Dr Sean Turner
Committee Secretary
Senate Economics References Committee
Parliament House
SYDNEY NSW 2000

Dear Dr Turner,

Re: Inquiry into micro-competition opportunities

On behalf of the NSW Productivity and Equality Commission (the Commission) I welcome the opportunity to make a submission to the inquiry into micro-competition opportunities in the Australian economy in relation to e-conveyancing.

The Commission is focused on driving economic reform to boost productivity and increase living standards. The Commission's priorities include fit-for-purpose regulation and efficient and competitive NSW industries.

eConveyancing is an important national market. Around 3.7 million eConveyancing transactions were processed nationally in the financial year ending June 2023.

The costs of eConveyancing are borne by buyers and sellers of property, including first home buyers. Effective competition in the eConveyancing market will ensure the costs of transactions are not higher than necessary and there is a choice of provider for users of these services.

I attach the Commission's eConveyancing market study for your consideration. The market study examines:

1. the effectiveness of competition in the eConveyancing market
2. the best ways of promoting long-term competition, building on the ongoing interoperability reform that will enable eConveyancing transactions to occur across different platforms.
3. resourcing (including sources of funding), governance, and regulatory structures needed to ensure a sustainable and long-term competitive eConveyancing market.

Yours sincerely,

Peter Achterstraat AM

NSW Productivity and Equality Commissioner

4 March 2025

NSW Productivity and Equality Commission

eConveyancing market study

June 2024

NSW GOVERNMENT

Acknowledgement of Country

We acknowledge that Aboriginal and Torres Strait Islander peoples are the First Peoples and Traditional Custodians of Australia, and the oldest continuing culture in human history.

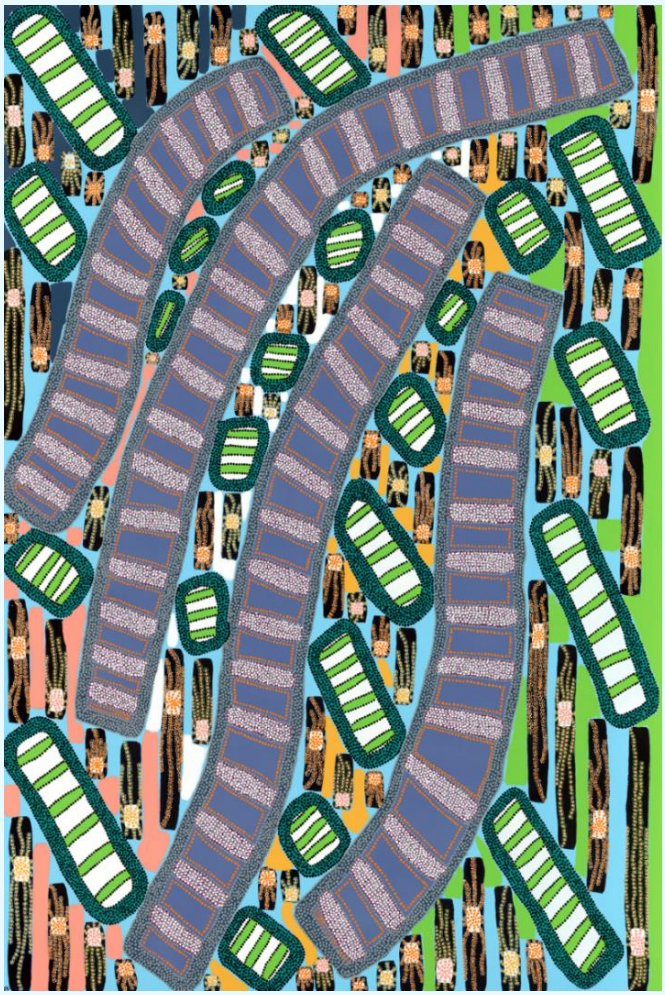
We pay respect to Elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to Country and acknowledge their continuing custodianship of the land, seas, and sky.

We acknowledge the ongoing stewardship of Aboriginal and Torres Strait Islander peoples, and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families, and communities, towards improved economic, social, and cultural outcomes.

Artwork:
Regeneration by Josie Rose



About the NSW Productivity and Equality Commission

The NSW Productivity and Equality Commission (formerly the NSW Productivity Commission) was established by the NSW Government in 2018 under the leadership of its inaugural Commissioner, Peter Achterstraat AM.

Productivity growth is essential to ensure a sustained growth in living standards for the people of New South Wales, by fully utilising our knowledge and capabilities, technology and research, and physical assets. The Commission is tasked with identifying opportunities to boost productivity growth in both the private and public sectors across the state. The Commission seeks to continuously improve the NSW regulatory policy framework and identify levers that can increase competition to deliver better and more affordable goods and services for NSW residents.

The Commission's priorities include:

- productivity and innovation
- fit-for-purpose regulation
- efficient and competitive NSW industries
- climate resilient and adaptive economic development.

The Commission provides objective, evidence-based advice to the Government.

In 2024, Mr Achterstraat was reappointed for a further two years in the expanded role of Productivity and Equality Commissioner. In performing its functions, the Commission considers equity and how costs and benefits are distributed across the community and over time. For instance, the Commission's research on housing examines the equity and environmental benefits of policies and reforms to improve housing affordability, beyond the overall productivity and economic benefits.

The Commission regularly engages with stakeholders to ensure its research and recommendations are well-informed and to encourage a public conversation on productivity reform.

Disclaimer

The views expressed in this paper are those of the NSW Productivity and Equality Commission alone, and do not necessarily represent the views of NSW Treasury or the NSW Government. The NSW Productivity and Equality Commission's recommendations only become NSW Government policy if they are explicitly adopted or actioned by the NSW Government. The NSW Government may adopt or implement recommendations wholly, in part, or in a modified form.

Abbreviations

Acronym	Term
ACCC	Australian Competition and Consumer Commission
AFSL	Australian Financial Services Licence
AIC	Australian Institute of Conveyancers
ARNECC	Australian Registrars' National Electronic Conveyancing Council
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
CCA	Competition and Consumer Act 2010 (Cth)
CFR	Council of Financial Regulators
CPI	Consumer Price Index
DCF	Discounted Cash Flow
EBITDA	Earnings before Interest, Taxes, Depreciation, and Amortisation
eC1	eConveyancing Payments Industry Code
ECNL	Electronic Conveyancing National Law
ELN	Electronic Lodgment Network
ELNO	Electronic Lodgment Network Operator
ESB	Enterprise Service Bus
HHI	Herfindahl-Hirschman Index
IP	Intellectual property
LOI	Ladder of investment
MOR	Model Operating Requirements
MPR	Model Participation Rules
NECDL	National E-Conveyancing Development Limited
NECDS	National Electronic Conveyancing Data Standard
NECIDS	National Electronic Conveyancing Interoperability Data Standard
NSW PEC	NSW Productivity and Equality Commission

Acronym	Term
PEXA	Property Exchange Australia Limited
RBA	Reserve Bank of Australia
RITS	Reserve Bank Information and Transfer System
RDS	Residual Document Spreadsheet
TPA	Trade Practices Act 1974 (Cth)
USO	Universal Service Obligation

Glossary

Term	Definition
eConveyancing	The electronic systems and processes used to perform certain steps in the conveyancing process.
First mover advantage	'[T]he ability of pioneering firms to earn positive economic profits (i.e. profits in excess of the cost of capital)' and is achieved primarily through technological leadership, pre-emption of assets, and the existence of switching costs (Lieberman and Montgomery 1988, p. 41).
Interoperability	The systems and processes to facilitate the exchange of data between ELNOs, to enable a subscriber to use their ELNO of choice to complete a transaction, regardless of the ELNO used by the other parties to the transaction.
Monopoly	A monopoly exists where one company is the only supplier of a product or service, with no readily available substitute.
Natural monopoly	When it is most economically efficient to have a single supplier of a product or service in a market.
Network effects	Where 'the value of membership to one user is positively affected when another user joins and enlarges the network' (Katz and Shapiro 1994, p. 94).
Oligopoly	An oligopoly occurs when two, or a handful of, companies supply a product or service. The products or services may be slightly differentiated, however, consumers consider them to be close substitutes.
Registrar	The person responsible for administering the ECNL and land titles legislation in each state and territory.
Subscriber	'[A] person who is authorised … to use an ELN to complete conveyancing transactions on behalf of another person or on their own behalf' (Electronic Conveyancing (Adoption Of National Law) Act 2012, (NSW), sec. Appendix).
Universal Service Obligation	A Universal Service Obligation (USO) is a legislative arrangement designed to protect consumers of an essential service by ensuring that everyone has equitable access to that service, regardless of where they live or work. USO arrangements in respect of telecommunications, postal, energy, and water services are common in OECD countries.[1]

[1] Note there is no precise definition of a USO as arrangements vary across countries and industries. That said, some crucial features of USO arrangements include an obligation for an operator to offer either a full range or a basic package of services, which are of good quality to all users at affordable rates (Cremer et al. 2011).

Contents

Findings and recommendations

Competition is beneficial and can be supported by the eConveyancing market but there are barriers to entry

Our market study finds that the eConveyancing market is not a natural monopoly and that competition would be beneficial, both to the eConveyancing market and to other related sectors.

We also show that the current market for eConveyancing is not effectively competitive, as demonstrated by high levels of market concentration and the incumbent Electronic Lodgment Network Operator (ELNO) earning high profits.

We find that there are a number of barriers to entry to the eConveyancing market, including strong network effects, the current policy framework, and the incumbent ELNO benefitting from 'first mover' advantage due to its technological leadership, eConveyancing mandates, and the existence of switching costs.

Recommendation	Detail
Recommendation 1	ARNECC should ask the Australian Treasury to request the ACCC to immediately conduct a comprehensive review of the current price control arrangements relating to eConveyancing services (the 'Review of eConveyancing price control arrangements'). This review should identify the efficient economic costs of providing eConveyancing services in Australia and recommend appropriate amendments to the current price control arrangements. Specifically, consideration should be given to the merits of moving to a weighted average price cap arrangement which would require ELNOs to reduce prices over time to appropriately reflect the underlying economic costs of provision as well as ongoing cost savings from productivity improvements. If the ACCC does not have capacity to undertake this review in a timely manner, ARNECC should consider approaching the Australian Treasury to request that the Commonwealth Productivity Commission undertake this review and report its findings publicly. If the Review recommends changes to the current price control arrangements, ARNECC should move quickly to reflect this in the MOR.
Recommendation 2	ARNECC to develop and publish a detailed industry roadmap for achieving the launch of interoperability by December 2025. This roadmap should include a detailed timeline setting out target dates for key milestones. This recommendation should be implemented without delay.
Recommendation 3	ARNECC (or individual Registrars) should impose regulatory requirements on all ELNOs to meet specific key milestones to achieve the interoperability date of December 2025. Failure by an ELNO to comply with these milestones should be enforced by ARNECC or individual Registrars — likely New South Wales and/or Queensland as the first states scheduled to implement interoperability — including by pursuing financial penalties under the *Electronic Conveyancing Enforcement Act 2022* (NSW). This recommendation should be implemented without delay.

Recommendation 4	Consideration by ARNECC and the ACCC should be given to removing requirements in the MOR that create barriers to entry in the eConveyancing market.
Recommendation 5	Ongoing price regulation of eConveyancing services should only apply to those provided by ELNOs which can be demonstrated to have substantial market power. Price regulation should be immediately removed from the services provided by ELNOs that do not have substantial market power.
Recommendation 6	ARNECC should update Section 18 of the MOR to include an obligation on all licensed ELNOs to provide ARNECC with a confidential report on a quarterly basis that sets out the following: • Any and all differences in service fees that it charges different subscriber types, including, but not limited to, any discounts (including volume discounts or whole-of-business discounts), credits, or rebates applied to a subscriber's bill. • The period of time for which these differences in service fees have been in place. • The commercial basis on which any differential charging — including any discounts, credits, or rebates — was offered. • The volume of transactions that have benefited from the differential service fees in the relevant reporting period, in the previous 12 months and since the differential service fees were first charged. • For each subscriber type, the total economic value (in nominal dollars) of any differential service fees offered — including any discounts rebates and credits — in the relevant reporting period, in the previous 12 months and since the differential service fees were first charged. In providing for this power in the MOR, ARNECC should make explicit that it can provide this data to other relevant regulatory or policy-making bodies, such as the ACCC (see recommendation 11), in order to carry out relevant regulatory functions.
Recommendation 7	States and territories should expedite the transfer of ownership and responsibility for all eConveyancing technical and data standards from PEXA to NECDS Ltd, to ensure fair and equal access to the standards and objective oversight and management of the standards.
Recommendation 8	ARNECC should expedite the legally binding formal resolution of any IP issue in an appropriate manner to support the achievement of ARNECC's interoperability timeline. If the incumbent does not agree to share all relevant technical standards with ARNECC's Interoperability Design Committee in a timely fashion consistent with ARNECC's interoperability timeline, or otherwise provide ARNECC with a formal legal basis on which it claims IP over the relevant standards, ARNECC or individual Registrars (or any other interested party) should immediately refer the incumbent to the ACCC for investigation on grounds that its conduct may amount to a breach of section 46 of the *Competition and Consumer Act 2010* (Cth).

The market needs a fit-for-purpose policy and regulatory framework that differs from the current framework

Our market study finds that, while the current industry regulator — ARNECC — may have been well-placed to perform this role to date, consideration needs to be given as to whether this still holds true going forward.

We show that ARNECC is under-resourced, and that several elements of its structure constrain its ability to act quickly. We also demonstrate that the financial settlement and competition components of eConveyancing are not currently adequately addressed.

We flag that the eConveyancing market needs a fit-for-purpose policy and regulatory framework. To achieve this, we recommend both setting up a regular meeting between ARNECC and the Council of Financial Regulators (CFR), and moving market oversight and monitoring to a different regulatory body. We also recommend leveraging and expediting existing processes, including the new licencing framework for payment service providers, the eConveyancing Payments Industry Code (eC1), and the Australian Government's Competition Review.

Recommendation	Detail
Recommendation 9	Members of ARNECC and the CFR should be equally represented in a body that meets quarterly to discuss policy and regulatory matters relevant to the financial settlement component of eConveyancing. The ACCC should also attend this meeting in the capacity of an observer and an adviser on competition matters relevant to financial settlement issues. This recognises that eConveyancing financial settlement is subject to a number of regulatory regimes and that a level of coordination is required to ensure comprehensive and nationally consistent regulatory oversight.
Recommendation 10	ARNECC should receive annual funding to appropriately resource its ongoing activities. Accordingly, ARNECC should be required to submit to the Australian Treasury every three years a forward-looking funding and fee proposal. This proposal should set out: 1. A proposed annual budget for each of the two financial years in the period detailing: a. The value of any financial assets or liabilities of ARNECC as at the date the proposal was prepared by ARNECC. b. A description of the activities to be undertaken by ARNECC and their expected benefits to the eConveyancing industry. c. An estimate of the financial resources required by ARNECC to complete the proposed activities, including any FTE staffing requirements. The basis on which this estimate was calculated should be detailed. d. What resources, including any FTE staffing requirements, that are required to support the ongoing day-to-day activities of ARNECC during the financial year. The basis on which this estimate was calculated should be detailed. e. Detailing the expected costs to be incurred by the ACCC in performing its eConveyancing market oversight and monitoring activities. The basis on which these costs have been estimated should be detailed. 2. An ELNO operating fee proposal detailing how much each operating ELNO should contribute to recover the cost of ARNECC's proposed

	activities based on their respective market share of total national eConveyancing transactions in the previous financial year. 3. The ELNO operating fee should include the licence fee to NECDS Ltd. The Australian Treasury should approve ARNECC's forward-looking funding and fee proposal if it deems the proposal to be reasonable. If the Australian Treasury forms the view that the funding and fee proposal is not reasonable it must notify ARNECC and the ACCC of its decision and request that ARNECC submit a revised proposal within 20 business days. If the Australian Treasury forms the view that ARNECC's fee proposal is not reasonable due to the expected costs to be incurred by the ACCC, then the ACCC must provide an updated costs estimates for the period to ARNECC so that ARNECC can resubmit a forward-looking funding and fee proposal within 20 business days.
Recommendation 11	ARNECC, state and territory governments, and the Australian Government should give consideration to the ACCC becoming responsible for the ongoing market oversight and monitoring of the eConveyancing market in Australia. This new role should be additional to the ACCC's current competition law enforcement role with respect to the eConveyancing market. Specifically, the ACCC should become responsible for: • monitoring and overseeing the eConveyancing market in all jurisdictions on an ongoing basis • periodically reviewing the price control arrangements applying to ELNOs which have significant market power (See recommendations 1 and 6) • monitoring of compliance and enforcement of competition-related ELNO regulatory requirements • providing advice to ARNECC about competition and market structure issues relating to eConveyancing.
Recommendation 12	Given the ACCC's current functions with respect to digital platforms, consideration should be given as to whether the ACCC's new role in respect of the ongoing market oversight and monitoring of the eConveyancing market warrants the establishment of a dedicated Digital Platforms Regulation Branch of the ACCC. If so, the Australian Government should make available to the ACCC the necessary resources to establish this additional branch of the ACCC along with the appointment of a dedicated ACCC Digital Platforms Commissioner.
Recommendation 13	The ACCC's roles and functions with respect to the eConveyancing market should be funded via annual ELNO operating fees set by ARNECC on a three-yearly basis in consultation with the ACCC and the Australian Treasury (see recommendation 10).
Recommendation 14	From time to time as appropriate, but no less than every five years, ARNECC should issue the ACCC with a formal Statement of Expectations providing it with direction on relevant government policies and operational priorities. The Statement of Expectations should be published by the ACCC.
Recommendation 15	No more than three years after the introduction of interoperability, ARNECC should initiate a competition and regulatory review of the eConveyancing market in Australia. This review should consider the extent

	to which competition for eConveyancing services has been promoted by interoperability and other regulatory reforms, the ongoing existence of material barriers to entry, the effectiveness of the regulatory framework, and other competition related matters. This study should also make recommendations regarding ongoing improvements to the regulatory and policy framework that support the ongoing promotion of competition in the market for eConveyancing.
Recommendation 16	The implementation of the AusPayNet Code should be expedited and, simultaneous with the implementation, the eConveyancing regulatory framework amended to require ELNOs to participate in and comply with the Code.
Recommendation 17	State and territory governments should refer concerns about the absence of effective competition in the eConveyancing market to the Australian Government's Competition Review.
Recommendation 18	As part of its Competition Review, the Australian Government should consider whether the *Competition and Consumer Act 2010* (Cth) is sufficient for dealing with potential anti-competitive conduct in the eConveyancing market and other competition matters related to digital platforms. Specific consideration should be given to: • Developing an access regime for digital platforms to deal with nationally significant services that develop strong network effects. • Amending Part XIB of the *Competition and Consumer Act 2010* (Cth) to also apply to the eConveyancing industry. • Introducing provisions into Part IV of the *Competition and Consumer Act 2010* (Cth) that prohibit a digital platform provider with a substantial degree of market power from exploiting that power.

