne, namely R1,2,3 and additional items, for completeness they are included as an attachment to this email. As per the workshop Steve has amended some of the descriptors to provide more clarity. We have also slotted the additional items into the appropriate releases.

The timeline we are working to as resolved by ARNECC is as we have discussed previously:

1. R1 July 2025
2. R2 & 3 by December 2025

The guiding principles referred to in the ARNECC statement are those presented at the recent workshop in Melbourne, again for convenience and completeness they are attached to this email.

Given all of the above and considering 12 months ago both PEXA and Sympli pointed out that the program had no, scope or timeline I think we are now at the point where discussion with respect to the scope and timeline is completed.

Our task as a program is now very clear, that is to continue refining our program and approach to deliver the following:

- R1 scope by July 2025
- R2 & 3 scope by December 2025
- In accordance with the guiding principles

Let's take the time at our next PMG meeting to discuss the achievement of the above. It is not the role of the program to debate the validity of these matters and ARNECC has made its position clear.

Regards

David Backley

Program Director

Interoperability Program

Working days Monday, Wednesday and Thursday

Release 1 Scope

#	Requirement / Scope Item	Description
1	Named Principal Subscribers only	Scope of transaction participants limited to a small set of named Principal Subscribers (currently expected to be ANZ, CBA, NAB, WBC)
2	Role-based RELNO switching	Switching of the RELNO role such that the Responsible Subscriber is acting on the RELNO. Capability based RELNO switching is out of scope
3	Authority Call Handling	LV, Lodgement, and Settlement to be done by RELNO only LTRV, RIS, TAC, Fee Forwarding, to be done by either RELNO or PELNO
4	Mortgage and discharge documents to be added to the workspace	Multiple in-scope documents can be added to the workspace. The workspace will allow Dealings (DM's and M's)
5	Delete document	Ability to delete any in-scope document from workspace
6	Allow Multiple Titles in a Workspace	Multiple titles can be added to a workspace according to jurisdictional rules.
7	Justifications	<ul style="list-style-type: none"> For M –Ability to justify when the Incoming Mortgagor does not match the Registered Proprietor on the Title (NSW only) For DM - Ability to justify when the Outgoing Mortgagee does not match the Mortgagee on Title
8	Include all Proprietors	Expanding the transaction scope to include all Proprietors on Title allowed by the jurisdiction.
9	Settlement date and time management	<ul style="list-style-type: none"> Ability for any participant to propose a new settlement date and or time Ability to reset settlement date and time to pending Remove settlement from workspace Including settlement rollover (same day only)
10	Conversations	Ability for workspace participants to have conversations with each other within the ELN platform.
11	All disbursement and payment types relevant to REFI	The type of disbursements which can be initiated for payment from within the workspace <ul style="list-style-type: none"> Bank Account (source & disbursement) and; Financial institution identifier (source)
12	All digital certificates accounted for	Both open and closed certificates can be used to sign documents and Financial Line Items in a Workspace
13	NECDS Schema Versions	Need to determine how to implement the NECDS Schema handling solution chosen by ARWG to ensure all ELNOs change to a new schema version at the same time.
14	Exception handling	Exception handling for those errors and functional requirements not marked as out of scope
15	Auto Balance (1)	Refinance: The loan advance or the vendor surplus payment types may be automatically adjusted to balance the workspace financials.
16	Common indicators for transactions (1)	Providing indicators of common requirements or agreements for settlements between participants in a workspace, e.g., loan documents received by incoming mortgagee, or discharge authority received by discharging mortgagee.

