



Statement of Issues

16 June 2022

Dye & Durham Corporation – proposed acquisition of Link Administration Holdings

Purpose

1. Dye & Durham Corporation (D&D) proposes to acquire Link Administration Holdings Limited (Link) (the Proposed Acquisition). Through the Proposed Acquisition D&D would acquire Link's 42.77% shareholding in PEXA Group Limited (PEXA).
2. This Statement of Issues:
 - gives the preliminary views of the Australian Competition and Consumer Commission (ACCC) on competition issues arising from the Proposed Acquisition
 - identifies areas of further inquiry
 - invites interested parties to submit comments and information to assist our assessment of the issues.
3. Statements of Issues do not refer to confidential information provided by the parties or other market participants and therefore may not necessarily represent a full articulation of the ACCC's preliminary position.

Overview of ACCC's preliminary views

4. The legal test which the ACCC applies in considering the Proposed Acquisition is set out in section 50 of the *Competition and Consumer Act 2010*. In general terms, section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
5. The ACCC divides its preliminary views into three categories, 'issues of concern', 'issues that may raise concerns' and 'issues unlikely to raise concerns'. In this Statement of Issues there is one issue of concern.

Issue of concern: foreclosure of competition in one or more markets in the conveyancing workflow

6. The ACCC's preliminary view is that the Proposed Acquisition is likely to substantially lessen competition in one or more markets in the conveyancing workflow.
7. Post-acquisition D&D and PEXA would have the ability and incentive to engage in mutual preferential dealing resulting in foreclosure of competitors in the conveyancing workflow. Foreclosure would lead to higher prices and/or lower quality in the supply of one or more services.

Making a submission

8. Interested parties should provide submissions by no later than 5pm on 7 July 2022. Responses may be emailed to mergers@acc.gov.au with the title: Submission re: Dye & Durham proposed acquisition of Link Administration Holdings - attention Annabel Garrard/Nicholas Welfare. If you would like to discuss the matter with ACCC officers over the telephone or in person, or have any questions about this Statement of Issues, please contact Annabel Garrard on (02) 9102 4028 or Nicholas Welfare on (02) 9230 3813.
9. The ACCC anticipates making a final decision on 8 September 2022, however, this timeline can change. To keep abreast of possible changes in relation to timing and to find relevant documents, interested parties should visit the Mergers Register on the ACCC's website at www.acc.gov.au/publicregisters/mergers-registers/public-informal-merger-reviews.

Confidentiality of submissions

10. The ACCC will not publish submissions regarding the Proposed Acquisition. We will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the *Competition and Consumer Act 2010*. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our [Informal Merger Review Process Guidelines](#) contain more information on confidentiality.

About ACCC 'Statements of Issues'

11. A Statement of Issues published by the ACCC is not a final decision about a Proposed Acquisition, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
12. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

Glossary of terms

ARNECC	Australian Registrars' National Electronic Conveyancing Council
API	Application Programming Interface
ATI	Australian Technology Innovators Pty Limited
ELN	Electronic Lodgment Network
ELNO	Electronic Lodgment Network Operator
D&D	Dye & Durham Corporation
PMS	Practice Management Software
Vol	Verification of Identity

The parties

D&D

13. D&D is an international provider of cloud-based software and technology solutions to legal and business professionals, including lawyers and conveyancers. D&D acquired SAI Global's Property Division in January 2021 and GlobalX in July 2021. D&D's core products and services relevant to the Proposed Acquisition include:

- Information search and broking services: including property, commercial and personal information.
- Practice Management Software (including conveyancing and legal practice management software): including Matter Centre, Conveyancing Manager, Conveyancing Directory, Open Practice, SettsPlus and Atom as well as ancillary solutions that support conveyancing transactions such as verification of identity (Vol) and digital signing software solutions.
- Manual property settlement services: services including physical property settlement attendance, stamp duty calculations and manual stamping, lodgment and registration.