1 Introduction

Electronic conveyancing (eConveyancing) is a significant national reform that has been made possible by substantial cooperation between state and territory governments, Electronic Lodgment Network Operators (ELNOs), financial institutions, and participants from across the property, legal, and conveyancing sectors.

To date, the adoption and use of eConveyancing has delivered substantial benefits to industry and users, including time and cost savings, and improved transaction accuracy. These benefits have grown significantly over the last five years as states and territories have progressively adopted and promoted eConveyancing and, in some cases, mandated its use to phase out traditional paper-based processes.

The NSW Productivity and Equality Commission (NSW PEC) regularly conducts reviews to identify opportunities to boost productivity growth in both the private and public sectors across New South Wales. We also undertake studies that look at the design of particular markets — 'market studies' — to assess their effectiveness.

We are undertaking this market study for three reasons:

1. It has been around five years since the NSW Government mandated eConveyancing. Given this, it is timely to examine the market to identify any structural or policy impediments preventing it from achieving the intent of the reform.
2. Housing affordability is a major issue impacting productivity growth in New South Wales. Given this, the NSW PEC's White Paper 2021*: Rebooting the economy* and recent housing paper series focus on reforms to make housing more affordable for NSW residents, including recommending progressing interoperability to promote competition in the eConveyancing market.
3. The Australian Government is currently undertaking a Competition Review, which will provide advice on competition issues raised by new technologies to ensure competition policy settings make the most of digitisation and reduce the costs of doing business.

Our purpose in undertaking this market study was to examine the:

- effectiveness of competition in the eConveyancing market
- options for promoting long-term competition, building on the current interoperability reform
- resources (including sources of funding), governance, and regulatory structures needed to ensure a sustainable and long-term competitive eConveyancing market.

While reviewing the technical model for interoperability was outside the scope of this market study, we note that the current interoperability program should be continued on the strong expectation it will promote competition for eConveyancing services both at the wholesale and retail levels of the market. We recognise, however, that some stakeholders have concerns about the interoperability reform and have given further thought to the nature of any regulatory reforms that could be implemented if interoperability cannot be achieved in a timely manner in **appendix B**.

In preparing this market study, we have drawn on insights from consultations with state and territory Registrars, ELNOs, industry peak bodies, regulators, and competition experts (see **appendix A**). We have supplemented these insights with desktop research including a literature review and quantitative analysis drawing on publicly available data.

We have structured this market study as follows:

- **Chapter 2** summarises the current state of the eConveyancing market.
- **Chapter 3** outlines the benefits of competition and demonstrates that the eConveyancing market in Australia can support competition. It also identifies some barriers to entry that could dampen competition unless appropriately addressed.
- **Chapter 4** identifies issues with the current regulatory framework and the need for a fit-for-purpose policy and regulatory framework to support and promote competition.

2 The market for eConveyancing has evolved over time

2.1 eConveyancing involves the electronic lodgment of registry instruments and settlement of associated financial transactions

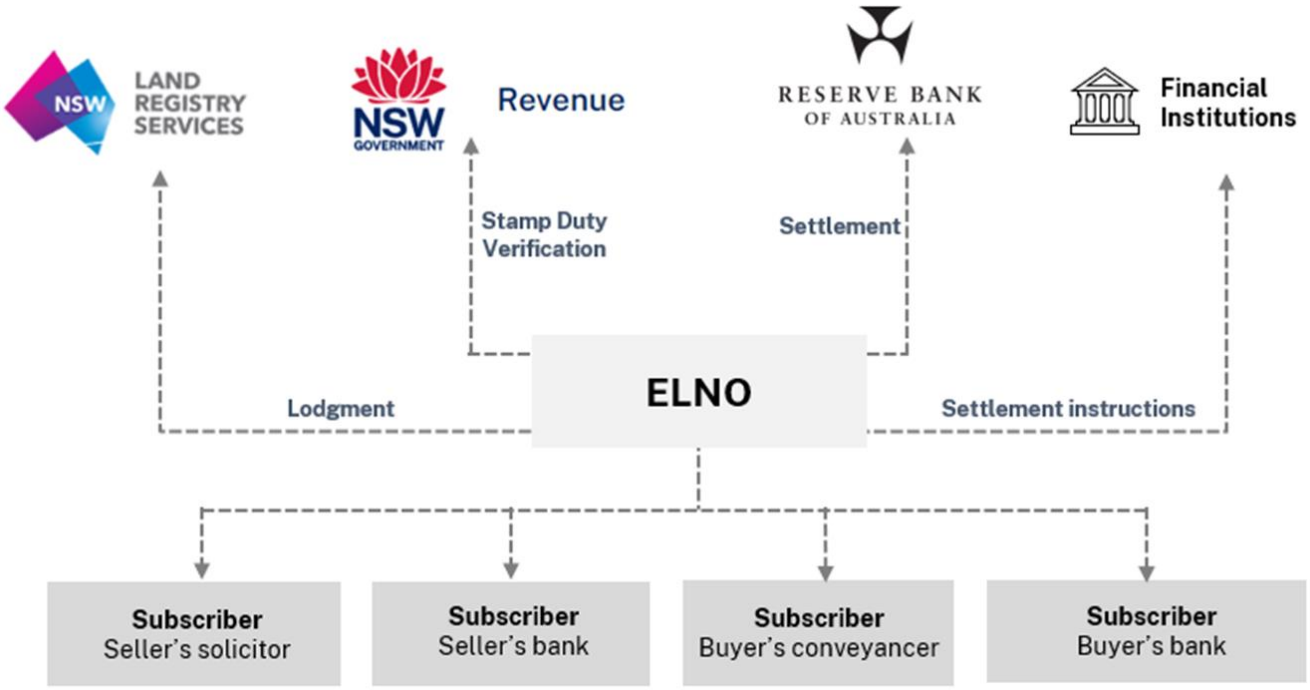
Electronic conveyancing (eConveyancing) describes the electronic systems and processes used to perform certain steps in the conveyancing process. Specifically, it includes:

- **Lodgment of registry instruments** – electronic lodgment of registry instruments and other documents with a land registry, to change interests in land. For example, registering a mortgage or transferring ownership.
- **Settlement of financial transactions –** electronic processes to initiate and complete the payment of funds which are part of a conveyancing transaction. For example, payment of funds to discharge a mortgage or payment of the purchase price under a contract of sale (IPART 2019).

Prior to eConveyancing, these steps involved physical, paper-based processes — physically lodging paper documents at the land registry and exchanging cheques to complete financial settlement. This process was time-consuming and usually involved the parties to a conveyancing transaction having to travel to lodge or exchange documents in person.

eConveyancing services are provided by Electronic Lodgment Network Operators (ELNOs) which facilitate and perform lodgment and settlement processes on behalf of subscribers — generally the conveyancers, lawyers, and banks acting on behalf of the transacting parties (IPART 2019). This is shown in **Figure 1**. These electronic processes can be completed remotely and at different times.

Figure 1: The eConveyancing process



Source: Office of the Registrar General 2023, 14.

Australia's eConveyancing system is a world first and has delivered significant benefits to industry and the broader community. These benefits include time and cost savings, faster delivery of settlement funds, and improved transaction accuracy (ACCC 2019). This is because the previous paper-based system required a high level of coordination between the various parties. These benefits have grown significantly over the last five years as states and territories have progressively adopted and promoted eConveyancing, and in some cases, mandated the use of eConveyancing instead of traditional paper-based processes.

2.2 eConveyancing started as an Australian Government initiative

In 2008, the Council of Australian Governments (COAG) agreed to develop eConveyancing as part of its *National Partnership to Deliver a Seamless National Economy*. This initiative led to two key developments:

1. In 2010, the establishment of National E-Conveyancing Development Limited (NECDL), a company limited by guarantee formed to design and implement a national eConveyancing platform.
    a. The initial shareholders were the governments of New South Wales, Victoria, and Queensland, with Western Australia joining later that year.
    b. In 2011, NECDL was converted to a company limited by shares and the four major banks became shareholders. The government shareholders maintained a majority shareholding. NECDL changed its name to Property Exchange Australia Limited, commonly referred to as PEXA.
2. In 2011, all states and territories signed the Intergovernmental Agreement (IGA) for an *Electronic Conveyancing National Law* (ECNL) (see **section 2.3**) – the IGA established the Australian Registrars' National Electronic Conveyancing Council (ARNECC), comprising Registrars from each state and territory, to develop and oversee the national regulatory framework for eConveyancing (ARNECC 2018).

From 2013, eConveyancing commenced and progressively expanded with government and industry support:

- States and territories started accepting eConveyancing transactions, starting with New South Wales and Victoria, followed by Queensland in 2013, Western Australia in 2015, South Australia in 2016, and the Australian Capital Territory in 2021 (PEXA n.d.a).
- From 2016, some states commenced mandating eConveyancing (see **Table 1**) and phasing out paper-based conveyancing. These mandates led to a surge in eConveyancing transactions and rapid uptake by industry.

PEXA became wholly privately owned in January 2019 when states sold their interests in the company as part of the acquisition by Link Group, Morgan Stanley Infrastructure Inc, and the Commonwealth Bank of Australia (PEXA n.d.a). Today, PEXA is a publicly listed company on the Australian Stock Exchange (ASX) with a market capitalisation of approximately $2.2 billion (AUD) as at 11 March 2024 (ASX 2024). PEXA's largest shareholder is the Commonwealth Bank of Australia, which owns 23.9 per cent of the issued ordinary shares (PEXA 2023a).

Table 1: Timeline for mandating eConyancing (by jurisdiction)

Jurisdiction	Effective date	Documents in scope
New South Wales	1 July 2019	Transfers, mortgages and discharges of mortgages, caveats and withdrawals of caveats, and transmission applications
	11 October 2021	All other documents

Jurisdiction	Effective date	Documents in scope
South Australia	3 April 2017	Discharges of mortgages
	12 February 2018	Mortgages
	3 August 2020	All other documents
Victoria	1 August 2016	Standalone discharges of mortgages for non-commercial properties and new mortgages if mortgagee is an Authorised Deposit-Taking Institution (ADI)
	1 August 2017	Mortgages and refinances involving ADIs
	1 December 2017	Refinances, standalone caveats, withdrawals of caveats, transfers, and survivorship applications
	1 October 2018	Mainstream documents
	1 August 2019	Residual documents
	4 March 2024	Any instrument made available electronically
Western Australia	1 December 2018	Transfers, mortgages and discharges of mortgages, caveats and withdrawals of caveats
Queensland	20 February 2023	Transfers, mortgages and discharges of mortgages, caveats and withdrawals of caveats, priority notices and withdrawal and extension of priority notices, and transmission applications

Source: Office of the Registrar General 2019; Office of the Registrar General n.d.; Government of South Australia – Office of the Registrar General 2020; Land Services SA n.d.; Department of Transport and Planning 2024; Landgate 2018; Titles Queensland n.d.

Note: These dates are subject to state-specific exemptions — e.g. for non-represented parties. Refer to the source documents for full details.

2.3 The eConveyancing market is governed by the Electronic Conveyancing National Law

The primary legislation governing eConveyancing is the Electronic Conveyancing National Law (ECNL). The ECNL is uniform national legislation which is implemented in New South Wales as the host jurisdiction and adopted by each state and territory. Registrars in each jurisdiction are responsible for administering and enforcing the ECNL in their jurisdiction.

Under the ECNL, Registrars determine rules that apply to eConveyancing participants. These include Operating Requirements — which apply to ELNOs — and Participation Rules — which apply to subscribers. The Operating Requirements and Participation Rules are based on Model Operating Requirements (MOR) and Model Participation Rules (MPR) developed by ARNECC to promote nationally consistent regulation.

Each Registrar is responsible for approving ELNOs to operate in their jurisdiction and monitoring and enforcing compliance with the regulatory framework. Regulatory and compliance matters are

frequently referred to ARNECC for consideration, to maintain national consistency where possible (see **section 2.3.1**).

2.3.1 ARNECC facilitates the implementation and ongoing management of the eConveyancing policy and regulatory framework

ARNECC is the Council established to facilitate the implementation and ongoing management of the policy and regulatory framework for eConveyancing. Its members are the Registrars (or their nominees) from each state and territory (ARNECC 2011).

As a council of Registrars, ARNECC does not have formal legal status, compliance, or enforcement functions. Its primary functions are:

- developing eConveyancing policy, with the aim of maintaining national consistency where possible
- reviewing the ECNL and proposing changes where appropriate
- developing MOR and MPR, which are implemented by Registrars in their own state or territory
- coordinating oversight of ELNOs and subscribers at the national level, and providing recommendations to Registrars on compliance matters, including:
  - assessing ELNO applications for compliance with the MOR at different stages, including the initial application (Category One)[2] and prior to the ELNO commencing operating in any jurisdiction (Category Two)[3]
  - annual compliance reviews
  - national oversight of subscriber compliance through a Subscriber Compliance Working Group and a national Subscriber Compliance Examination process adopted by all states and territories, subject to minor differences for jurisdiction-specific requirements.

2.3.2 The eConveyancing legislative framework is supplemented by other regulatory and self-regulatory arrangements

The ECNL framework is primarily directed to the *lodgment* component of an eConveyancing transaction — this reflects the historical role of Registrars as custodians of land registries and their oversight of and responsibility for land titling and registration.

The financial settlement component of eConveyancing is not comprehensively regulated through the ECNL regulatory framework — it is supplemented by other regulatory and self-regulatory arrangements:

- The **Australian Financial Services Licence (AFSL) regime** – ELNOs are providers of "non-cash payment" services under the AFSL regime in the *Corporations Act 2001* (Cth). Both operating ELNOs currently hold a conditional exemption of the requirements to hold an AFSL (ASIC 2019; ASIC 2020).
- The **eConveyancing Payments Industry Code (eC1)** – ELNOs and banks are members of a self-regulatory industry code that applies to eConveyancing payments. The Australian Payments Network (AusPayNet) led the development of the eC1 based on a recommendation of the Council of Financial Regulators (CFR) in 2021. The eC1 'provides regulations and operating procedures to ensure that all parties involved in eConveyancing financial transactions have a common set of rules and mutually understood obligations' (AusPayNet 2023). The eC1 addresses a range of matters including messaging standards, technical requirements, settlement models, and dispute resolution. While the AusPayNet Board approved the eC1 on 31 August 2023, it has not yet taken

[2] Category One refers to the initial compliance checkpoint at schedule 3 of the OR that permits an ELNO to commence building its ELN and developing its operations.

[3] Category Two refers to the second compliance checkpoint schedule 3 of the OR that permits an ELNO to commence providing ELN services once it has obtained approval to operate in a jurisdiction.

effect (ARNECC 2023d). The CFR has recommended that the eC1 is operationalised by mid-2024 and that it be adopted by banks and ELNOs. ARNECC, AusPayNet, and eC1 members are working to meet this timeframe.

- The **Reserve Bank Information and Transfer System (RITS) regulations** – The current operating ELNOs use the RITS to effect batch settlement of eConveyancing payments (RBA 2024). Consequently, ELNOs must comply with the RITS regulations.

2.3.3 Management of the eConveyancing data standards is being transitioned to NECDS Limited, a state-controlled entity

The National Electronic Conveyancing Data Standard (NECDS) is the data standard that governs the exchange of data between ELNOs and land registries, to enable the electronic lodgment of registry instruments (ARNECC 2019).

The NECDS was developed collaboratively between ARNECC, land registries, and PEXA (or NECDL, as it was initially). Changes to the NECDS are managed by PEXA. This is a legacy arrangement that recognises that PEXA, as the only operating ELNO from when eConveyancing was established until Sympli's approval in 2019, was best placed to coordinate changes and updates to the NECDS with the land registries.

As eConveyancing transitions to a competitive market, it is no longer appropriate for PEXA to play a central role in maintaining the NECDS. ARNECC and PEXA have reached in-principle agreement to transfer responsibility and control of the NECDS to a state and territory-controlled and -owned entity, NECDS Ltd. It is expected that management of the NECDS will be transferred to NECDS Ltd in late 2024 (ARNECC 2023d).