Release 2 Scope

#	Requirement / Scope Item	Description
1	Representative subscribers	Ability to have representative subscribers join the workspace (rep subscribers for Incoming/Discharging Mortgagee, Caveator)
2	Capability-based RELNO switching	
3	Adding a caveator to a workspace	Ability to add the role of a caveator to a workspace
4	Attachment management	<ul style="list-style-type: none"> •for dealings - Ability to upload attachments for dealings being registered - Mortgage and Caveat •Delete attachments from workspace
5	Linked subscribers - linking and unlinking	Allow subscriber linking and any subsequent search and invitation-based outcomes for users.
6	Allow caveat and withdrawal of caveat	
7	Joining a workspace outside of invitations	Ability for a participant to join a workspace without an invitation
8	Invitation forwarding	The ability for ELNO users to forward an invitation to another subscriber
9	Single workspace settlement only	Linked Settlements are out of scope.
10	Multiple lodgement cases	Ability for a workspace to support multiple lodgement cases
11	All IOP data object CRUD for Day 2 (Document, Party, Participant, Financial line item, Invitations, etc.)	Ability to create, retrieve, update, & delete the required IOP data objects from workspaces via the Interoperability APIs
12	Express Refinance	Ability for a refinance transaction to be marked as an “Express Refinance”.
13	Attachment management	Workspace attachments – Ability to upload a non-document attachment to a workspace
14	Trust account as source account	The use of trust accounts as source funds for the purpose of ELNO transaction settlement
15	Linked lodgements	<p>Supports other properties that are to be used as a collateral, which forms a separate lodgment case.</p> <ul style="list-style-type: none"> • For IOP, this requires linking a standalone lodgement to a settlement or vice versa • The user will link a lodgement workspace to a settlement workspace, then once settlement is successful, the ELN platform will lodge the linked lodgement case with the land registry • Without this the FIs need to have a process outside the platform to remember to lodge the linked lodgement case
16	Reconciliation of transactions between RELNO and PELNO	Supports requirements from FIs where a payment is not processed correctly due to erroneous account details or errors in the payments process. This supports FI processes to ensure the funds get to the right recipient For e.g., to allow to resolution of Unapplied/misapplied funds

Release 3 Scope

#	Requirement / Scope Item	Description	Variations
1	All roles that enter the workspace	To allow Subscribers representing any party to be invited to or join workspaces.	To extend into additional roles and party capacities e.g., Lessor/Lessee, Trustee, etc.
2	Transfer & Supporting documents	Transfers and jurisdiction based supporting documents between Vendors and Purchasers e.g., Notice of Sale, Form 24.	Multiple transfers and duty assessments. VIC - inclusion of Complex Duty.
3	All Transfer and additional documents	The inclusion of Transfer and supporting documents, plus other documents in Transfer lodgment cases,	Extend to e.g., Caveat, Withdrawal of caveat (testing), Transmission Application, Survivorship, Notice of Death, Lease documents, etc. State based documents as required - e.g., Encumbrance in SA.
4	Dealing requirements (VIC only)	The ability to add dealing requirements to lodgment cases in VIC.	
5	Exotic lodgment cases	Multi-party lodgment cases assembled by combination of documents prepared by participants in either ELN, including combinations of Residual Documents.	
6	Requests/Distribution of Authority Calls by the Responsible and Participating ELNOs (SRO included)	Extending Authority calls functionality to include Stamp Duty Verification authority calls.	
7	All Payment Types	Inclusion of payment types previously left out of scope, e.g., BPAY, NPP, etc. <ul style="list-style-type: none"> •Bank account (source and disbursement), •Financial Institution Identifier (source), •BPAY (disbursement) and •NPP (disbursement). 	
8	Auto Balance (2)	Transfer: Auto balance for practitioners involve purchaser/vendor surplus payments.	
9	Common indicators for transactions (2)	User workspace data - Flags	
10	International Disbursements	Collecting international banks details to process an international payment through e.g., SWIFT or IBAN.	
11	Linked Settlements	Supports directions from one settlement that are to be used as source funds for another conveyancing transaction.	
12	ATO (Australian Taxation Office)	ATO GST Withholding is a tax office requirement for which an API service is published and provided to ELNOs to integrate and streamline the forms and payments required for the transaction.	
13	ELN source accounts	Ability for a Purchaser or Vendors rep to use their ELN's source account in a workspace	10

Key Guiding Principles for Interoperability

- 1) Security and integrity of the eConveyancing ecosystem must be maintained at all times:
 - a) Secure by design.
 - b) Maintain transactional nonrepudiation.
 - c) Automated exception and error management.
- 2) Maintains or enhances the customer experience in keeping with the capability and experience of the ELN chosen by the customer.
 - a) Data needs to be exchanged to maintain individual ELN functionality.
- 3) Interoperability must enable competition:
 - a) Simple to adopt efficient integration patterns.
 - b) Standardised data exchange at the core.
- 4) Interoperability must allow for innovation.
- 5) The interoperable solution must be simple and effective for ARNECC to administer.