Link

14. Link is a technology-enabled provider of outsourced administration services for superannuation fund administration and corporate markets, as well as related services including data management, analytics, digital communication and stakeholder education and advice.

15. Link also holds a ~42.77% shareholding in PEXA, which D&D would acquire through the Proposed Acquisition.

PEXA

16. PEXA principally operates as an Electronic Lodgment Network Operator (ELNO), through its Electronic Lodgment Network (ELN) product, PEXA Exchange. An ELN enables users (also known as subscribers) to complete property lodgments and settlements electronically through a digital process known as e-conveyancing. The PEXA Exchange is integrated with six land titles offices and

five state revenue offices for the lodgment of documents, as well as the Reserve Bank of Australia, the Australian Taxation Office and major financial institutions to facilitate financial settlement.

17. The PEXA Exchange was born out of a 2010 Council of Australian Governments initiative to transition property lodgment away from paper-based to more efficient digital processes. PEXA was listed on the Australian Securities Exchange in 2021 and its largest shareholders are Link Property Group Pty Ltd (42.77%) and Commonwealth Bank of Australia (23.9%). No other shareholder has a shareholding greater than 10%.
18. In addition to PEXA Exchange, PEXA also offers a range of complementary tools separate from its ELN service to assist its subscribers with the conveyancing process. Some of these products and services include:
 - PEXA Plus: through which PEXA operates as a reseller of information searches provided by third party brokers.
 - PEXA Projects: which supports members in completing conveyancing matters in the role of Proprietor on Title or Mortgagee on Title. It provides a range of features that seek to streamline the processes involved with coordinating and executing property settlements.
 - PEXA Insights: which provides insights into the Australian property market, using information from the PEXA exchange coupled with complementary datasets.
 - PEXA Ventures: which offers a range of funding, bespoke services and programs to businesses in the property services sector.

Other industry participants

Practice management software (including conveyancing and legal practice management software)

19. In addition to D&D, other suppliers of PMS include Australian Technology Innovators (ATI), LexisNexis, Thomson Reuters, Aderant, ActionStep, CATS, CaseFlow and LawMaster.
20. ATI is the largest supplier of conveyancing and legal practice management software (PMS) in Australia. Its associated software products include LEAP Legal Software, PracticeEvolve and TriConvey.

Information search and broking services

21. In addition to D&D's GlobalX Search Platform, other "full service" suppliers of information broking services include InfoTrack, Equifax, CITEC and Ilion. Suppliers with narrower offerings include DirectInfo, PsiGlobal and Hazlett.
22. Lawyers and conveyancers also obtain information search results directly from regulatory authorities (e.g. state/territory land titles offices) and authorised resellers of information broking services (e.g. Landchecker and PEXA Plus).

ELN services

23. In addition to PEXA, Sympli Australia Pty Limited (Sympli) is approved to operate as an ELNO in multiple jurisdictions in Australia and is in the process of developing its systems and expanding its customer base. ATI, which has interests in InfoTrack, LEAP and other relevant entities, holds a 50% stake in Sympli.
24. A potential third ELNO, LEXTECH, owned by Purcell Partners obtained stage one (of two) approvals from the Australian Registrars' National Electronic Conveyancing Council (ARNECC) to provide ELN services in May 2018. It is unclear whether LEXTECH will be approved to operate as an ELNO in the near future.