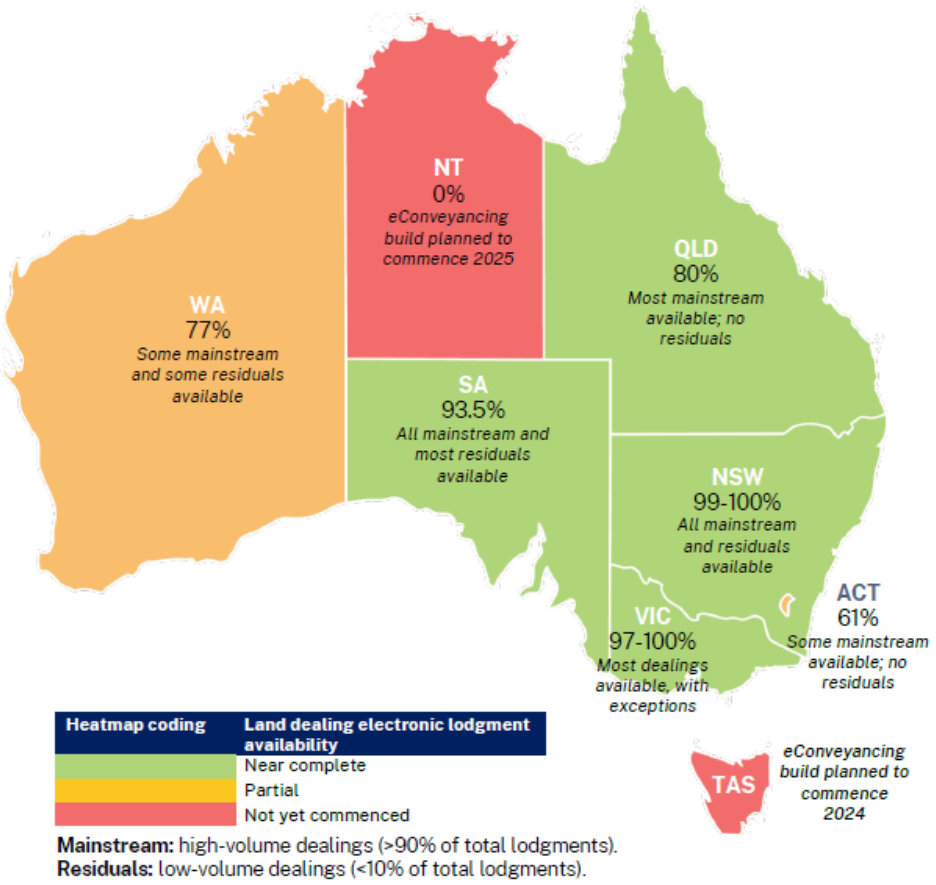
In addition to the NECDS and its related artefacts, there are two other eConveyancing data standards:

- The **Residual Document Spreadsheet (RDS)** is an artefact that draws on the data specifications in the NECDS to create a framework for generating residual documents, which comprise approximately 90 per cent of total document types, but fewer than 10 per cent of lodgment volumes (ARNECC 2023d). It is proposed that management of the RDS will pass to NECDS Ltd with the NECDS.
- The **National Electronic Conveyancing Interoperability Data Standard (NECIDS**) governs the exchange of data between ELNOs to facilitate interoperable transactions (see **section 2.4.2**). The NECIDS is currently being developed collaboratively between ARNECC representatives and ELNOs through ARNECC's Interoperability Design Committee. Once the NECIDS is further developed, ownership and responsibility may be transferred to NECDS Ltd to manage changes together with the NECDS, although this has not yet been conclusively determined (ARNECC 2023d).

2.4 eConveyancing is available in most Australian jurisdictions

eConveyancing is currently available in all states and territories, except Tasmania and the Northern Territory. **Figure 2** shows the availability and uptake of eConveyancing across Australia.

Figure 2: Update of eConveyancing by jurisdiction



Source: ARNECC 2023d, 6.

There are currently two ELNOs operating in the eConveyancing market:

- **PEXA** is approved to operate in all operating jurisdictions. It finalised its payment connections with Australia's big four banks in November 2013 (PEXA n.d.a). PEXA was formerly government-owned but was privatised in January 2019.
- **Sympli** is a joint venture between InfoTrack — a legal software provider owned by Australian Technology Innovators — and ASX Ltd (ASX 2018). ASX Ltd announced the partnership on 31 May 2018. Sympli achieved Category Two compliance from ARNECC in November 2018 and is approved to operate in all operating jurisdictions except the Australian Capital Territory (ORG 2018; ARNECC n.d.). Sympli finalised its payment connections with Australia's big four banks in December 2021 (Sympli 2021).

A third entity, Lextech, has applied to become an ELNO and been assessed by ARNECC as meeting the initial Category One requirements (ARNECC 2023a). Lextech is not yet approved to operate in any jurisdiction.

2.4.1 Only one ELNO has full-service functionality

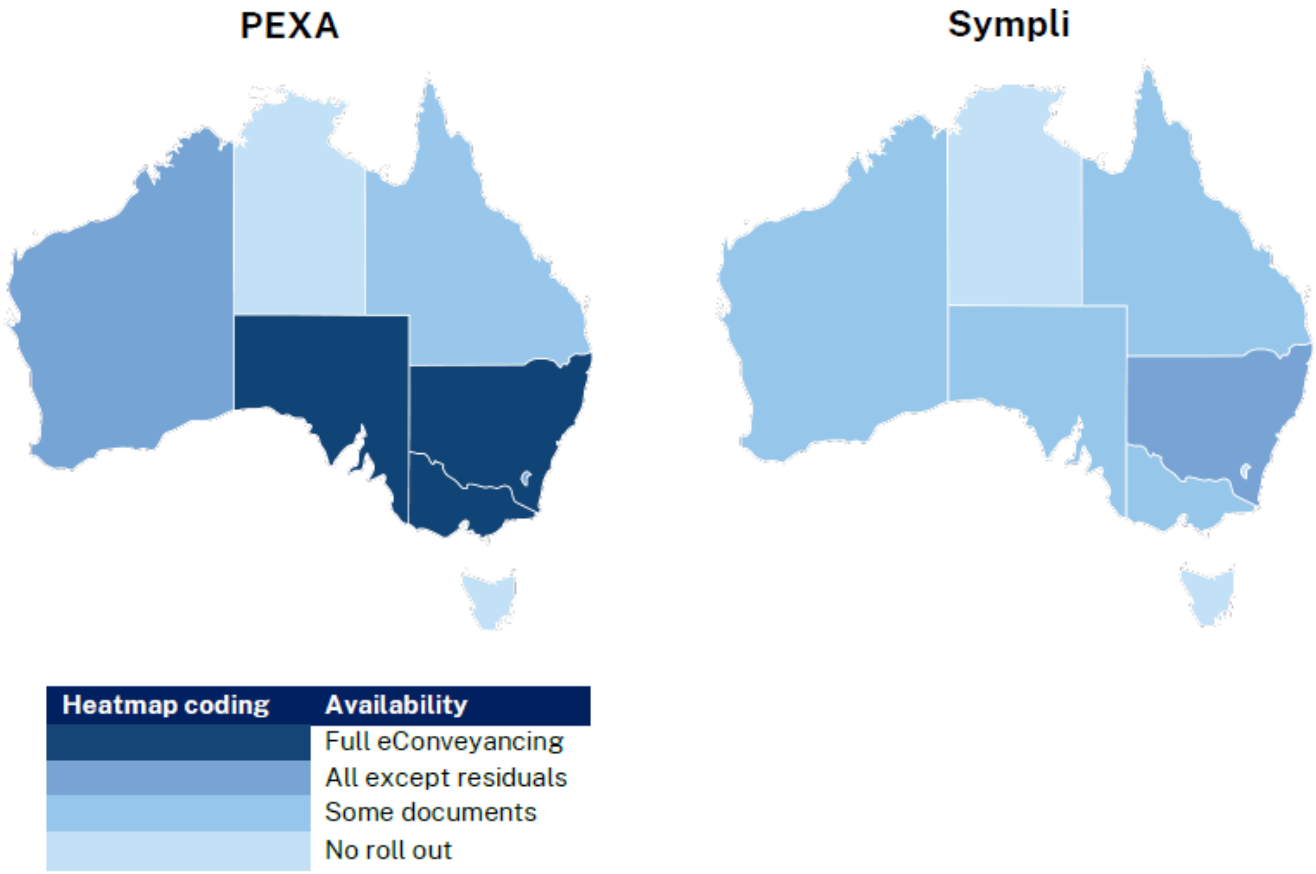
Of the two operating ELNOs, only PEXA has full-service functionality across its operating jurisdictions, meaning it offers the full suite of document and transaction types. PEXA has almost completed its national rollout, with Tasmania and the Northern Territory scheduled to commence

rollout in 2025 (ARNECC 2023d). In New South Wales, Victoria, and South Australia, where eConveyancing is mandatory, PEXA has over 95 per cent of the transfer market based on transaction volumes (PEXA 2023b) (see **section 3.2**).

In comparison, Sympli does not have full-service functionality in any state or territory, and the extent of its offering varies across jurisdictions. For example, in Victoria, Sympli does not yet offer some mainstream documents such as transfers. In New South Wales, Sympli offers all mainstream documents, but is subject to exceptions for certain transaction types. Furthermore, Sympli does not yet offer residual documents — these are the non-mainstream documents that are lower volume than mainstream documents, but essential to an ELNO providing full-service functionality (Sympli n.d.a).

Figure 3 summarises the ELNOs' rollout across jurisdictions.

Figure 3: ELNO rollout across jurisdictions



Source: ARNECC 2023d, 7.

2.4.2 Interoperability will allow Electronic Lodgment Networks to talk to each other

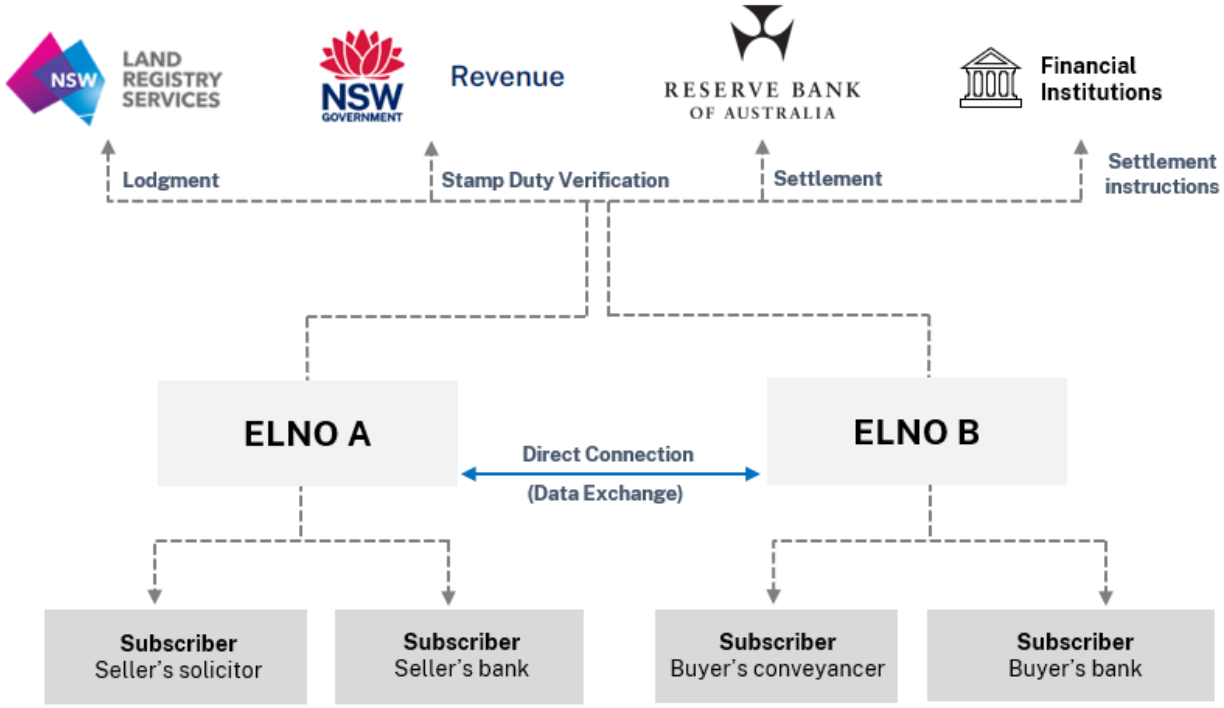
Interoperability describes the systems and processes to facilitate the exchange of data between ELNOs, to enable a subscriber to use their ELNO of choice to complete a transaction, regardless of the ELNO used by the other parties to the transaction (ORG n.d.). Once interoperability is operational, parties to an eConveyancing transaction will no longer be required to use the same ELNO to complete a transaction (as is currently the case). ARNECC is leading the interoperability reform with the participation of ELNOs, major banks, and other key industry and government stakeholders.

ARNECC has adopted a phased model of interoperability, commencing with direct connection between ELNOs. ARNECC will continue to consider the interoperability model as the market evolves

to ensure it remains fit-for-purpose. For instance, in a market with a higher number of ELNOs, it may be appropriate to transition to an Enterprise Service Bus (ESB) or hub model (ARNECC 2020).[4]

Figure 4 shows an eConveyancing transaction conducted across two ELNOs using the direct connection model of interoperability.

Figure 4: eConveyancing transaction under interoperability



Source: Office of the Registrar General 2023, 15.

The first release of interoperability to the market is scheduled for 31 July 2025, with the full interoperability reform scheduled to be complete by early 2026. The interoperability reform, however, has experienced a number of delays to date (see **Table 2**). The current timetable is at risk unless the underlying causes of such delays are resolved (see **section 3.3.1** for more detail).

Table 2: Timeline of interoperability reform delays to date

Date	Activity
First half of 2021	Ministers supported a timeline to achieve the first interoperable transaction by the end of 2021, with broader implementation in 2022.
Late 2021	The timeline was extended, with the first interoperable transaction proposed for Q3 2022 and full interoperability functionality by mid-2023.
Mid 2022	The timeline was again revised, with the first transaction pushed back to March 2023 and agreement to revise the dates for broader implementation.

[4] The direct connection model (shown in **figure 4**) involves ELNO-to-ELNO data exchange, while an ESB model involves a central hub to which each ELNO connects and all data is exchanged. An ESB model becomes more viable as the number of ELNOs in the market increases, as each ELNO only needs to establish a single connection to the hub, rather than establishing separate connections to every other ELNO.

Date	Activity
February 2023	The timeline was again revised, with the first transaction pushed back to September 2023.
July 2023	ARNECC announced that the rollout of interoperability will commence in New South Wales, and Queensland from July 2025 and ELNOs will be required to complete the design, build and testing of the technical solution by 31 December 2025.

Source: ARNECC 2021b, ARNECC 2021c, ARNECC 2022, ARNECC 2023b, ARNECC 2023g.

3 Competition is beneficial and can be supported by the eConveyancing market but there are barriers to entry

3.1 Competition is beneficial to both the eConveyancing market and other related markets

Competition is an important driver of dynamism, productivity, and wages growth. Competition is not just about lower prices — it is also about innovation, which can lead to higher quality, lower production costs, and improved variety of products with benefits to industry and the broader community. Competition has been shown to produce superior consumer outcomes relative to non-competitive markets subject to regulation (see **Box 1**).

Box 1: The benefits of competition

Competition between businesses encourages them to innovate and find ways to work more efficiently. This results in:

- lower prices
- better quality products and services
- more choice for consumers
- increased prosperity and welfare.

Even the mere threat of competition may encourage an existing business to innovate, improve their product offerings, and offer lower prices.

Since the Hilmer reforms in the early 1990s, evidence from a range of industries suggests the introduction of competition has significantly decreased prices, increased customer choice, and improved the quality of products and services. For example:

- Competition in the **aviation** sector has helped lower prices. Average airfares halve when three airlines service a route, compared to one monopoly operator — airfares average 19.2 cents a kilometre versus 39.6 cents per kilometre.
- The introduction of competition in **equities trading services** reduced prices significantly through both lower prices offered by the new entrant, and the incumbent provider significantly reducing prices.
- The introduction of **ridesharing** has given passengers the option to use a lower-cost-service that offers a better customer experience.
- Additional competition in the **Australian retail market** has reduced retail margins and improved productivity.
- In markets with effective competition between **mobile telephone operators**, the Organisation of Economic Cooperation and Development (OECD) has observed lower prices and greater product and service innovation.
- The ACCC has found that Australian consumers of **fixed line broadband services** pay high prices and receive lower quality relative to other countries of comparable population density. There are many reasons for this, one being that Australia's fixed line broadband market is dominated by NBN Co which, while subject to ongoing price and service regulation, faces limited competition.

Source: ACCC n.d.b; The Hon. Dr Andrew Leigh MP 2024; ACCC 2018; CIE 2020; OECD 2015.

3.1.1 There are benefits to achieving effective competition in the eConveyancing market

Most industry stakeholders expressed strong support for achieving effective competition in the eConveyancing market. NSW Productivity and Equality Commission (NSW PEC) consultations revealed that some stakeholders had already seen the benefits of competition through time-saving innovations, lower prices, and better customer support.