Date: 16 November 2023

Functional Requirements Review: Terms of Reference

Background

Section 18A of the Electronic Conveyancing National Law (ECNL) requires an ELNO to establish and maintain interoperability between its Electronic Lodgment Network (**ELN**) and the ELN of each other ELNO, in accordance with the Operating Requirements (**ORs**).

Section 22(2) of the ECNL provides for the Registrar to determine, in writing, requirements (*operating requirements*) relating to:

- interoperability (section 22(2)(c)); and
- 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 (section 22(2)(c1).

OR 5.7.7 requires an ELNO to:

- (a) Interoperate with all ELNOs on an Equivalent Basis; and
- (b) ensure that the standard of performance of its ELN in an Interoperable Electronic Workspace is equivalent to the performance of its ELN in a standalone Electronic Workspace.

To comply with OR 5.7.7 and ARNECC's Key Guiding Principles for Interoperability ("the Principles"), ELNOs will need to ensure functionality available to a Subscriber in a standalone Electronic Workspace continues to be available and operational in an Interoperable Electronic Workspace. This compliance is required to be self-certified by ELNOs under Schedule 3, Category Three of the Operating Requirements.

In 2023, a process was run by the ARNECC Interoperability Program to develop a functional scope for interoperability. This resulted in the development of the scope in Annexure 1 that was provided to ELNOs in November 2023.

Of the 45 scope items listed in the scope, 13 items were contested by an ELNO on the basis that disclosure of information relating to those items as part of the process to design the National Electronic Conveyancing Interoperability Data Standard (NECIDS) would potentially involve disclosure of their intellectual property (IP).

Financial institutions have stated that the 45 scope items will not be sufficient to achieve the equivalence between Interoperable and standalone Electronic Workspaces as required by OR 5.7.7 and the Principles.

Capitalised terms have the meaning as in the ECNL and the OR.

The Review

The review is being conducted on behalf of ARNECC.

The review will include engagement of the following reviewers who will report and make recommendations to ARNECC:

- (a) A technical expert, and
- (b) An IP expert.

Purpose of the review

The purpose of this review is to identify and define a full list of functions, along with data elements to be exchanged, including as applicable any related rules and requirements (e.g. sequencing, triggers, pre- and post-conditions), which are required in order to achieve the equivalence between interoperable and standalone Electronic Workspaces as required by OR 5.7.7 and the Principles.

The review will cover, at a minimum, functions and data elements required to establish the interworking of ELNs 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.

This will include but is not limited to:

- the preparation of Electronic Workspace Documents;
- the presentation for Lodgment of electronic Registry Instruments or other electronic Documents at a Land Registry;
- anything else required for the completion of an interoperable Conveyancing Transaction which includes completion of an Associated Financial Transaction.

In light of the above, the review will also analyse to the extent required:

1. what data (if any) is needed to be shared between ELNOs for any required function to work in an interoperable Conveyancing Transaction.
2. whether any data needed can be described in the NECIDS in terms of its high-level functionality, and an API developed, deployed and used, without any party needing to disclose or use IP (such as copyright) or disclose confidential information that party may have in respect of a function. i.e., can any IP or confidential information be kept in a “Black box”, with only the input and output data, general descriptions of functionality and other non-proprietary information being visible to ELNOs.
3. what would happen in an interoperable Conveyancing Transaction if data elements are not provided for a particular ELN function (including what the Subscriber impact would be).
4. where any claim is made by an ELNO that it owns IP or confidential information that would need to be disclosed to another ELNO, or in the NECIDS, for the function to work (**IP/CI Claim**), the review will also analyse whether:

- a) the relevant data or information is protected by IP or confidential information rights that are owned by the ELNO;
 - b) disclosure of the relevant data or information to another ELNO would cause harm to the ELNO making the claim;
 - c) disclosure of the relevant data or information within the NECIDS would cause harm to the ELNO making the claim;
- (together the **IP/CI Claim Questions**), and separately whether:
- d) the function can be delivered in an interoperable environment without requiring an ELNO to disclose its IP or confidential information to other ELNOs, or incorporating such IP or confidential information in the NECIDS.