Industry background

The conveyancing workflow

25. While the specifics of the conveyancing process differ based on the type of transaction, as well as relevant state or territory laws, the ACCC understands that some of the key steps in a typical process include:
 - Verification of Identity: the identity of the seller and buyer as the relevant transaction parties is confirmed. Vol software and an information search service may be used in the verification process. These tools may also integrate with the PMS of the lawyer or conveyancer engaged by the buyer and seller.
 - Contract: a contract for sale is prepared. PMS may be used to generate a contract from a template library. This contract may also be automatically populated with integrated information search results (titles, plans, planning certificates etc).
 - Listing: property is listed for sale.
 - Due Diligence: buyer's lawyer/conveyancer undertakes further searches using information search services.
 - Exchange: contracts are signed and exchanged between the buyer and seller. Electronic signature software may be used to sign the contracts, which may be integrated with the PMS of the lawyer/conveyancer.
 - Deposit: buyer pays the deposit.
 - Pre-settlement: buyer and financier undertake final due diligence/checks. An information search service may be used.
 - Settlement: buyer (or financier) transfers funds to seller and seller transfers title to buyer. This may occur electronically via an ELNO, or the parties may meet to manually exchange contracts, titles and funds. If an ELNO is used, the vendor's conveyancer/solicitor will create a digital workspace using the ELNO and invitations to join the workspace will be sent to the financial institutions and purchaser's conveyancer/solicitor to complete the transaction electronically. The ELNO workspace may also be integrated with the parties' PMS or information search software.

- Lodgment: relevant conveyancing documents are lodged with the relevant regulatory authorities (manually or via an ELNO).
26. The steps in the conveyancing process are commonly referred to as “the conveyancing workflow”. Please refer to **Figure 1** below for a diagrammatic representation.

E-conveyancing and interoperability

Advent of e-conveyancing

27. The Council of Australian Governments committed to creating a single, national electronic system for the settling of real property transactions in all Australian States and Territories in 2008. Since 2013 there has been a shift from traditional manual settlement processes towards e-conveyancing. Technology and connections required for e-conveyancing have been rolled out progressively in various states and territories. E-conveyancing allows lawyers, conveyancers and financial institutions to transact property settlements and lodgments online through an ELN.
28. To date, Victoria, Western Australia, New South Wales and South Australia have mandated e-conveyancing. Queensland and the Australian Capital Territory have enabled e-conveyancing, but have not mandated its use. The Northern Territory and Tasmania¹ have not implemented e-conveyancing.
29. In states where e-conveyancing has been mandated, PEXA completes almost all transactions. Although a second ELNO, Sympli has emerged, the lack of interoperability between ELNOs has limited its expansion.

Interoperability

30. Currently, all parties to an e-conveyancing transaction must use the same ELN. The existing infrastructure and regulatory regime do not enable parties on separate ELNs to exchange data to complete a transaction. This puts Sympli at a significant disadvantage and makes it difficult for it to attract subscribers. Absent interoperability between ELNOs, PEXA’s position as the near monopoly ELNO is unlikely to change.
31. If implemented, interoperability should enable the exchange of settlement information between ELNs to allow participants to complete an electronic conveyancing transaction using different ELNOs. Interoperability should therefore allow subscribers to transact efficiently with all other parties to a settlement or conveyancing transaction, while subscribing only to the ELNO(s) they choose.
32. On 12 May 2022, the *Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022* was passed by the NSW Parliament. This Bill amended the Electronic Conveyancing National Law to provide a framework for requiring ELNOs to ensure their ELNs are interoperable. As the Bill is part of a broader scheme, its reach will be national, therefore requiring interoperability to be

¹ Tasmania’s 2022-23 Budget includes funding related to the implementation of eConveyancing: https://www.premier.tas.gov.au/budget_2022/budget_releases/strengthening_the_future_of_tasmanias_parks

enlivened in each state and territory. A further series of amendments to the Model Operating Requirements in each state and territory will also be required to set out the steps to implementation and a timetable for the introduction of interoperability.