A small number of stakeholders, however, questioned the merits of competition on the following bases:

- The eConveyancing market is a natural monopoly and competition would therefore result in higher prices for consumers.
- Competition in the eConveyancing market would simply result in a duopoly, or oligopoly, market structure, which may not produce meaningful benefits for users relative to an efficient monopoly.
- The cost of an eConveyancing transaction is only a small portion of the total overall costs of purchasing a home and greater competition would unlikely result in a meaningful cost saving.

Our strong view is that greater competition for the provision of eConveyancing services is worth pursuing. This is because:

- There is no evidence to suggest that ELNOs are a natural monopoly, and in fact evidence to the contrary (see **Box 2**).
- Competition is a process of rivalry between businesses over time in which businesses strive to maximise profits by lowering their costs of supply and improving their product and pricing offers. Even in industries characterised by a small number of businesses, the rivalry between those businesses, and the threat of new businesses entering the market, spurs innovation leading to lower prices and better quality (see **Box 3**).
- Even a small reduction in the price of eConveyancing services will be material given the eConveyancing mandates coupled with the high transaction volume.[5]
- A lack of competition in the market for eConveyancing could have adverse implications for competition in adjacent markets, including the banking sector and the conveyancing sector.

Box 2: Are ELNOs a natural monopoly?

A natural monopoly arises when it is most economically efficient to have a single supplier of a product or service in a market. Given the insurmountable barriers to entry, the market in which a natural monopolist operates is uncontestable and it is not required to eliminate the competition to maintain its monopoly status. Examples of natural monopolies include electricity transmission networks, railways, ports, and utility providers.

Once a natural monopoly has made its initial investment and incurs large fixed costs to begin production, the marginal cost of producing additional units is small. As production expands, a natural monopolist can achieve economies of scale, lowering its average total costs and dominating the size of the market. These high costs to entry effectively prohibit competitors from entering the market, which results in the natural monopolist's ongoing advantage in the market. As a condition for a natural monopoly to exist, the costs must be sub-additive — that is, the natural monopolist must be able to produce the total output at a lower cost than what two or more suppliers can at the same level of demand.

[5] According to PEXA's FY23 Annual Report, PEXA supported 900,000 consumers undertaking 3.7 million transactions with a property settlement value of more than $814 billion (PEXA 2023a, 18) This was down on the previous year's total transaction volumes, which saw PEXA complete more than four million transactions on behalf of approximately 1.1 million customers, with a property settlement value of more than $900 billion (PEXA 2022a, 12).

While upfront capital costs play a crucial role in understanding natural monopolies, they alone are not sufficient to prove their existence. Whether a firm or industry is a natural monopoly is a question that requires empirical analysis considering both fixed and variable costs and how those costs vary over the entire demand profile for the product or service.

There is no robust empirical evidence to suggest that an ELNO would be a natural monopoly. That said, the presence of Sympli as a second licenced ELNO, and Lextech as a potential third ELNO is strong evidence suggesting that ELNOs are *not* a natural monopoly and that the upfront sunk costs of developing an ELNO are not a barrier to entry. This view is shared by both the CIE and the ACCC.

Source: Economics Help n.d.; CIE 2020; ACCC 2019.

Box 3: Is a duopoly or oligopoly better than a monopoly?

A monopoly exists where one company is the only supplier of a product or service, with no readily available substitute. Given its strong market position, the monopoly provider can determine the price and output for its product or service, and consumers have little or no choice but to pay this set price. As monopolies have no competition, this often leads to little innovation and inefficiencies in production.

An oligopoly occurs when two, or a handful of, companies supply a product or service. The products or services may be slightly differentiated; however, consumers consider them to be close substitutes. Unlike a monopoly, the market in which an oligopoly operates is not dominated by a single player. Accordingly, healthy competition can result, leading to greater choice for consumers through innovation, efficiencies, and more competitive pricing.

For example, a recent study of competition in the Australian aviation sector found that average fares per kilometre dropped from 39.6 cents to 28.2 cents when the number of airlines increased from one to two.

A market failure occurs when oligopolies do not act independently and engage in anti-competitive conduct such as forming cartels, engaging in coordinated behaviour, price fixing, and dividing markets. In Australia, the ACCC administers and enforces an established anti-competitive conduct regime that prohibits the misuse of market power, cartels, and other forms of coordinated conduct.

Source: The Hon. Dr Andrew Leigh MP 2024.

3.1.2 A lack of competition in the eConveyancing market could undermine competition in other sectors

In the longer term, a lack of competition in the eConveyancing market could have adverse implications for competition in adjacent markets. For example, a business with significant market power in one market may seek to leverage that power to establish itself in an adjacent market via the bundling of complementary products or services. Such conduct can lead to adverse market outcomes in the adjacent market.

The OECD (2022) identified vertical integration a key feature of digital markets (see **Box 4** for other key features), noting:

> Digital platforms that act as "gatekeepers" between downstream firms and their customers may be the subject of competition concerns if they provide advantages to their own downstream operations. Further, firms may seek to leverage their market power from one market into another, for example with bundling and tying strategies that foreclose competition for a digital "ecosystem" of products.
>
> OECD 2022, 14

This risk is of particular concern given the provision of eConveyancing services could be bundled with several related products and services including the provision of legal/conveyancing advice, the supply of practice management software, or the provision of property data. This risk is exacerbated

given the ELNO market is highly concentrated and an ELNO with market power may be able to use that market power to penetrate the conveyancer market — including by:

- bundling its ELNO services with conveyancer services
- using its whole-of-market data to reach customers and design services that conveyancers (who are generally small businesses) are not able to provide.

The Australian Institute of Conveyancers (AIC) has expressed strong concern about the potential for an ELNO to use its market power to move into the conveyancing market and operate with an unfair competitive advantage (AIC 2022).

Section 5.6 of the Model Operating Requirements (MOR) seeks to address this specific concern as it includes ring-fencing provisions that aim to prevent ELNOs from gaining an unfair competitive advantage in upstream or downstream markets (ARNECC 2024a). Additionally, section 14.10 of the MOR explicitly state that '[t]he ELNO must not be a Subscriber to the ELNO's ELN except for the purpose of testing the functionality of the ELN' (ARNECC 2024a, 54). The AIC and other stakeholders, however, have expressed concern that these arrangements may not be sufficient; and that the Australian Registrars' National Electronic Conveyancing Council (ARNECC) and Registrars lack the necessary expertise to apply and enforce these provisions.

Any leverage of market power by an ELNO could also have adverse implications for competition in adjacent markets, such as the banking sector and the conveyancing sector.

Australia's retail banking sector is already highly concentrated relative to other international jurisdictions. Banks have previously been criticised for their opaque and synchronised pricing in the home loan market (ACCC 2023). Given the incumbent ELNO currently has a complete picture of the home loan market in some jurisdictions, any data sharing agreement or merger between the incumbent ELNO and a bank may increase the risk of coordination and have serious implications for competition in the home loan market. In the Reasons for Determination behind the ACCC's decision to deny authorisation to the ANZ's proposal to acquire Suncorp, the ACCC (2023) notes that:

> Having regard to the importance of competition between major banks in the home loan market, the significant cost and scale advantages they enjoy over other banks and the high barriers to entry and expansion, the competitive impact of any coordination between the major banks emerging would be substantial.
>
> ACCC 2023, 8

Box 4: Key features of digital markets

The *OECD Handbook on Competition Policy in the Digital Age* identifies some key features of digital markets. These are:

- **Multi-sided markets** – the digital product acts as a platform between several stakeholders.
- **Network effects** – there are large network effects, meaning the value of the product increases alongside the number of users.
- **Economies of scale and scope** – there are substantial economies of scale and scope, categorised by high fixed costs and low or no variable costs.
- **User data** – digital markets rely on large amounts of user data and can be difficult or costly to replicate or analyse.
- **Switching costs** – consumers experience switching costs when changing providers in terms of the time and effort they must expend.
- **Intellectual property (IP) rights** – the incumbent provider(s) often has or claims IP rights over the technology or method it uses.
- **Low/zero prices** – providers earn revenue from the collection of consumer data, advertising, and/or selling premium paid products.

- **Disruptive innovations** – new innovations that do not sit within the standard regulatory framework may come in to disrupt the market.
- **Vertical integration** – providers sometimes integrate into upstream or downstream markets, which could lead to competition concerns.

Source: OECD 2022.

3.1.3 Interoperability is expected to increase competition

As discussed in **section 2.4.2**, ARNECC is leading a program to achieve interoperability between ELNOs for the purpose of promoting increased competition in the eConveyancing market.

According to the Centre for International Economics (2020), the net benefit of interoperability relative to the base case is estimated at around $83.6 million in net present value terms.[6] The costs associated with establishing interoperability were outweighed by the benefits of lower prices, quality improvements, and innovation. By comparison, the net benefit of enhanced price regulation — like capping price increases by the Consumer Price Index (CPI) — relative to the base case is estimated at around $19.7 million in net present value terms. Interoperability also had a net benefit of $82.1 million in net present value terms compared to an alternate base case of multi-homing of subscribers (CIE 2020).

Consultations revealed that while, for the most part, stakeholders are supportive of the interoperability reform, some had alternative views on how to promote competition in the market. Property Exchange Australia Limited (PEXA), for example, proposed a 'ladder of investment' (LOI) approach in the consultation process which it claims will be less costly and more timely to implement compared to interoperability. **Box 5** outlines why this approach is unlikely to lead to increased competition in the eConveyancing market.

Box 5: Ladder of investment

The LOI approach involves gradually offering potential new entrants different levels of regulated access to the incumbent ELNO's network at cost base prices. As the entrant's customer base grows, it is encouraged to invest in its own network elements so that over time the new entrant has sufficient network infrastructure of its own to allow it to bypass the incumbent's network altogether, resulting in network (or facilities-based) competition.

Recent studies, however, suggest the LOI approach does *not* promote competition relative to network-based competition. For example:

- A study across 25 European countries involving 180 telecommunications firms between 1996-2006 concluded the LOI approach to regulation discouraged infrastructure investments by new entrants. In particular, the authors state:

> Promoting market entry by means of regulated access might have the desired short-term effect of lower prices and more consumer surplus, but at the same time undermines the incentives of entrants to invest in their own infrastructure thereby compromising on the long-term goal to establish facilities-based competition.
>
> Friederiszick, Grajek, and Röller 2008, 6

- In the United States (U.S), states that adopted a LOI approach to fixed-line telecommunications regulation exhibited higher prices and less investment in competitive infrastructure relative to states that sought to promote infrastructure-based investments.

In the context of Australia's eConveyancing industry, moving to the LOI approach now would be highly disruptive for market participants and would likely strand investments made by new entrant firms and ARNECC. Moreover, it would be difficult to justify adopting a LOI approach to

[6] Over 10 years, using a discount rate of seven per cent.

regulation given the upfront capital costs to develop an ELNO do not appear to be a significant barrier to entry.

Source: Bourreau, Doğan, and Manant 2010; Crandall, Ingraham, and Singer 2004; Friederiszick, Grajek, and Röller 2008.

3.2 The eConveyancing market can support competition

3.2.1 The eConveyancing market is not effectively competitive

Measures of market concentration and profitability suggest the market for eConveyancing in New South Wales and other jurisdictions in Australia is not effectively competitive.

The market is highly concentrated

The Herfindahl-Hirschman Index (HHI) is a statistical measure of market concentration (Rhoades 1993). It is calculated by squaring the market share of each firm in the industry and summing these squares together.

The HHI is commonly used by regulatory authorities when assessing the competitiveness of a market. For example, the ACCC (2017) is more likely to identify concerns when the HHI is more than 2,000 post merger. The U.S. Department of Justice and the Federal Trade Commission (FTC) (2023), on the other hand, define a market as being highly concentrated if it has an HHI greater than 1,800.

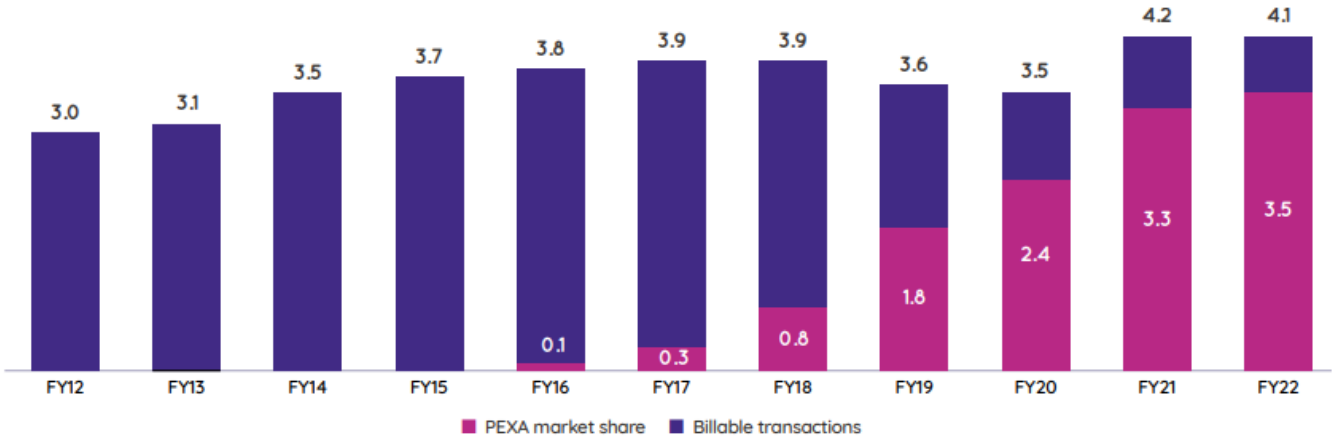
Based on market share data from PEXA's annual reports, the eConveyancing market in Australia is highly concentrated, with an HHI estimate of 7,554 and 7,926 for FY2022 and FY2023 respectively — far greater than the ACCC and FTC thresholds. Furthermore, it appears the market for eConveyancing has become increasingly concentrated since PEXA was privatised in FY2020.

This high level of market concentration is because PEXA is the dominant ELNO in all jurisdictions in which eConveyancing operates and has a dominant share for key eConveyancing transaction types. For example, of the total addressable national conveyancing market (which excludes Tasmania and the Northern Territory as eConveyancing is not yet available) in 2023, PEXA had:

- 99 per cent market share of refinancing transactions
- 88 per cent market share of property transfer transactions
- 88 per cent overall market share (PEXA 2023a, PEXA 2023b).

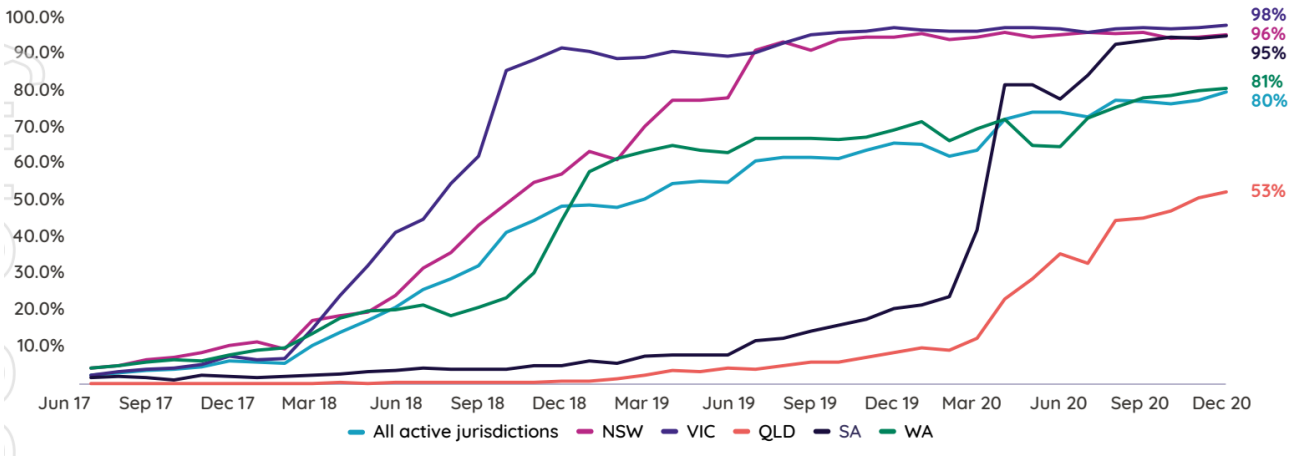
This dominant market share has increased over time. PEXA's high market share is also evidenced by its high share of the total billable eConveyancing transactions in Australia (see **Figure 5**) as well as its high market share of the Transfer Market in each Australian state and territory (see **Figure 6**)

Figure 5: PEXA's share of total potential digital property settlement billable transactions in Australia (millions)



Source: PEXA 2021b, 69.