If this cannot be achieved for a particular function, the review may identify alternative options for delivery of functionality that respects an ELNO's IP and confidential information claim.

In undertaking this analysis, the reviewer will also consider the guiding principles published by ARNECC, including that interoperability must allow for innovation.

These Terms of Reference recognise that interoperability does not require ELNOs to interoperate in respect of every function or feature available in their electronic workspace where those functions are not necessary to meet the requirements of OR 5.7.7. In conducting the review, the reviewer should identify (with reasons) such functions or features currently provided by an ELNO that are not necessary to meet the requirements of OR 5.7.7 and thus are outside the scope of the reviewer's recommendations.

Process for the Review

A detailed process for the review will be further developed by the reviewers engaged to complete the review.

Review participants will be given an opportunity to provide feedback on the process before finalisation by the reviewers.

Stages

At a high level it is anticipated that the review will involve the following stages:

1. Analysis by reviewers of existing material and preparation for workshops.
2. Workshop with each ELNO during which the ELNO will be required to outline the process followed by a Subscriber (including any data entered or received) and how non-interoperable transactions are processed for a specified set of Conveyancing Transactions.
3. Workshops with financial institutions or other Subscribers (if required).
4. Documentation of outcomes of the workshops.

Existing material analysed by the reviewers may include documentation collected as part of the relevant interoperability working groups and subcommittees, as well as industry documentation setting out the processes of eConveyancing (such as guidance provided by ELNOs, industry bodies such as law societies and Registrars and other regulatory bodies).

The review will take into account, outputs from the proposed cost benefit analysis as appropriate.

The review may be conducted in phases, including with respect to certain interoperable Conveyancing Transaction types and/or market segments, as appropriate.

Financial institutions, legal and conveyancing practitioners and other Subscribers (or their respective industry representative bodies) may be engaged to provide their views on the impact of any proposed recommendations of the reviewers. An ELNO may participate in these sessions with the approval of the reviewers. The reviewers may request an ELNO to participate in engagements with these parties.

IP /confidential information matters

The IP reviewer will consider the IP/CI Claim and the views of the ELNO making the IP/CI Claim. The reviewer may discuss the ELNO's views with the ELNO and request further documents and information from the ELNO relating to the IP/CI Claim if the reviewer considers it appropriate to do so.

Deliverables

The reviewers will produce one or more reports for ARNECC on the outcomes of the review. In the case of the IP expert the report(s) may take the form of a legal opinion.

These reports may be released in phases as determined by the reviewers, and may cover outcomes for certain transaction types and/or classes of Subscribers.

At an appropriate stage during the course of the review a determination will be made by ARNECC as to whether the reviewers prepare:

1. a functional scope document and associated artefacts (including documentation of key data elements) which can be shared with industry stakeholders.
2. any system, solution or design assumptions made (and related artefacts) used when determining this documentation; and
3. one or more process flows showing where in the workspace lifecycle each function is used.

Request to Review Participants

ELNOs are requested to:

- Make available relevant subject matter and technical experts to attend workshops with the reviewers upon reasonable notice.
- Conduct impact assessments to assess any impacts on the process for completion of a Conveyancing Transaction (including an associated financial transaction) that may occur as a result of the inclusion or exclusion of certain data elements, and provide results of these assessments to the reviewer.
- Provide all information required to support the review in a timely manner, including any information, whether confidential or proprietary, requested by the reviewers or any other experts engaged in the course of the review to support the review that is relevant to the scope of the review as set out in these Terms of Reference with such

disclosures subject to a non-disclosure agreement between the ELNO and reviewers as referred to below.