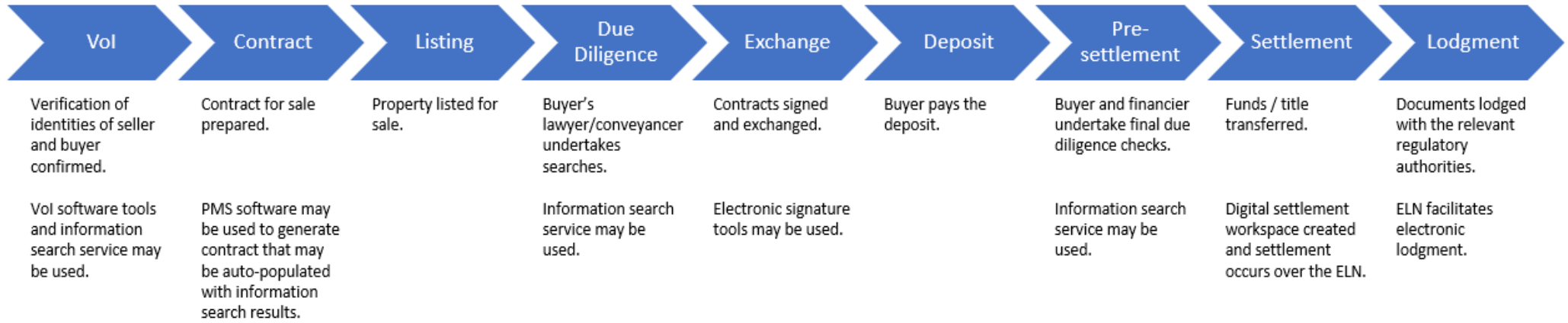
33. The likely timeline for achieving interoperability is uncertain. The recently released Ministers Statement on National Electronic Conveyancing notes the timeline for the rollout has been extended and in the first instance, the reforms will be progressed in New South Wales and Queensland.² The statement also notes an independent assessment of the current (mid-2023) target will likely be considered by the Minister in September 2022. Market participants have raised strong concerns about further likely delays to the implementation of complete interoperability. Market participants have also raised concerns regarding PEXA's capacity to further frustrate certain aspects of the reform process.

Digitisation and increased integration in the conveyancing workflow

34. Concurrent with the digitisation of the settlement and lodgment process, the conveyancing workflow has also become increasingly digitised in recent years. Application Programming Interfaces (APIs) allow software providers to integrate with third-party software solutions to provide a more seamless transfer of information between the various steps in the conveyancing workflow.
35. Market feedback indicated that conveyancing is an efficiency driven process. Integration of the various steps increases the value proposition of software providers as it minimises the need for duplicative manual processes. This allows lawyers and conveyancers to achieve efficiencies and a higher degree of rigour in managing high volume, low margin property transactions.
36. D&D and ATI in particular have emerged as prominent vertically integrated suppliers of conveyancing workflow solutions. They offer integrations with their own product suite, as well as API integration with third parties. PMS, information search and broking, Vol and eSignature software are of most importance in the conveyancing workflow. Other software includes data analytics.
37. The ACCC is considering whether this trend toward integration will continue. It appears likely to become increasingly important to the value proposition for software providers in the conveyancing workflow.

² https://www.arnecc.gov.au/wp-content/uploads/2022/06/ARNECC-Paper_Ministerial-Forum-2-June-2022_Ministers-Statement.pdf

Figure 1: Steps in the conveyancing workflow*



Practice management software may be used by the lawyer/conveyancer throughout the process to capture information, track the matter progress and access integrated tools used in the conveyancing workflow (e.g. Vol, information search and broking, and e-signature tools).

*ACCC analysis, market participant submissions

The proposed transaction

38. D&D, via Dye and Durham Link Holdings Ltd (a wholly owned Ontario incorporated subsidiary of D&D) proposes to acquire 100% of the issued share capital in Link by way of a scheme of arrangement for a total value of approximately A\$3.7 bn. Through the transaction, D&D will also acquire Link's 42.77% stake in PEXA.

Previous ACCC decisions

39. On 17 June 2021, the ACCC announced it would not oppose D&D's proposed acquisition of GlobalX after concluding that the acquisition would be unlikely to result in a substantial lessening of competition. The transaction combined GlobalX and SAI Global's property division, which D&D had acquired early that same year.
40. Although the ACCC did not consider it was necessary to reach a concluded view on the precise definition of the relevant markets, the ACCC considered the effect of the acquisition of GlobalX on the markets for information search and broking services, conveyancing and legal practice management software, and manual property settlements.