Figure 6: PEXA market share by Australian jurisdiction (percentage of transfer market)

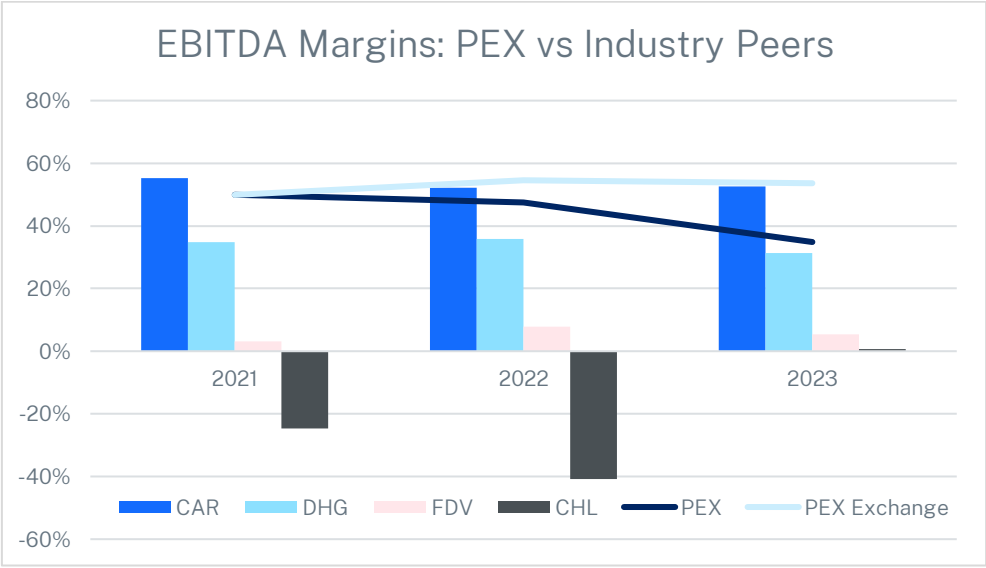


Source: PEXA 2021b, 130.

The incumbent ELNO is earning very high profits

A company's EBITDA (earnings before interest, taxes, depreciation, and amortisation) margin is a measure of its operating profit (Chen 2023). An EBITDA margin is calculated by dividing EBITDA by revenue. Relative to several other IT and technology companies listed on the ASX, PEXA enjoys a high EBITDA margin. Furthermore, PEXA's Australian operations — which comprise the PEXA Exchange platform — earn significantly higher EBITDA margins relative to PEXA's other business units (PEXA 2021a, 2022a, 2023a) (see **Figure 7**).

Figure 7: PEXA Group and PEXA Australia: EBITDA margins relative to ASX-listed peer firms FY2023



Note: CAR is CAR Group Limited; DHG is Domain; CHL is Camplify Holdings Limited; FDV is Frontier Digital Ventures; PEX is PEXA Group Limited which includes PEXA Exchange, PEXA Digital Growth, and PEXA International; PEXA Exchange is the operation of an ELN in Australia.

Source: PEXA 2021a, 2022a, 2023a; Domain 2021, 2022, 2023; Camplify Holdings Limited 2021, 2022, 2023; Frontier Digital Ventures 2021, 2022, 2023; CAR Group Limited 2023.

Additionally, in a public submission to IPART's draft report into interoperability pricing for ELNOs dated 29 March 2023, PEXA claims that it 'has incurred $182 million in capex to build and deliver the e-conveyancing service that exists today' (PEXA 2023c, 9).

We note that PEXA did not provide any detailed breakdown, or independent verification, of its build costs. This estimate is significantly higher than other publicly available alternative estimates:

1. The estimated value of the PEXA Exchange intangible asset as detailed in its IPO replacement prospectus. In particular, PEXA's IPO Replacement Prospectus states that as at the PEXA Acquisition (16 January 2019) the written down value of the PEXA Exchange platform was $40 million with a useful asset life of 15 years (PEXA 2021b):

> Amortisation is a non-cash expense that relates to internally generated intangible assets, which is primarily related to capitalised employee costs and capitalised third party expenses related to the development of the PEXA Exchange and other in-house software intangible assets. After the PEXA Acquisition the estimated useful life of the PEXA Exchange intangible asset was changed from five years to 15 years to reflect the expected minimal changes to the interfaces and integrations to regulatory and financial systems over the next 15 years and align with industry adopted useful lives of software platforms used in similar Australian registry and exchange businesses... The PEXA Exchange intangible asset had a written down value of $40 million at the time of the PEXA Acquisition and the change of estimated useful life has resulted in annual amortisation reducing from $8.0 million annually to $2.7 million.
>
> PEXA 2021b, 133

2. AECOM's $5.55 million estimate (in 2019 dollars) of the efficient capital expenditure to develop an ELNO platform (AECOM 2019, 11).
3. Deloitte's estimates of between $2 million to $13.3 million depending on the extent of the ELNO's service offerings (including 'Robotic Process Automation') (Deloitte 2018, 62-63).

Even using PEXA's higher costs claim, a discounted cash flow (DCF) analysis using data sourced from PEXA's Replacement Prospectus and Annual Reports suggests that over the life of those investments[7] it will earn an internal rate of return significantly above its commercial costs of capital[8]. This suggests that in New South Wales and other Australian jurisdictions, PEXA is currently earning revenues above its economic cost (including a reasonable rate of return) — an outcome inconsistent with a competitive market setting.

3.2.2 Price control arrangements have not benefited consumers

The price control arrangements have allowed ELNOs to set prices at levels that do not reflect their underlying costs. The arrangements also allow ELNOs to increase prices on an annual basis in line with the CPI (see **section 3.3.2**) with no requirement to improve efficiency or pass on the benefits of cost efficiencies to consumers. It is therefore unlikely that consumers have fully benefited from lower costs due to the shift to eConveyancing. Rather, the significant productivity benefits — estimated to be $89 million annually (Deloitte Access Economics 2018) — have likely been captured by ELNOs operating in the market to date in the form of above normal profits as well as by conveyancers in the form of time savings from not having to physically travel and attend settlements in person. That end-user consumers have not shared in the significant productivity

[7] Assumed to be 15 years, consistent with PEXA's amortisation rates.

[8] The DCF calculation assumes that PEXA incurred $182 million of upfront capital costs to develop the PEXA Exchange in 2019 (i.e., Year 0) with no other expenses or revenue being earned in that year. For the years 2020-23 (i.e., Years 1 to 4) it was assumed that PEXA Exchange generated total revenues, and incurred cost of sales and operating expenditure (OPEX) as reported in PEXA's Annual Reports. For subsequent years (i.e., Years 5 to 15) average revenues per transaction, cost of sales and OPEX are assumed to increase in line with CPI. Transaction volumes for Years 5 - 15 are assumed to increase as per the annual average compound historical growth rate of PEXAs calculated for the period 2019-23 based on transaction volumes reported in PEXA's IPO Replacement Prospectus and Annual Reports. A discount rate of 12 per cent was used noting that PEXA's 2023 Annual Report estimated that its current weighted average cost of capital (WACC) is approximately 9 per cent. Consistent with the PEXA Exchange having a useful asset life of 15 years, it is assumed that no cashflows are generated after Year 15. For completeness no terminal value has been included.

benefits that eConveyancing has produced is unfortunate given eConveyancing services are government-mandated in some jurisdictions.

A lack of increased consumer welfare arising from a government-sponsored initiative to digitise and improve the efficiency of the conveyancing process is worthy of further consideration. Accordingly, ARNECC should ask the Australian Treasury to request the ACCC to immediately conduct a comprehensive review of the current price control arrangements relating to eConveyancing services. This review should identify the efficient economic costs of providing eConveyancing services in Australia and recommend appropriate amendments to the current price control arrangements. Specifically, consideration should be given to the merits of moving to a weighted average price cap arrangement which would require ELNOs to reduce prices over time to appropriately reflect the underlying economic costs of provision as well as ongoing cost savings from productivity improvements.

Recommendation 1

ARNECC should ask the Australian Treasury to request the ACCC to immediately conduct a comprehensive review of the current price control arrangements relating to eConveyancing services (the 'Review of eConveyancing price control arrangements'). This review should identify the efficient economic costs of providing eConveyancing services in Australia and recommend appropriate amendments to the current price control arrangements. Specifically, consideration should be given to the merits of moving to a weighted average price cap arrangement which would require ELNOs to reduce prices over time to appropriately reflect the underlying economic costs of provision as well as ongoing cost savings from productivity improvements.

If the ACCC does not have capacity to undertake this review in a timely manner, ARNECC should consider approaching the Australian Treasury to request that the Commonwealth Productivity Commission undertake this review and report its findings publicly.

If the Review recommends changes to the current price control arrangements, ARNECC should move quickly to reflect this in the MOR.

3.2.3 The market can accommodate more than one provider

The Commission's consultations revealed divergent views among some industry participants about the extent to which the eConveyancing market in Australia could support multiple ELNOs. Some reasoned that the market may be too small to support two or more ELNOs. It was also suggested that some smaller jurisdictions — like Tasmania and the Northern Territory — may be uneconomic to serve and would therefore need to be cross-subsidised via uniform national prices. Other market participants indicated that the Australian eConveyancing market could sustain competition and that the cost to serve smaller jurisdictions was not prohibitive.

A DCF analysis, using publicly available data, suggests that all Australian jurisdictions, and the Australian eConveyancing market as a whole, are economic to serve and can support two or more ELNOs. Assuming the cost to develop an ELNO is:

- $40 million[9] – an ELNO as efficient as PEXA would only need to capture around five per cent market share[10] to earn a 12 per cent rate of return before tax[11].

[9] As per PEXA's Replacement Prospectus (PEXA 2021b).

[10] Share of the total eConveyancing transactions, excluding the jurisdictions of Tasmania and Northern Territory.

[11] As per footnote 6 with the exception that it is assumed that PEXA only incurs $40 million dollars in 2019 (i.e. year 0) to develop the PEXA Exchange Platform.

- $182 million[12] – an ELNO as efficient as PEXA would only need to capture around 20 per cent market share to earn a 12 per cent rate of return before tax[13].

Similarly, a DCF analysis suggests that despite having a smaller population and fewer annual eConveyancing transactions relative to other jurisdictions, both Tasmania and the Northern Territory could profitably accommodate two or more ELNOs if they were to transition to a full eConveyancing model. For example, assuming the incremental cost of an established ELNO to service an additional jurisdiction is $317,000 (in 2023 dollars) over a 15-year period, an ELNO could expect a before tax rate of return of 12 per cent by capturing just one per cent market share in Tasmania[14] and five per cent in the Northern Territory[15]. Neither of these jurisdictions would need to contribute a share to recover the upfront costs of developing the core ELNO functionality as this is expected to be fully recovered from other jurisdictions.

Based on this analysis, we conclude that the market for eConveyancing in all Australian jurisdictions is likely to be economic to serve and will be able to support a competitive market of two or more ELNOs. This is consistent with the views of several market participants.

3.3 The eConveyancing market exhibits material barriers to entry

Our analysis, informed by consultation with key industry stakeholders, has identified several barriers to entry and expansion. Unless these barriers are addressed, they have the potential to deter future market entry and could potentially result in the exit of existing new entrant ELNOs.

3.3.1 The market for eConveyancing exhibits strong network effects

Network effects occur where 'the value of membership to one user is positively affected when another user joins and enlarges the network' (Katz and Shapiro 1994, 94). According to Katz and Shapiro (1994, 105-106):

> In markets with network effects, there is a natural tendency toward de facto standardization [sic], which means everyone using the same system. Because of the strong positive-feedback elements, systems markets are especially prone to "tipping", which is the tendency of one system to pull away from its rivals in popularity once it has gained an initial edge.
>
> Katz and Shapiro 1994, 105-106

[12] As per PEXA's submission to IPART's draft report into interoperability pricing for ELNOs.

[13] See footnote 6.

[14] This DCF calculation assumes that PEXA incurred $317,000 of upfront capital costs in 2023 (i.e. year 0) to establish a connection to Tasmania's State Office Revenue and Land Titles Office. This figure reflects the estimated cost of developing APIs ($270,000 in 2019 dollars) to connect into additional jurisdictions as per the AECOM report adjusted for inflation (AECOM 2019). Transaction volumes and cashflows for 2024-28 (i.e. years 1 to 15) have been calculated by assuming that Tasmania accounts for 2.1 per cent of Australia's total annual conveyancing transaction volumes and that this volume increases at the national annual average compound growth rate. It is assumed that from 2024 all conveyancing transactions in Tasmania will be completed electronically. All other assumptions as per footnote 6.

[15] This DCF calculation assumes that PEXA incurred $317,000 of upfront capital costs in 2023 (i.e. year 0) to establish a connection to the Northern Territory's Revenue Office and Land Titles Office. Transaction volumes for 2024-28 (i.e. years 1 to 15) and cashflows have been calculated by assuming that the Northern Territory accounts for 0.5 per cent of Australia's total annual conveyancing transaction volumes and that this volume increases at the national annual average compound growth rate. It is assumed that from 2024 all conveyancing transactions in the Northern Territory will be completed electronically. All other assumptions as per footnote 6.

Currently ELNOs cannot 'talk' to each other. In a standard purchase-sale transaction, this means that all parties must be with the same ELNO for the transaction to go through effectively. To give an example from the telecommunications industry, this would be like Android users only being able to message other Android users. Network effects entrench the market power of the incumbent ELNO, making it difficult for competitor ELNOs to gain a sustainable market share.

As discussed in **section 2.4.2**, ARNECC is currently leading an interoperability reform to enable subscribers to transact on their preferred ELNO, regardless of the ELNO(s) used by other subscribers in the transaction. Reverting to the telecommunications example, this means that an Android user can now also message an iPhone user. The introduction of interoperability between ELNOs is expected to dampen the impact of network effects on the market in the future.

Considerable progress has been made to date with respect to designing and implementing an industry model for interoperability between ELNOs. However, the timeline to achieve interoperability has taken much longer than first proposed. Delays are, in part, due to stakeholder opposition to the interoperability reform and its principles and governance arrangements. In November 2021, PEXA withdrew from key technical design and implementation working groups, citing a number of issues with the interoperability reform. PEXA resumed its participation in May 2022 (ARNECC 2023e) — however the six-month withdrawal had a significant impact on the timeline for the reform.

Any further delays in the introduction of interoperability could have significant adverse long-term impacts for the promotion of competition in the provision of eConveyancing services across Australia. Stakeholder consultation revealed that this is a concern for many industry participants.

PEXA's Chief Customer and Commercial Officer, Mr Les Vance, appeared by video link at the *Inquiry into promoting economic dynamism, competition and business formation* on 31 August 2023 (Australia. Standing Committee on Economics. 2023, 19). He claimed that the complexity of implementing interoperability had led to delays in the process, saying:

> 'The reality is that interoperability is far more complex to design, execute and build than was represented or assumed at the start. That's why it's taking time.'
>
> Australia. Standing Committee on Economics. 2023, 19

Economic theory, however, suggests that incumbent firms have an incentive to oppose measures to promote compatibility. As Katz and Shapiro (1994, p. 111) note:

> Since systems competition is prone to tipping, there are likely to be strong winners and strong losers under incompatibility. Therefore, if a firm is confident it will be the winner, that firm will tend to oppose compatibility.
>
> Katz and Shapiro 1994, 111

PEXA's IPO Replacement Prospectus suggests that the introduction of interoperability could have adverse commercial and financial consequences for PEXA (PEXA 2021b). For example, the section titled *Competition and Market Structure Risks* explains a range of commercial and financial impacts that may arise because of interoperability to potential investors:

> Establishing interoperability may subject PEXA to additional risks, including the risk of disruption to its normal operations as a result of making the necessary changes to its platform and processes, additional implementation costs, and the diversion of the time and attention of management and technical staff time. It may also introduce new competition risks and IT systems and cyber security risks to PEXA.
>
> Once established, interoperability may result in PEXA achieving lower revenue compared to what it would achieve in a non-interoperable environment. In particular, the fees payable by Participating ELNO(s) to the Responsible ELNOs have yet to be legislated or determined and may not be set at a level that properly compensates PEXA for the use of its platform and the risk it assumes. The revenue that PEXA earns for serving as a Responsible ELNO may be less than the revenue it would earn for settling the transaction in a non-interoperable environment, and the margins on such services may be lower. In addition, the regulatory framework envisages that competing ELNO(s) must construct the

> capabilities needed to serve as a Responsible ELNO over time. To the extent that they are successful, competing ELNO(s) will seek to offer services and obtain revenue that would otherwise be obtained by PEXA. As a result, interoperability may adversely affect PEXA's financial performance.
>
> In the longer term, because interoperability may enable ELNOs to service customers without a stand-alone platform and network, interoperability may accelerate competition by facilitating integration between alternative platform providers and subscribers, attracting additional competitors to the market and enabling them to earn revenue and develop their brand and subscriber base while they are still developing a platform that enables them to provide similar e-conveyancing services as PEXA.

PEXA 2021b, 162-163

Recommendation 2

ARNECC to develop and publish a detailed industry roadmap for achieving the launch of interoperability by December 2025. This roadmap should include a detailed timeline setting out target dates for key milestones. This recommendation should be implemented without delay.

Recommendation 3

ARNECC (or individual Registrars) should impose regulatory requirements on all ELNOs to meet specific key milestones to achieve the interoperability date of December 2025. Failure by an ELNO to comply with these milestones should be enforced by ARNECC or individual Registrars — likely New South Wales and/or Queensland as the first states scheduled to implement interoperability — including by pursuing financial penalties under the *Electronic Conveyancing Enforcement Act 2022* (NSW). This recommendation should be implemented without delay.

3.3.2 The current policy framework creates barriers to entry

The minimum service requirement may dampen market entry

Regulatory requirements may also act as a barrier to new ELNOs entering the market. MOR 5.2(a) requires an ELNO to ensure that 'the ELN is available to each Land Registry in Australia capable of receiving electronic Registry Instruments and other electronic Documents from an ELN and to subscribers in all states and territories in Australia' (ARNECC 2024a, 27). In short, existing and prospective ELNOs must demonstrate the intention and ability to provide a level of baseline functionality in all jurisdictions.

This requirement operates as a minimum coverage and service requirement for all ELNOs, however, the policy basis for the requirement is not clear. If the intention is to ensure that every person in Australia has access to eConveyancing services regardless of where they live (i.e. as a form of Universal Service Obligation) then it is not necessary for every ELNO to provide this baseline functionality. It is only necessary that *at least one* ELNO provide a minimum level of service across all jurisdictions.