- Where there is an IP/CI Claim, to advise the reviewers as soon as possible. Such notice must be in writing and clearly identify and describe with particulars the ELNO's asserted interest and the legal and factual basis for the IP/CI Claim.
- The reviewers may request an ELNO to substantiate any claim made by the ELNO. The reviewers will be entitled not to accept any claim which they consider not to have been adequately substantiated.

Engagement of the Reviewers

The terms of the engagement will require the reviewers to conduct the review with due process and in an impartial manner. The reviewers must treat each ELNO fairly and on an equivalent basis, and ensure that there is procedural fairness in conducting the review.

All materials that the reviewers develop in the course of the review will be owned by ARNECC (except to the extent a document includes information which is the IP of a third party – the ownership of this IP will not be affected by its inclusion in any materials developed by the reviewers in the course of the review).

The role of the reviewers is to report and provide recommendations to ARNECC. The reviewers do not have powers to make determinations that are binding on ARNECC, the Registrars or ELNOs. However, the reviewers can make decisions as to the procedure and conduct of the review provided that doing so is not inconsistent with these Terms of Reference.

Skills

The technical reviewer will be required to have the following skills:

1. Understanding of complex integrations and API & data exchange design.
2. Subject matter expertise or the ability to draw from subject matter expertise in the following, as applicable:
 - a) Payments
 - b) E-conveyancing.

The IP reviewer will be required to have the following skills:

1. Understanding of complex intellectual property law in a digital environment.
2. Subject matter expertise or the ability to draw from subject matter expertise in the following, as applicable:
 - a) E-conveyancing
 - b) Interoperable computer/ software systems.

Confidentiality

Each reviewer will be required to sign a Non-Disclosure Agreement in favour of each ELNO and will conduct all workshops and other engagement with each ELNO separately.

Protection and retention of supporting information and documentation

The reviewers must create and maintain detailed records of all interactions with the review participants and all material relied upon in preparation of their report(s) and other deliverables.

The reviewers must have a facility to securely and confidentially retain all records for a period of seven years after the completion of the review.

Legal Privilege

The IP expert is engaged by ARNECC to provide legal advice to ARNECC and to assist the technical reviewer as a consultant for ARNECC. Any reports, work, opinions or other legal advice of the IP expert will be subject to legal professional privilege for the exclusive benefit of ARNECC and of the Registrars. The role of the IP expert is not to provide legal or other advice to ELNOs or third parties.

Requirement for the reviewers to conduct the review personally

The reviewers may not engage subcontractors or delegate any of their obligations.

Annexure 1

Release 1 Scope

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14	Exception handling	Exception handling for those errors and functional requirements not marked as out of scope
15	Auto Balance (1)	Refinance: The loan advance or the vendor surplus payment types may be automatically adjusted to balance the workspace financials.
16	Common indicators for transactions (1)	Providing indicators of common requirements or agreements for settlements between participants in a workspace, e.g., loan documents received by incoming mortgagee, or discharge authority received by discharging mortgagee.

Release 2 Scope

#	Requirement / Scope Item	Description
1	Representative subscribers	Ability to have representative subscribers join the workspace (rep subscribers for Incoming/Discharging Mortgagee, Caveator)
2	Capability-based RELNO switching	
3	Adding a caveator to a workspace	Ability to add the role of a caveator to a workspace
4	Attachment management	<ul style="list-style-type: none"> for dealings - Ability to upload attachments for dealings being registered - Mortgage and Caveat Delete attachments from workspace
5	Linked subscribers - linking and unlinking	Allow subscriber linking and any subsequent search and invitation-based outcomes for users.
6	Allow caveat and withdrawal of caveat	
7	Joining a workspace outside of invitations	Ability for a participant to join a workspace without an invitation
8	Invitation forwarding	The ability for ELNO users to forward an invitation to another subscriber
9	Single workspace settlement only	Linked Settlements are out of scope.
10	Multiple lodgement cases	Ability for a workspace to support multiple lodgement cases
11	All IOP data object CRUD for Day 2 (Document, Party, Participant, Financial line item, Invitations, etc.)	Ability to create, retrieve, update, & delete the required IOP data objects from workspaces via the Interoperability APIs