Overlap and potential markets

41. The ACCC has not formed a concluded view on market definition. However the ACCC's preliminary view is that the relevant markets are:
- the national supply of ELN services
 - the national supply of information search and broking services
 - the national supply of PMS.
42. The ACCC is considering the extent of complementarities between these activities, including whether, over time, demand and supply side efficiencies may require providers to supply all of these services as a fully integrated end-to-end offering.

ELN services

43. The ACCC's preliminary view is that there is a national market for the supply of ELN services. Although demand for ELN services may differ between states (including because of state-based land laws), on the supply side, PEXA and Sympli operate on a national basis.

Information search and broking services

44. There are a range of service models offered by information brokers. "Full service" brokers offer information search and broking services across property, corporate and/or credit, and with significant depth in each of those sectors. Other brokers may only offer property or credit information search and broking services. Different buyers of information search and broking services also require different service levels. For example, large law firms require the full suite

of search services, while conveyancing practitioners may only require property search services.

45. In geographic terms, some information brokers only operate in particular states or territories, the land titles registries service individual states and territories and many lawyers and conveyancers likely purchase property searches only in individual states or territories. The ACCC is considering whether it is appropriate to consider state-based markets but does not believe this will be critical to its review of the Proposed Acquisition.

PMS supplied to lawyers and conveyancers

46. The ACCC's preliminary view is that there is a national market for the supply of PMS to lawyers and conveyancers. This includes both conveyancing software and broader application legal practice management software.
47. Conveyancing software is marketed to conveyancers and offers solutions tailored to conveyancers' needs. Legal practice management software typically provides the same conveyancing functionality, with the addition of broader practice management solutions to support multi-disciplinary legal practice.
48. Market participants describe the PMS industry as catering to three customer categories with respect to real property transactions:
- Large: encompassing large law firms typically focussing on commercial real estate transactions, including settlements for new apartment towers (typically operating nationwide).
 - Medium: covering a range of law firms and conveyancers with some involvement in both commercial real estate and individual residential transactions (includes nationwide and state-based participants).
 - Small/micro: encompassing small conveyancing and legal practices focusing on individual residential transactions (typically state-based or even local areas).
49. Although some PMS suppliers operate in certain states and not in others, the ACCC's preliminary view is that there is a national market for the supply of PMS as the majority of providers operate in all Australian jurisdictions. However, the ACCC is considering the significance of local variations between states.

The ACCC invites comments from market participants on its preliminary views about the definition of the relevant market(s). In particular, market participants may wish to comment on:

- Whether there is a separate market for the supply of conveyancing software that is distinct from the supply for general legal practice management software.
- The extent and depth of integration between the various steps in the conveyancing workflow.
- How important integration is between the various steps in the conveyancing workflow, including whether any integrations are (or are likely to become) "must have".

- What factors lawyers and conveyancers consider when choosing PMS and how this can differ between practitioners and customer categories (i.e. between conveyancers and lawyers, and between large, medium and small/micro customers).
- Whether there are specific state-based regulatory requirements that would preclude conveyancers, or real property lawyers from operating in some states, but not others.
- The likelihood of new entry or expansion in each of the markets identified above.
- The timing of interoperability, including how this may impact competition between ELNOs.

Issue of concern: foreclosure of competition in one or more market(s) within the conveyancing workflow

50. The Proposed Acquisition would result in significant vertical integration in the conveyancing workflow such that a near monopoly provider of ELN services (PEXA) will be aligned with a significant provider of upstream software services (D&D).
51. The ACCC's preliminary views are that:
- PEXA has a near monopoly position in the supply of ELN services
 - D&D is a significant supplier of upstream software services (PMS and information search and broking)
 - the Proposed Acquisition aligns the near monopoly provider of ELN services with a significant competitor in upstream software markets
 - post-acquisition, D&D and PEXA would have the ability and incentive to engage in mutual preferential dealing resulting in the foreclosure of competitors in the conveyancing workflow
 - the effect of this conduct is likely to substantially lessen competition in one or more relevant markets in the conveyancing workflow
 - although the combined D&D-Link will have a minority 42.77% shareholding in PEXA, and ELNOs are subject to a regulatory framework, these factors are unlikely to constrain the risk of foreclosure conduct as outlined above.