In the NSW PEC's consultations, a few stakeholders indicated that the minimum service requirement acts as a barrier to entry as it imposes an all-or-nothing investment requirement on potential new entrants. Removing the minimum service requirement could lead to an increase in local competition and product differentiation — for instance, one stakeholder noted that removing the minimum service requirement could lead to the emergence of smaller jurisdiction-specific ELNOs that provide bespoke services based on the lodgment processes, customer needs, and market dynamics of particular jurisdictions.

Given all jurisdictions are economic to serve (see **section 3.2.3**) — meaning ELNOs are likely to want to operate there for profit-driven reasons without regulatory intervention — consideration could be given to abolishing the minimum service requirement in the MOR to reduce this barrier to market entry. Other stakeholders, however, noted in the NSW PEC's consultations that smaller jurisdictions

still do not have access to eConveyancing services and removing the minimum service requirement may further delay this process. These concerns should be explored further in any review of the MOR.

IPART's 2019 report concluded there was little evidence that the minimum service obligation was constraining new ELNOs from entering the market (IPART 2019). This conclusion, however, was based on the fact that many smaller jurisdictions had not yet introduced eConveyancing, and the understanding that both the cost to enter smaller jurisdictions was not prohibitive and national pricing was not required under the legal framework. While recommendations on market design were out of the scope of IPART's 2023 report, it noted that:

> 'In Issues Paper 2 we noted that there may be more economically optimal ways to design a market that provides eConveyancing services to all Australians than a USO. In response, ARNECC has indicated it will not investigate the USO at this stage but may revisit this issue in the future.'
>
> (IPART 2023, 67)

According to the Commonwealth Productivity Commission (2017), other ways of addressing universal service objectives without mandating universal service or minimum coverage requirements on service providers include:

- taking a market-based approach, with government intervention if necessary, targeted at gaps
- government-provision of services
- competitive tendering for universal service delivery
- directly subsidising users of services.

Another mechanism is to impose a specific USO on just one service provider. In the Australian telecommunications industry, for instance, Telstra is responsible for delivering the USO under the Telstra Universal Service Obligation Performance Agreement (Department of Infrastructure, Transport, Regional Development, Communications and the Arts, n.d.a). As compensation, Telstra receives an annual USO payment that is funded partially by the Australian Government through a Budget appropriation and by industry through a telecommunications industry levy (ANAO 2017).

In a public submission to IPART, PEXA praised the USO funding arrangement that operates in Australia's telecommunications market and asked IPART to consider compensating the ELNO responsible for universal service delivery through inter-ELNO fees (PEXA 2022b). It should be noted, however that the funding arrangements that apply in the telecommunications industry are the result of several detailed industry processes and policy reviews which have confirmed that providing the relevant telecommunications services in regional and remote parts of Australia is uneconomic and quantified the financial losses incurred by Telstra arising from its USO supply obligations. No such analysis has been undertaken in respect of eConveyancing, making PEXA's request for such arrangements premature.

Recommendation 4

Consideration by ARNECC and the ACCC should be given to removing requirements in the MOR that create barriers to entry in the eConveyancing market.

The current price regulation constrains market entry

Price regulation of all ELNOs is unjustified and operates as a barrier to entry

ELNO service fees are the fees charged to subscribers and generally passed on to transacting parties, like buyers and sellers.[16] These fees are currently subject to regulation that prohibits annual

[16] Lawyers and conveyancers will generally pass on ELNO Service Fees as a disbursement charge to their clients, while banks may pass on the fees as an administrative fee for granting or discharging a loan.

increases above CPI. This CPI cap is set and governed by ARNECC through the OR, which specify that:

> From 1 July 2019 to 30 June 2025, the ELNO may increase the ELNO Service Fees as listed in its Pricing Table, once every Financial Year on 1 July, provided that the percentage increase in the revised ELNO Service Fees does not exceed the percentage increase in the CPI for the immediately preceding March quarter when compared with the CPI for the March quarter of the previous year.
>
> ARNECC 2024a, 31

While price regulation is justified for ELNOs that have substantial market power and can unilaterally raise market prices to the detriment of consumers, it is unclear why this regulation also applies to new entrant ELNOs. In a market where the incumbent firm has a high market share and is subject to price control regulation, it would be expected that any new entrant seeking to capture market share would likely price below or equal to the incumbent. In this way, applying price control regulation only to the incumbent firm will serve to moderate price competition across the sector.

The application of price controls on new entrant ELNOs, or ELNOs that do not have market power, unnecessarily increases the burden of regulation for the overall eConveyancing market. For example, Registrars are required to review and approve any subsequent changes to an ELNO's price schedules, as well as monitor and enforce compliance with the regulated annual price cap. Additionally, price control regulation on new entrant ELNOs may act as a barrier to entry given they impose compliance costs and risks on new entrant firms and may limit their flexibility to differentiate their product and prices to effectively compete with incumbent firms and maximise consumer choice.

Some may argue that the application of price control regulations on all ELNOs is justified given that the use of eConveyancing is mandated in some jurisdictions. This argument, however, is not persuasive given that consumers are best served by promoting competition and imposing regulatory constraints on those firms with market power. Regulation of firms without market power is both unnecessary and may adversely discourage or dampen competition.

National consistent pricing limits flexibility and constrains competition

Both operating ELNOs currently adopt nationally consistent pricing — meaning that the fees charged for each document are the same across all jurisdictions (PEXA n.d.b; Sympli n.d.b).

Some market participants suggested that nationally consistent pricing is a regulatory requirement — however this is not the case. As the OR are implemented separately in each jurisdiction, ELNOs are entitled to publish a Pricing Table with different fees across jurisdictions.

While nationally consistent pricing is *not* a regulatory requirement, the CPI cap on increases has the effect of 'locking in' the current national pricing framework as it limits ELNOs' flexibility to change their existing fee structure (at least in jurisdictions where an ELNO currently operates).[17]

IPART's 2023 report noted that 'the USO combined with national pricing may set up incentives for ELNOs to delay full roll-out in order to cherry-pick the most profitable jurisdictions and transactions' (IPART 2023, 67). PEXA also raised concerns in the NSW PEC's consultation process that the current national pricing approach may incentivise new ELNOs to roll out in the more profitable jurisdictions, leaving PEXA to service those that are less profitable. As noted at **section 3.3.2**, the current minimum service requirement means an ELNO cannot choose to operate in specific jurisdictions — it must provide (or have a plan to provide) a level of baseline functionality in all jurisdictions. If the minimum service requirement is removed in favour of a market-based approach, this should be accompanied by flexible pricing regulation that permits established ELNOs to adopt jurisdiction-based pricing to respond to different market conditions in each jurisdiction.

[17] ELNOs can apply to the Registrar to increase their fees by more than CPI for certain reasons, such as increased costs or taxes – however this provides limited flexibility only.

Recommendation 5

Ongoing price regulation of eConveyancing services should only apply to those provided by ELNOs which can be demonstrated to have substantial market power. Price regulation should be immediately removed from the services provided by ELNOs that do not have substantial market power.

Banks pay lower fees per transaction than lawyers and conveyancers

Currently, banks pay lower fees per transaction than lawyers and conveyancers – this is because the fees for finance documents — mortgages and discharges — are substantially lower than the fees for transfer documents used by lawyers and conveyancers.[18]

There are several reasons that banks' fees may be lower than lawyer and conveyancer fees:

- higher transaction volumes and a lower cost per transaction, leading to lower fees
- stronger bargaining power due to their size, commercial sophistication, and criticality to the conveyancing process
- the need to secure banks' support for the transition from paper-based processes to eConveyancing may have allowed banks to negotiate lower fees.

Whatever the reason, it is important that the regulatory framework allows sufficient flexibility to allow ELNOs to adapt their pricing framework as the market evolves. The current CPI cap potentially limits this flexibility and effectively entrenches the current differential pricing between banks and lawyers and conveyancers. This issue should be considered as part of the Review of eConveyancing price control arrangements (see **section 3.2.2** and **recommendation 1**).

There is a lack of transparency relating to prices charged to different subscribers

A related matter is whether PEXA charges different banks different service fees — that is, does it price discriminate between banking subscribers? As the margins from mortgage lending are thin, any price discrimination could be a source of competitive advantage for the banks, with potential concerns for competition in that market (see **section 3.1.2**).

The regulatory framework effectively establishes maximum service fees by requiring an ELNO to publish a Pricing Table with its fees and prohibiting an ELNO from increasing those fees by more than CPI each year. Accordingly, ELNOs may choose to price below the maximum prices set out in their Pricing Tables for either some or all cohorts of customers, such as banks.

Clause 3.6 of PEXA's Pricing Policy appears to provide it with scope to charge differential prices to different subscribers, given that 'Pricing can be tiered in accordance with PEXA's cost to serve a specific Subscriber type' (PEXA n.d.b). If this is the case, ARNECC does not have visibility of these arrangements and is therefore unable to determine whether such pricing practices have impacts on the market and on competition. Furthermore, if ELNOs do engage in differential pricing practices for some subscriber types, the extent to which any differential prices comply with OR 5.4.3 is unknown.

Accordingly, there is merit in ARNECC updating section 18 of its MOR to include an obligation on all ELNOs to provide ARNECC with a confidential report on a quarterly basis that sets out:

- Any and all differences in service fees that it charges different subscriber types, including, but not limited to, any discounts (including volume discounts or whole-of-business discounts), credits, or rebates applied to a subscriber's bill.
- The period of time for which these differences in service fees have been in place.
- The commercial basis on which any differential charging — including any discounts, credits, or rebates — was offered.

[18] PEXA's mortgage and discharge fees range from $23.98 - $66.33 per subscriber while transfer fees are $132.66 per subscriber (PEXA n.d.b).

- The volume of transactions that have benefited from the differential service fees in the relevant reporting period, in the previous 12 months, and since they were first charged.
- For each subscriber type, the total economic value (in nominal dollars) of any differential service fees offered — including any discounts rebates and credits — in the relevant reporting period, in the previous 12 months, and since they were first charged.

Regular reporting on price changes and service volumes is a common feature of other regulatory regimes. For example, the *Port Terminal Access (Bulk Wheat) Code of Conduct* requires port terminal service providers to provide the ACCC with a port loading statement for each business day (Competition and Consumer (Industry Code — Port Terminal Access (Bulk Wheat)) Regulation 2014, (Australia)). Similarly, telecommunications providers are required to regularly report to the Australian Communications and Media Authority (ACMA) on a broad range of issues including customer complaints, annual eligible revenues, and compliance with various industry codes and consumer protection obligations (ACMA n.d.). Data and information provided by market participants in accordance with regulatory reporting obligations assist regulatory agencies to carry out their regulatory functions including compliance monitoring and enforcement activities.

Recommendation 6

ARNECC should update Section 18 of the MOR to include an obligation on all licensed ELNOs to provide ARNECC with a confidential report on a quarterly basis that sets out the following:

- Any and all differences in service fees that it charges different subscriber types, including, but not limited to, any discounts (including volume discounts or whole-of-business discounts), credits, or rebates applied to a subscriber's bill.
- The period of time for which these differences in service fees have been in place.
- The commercial basis on which any differential charging — including any discounts, credits, or rebates — was offered.
- The volume of transactions that have benefited from the differential service fees in the relevant reporting period, in the previous 12 months and since the differential service fees were first charged.
- For each subscriber type, the total economic value (in nominal dollars) of any differential service fees offered — including any discounts rebates and credits — in the relevant reporting period, in the previous 12 months and since the differential service fees were first charged.

In providing for this power in the MOR, ARNECC should make explicit that it can provide this data to other relevant regulatory or policy-making bodies, such as the ACCC (see recommendation 11), in order to carry out relevant regulatory functions.

3.3.3 The incumbent has benefited from 'first mover' advantage

A 'first mover' can be described as the first firm to produce a new product, use a new process, or enter a new market (Kerin et al. 1992). First mover advantage is 'the ability of pioneering firms to earn positive economic profits (i.e. profits in excess of the cost of capital)' and is achieved primarily through technological leadership, pre-emption of assets, and the existence of switching costs (Lieberman and Montgomery 1988, 41). These are explained below:

- **Technological leadership** describes the initial market entrant's ability to claim that their knowledge is proprietary and keep it confidential, sometimes through patents.
- **Pre-emption of assets** refers to the ability of the first mover to gain access to necessary inputs (for instance, natural resources) and precious space in the market.
- **Switching costs** reflect the fact that subsequent entrants must work hard to attract new customers — who are often happy with the status quo — to make up for the costs they will incur in implementing a new system, including the time they must invest in learning how to use it.

The incumbent ELNO has benefited from significant first mover advantage as reflected in its high market shares in New South Wales, Queensland, Victoria, and South Australia. Stakeholder consultations revealed that this first mover advantage is expected to continue for some time given there are material switching costs associated with onboarding onto another ELNO platform.

The incumbent has technological leadership

As discussed in chapter 2, before its privatisation in January 2019, the incumbent ELNO was government-owned, and benefited from a government-sponsored program of work — involving Registrars, land registries, revenue offices, commercial banks, and other industry stakeholders.

Stakeholders flagged as part of the consultation process that many of the bank and land registry processes had been created around the incumbent's offering. The incumbent, however, has raised IP concerns about the use of the data specifications and functionality that underpin eConveyancing functions and services. This has been mentioned by both the incumbent and the Australian Banking Association (ABA) at forums, including at the Interoperability Industry Panel (ARNECC 2023f).

As noted in section 2.3.3, PEXA has played a role to date in developing and maintaining various eConveyancing data standards and artefacts, including the National Electronic Conveyancing Data Standard (NECDS), the Residual Document Spreadsheet (RDS), and the National Electronic Conveyancing Interoperability Data Standard (NECIDS). For some time, ARNECC and PEXA have been negotiating the commercial arrangements to hand over responsibility for the NECDS and RDS to NECDS Ltd, including assignment of PEXA's IP. Once these arrangements are finalised, NECDS Ltd will license access to the standards and artefacts to ELNOs and other stakeholders.

There have, however, been a series of delays in the process of operationalising NECDS Ltd due to the time taken to finalise the legal documents required to transfer the alleged IP and establish the operating model and procedures of the company. As long as PEXA maintains control of eConveyancing standards and artefacts, there will be market impacts:

- Other ELNOs must pay PEXA for access to the NECDS. While the license fee is limited to covering PEXA's costs of maintaining the NECDS,[19] the other ELNOs have limited input and control over management of the NECDS.
- PEXA will not provide access to the RDS, which means that other ELNOs cannot develop and offer residual documents to subscribers, limiting their service offering and keeping PEXA as the only full-service ELNO.
- PEXA maintains control over the NECDS and has control over key matters including change management and NECDS schema upgrades for land registries and revenue offices.

In addition to eConveyancing data standards and artefacts, PEXA claims IP over what it states are unique components of its service offering, in particular bespoke integration with banks to streamline processes and create workspace efficiencies. While ARNECC is in discussions with PEXA to resolve IP issues, stakeholders have noted in the NSW PEC's consultation process and in separate forums that resolution is being hampered by banks' reluctance to provide key information due to concerns about infringing PEXA's IP (ARNECC 2023f).

Stakeholders have noted these IP issues are preventing critical design and build work and putting at risk the current timetable for implementing interoperability (ARNECC 2023f).

Recommendation 7

States and territories should expedite the transfer of ownership and responsibility for all eConveyancing technical and data standards from PEXA to NECDS Ltd, to ensure fair and equal access to the standards and objective oversight and management of the standards.

[19] PEXA and the NSW Registrar General have entered into an agreement which requires PEXA to provide access to the NECDS to other ELNOs on certain terms, pending handover to NECDS Ltd.

Recommendation 8

ARNECC should expedite the legally binding formal resolution of any IP issue in an appropriate manner to support the achievement of ARNECC's interoperability timeline. If the incumbent does not agree to share all relevant technical standards with ARNECC's Interoperability Design Committee in a timely fashion consistent with ARNECC's interoperability timeline, or otherwise provide ARNECC with a formal legal basis on which it claims IP over the relevant standards, ARNECC or individual Registrars (or any other interested party) should immediately refer the incumbent to the ACCC for investigation on grounds that its conduct may amount to a breach of section 46 of the *Competition and Consumer Act 2010* (Cth).

eConveyancing mandates allowed the incumbent to secure space in the market

The decision to make eConveyancing mandatory in several jurisdictions has given the incumbent, as the first mover, access to precious space in the market that was formerly occupied by paper-based conveyancing services (see **table 1** in **section 2.2**). Mandating of eConveyancing was significantly progressed prior to the second entrant, Sympli, commencing operations, meaning it was not in a position to capture the increased transaction volumes that these mandates created. As former Member for Wollondilly, Mr Nathaniel Smith, said in support of the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022:

> The incumbent operator has secured an unintended monopoly in the ELNO market, which has been bolstered by the mandating of eConveyancing in New South Wales, removing any competition from paper conveyancing.

NSW Legislative Assembly 2022, 8617

The PEXA Replacement Prospectus highlights that one of the drivers of PEXA's increasing market share over time has been the decision of four states (New South Wales, Victoria, South Australia, and Western Australia) to mandate eConveyancing for all major transaction types (PEXA 2021b). This suggests that in the absence of paper-based conveyancing in Queensland and the ACT, PEXA's market share would be even higher.