12	Express Refinance	Ability for a refinance transaction to be marked as an “Express Refinance”.
13	Attachment management	Workspace attachments – Ability to upload a non-document attachment to a workspace
14	Trust account as source account	The use of trust accounts as source funds for the purpose of ELNO transaction settlement
15	Linked lodgements	<p>Supports other properties that are to be used as a collateral, which forms a separate lodgment case.</p> <ul style="list-style-type: none"> •For IOP, this requires linking a standalone lodgement to a settlement or vice versa •The user will link a lodgement workspace to a settlement workspace, then once settlement is successful, the ELN platform will lodge the linked lodgement case with the land registry •Without this the FIs need to have a process outside the platform to remember to lodge the linked lodgement case
16	Reconciliation of transactions between RELNO and PELNO	Supports requirements from FIs where a payment is not processed correctly due to erroneous account details or errors in the payments process. This supports FI processes to ensure the funds get to the right recipient For e.g., to allow to resolution of Unapplied/misapplied funds

Release 3 Scope

#	Requirement / Scope Item	Description	Variations
1	All roles that enter the workspace	To allow Subscribers representing any party to be invited to or join workspaces.	To extend into additional roles and party capacities e.g., Lessor/Lessee, Trustee, etc.
2	Transfer & Supporting documents	Transfers and jurisdiction based supporting documents between Vendors and Purchasers e.g., Notice of Sale, Form 24.	Multiple transfers and duty assessments. VIC - inclusion of Complex Duty.
3	All Transfer and additional documents	The inclusion of Transfer and supporting documents, plus other documents in Transfer lodgment cases,	Extend to e.g., Caveat, Withdrawal of caveat (testing), Transmission Application, Survivorship, Notice of Death, Lease documents, etc. State based documents as required - e.g., Encumbrance in SA.
4	Dealing requirements (VIC only)	The ability to add dealing requirements to lodgment cases in VIC.	
5	Exotic lodgment cases	Multi-party lodgment cases assembled by combination of documents prepared by participants in either ELN, including combinations of Residual Documents.	
6	Requests/Distribution of Authority Calls by the Responsible and Participating ELNOs (SRO included)	Extending Authority calls functionality to include Stamp Duty Verification authority calls.	
7	All Payment Types	Inclusion of payment types previously left out of scope, e.g., BPAY, NPP, etc. <ul style="list-style-type: none"> • Bank account (source and disbursement), • Financial Institution Identifier (source), • BPAY (disbursement) and • NPP (disbursement). 	
8	Auto Balance (2	Transfer: Auto balance for practitioners involve purchaser/vendor surplus payments.	

9	Common indicators for transactions (2)	User workspace data - Flags	
10	International Disbursements	Collecting international banks details to process an international payment through e.g., SWIFT or IBAN.	
11	Linked Settlements	Supports directions from one settlement that are to be used as source funds for another conveyancing transaction.	
12	ATO (Australian Taxation Office)	ATO GST Withholding is a tax office requirement for which an API service is published and provided to ELNOs to integrate and streamline the forms and payments required for the transaction.	
13	ELN source accounts	Ability for a Purchaser or Vendors rep to use their ELN's source account in a workspace	

PEXA

Response to Question 6 (Hansard page 56):

The Hon. SUSAN CARTER: Was the intention of you writing to ARNECC and pointing out your claims in relation to intellectual property, and one of the reasons for writing that letter, in fact, to pause the ARNECC push towards interoperability, which you now in a circular way appear to be claiming is the reason that you're not going forward on interoperability because that has been paused?

RUSSELL COHEN: Do you want to take that? The letter predates me. As far as I understand that letter—it was before my time; I've only been in the role six months—

The Hon. SUSAN CARTER: Perhaps somebody who understands it could answer.

CLARE GILL: Damien was here at the time.

RUSSELL COHEN: Damien, do you want to take it?