PEXA's near monopoly position in ELN services

52. PEXA's near monopoly position in the supply of ELN services in Australia provides it with the ability to influence upstream competition. Absent the introduction of timely and effective interoperability, PEXA is very likely to remain a near monopoly provider of ELN services.
53. PEXA is the only fully operational ELNO. Its competitors provide limited competitive constraint. Sympli has entered to a limited extent and poses a threat of expansion. LEXTECH has not entered and provides an uncertain threat of entry.

54. The supply of ELN services is characterised by strong network effects whereby the incumbent supplier is highly valuable to subscribers because it can execute multiparty transactions that involve other subscribers.
55. As a consequence, PEXA has benefited from a significant first mover advantage and continuing network effects. Mandated e-conveyancing required all participants in the conveyancing workflow (e.g. lawyers, conveyancers, banks, land titles registries and state revenue offices) to adopt and align their practices with e-conveyancing at a time when PEXA was the only available ELNO. New entrant ELNOs are unlikely to benefit to this extent from any future mandates.
56. Interoperability is likely to reduce barriers for competing ELNOs if implemented (as it allows subscribers of different ELNs to transact). While this is the case, PEXA is likely to retain a significant share of subscribers at the time of implementation (at least in the short to medium term), due to its significant first mover advantage and the transaction costs faced by upstream suppliers when integrating with additional ELNOs.

D&D's significant market position in the supply of upstream software services

57. D&D is a significant supplier of certain upstream software services.
58. While there are currently a number of different suppliers of PMS nationally, D&D has a particularly significant position in particular segments in the supply of PMS. For example, market feedback indicates that D&D's PMS products have particularly high take up amongst conveyancers in Victoria and Western Australia.
59. In the supply of information search and broking services, market feedback has indicated that InfoTrack and D&D are the largest national suppliers, in particular with respect to property title searches.
60. For both PMS and information search and broking, barriers to entry appear to be at least moderate, due to likely significant economies of scale combined with the need to incur up-front fixed and sunk costs.

Possible foreclosure conduct

61. The Proposed Acquisition would create incentives for each of PEXA and D&D to engage in mutual preferential dealing that would result in foreclosure of competition in the conveyancing workflow.
62. The Proposed Acquisition would facilitate D&D and PEXA creating a combined offering that is integrated across ELN, information broking and PMS services. There is a substantial risk that post-acquisition PEXA will favour D&D's information broking and PMS services at the expense of third-party providers. This will strengthen the already significant market position of D&D in providing these services. In turn, and given its financial interest in PEXA, D&D would have strong incentives to integrate with PEXA's ELN services while de-prioritising integration with emerging providers of these services. The effects are also likely to be self-reinforcing, raising barriers to entry at various levels of the conveyancing workflow.
63. The risk of this occurring is significantly heightened by the emerging threat to PEXA's near monopoly position in ELN services posed by interoperability. As

noted above, interoperability would undermine the network effects that underpin PEXA's current position as the near monopoly supplier of ELN services. By 'locking' a large proportion of law and conveyancing firms into an integrated package of PMS and ELN services prior to interoperability occurring, PEXA would be in a much stronger position to preserve its near monopoly position in ELN services into the future. The ACCC might be less concerned by the Proposed Acquisition if complete interoperability of ELNs was imminent, but as noted above, the timeframe for achieving interoperability is uncertain.