This is reflected in the data, with PEXA's annual exchange transactions averaging 3.38 million and its market share steadily growing between FY 2020 and FY 2023. This follows PEXA only first reaching one million transactions in total on 11 April 2018 and two million later that year on 8 December 2018 (PEXA n.d.a).

The Australian Government's intention to phase out cheques by 2030 as part of its *Strategic Plan for Australia's Payments System* may also have the effect of allowing the incumbent to secure additional market space in jurisdictions where eConveyancing is not yet mandatory (Commonwealth of Australia 2023).

High switching costs may discourage subscribers from changing platforms, which will benefit the incumbent ELNO

Switching costs are present in the eConveyancing market. In stakeholder consultations, we heard that subscribers may be reluctant to switch from the incumbent to competitor ELNOs due to both perceived financial and non-financial switching costs.

Stakeholders noted that they would have to spend money and time establishing an account with the new ELNO — including setting up a new digital certificate, completing a criminal background check, and linking relevant bank accounts—and retraining staff on a new system. Given many conveyancers and lawyers work in small businesses, this represents a significant cost.

If these switching costs prove to be too high, it is unlikely that subscribers will make the switch from the incumbent platform to competitor offerings, even if the user charges for the competitor's platform are less than the incumbent's.

Stakeholders identified ways to lower switching costs and make it easier for subscribers to hold multiple accounts, including mutual recognition of subscribers, requiring ELNOs to use open digital

certificates, and standardised participation agreements. While measures to lower switching costs should be considered, immediate focus should be on lowering barriers to entry for new ELNOs by reducing network effects (through interoperability) and appropriate policy and regulatory change to facilitate market entry and effective competition.

4 The market needs a fit-for-purpose policy and regulatory framework that differs from the current framework

Australia is a world leader in eConveyancing. This reflects the considerable effort and innovative thinking of many parties and industry participants.

This is because the Australian Registrars' National Electronic Conveyancing Council (ARNECC) has guided a broad range of stakeholders and worked collaboratively with them to support the success of eConveyancing. While doing so, ARNECC has developed a coherent and pragmatic policy framework within which the industry operates.

That said, as a council of Registrars, ARNECC is doing too much given its existing expertise and resourcing. ARNECC was not established to oversee the development of technical standards or to undertake ongoing market monitoring, compliance, and enforcement activities.

The evolution of the eConveyancing market in Australia into a well-functioning competitive market that operates in all Australian states and territories requires a fit-for-purpose policy and regulatory framework. While ARNECC must continue to play an important policy function within the new policy and regulatory framework, the promotion of competition requires ongoing market monitoring of interoperability — and related activities such as the development of technical standards and licensing of new ELNOs — as well as enforcement of non-compliance with regulatory obligations or anti-competitive conduct.

4.1 There are issues with the current regulatory framework

Several stakeholders raised concerns with the regulatory framework that currently applies to the provision of eConveyancing services. This framework has evolved alongside the development of the first ELNO platform and the evolution of the eConveyancing market in Australia.

As noted at **section 2.3.1**, ARNECC does not have formal regulatory, compliance, or enforcement powers — it is a council of Registrars established to facilitate the implementation and ongoing management of the policy and regulatory framework for eConveyancing. Despite this, ARNECC has taken on de facto regulatory status due to its role in the evolution of eConveyancing, its industry knowledge, and its extensive engagement with stakeholders.

In practice, regulatory and compliance matters are considered by ARNECC to promote national consistency, however decisions and actions must be implemented by individual Registrars. While this framework has been operating satisfactorily, consideration needs to be given as to whether this should continue as the market evolves and eConveyancing becomes an increasingly complex national reform.

4.1.1 ARNECC faces challenges with its structure and resourcing

Stakeholders expressed concerns that ARNECC faces challenges with its structure and resourcing that constrain its ability to deal with eConveyancing issues, both today and in the future.

Stakeholders identified that several aspects of ARNECC's structure are not conducive to it acting quickly, including:

- As a council, 'ARNECC has no authority additional to that of its individual members' (ARNECC 2021a, 1). This differs to other regulators. For instance, the Australian Energy Regulator has the power to take enforcement action against energy providers who do not comply with obligations set in energy legislation (AER n.d.).
- ARNECC makes decisions by consensus, with determinations needing the support of at least 75 per cent of members who are present at the meeting and not abstaining (ARNECC 2021a). This is

despite each jurisdiction being at different stages of the rollout of eConveyancing and consequently having a range of different policy positions and priorities. This model often leads to delays in decision-making and the implementation of those decisions, and difficulty in adapting to market changes.

- ARNECC has limited resources and funding. Jurisdictions make in-kind resource contributions based on their annual lodgment volumes and members are responsible for their own costs of participation in meetings (ARNECC 2023d). This too differs from the experience of other regulators. Bodies that undertake a national regulatory role are 'usually funded jointly by the Australian Government and the states/territories, with the Commonwealth usually contributing the largest portion' (Department of Finance 2023). For example, regulatory costs incurred by the Australian Securities and Investments Commission (ASIC) are funded through an appropriation from the Australian Government and recovered from the industry sectors it regulates through levies and fees.
- ARNECC lacks the necessary expertise to oversee the eConveyancing market as a whole. As a council of Registrars, ARNECC has a high level of expertise about land titling matters, however, it lacks expertise in key areas such as technology (critical given ELNOs operate digital platforms), competition, and financial settlement. ARNECC's capacity to develop this expertise — either through additional staff or consulting/contracting arrangements — is constrained by limited funding and resources.

4.1.2 The financial settlement and competition components of regulation are not adequately addressed

Unlike the eConveyancing market which has three separate but interlinked components — land title registration, financial settlement, and competition — the regulatory framework is primarily focused on the land titles registration processes and is administered by Registrars. This is problematic for the following reasons:

- ARNECC does not have the expertise or resources required to monitor a highly concentrated market and to identify instances of anti-competitive behaviour that can be referred to the Australian Competition and Consumer Commission (ACCC).
- While the eConveyancing market is subject to the economy-wide provisions of the *Competition and Consumer Act 2010* (Cth) (CCA), the ACCC has no eConveyancing-specific role.
- Although there is some overlap between ARNECC's remit and financial settlement, Registrars are not well-placed to deal with issues or concerns regarding financial settlement processes. One stakeholder emphasised that ARNECC has no explicit accountability or power to oversee and deal with the financial settlement aspects of eConveyancing. This represents a shortcoming in the current regulatory framework, which is giving rise to uncertainty.

4.1.3 The Electronic Conveyancing National Law lacks fit-for-purpose enforcement powers to ensure compliance

The Electronic Conveyancing National Law (ECNL) currently lacks the range of enforcement powers found in many other regulatory regimes. This means that Registrars have limited powers to enforce compliance and to take appropriate action in the event of non-compliance by ELNOs and subscribers.

Registrars' limited enforcement powers increase the risk of non-compliance and hinder ARNECC's ability to progress and implement critical reforms – as noted above, the interoperability reform has been subject to a number of delays and the risk of further delay is exacerbated by deficiencies in the current enforcement powers.[20]

[20] This is supported by ARNECC's proposal to attach a financial penalty to an ELNO's failure to interoperate, as part of the proposed new enforcement powers.

ARNECC is currently progressing a legislative reform to provide Registrars with a broader range of fit-for-purpose enforcement powers, including enforceable undertakings, remedial directions, and financial penalties (ARNECC 2023c). While this reform is currently scheduled to be implemented in the first half of 2025, stakeholders have noted the difficulty of progressing the national enforcement proposal, due in part to accommodating jurisdiction-specific policy and legislative requirements. ARNECC members are continuing to consider the maximum financial penalty for ELNOs (ARNECC 2023d).

It is critical that the national enforcement changes are progressed to promote compliance and facilitate progress of key reforms, in particular interoperability.

New South Wales has enacted its own enforcement regime as an interim arrangement, pending the introduction of the national enforcement regime (Electronic Conveyancing Enforcement Bill 2022 (NSW)). The NSW regime includes similar powers to the proposed national regime, including the imposition of a financial penalty of up to $10 million for non-compliance with the interoperability requirement (Electronic Conveyancing Enforcement Bill 2022 (NSW), sec. 16(6)(a)). Noting that the national reform will continue into 2025, New South Wales should strongly consider engaging its standalone regime to enforce compliance with the interoperability requirements in the ECNL and OR, including any interim milestones determined in the lead up to the July 2025 deadline (see **recommendation 2**).

4.2 The eConveyancing market requires a fit-for-purpose policy and regulatory framework

As detailed in the previous section, there are opportunities to strengthen and improve the current regulatory framework that applies to eConveyancing services. There are also opportunities to better resource ARNECC and clarify its important role into the future.

4.2.1 ARNECC and financial regulators should meet regularly to discuss financial settlement

Despite differences between state and territory jurisdictions in respect of land titles lodgment processes, ELNOs operate across jurisdictions and currently price on a nationally consistent basis. Indeed, Property Exchange Australia Limited's (PEXA) annual report refers to an Australian market for eConveyancing services and, subject to Tasmania and the Northern Territory adopting electronic lodgment, its platform operates on a national footprint. Banks — the largest subscribers to ELNOs — frequently operate nationally or at least across multiple jurisdictions. Sympli and Lextech's platforms also operate across jurisdictions and intend to provide services Australia-wide. This suggests that, while there are different jurisdictional requirements in each state and territory, the market for eConveyancing operates nationally.

Additionally, as discussed in **section 4.1.2**, the financial settlement components of regulation are currently not adequately addressed.

One way of recognising that the market for eConveyancing operates nationally and that financial settlement should be overseen appropriately could be to create a body that is made up of ARNECC members and members of the Council of Financial Regulators (CFR) (see **Box 6**).

Box 6: The Council of Financial Regulators is made up of Australia's financial regulators

The CFR is a non-statutory coordination body for Australia's financial regulatory agencies. It aims to achieve a 'competitive, efficient and fair financial system' by supporting financial stability and effective and efficient regulation (CFR n.d.). The CFR has four members:

- The **Reserve Bank of Australia** (RBA) is Australia's central bank and the Chair of the CFR. The RBA has two Boards — the Reserve Bank Board and the Payments System Board. The latter is responsible for the promotion of efficiency and competition in the payments system, and for the stability of the financial system. The *Payment Systems (Regulation) Act 1998* (Cth) gives the RBA the power to designate payment systems and then to establish access regimes or

standards for participants. For example, the RBA has designation of the MasterCard and Visa payment systems and sets their access regimes and standards.

- The **Australian Prudential Regulatory Authority** (APRA) is an independent statutory authority. APRA's role is to ensure that 'Australians' financial interests are protected and that the financial system is stable, competitive and efficient'. To do so, it regulates a range of financial institutions including banks, insurers, and superannuation funds.
- The **Australian Securities & Investments Commission** (ASIC) is an independent Australian Government body. ASIC's role is to administer and enforce the *Australian Securities and Investments Commission Act 2001* (Cth), which involves regulating financial services, consumer credit, and authorised financial markets.
- The **Australian Treasury** (Treasury) is the Australian Government's chief economic adviser. Treasury aims to 'achieve strong and sustainable economic and fiscal outcomes for Australians.'

Source: RBA n.d.a; RBA n.d.b; APRA n.d.; ASIC 2023; The Treasury n.d.c.

Recommendation 9

Members of ARNECC and the CFR should be equally represented in a body that meets quarterly to discuss policy and regulatory matters relevant to the financial settlement component of eConveyancing. The ACCC should also attend this meeting in the capacity of an observer and an adviser on competition matters relevant to financial settlement issues. This recognises that eConveyancing financial settlement is subject to a number of regulatory regimes and that a level of coordination is required to ensure comprehensive and nationally consistent regulatory oversight.

Recommendation 10

ARNECC should receive annual funding to appropriately resource its ongoing activities. Accordingly, ARNECC should be required to submit to the Australian Treasury every three years a forward-looking funding and fee proposal. This proposal should set out:

1. A proposed annual budget for each of the two financial years in the period detailing:
    a. The value of any financial assets or liabilities of ARNECC as at the date the proposal was prepared by ARNECC.
    b. A description of the activities to be undertaken by ARNECC and their expected benefits to the eConveyancing industry.
    c. An estimate of the financial resources required by ARNECC to complete the proposed activities, including any FTE staffing requirements. The basis on which this estimate was calculated should be detailed.
    d. What resources, including any FTE staffing requirements, that are required to support the ongoing day-to-day activities of ARNECC during the financial year. The basis on which this estimate was calculated should be detailed.
    e. Detailing the expected costs to be incurred by the ACCC in performing its eConveyancing market oversight and monitoring activities. The basis on which these costs have been estimated should be detailed.
2. An ELNO operating fee proposal detailing how much each operating ELNO should contribute to recover the cost of ARNECC's proposed activities based on their respective market share of total national eConveyancing transactions in the previous financial year.
3. The ELNO operating fee should include the licence fee to NECDS Ltd.

The Australian Treasury should approve ARNECC's forward-looking funding and fee proposal if it deems the proposal to be reasonable. If the Australian Treasury forms the view that the funding and fee proposal is not reasonable it must notify ARNECC and the ACCC of its decision and request that ARNECC submit a revised proposal within 20 business days.

If the Australian Treasury forms the view that ARNECC's fee proposal is not reasonable due to the expected costs to be incurred by the ACCC, then the ACCC must provide an updated costs estimates for the period to ARNECC so that ARNECC can resubmit a forward-looking funding and fee proposal within 20 business days.

4.2.2 Market oversight and monitoring should be transitioned to an existing or new regulatory body

As discussed in **section 4.1**, ARNECC does not have the appropriate structure, resources, nor expertise to undertake ongoing market monitoring, compliance, and enforcement activities. Instead, this function should be transitioned to an existing or new regulatory body.

This regulatory body will by no means replace the role of ARNECC or Registrars — they will still play an essential role in licensing of ELNOs, policy development, and land registry lodgments. Some functions, however, will move to the regulatory body, including:

- monitoring compliance and enforcement of ELNO regulatory requirements in all jurisdictions on an ongoing basis, in respect of market structure, interoperability and access arrangements, data standards, price controls, and regulatory reporting
- providing advice to ARNECC about competition and market structure issues relevant to eConveyancing.

Stakeholder consultations indicated that assigning a specialist regulator, rather than fragmenting roles and responsibilities across several regulators, would mean issues are less likely to fall through the cracks. **Table 3** identifies the pros and cons of different regulatory models, including:

- existing regulatory bodies — the ACCC, APRA, ASIC, and the RBA
- a new regulatory body.

Considering the pros and cons of each option, the Commission considers the ACCC to be best-placed to take on a greater ongoing role in respect of eConveyancing market. Specifically, the ACCC:

- has previously undertaken a review of the eConveyancing market and has a history of dealing with the type of issues that the eConveyancing market currently faces. These include network effects, dealing with established incumbent firms with large market share, addressing market structure and competition issues arising from technological change, and addressing barriers to entry to promote competition
- has a strong understanding of network industries as well as digital platforms and ecommerce. This understanding is likely to be relevant to the eConveyancing market
- is experienced in monitoring and regulating markets to promote competition and lower barriers to entry consistent with the objectives of the CCA.

Additionally, we see strong parallels between the current state of the eConveyancing market and Australia's telecommunications industry in the mid- to late 1990s. In this regard, we note that the ACCC has a dual role in respect of the telecommunications industry which was justified by Telstra's incumbency and level of vertical and horizontal integration as well as the fact that the telecommunications industry is subject to ongoing rapid technological changes.

Table 3: Options of regulatory bodies

Option	Pros	Cons
ACCC	• Responsible for administering and enforcing the CCA and other legislation promoting competition and fair trading. This is an economy-wide remit which includes the eConveyancing industry. • Experience in access regulation and enforcement. • Has previously reviewed the eConveyancing market. • Expertise in economic regulation of other network industries, such as telecommunications, energy, and transport. • Expertise in designing, and monitoring compliance with, price control frameworks. • Expertise and knowledge of digital platforms.	• May not have capacity to take on a large role in this market alongside other regulatory responsibilities.
APRA	• Responsible for ensuring Australians' financial interests are protected and that the financial system is stable, competitive, and efficient. • Experience regulating financial institutions.	• Primarily concerned with prudential regulation — the safety and stability of financial institutions.
ASIC	• eConveyancing may come under new licensing framework for payment service providers. • Experience in regulating financial services, consumer credit, and authorised financial markets. • Experience in approving codes of conduct.	• Lacks experience in access regulation and enforcement.
RBA	• Responsible for the promotion of efficiency and competition in the payments system, and the stability of the financial system. • Has the power to designate payment systems and then to establish access regimes or standards for participants. • Already part of the eConveyancing ecosystem.	• Primarily relies on self-regulation due to the narrow breadth of its regulatory remit in payments systems. • Lacks experience in access regulation and enforcement.
New industry specific regulator	• Designated regulator for the eConveyancing market.	• Would require expertise from other regulatory agencies. • Costly to establish and maintain on an ongoing basis. Could give rise to duplicative responsibilities of regulatory agencies.
Source: ACCC n.d.a ; APRA n.d. ; ASIC 2023 ; RBA n.d.a; RBA n.d.b.		