DAMIEN MANUEL: Yes, I'll take that question. Before we issued the letter to ARNECC, there were a lot of additional problems with the interoperability scope and program of work. We had raised and flagged that there were issues around the risk, in terms of the program.

The Hon. SUSAN CARTER: With respect, I think we're going over old ground. The question was very specific. You have told us that the reason interoperability isn't proceeding has nothing to do with you; it has been paused by ARNECC. What role did you play—and, in particular, that letter—in causing ARNECC to pause the push towards interoperability?

Answer:

PEXA raised issues with the scope and feasibility of the interoperability program throughout its design period, including at the ministerial forum of 9 November 2023 and in subsequent correspondence copied to ARNECC members.

PEXA notes that the ARNECC statement of 20 September 2024 states:

Several years ago, ARNECC commenced its Interoperability Program to enable greater competition amongst ELNOs. ARNECC achieved considerable progress in developing interoperability with the support and collaboration of many stakeholders across the industry. However, as noted in the Ministers' Statement of 26 June 2024, significant issues were raised by the banking industry as part of this program of work. It is clear that the Interoperability Program faces significant challenges in delivering a solution that will be acceptable to industry and achieve

its purpose of promoting competition without these issues being resolved.
(ARNECC's Decision on Interoperability, 20 September 2024)

PEXA

Response to Question 7 (Hansard page 56):

DAMIEN MANUEL: I think that letter just highlighted one of many flaws with the program, and then it was a ministerial decision to pause the program.

The Hon. SUSAN CARTER: But the letter essentially threatened legal ramifications if the process continued, didn't it?

CLARE GILL: Can I just clarify. In relation to intent of the letter, my understanding is the intent of the letter—

The Hon. SUSAN CARTER: Ms Gill, you were there when the letter was written?

CLARE GILL: No, I wasn't, but I have spoken to people.

Ms ABIGAIL BOYD: Can you provide the letter?

The Hon. SUSAN CARTER: Perhaps those people could provide us with information, then.

CLARE GILL: We can give you that question on notice. We will talk to the person there. But if I can just correct—you want to know what the intent was of sending the letter. Is that correct?

The Hon. SUSAN CARTER: One of the many questions I have about that letter.

Answer:

PEXA disputes the characterization that the letter to ARNECC was threatening. Specifically, it notes that PEXA “has sought to engage constructively with the interoperability program and will continue to do so.”

A copy of the letter is attached.

19 December 2023

By E-mail

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

Copy to:

Jenny Cottnam, Registrar-General, South Australia
Nikki Alder, CEO, Titles Queensland
Melissa Harris, Registrar of Titles, Victoria
Jane Allan, Manager, Land Use Victoria Legal & Deputy
Registrar of Titles
Bruce Roberts, Registrar of Titles, Western Australia
Robert Manning, Recorder of Titles, Tasmania

Your Ref

File No.

Contact

Justin Vaatstra

Partner

Leon Zwier

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 Sympli 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.¹ 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.² 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.

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

² 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:³

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:⁴

- *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.⁵ As to constraints on innovation, the IGA Review Report expressly noted that:⁶

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*".⁷ The IGA Review Report therefore defined interoperability as no more than "*...the ability of two or more ELNs to exchange*

³ Parliament of New South Wales, Legislative Assembly Hansard, 15 February 2022.

⁴ IGA Review Report at [5.157].

⁵ IGA Review Report at [5.169]-[5.170].

⁶ IGA Review Report at [5.170].

⁷ IGA Review Report at [5.169], [5.171].

*information and use the information to complete a multi-party transaction”.*⁸ 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.*”⁹ .
- 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.¹⁰
- 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.¹¹ 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.

⁸ IGA Review Report at [5.161].

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

¹⁰ IGA Review Report at [5.170].

¹¹ 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.¹² An inconsistency can arise from the practical effect of State law on rights created by federal legislation.¹³

- 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.¹⁴ 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.¹⁵
- 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:

¹² *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).

¹³ *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).

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

¹⁵ *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);¹⁶ 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”).¹⁷

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

¹⁶ IPART Report at 16.

¹⁷ 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