64. Market participants have raised strong concerns about various forms of conduct, which the ACCC considers may occur concurrently or sequentially. Examples of such conduct include:
- PEXA could degrade or diminish the quality (or slow the pace) of integration with PEXA for D&D's rival suppliers of upstream services
 - PEXA could offer discounts on its ELN services to D&D's customers
 - D&D could refuse, degrade, or diminish integration of its upstream services with PEXA's rival suppliers of ELN services
 - D&D could offer discounts on its upstream products on condition that its customers transact a minimum volume on PEXA's ELN, and/or
 - PEXA and/or D&D could provide one another with preferential access to data.
65. If the conduct above occurs, conveyancers and lawyers would have the option to input information directly into the PEXA platform. However, this is a less efficient process, particularly for firms conducting large volumes of conveyancing matters each day.

Foreclosure is likely to create reciprocal benefits due to the interlinked nature of D&D and PEXA's products

66. As noted at paragraph 72 below, the combined D&D-Link would have 42.77% of shares in PEXA post-acquisition. The ACCC is taking this into account when assessing the parties' incentives to engage in the conduct outlined above.
67. Post-acquisition, D&D-Link's shareholding in PEXA would ensure D&D receives financial benefit for conduct which promotes or protects PEXA's profitability. Given PEXA's scale, D&D's 42.77% share in PEXA's profits would likely provide it with an incentive to preference PEXA's market position.
68. As PEXA would have no ownership interest in D&D, it would not obtain a corresponding immediate financial benefit from the foreclosure of D&D's upstream rivals in the supply of information broking and/or PMS.
69. However, PEXA would be likely to have an incentive to engage in foreclosure of D&D's upstream rivals. Doing so is likely to materially elevate D&D's market position in the supply of upstream services. If and when interoperability is implemented, any preferencing conduct by D&D to PEXA's ELN would increase the likelihood of foreclosure of PEXA's rivals. Such conduct could include degrading the quality or slowing the pace of PEXA integration with third party suppliers of upstream services. This could reduce the scale and output of third party suppliers, forcing them to raise prices or exit.

Foreclosure conduct is likely to result in a substantial lessening of competition in one or more potential markets

70. The ACCC's preliminary view is that foreclosure resulting from the mutual preferential dealing described above is likely to result in a substantial lessening of competition in one or more relevant markets. The ACCC is particularly concerned of the risk that, over time foreclosure would:
- force competing PMS and information search services suppliers to raise their prices or exit, allowing D&D to raise its own prices for these services
 - entrench PEXA's market position in the supply of ELN services, and/or
 - materially raise rivals' costs of entry and expansion within the conveyancing workflow such that in order to compete effectively, suppliers would be required to provide an end-to-end offering.
71. The ACCC is continuing to consider the likely effect of foreclosure conduct.

D&D-Link's minority interest in PEXA is substantial

72. Post-acquisition, D&D would control Link's 42.77% shareholding in PEXA. The ACCC's preliminary view is that while this is a minority shareholding, it is a substantial stake and the combined D&D-Link would have significant influence in respect of PEXA's strategy and behaviour. This is for reasons including:
- Link is the largest individual holder of shares and associated voting rights in PEXA, and is one of only two substantial shareholders (the other being CBA with 23.90%) with the remainder of shares widely dispersed³
 - of the eight directors currently on PEXA's board, Link can nominate two directors (one of which is currently Link's Managing Director and CEO) and be represented on the two board committees⁴
 - Link accounts for PEXA in its financial statements as an equity-accounted investee on the basis Link Group has significant influence over PEXA.⁵
73. The ACCC is continuing to consider the degree of control or influence D&D would be likely to have over PEXA as a result of the Proposed Acquisition.
74. In any case, the preliminary competition concerns outlined above are not reliant only on D&D-Link being able to control PEXA post-acquisition but are present in any event as the Proposed Acquisition creates alignment between D&D and PEXA. Should D&D-Link in fact achieve significant influence over PEXA's strategy and behaviour, this would enhance the concerns outlined above.
75. Other shareholders in PEXA would be unlikely to directly benefit from PEXA engaging in conduct which favours D&D unless such conduct ultimately benefits PEXA and indirectly them. All directors on PEXA's board, including those nominated by D&D-Link in future, also have fiduciary obligations including duties to act in the best interests of PEXA. Nevertheless, the ACCC's preliminary view

³ PEXA Annual Report 2021, pg 121.