The ACCC, however, has previously flagged that it does not have the capacity to undertake a large role in the eConveyancing market alongside its other regulatory responsibilities. This concern could be alleviated by funding the ACCC's roles and functions with respect to eConveyancing through annual ELNO operating fees. These could be set by ARNECC on a three-yearly basis in consultation with the ACCC and the Australian Treasury. This is consistent with the approach taken in other industries. For instance, in the telecommunications industry, each participating licensed carrier must pay an annual charge to the communications and media regulator — the Australian Communications and Media Authority (ACMA) — that consists of a fixed minimum charge, as well as a variable component that is based on market share. According to the ACMA's Carrier Licensing Guide:

> The annual charge is intended to provide a mechanism for recovery of costs associated with the regulation of the telecommunications industry by the ACMA and the ACCC.
>
> ACMA 2018, 10

ARNECC could also support the ACCC by providing it with a formal Statement of Expectations from time to time as appropriate, but no less than every five years. This is a common practice in Australia. The Australian Treasury noted:

> Through issuing a Statement of Expectations, Ministers are able to provide greater clarity about government policies and objectives relevant to a statutory authority, including the policies and priorities it is expected to observe in conducting its operations.
>
> The Treasury, n.d.b

For example, the Australian Government's Energy Ministers regularly provide the Australian Energy Regulator with a Statement of Expectations that communicates their expectations on a range of matters including the AER's key roles in respect of the National Energy Market (AER 2022). Similar statements are also issued by the Energy Ministers to the Australian Energy Market Commission (AEMC) and Australian Energy Market Operator (AEMO). The Australian Minister for Communications can also issue the ACCC with a Statement of Expectations about functions and powers in the Telecommunications industry (Department of Infrastructure, Transport, Regional Development, Communications and the Arts. n.d.b.).

Recommendation 11

ARNECC, state and territory governments, and the Australian Government should give consideration to the ACCC becoming responsible for the ongoing market oversight and monitoring of the eConveyancing market in Australia. This new role should be additional to the ACCC's current competition law enforcement role with respect to the eConveyancing market. Specifically, the ACCC should become responsible for:

- monitoring and overseeing the eConveyancing market in all jurisdictions on an ongoing basis
- periodically reviewing the price control arrangements applying to ELNOs which have significant market power (See recommendations 1 and 6)
- monitoring of compliance and enforcement of competition-related ELNO regulatory requirements
- providing advice to ARNECC about competition and market structure issues relating to eConveyancing.

Recommendation 12

Given the ACCC's current functions with respect to digital platforms, consideration should be given as to whether the ACCC's new role in respect of the ongoing market oversight and monitoring of the eConveyancing market warrants the establishment of a dedicated Digital Platforms Regulation Branch of the ACCC. If so, the Australian Government should make available

to the ACCC the necessary resources to establish this additional branch of the ACCC along with the appointment of a dedicated ACCC Digital Platforms Commissioner.

Recommendation 13

The ACCC's roles and functions with respect to the eConveyancing market should be funded via annual ELNO operating fees set by ARNECC on a three-yearly basis in consultation with the ACCC and the Australian Treasury (see recommendation 10).

Recommendation 14

From time to time as appropriate, but no less than every five years, ARNECC should issue the ACCC with a formal Statement of Expectations providing it with direction on relevant government policies and operational priorities. The Statement of Expectations should be published by the ACCC.

Recommendation 15

No more than three years after the introduction of interoperability, ARNECC should initiate a competition and regulatory review of the eConveyancing market in Australia. This review should consider the extent to which competition for eConveyancing services has been promoted by interoperability and other regulatory reforms, the ongoing existence of material barriers to entry, the effectiveness of the regulatory framework, and other competition related matters. This study should also make recommendations regarding ongoing improvements to the regulatory and policy framework that support the ongoing promotion of competition in the market for eConveyancing.

4.2.3 Existing processes should be leveraged and expedited

Ongoing market oversight and monitoring by a new or existing regulator should also be complemented by existing processes underway.

ELNOs should be included in the licensing framework for payment service providers

In October 2020, the Australian Treasury undertook a *Review of the Australian Payments System* to 'ensure the payments system remains fit-for-purpose and is capable of supporting continued innovation for the benefit of both businesses and consumers' (The Treasury n.d.a). This Review culminated in a final report with recommendations released on 31 August 2021, and a Government Response in December of that year.

Following this Review, the Australian Treasury has more recently been undertaking *Payments System Modernisation (Regulation of Payment Service Providers)* consultations with a view to introducing a licensing framework for payment service providers into legislation in 2024 (The Treasury 2023). The Consultation Paper notes that ELNOs currently have conditional relief from the Australian Financial Services (AFS) licensing, disclosure and conduct obligations and asks responding parties — including ARNECC — to consider:

> 'Should the relief provided by ASIC for certain activities be moved into regulation or discontinued? For example, should loyalty schemes, road toll devices and electronic lodgement operators be exempted?'
>
> The Treasury 2023, 39

ARNECC has provided a submission to the consultation paper querying the basis for ELNOs' current exemption and identifying aspects of ELNOs' financial settlement functions that are important to ARNECC's oversight of the eConveyancing system (ARNECC 2024b).

Given the current gaps in the eConveyancing regulatory framework about financial settlement and ELNOs' key role in the payments process, strong consideration should be given to ELNOs' inclusion in the new licensing framework.

The eConveyancing Payments Industry Code should be expedited and mandated

As discussed in **section 2.3.2**, ELNOs and banks are members of a self-regulatory eConveyancing Payments Industry Code (eC1) developed by AusPayNet. However, while the AusPayNet Board approved the Code on 31 August 2023, it is not yet operational and the timeline for implementation has not been communicated (AusPayNet 2023). Furthermore, the eC1 is voluntary, meaning that ELNOs are not required to comply.

Given existing regulatory gaps about financial settlement, it is important that the industry code is operationalised without delay.

It is understood that in March 2024, the CFR met with ARNECC, AusPayNet, and industry code participants to discuss implementation of the Code. Following that meeting, the CFR recommended that the industry code be operationalised within three months, and that it be adopted by banks and ELNOs.

AusPayNet should expedite the implementation of the Code immediately. Upon its operationalisation, ARNECC should mandate compliance with the Code by including it as a requirement in the MOR.

Recommendation 16

The implementation of the AusPayNet Code should be expedited and, simultaneous with the implementation, the eConveyancing regulatory framework amended to require ELNOs to participate in and comply with the Code.

The Competition Review should consider the eConveyancing market

The Australian Treasurer, The Hon. Dr Jim Chalmers MP, announced a Competition Review on 23 August 2023 (The Treasury n.d.d). This follows on from the Hilmer Review in 1993 and the Harper Review in 2013. The latest Review will look at:

> 'competition laws, policies and institutions to ensure they remain fit-for-purpose for the modern economy, with a focus on reforms that would increase productivity, reduce the cost of living and/or lift wages.'
>
> The Treasury n.d.d

The eConveyancing market features an incumbent operator with strong incentives to protect its market share and deter market entry. There is also broad scope for anti-competitive conduct ranging from delays to interoperability, cross-subsidies between customer groups, and horizontal and vertical integration of firms. Furthermore, eConveyancing is a technology-based industry which experiences ongoing and often fast-paced technological change.

This unique combination of market features may present challenges for regulators given their current regulatory and competition law powers. In particular:

- the extent to which Part IIIA of the CCA could be used to declare an ELNO facility to provide regulated access to the incumbent's platform is uncertain
- there is no industry-specific access regime that applies to ELNO platforms
- the effectiveness of the general anti-competitive conduct provisions set out in Part IV of the CCA (including section 46) in deterring and enforcing anti-competitive behaviour in eConveyancing markets in a timely fashion is uncertain.

The Australian Treasury, as part of its Competition Review, is considering a range of matters relevant to the regulation of digital platforms and new technologies. Accordingly, it is recommended that the Australian Treasury consider whether the CCA is sufficient for dealing with potential anti-competitive conduct in the eConveyancing market and other competition matters related to digital platforms. In doing so, the Australian Treasury may wish to consider the merits of the following proposals:

- Developing an access regime for digital platforms to deal with nationally significant services that develop strong network effects. This could be done by creating a new access regime that is appropriate for digital platforms or alternatively by amending Part IIIA[21] to better deal with emerging technologies. This access regime could be relied upon if the December 2025 deadline for interoperability is not reached.
- Amending Part XIB of the CCA to also apply to the eConveyancing industry. The unique combination of market characteristics present in the eConveyancing market are the same as those that justified the adoption, and ongoing retention of, Part XIB as part of Australia's telecommunications regulatory framework (see **Box 7**) (Productivity Commission 2001, 163). Part XIB, however, is a blunt instrument, and could lead to an increased risk of regulatory error (Productivity Commission 2001, 185).
- Introducing provisions into Part IV of the CCA[22] that prohibit a digital platform provider with a substantial degree of market power from exploiting that power. This would limit the ability of a digital platform provider with a substantial degree of market power from:
  - imposing unreasonable or discriminatory conditions on other firms or customers to exploit them or earn monopoly profits
  - exploiting data and technical standards and proprietary information rights to the detriment of competition
  - refusing to provide for interoperability between digital platforms that operate in the same market.

Box 7: Part XIB of the Competition and Consumer Act 2010

Part XIB of the CCA establishes an anti-competitive conduct regime for Australia's telecommunications industry which are additional to the economy-wide provisions (set out in Part IV of the Act) that apply to all industries. The introduction of Part XIB into the then *Trade Practices Act 1974* (Cth) (TPA)[23] in 1997 was part of a broader program of pro-competitive reforms that began in 1991 to transition Australia's telecommunications industry from a market structure in which Telstra was a statutory monopoly, to an effectively competitive industry with low barriers to entry.

Despite opposition to its introduction by Telstra, the Government considered that total reliance on the general provisions in Part IV of the Act would not achieve its objectives for the telecommunications industry. This was for a number of reasons. These included the view that Part IV would not encourage competition sufficiently in telecommunications markets, and that it left considerable scope for anti-competitive conduct, including the possibility of cross-subsidies. There were also concerns regarding the potential ongoing impacts of Telstra's incumbency, the extent to which Telstra was horizontally and vertically integrated, and the rapid pace of technological change in the telecommunications industry. These concerns are reflected in the Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996*:

> Telecommunications is an extremely complex, horizontally and vertically integrated industry and competition is not fully established in some telecommunications markets. There is considerable scope for incumbents to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbents. Furthermore, the possibility of anti-competitive

[21] Part IIIA of the CCA establishes the National Third-Party Access Regime for services provided by significant monopoly infrastructure (NCC 2017).

[22] Part IV of the CCA prohibits anti-competitive practices, such as misuse of market power, cartel arrangements, exclusive dealing, imposing minimum resale prices, and anti-competitive mergers (Australian Competition Law 2017).

[23] The TPA was the predecessor of the CCA - both being the main legislative vehicle for competition law in Australia.

> cross-subsidies by incumbents from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment.
>
> Total reliance on Part IV of the TPA to constrain such anti-competitive conduct might, in some cases, prove ineffective because of the state of competition in the telecommunications industry and the fast pace of change in this industry. There may be difficulty, for example, in obtaining evidence of predatory behaviour supported by inappropriate internal cost allocation by horizontally or vertically integrated firms. Anti-competitive behaviour in telecommunications could cause particularly rapid damage to competition because of the volatile state of the industry during the early stages of competition. Against this background, Part IV alone may prove insufficient to deal with anti-competitive behaviour in telecommunications at this time
>
> Trade Practices Amendment (Telecommunications) Bill 1996 [1997], (Australia), Explanatory Memorandum, 6

Since 1997, both Part XIB and Part IV of the TPA have been the subject of several competition law reviews and have undergone significant consequential amendments. Today, Part XIB continues to operate in addition to Part IV of the CCA, reflecting ongoing concerns about the potential for anti-competitive behaviour in Australia's telecommunications industry.

The key features of Part XIB in its current form are:

- It establishes a special regime for regulating anti-competitive conduct in the telecommunications industry and sets out the circumstances in which telecommunications carriers and carriage service providers are said to *engage in anti-competitive conduct*. Part XIB continues to apply in addition to Part IV.
- It prohibits a telecommunications carrier or carriage service provider from engaging in anti-competitive conduct. This is called the *competition rule*.
- It provides the ACCC with the power to issue a notice stating that a specified carrier or carriage service provider has engaged, or is engaging, in anti-competitive conduct. This is called a *Part A competition notice*.
- Proceedings for the enforcement of the competition rule (other than proceedings for injunctive relief) must not be instituted unless the alleged conduct is of a kind dealt with in a Part A competition notice that was in force at the time when the alleged conduct occurred.
- The ACCC may issue a notice stating that a specified carrier or carriage service provider has contravened, or is contravening, the competition rule. The notice is called a *Part B competition notice* and is prima facie evidence of the matters in the notice. In this sense, Part XIB reverses the onus of proof as to whether the carrier or carriage service provider has engaged in, or is engaging in, anti-competitive conduct.
- The ACCC is also able to seek pecuniary penalties and a third party can seek damages where anti-competitive conduct is engaged in after the ACCC has issued a competition notice and while the notice is in force.

Recommendation 17

State and territory governments should refer concerns about the absence of effective competition in the eConveyancing market to the Australian Government's Competition Review.

Recommendation 18

As part of its Competition Review, the Australian Government should consider whether the *Competition and Consumer Act 2010* (Cth) is sufficient for dealing with potential anti-competitive conduct in the eConveyancing market and other competition matters related to digital platforms. Specific consideration should be given to:

- Developing an access regime for digital platforms to deal with nationally significant services that develop strong network effects.
- Amending Part XIB of the *Competition and Consumer Act 2010* (Cth) to also apply to the eConveyancing industry.
- Introducing provisions into Part IV of the *Competition and Consumer Act 2010* (Cth) that prohibit a digital platform provider with a substantial degree of market power from exploiting that power.

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Appendix A: Stakeholders consulted

The NSW Productivity and Equality Commission consulted a number of stakeholders. These include:

- Australian Banking Association
- Australian Competition & Consumer Commission
- Australian Capital Territory Registrar General
- Australian Institute of Conveyancers
- Australian Payments Network
- Australian Registrars' National Electronic Conveyancing Council
- Australian Securities and Investments Commission
- Australian Treasury
  - Competition Taskforce
  - Market Conduct and Digital Team
  - Payments Licensing Unit
- Independent Pricing and Regulatory Tribunal
- Law Council of Australia
- Law Society of New South Wales
- Lextech
- Northern Territory Registrar-General's Office
- NSW Office of the Registrar General
- Property Exchange Australia
- Reserve Bank of Australia
- South Australian Office of the Registrar-General
- Sympli
- Titles Queensland
- Victorian Registrar of Titles

Appendix B: Addendum relating to interoperability

While most consulted stakeholders supported the interoperability reform, several questioned whether it could be achieved in the timeframe set by the Australian Registrars' National Electronic Conveyancing Council (ARNECC). Additionally, some raised concerns about the reform's feasibility given the incumbent Electronic Lodgment Network Operator (ELNO) — which has a high degree of systems integration with the banks — has not shared details of its platform functionality and data standards with the interoperability working group. As discussed in **section 3.3.3**, the incumbent ELNO is currently claiming intellectual property (IP) over this functionality and these standards.

Despite ARNECC seeking to understand the nature and scope of the incumbent's IP claims, it is not clear whether this can be resolved in the short term. This is preventing critical design and build work, posing a significant risk to the current timetable for implementing interoperability.

Accordingly, we believe further thought should be given to the nature of any regulatory reforms that could be implemented if interoperability cannot be achieved in a timely manner. This addendum sets out several recommendations policymakers may wish to consider. It is important to note this does not suggest interoperability is not technically possible or reflect a view that interoperability is not the best way to support sustainable long-term competition in the supply of eConveyancing services.

Firstly, consistent with **recommendation 8**, ARNECC and other participants in the interoperability working group should consider the extent to which the incumbent's conduct may amount to anti-competitive conduct under Part IV of the *Competition and Consumer Act 2010* (Cth) and whether a formal complaint should be referred to the ACCC.

Secondly, there is merit in establishing an industry-specific access regime for ELNO services. This can be justified as the industry is characterised by a near-monopoly incumbent operator and persistently high barriers to entry — like network effects and switching costs — and given the essential nature of eConveyancing services in several jurisdictions because of mandates. The industry-specific access regime should be administered by the ACCC and, at minimum, allow for the following:

- If the ACCC forms the view, following a public inquiry, that declaration of an ELNO service is in the long-term interest of end users, it should have the ability to declare that service. Only ELNOs with significant market power should be subject to declaration.
- The wholesale access services to be declared by the ACCC should not be limited to the provision of wholesale electronic lodgment services, but also include wholesale access to any data services or products, or any other service capable of being supplied by the regulated ELNO due to its operation of the Electronic Lodgment Network (ELN) platform.
- Wholesale access charges for any declared service should be set at cost-based levels with a productivity dividend applied over time, recognising only those costs that a prudent and efficient ELNO would incur. Prices should reflect the efficient costs of developing an ELNO at the time of setting the wholesale charges, not legacy costs and the operational efficiencies made possible from completing conveyancing transactions digitally as opposed to physically.
- Any wholesale service declared by the ACCC should be supplied on the same price terms and conditions to all access seekers, including to the retail business units of the regulated ELNO. This non-discrimination obligation should not be subject to any exceptions.
- The declaration of any wholesale access service should not prevent, or interfere with, the achievement of ELNO interoperability. This seeks to allow for interoperability to be achieved at any time in the future should ARNECC, the ACCC, or industry wish to continue to explore it.
- Price and non-price terms and conditions for any declared wholesale access service should be set to encourage the efficient use of, and investment in, ELNs.
- The access regime should be reviewed on a periodic basis (at least every five years) to ensure it remains fit-for-purpose. If effective competition between ELNOs does emerge over time, and the current high barriers to entry are lowered, consequential changes to any industry-specific access regime should be considered.

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