⁴ Current board of directors, <https://investors.pexa.com.au/investor-centre/?page=board-of-directors>; see further [PEXA's Constitution](#), clause 4.2 and PEXA's Replacement Prospectus, pg 234.

⁵ Link Annual Report 2021, pg 134.

is that the conduct outlined above is likely to be in the interests of all PEXA shareholders.

Likelihood that regulatory framework will prevent foreclosure conduct

76. The likelihood that the existing and likely future regulatory framework governing the supply of ELN services could constrain PEXA and a combined D&D-Link's ability to engage in foreclosure conduct is an important issue. The ACCC's preliminary view is that there is considerable uncertainty on this.
77. At a high level, ELNOs are required to comply with Model Operating Requirements which (amongst other things) require ELNOs to:
- provide equivalent access to parties seeking to integrate with its ELN, subject only to differences attributable to the type, level or class of integration with the ELN
 - ensure that its ELN and any non-ELN businesses are structurally separated to limit the ELNO, and the related businesses, from obtaining an advantage over competitors as a result of the ELNO's position
 - set its service fees according to a publicly available and equitable pricing policy.
78. Market participants have raised strong concerns that this regulatory framework may be insufficient to prevent foreclosure conduct.
79. Particular concerns have been raised that state and territory registrars and ARNECC (the body established to facilitate the implementation and ongoing management of the regulatory framework), currently lack some of the investigative and enforcement tools that would assist those bodies to effectively constrain PEXA's conduct.
80. The ACCC notes that ARNECC has released a position paper regarding changes to the available enforcement powers. It states that the Electronic Conveyancing National Law currently lacks the range of enforcement powers found in many other regulatory regimes, and that ARNECC has resolved to amend the law.⁶ The ACCC also notes the recent statements made by Ministers and ARNECC regarding further legislative amendments, but the timing and final form of any such amendments is currently uncertain.⁷
81. In the context of PEXA's near monopoly position and the significant structural change in the market that may occur as a result of the Proposed Acquisition, the ACCC considers there is considerable uncertainty regarding the extent to which the existing and likely future regulatory framework can be relied upon to constrain PEXA and D&D's conduct post-acquisition. The ACCC will continue to closely consider this issue.

⁶ <https://www.arnecc.gov.au/wp-content/uploads/2021/08/changes-enforcement-powers-ecnl-april-2021.pdf>

⁷ For example, see submissions to the NSW Parliamentary Committee Inquiry into the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2859>

The ACCC invites comments from market participants on its concerns in relation to the concerns identified above. In particular market participants may wish to comment on the following:

- Whether the threat of interoperability is likely to materially lessen PEXA's incentives to engage in foreclosure of upstream suppliers of information search and broking and/or PMS suppliers.
- The current, and likely future, significance of integration between ELNs and PMS and/or information search and broking services.
- How likely the existing regulatory framework is to limit a combined D&D-Link's ability to engage in foreclosure conduct and any comments on the existing enforcement regime (including any proposed amendments)
- How likely ELN subscribers are to switch to alternative ELNOs if interoperability is implemented (including any barriers to switching) and/or whether subscribers may subscribe to more than one ELNO (i.e. "multi-home").
- How easy or difficult it is for lawyers and conveyancers to switch PMS and/or information broking suppliers.
- Whether D&D has market power in the supply of PMS or information search and broking services.

ACCC's future steps

82. As noted above, the ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter. Submissions are to be received by the ACCC no later than 7 July 2022 and should be emailed to mergers@acc.gov.au.
83. The ACCC will finalise its view on this matter after it considers submissions invited by this Statement of Issues.
84. The ACCC intends to publicly announce its final view by 8 September 2022. However, the anticipated timeline may change in line with the *Informal Merger Review Process Guidelines*. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement to explain its final view.