



Office of the Registrar General

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Our reference: BN19/797-DOC19/726795

Ms Jennifer Vincent
Director, Pricing
Independent Pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop NSW 1240

Dear Ms Vincent

Office of the Registrar General's response to *Review of the pricing framework for electronic conveyancing services in NSW*

We welcome IPART's review of the pricing framework for eConveyancing services in NSW.

As you'd be aware, the NSW Office of the Registrar General (**ORG**) is responsible for regulating Electronic Lodgment Network Operators (**ELNOs**), of which there is currently only one operating in the NSW market – a company known as Property Exchange Australia – PEXA. In addition, we regulate and oversee the terms of the Concession Deed issued to the private operator of the State's land registry, an entity now known as NSW Land Registry Services (**NSW LRS**). We believe it is critical to have expert, independent review of pricing in this market. Identifying an appropriate baseline approach for pricing and competition is critical to the future of eConveyancing.

eConveyancing is an integral part of the property market, touching almost every citizen, and providing a bedrock for our economy. It is critical that those buying and selling and lending against property have access to a secure, efficient and reliable system for doing so.

Price is an important part of this system. Market developments have shown that eConveyancing is an attractive investment opportunity, with the successful trade sale of PEXA, and the prospect of several new entrants. We support the establishment of an open and competitive ELNO market.

The NSW's Government's commitment to the modernisation of the conveyancing system is shown by its mandates, which mean that by 1 July 2019, all mainstream documents must be lodged electronically. These eConveyancing mandates have helped provide industry with the confidence and certainty to plan their transition from paper to digital enabling the benefits of eConveyancing to be embedded. This means fewer errors, greater efficiency, and more accessibility.

However, due to the incumbency and monopoly status of PEXA there is currently no competitive pressure on service and price in the eConveyancing market. It is therefore opportune to review pricing for eConveyancing in detail, and set a benchmark for the market.

IPART's review is also timely given the significant changes to the eConveyancing market over the past 18 months, with further rapid evolution expected in the coming period.

It is important that industry – ELNOs, lawyers, conveyancers, financial institutions and their clients – have certainty of regulation, so that they can run their business efficiently, and invest in innovations. At the same time, it is critical to ensure appropriate competition settings in the eConveyancing market.

Our detailed responses to IPART's Issues Paper are at Attachment A.


NSW Government's approach to competition and interoperability

The NSW Government's commitment to the establishment of an open and competitive ELNO market is demonstrated by its leadership on the national industry discussion regarding the future of PEXA and the need for ELNOs to provide interoperability between their lodgment platforms. The ORG issued a Directions Paper (Attachment B) on these issues earlier this year.

The NSW Government hosted an industry forum in February 2019 where it was identified that finding an interoperability solution was an urgent and critical matter. Following that Forum, ORG established industry working groups under an independent chair, to analyse the issues in more detail, on a cross-industry basis. These working groups will finish in June 2019, with a report to be issued in July 2019 on a possible baseline model for interoperability, designed for national consistency. Terms of reference for these groups are attached (Attachment C).

We also note the review of the eConveyancing Intergovernmental Agreement by Dench McLean Carlson (Issues Paper dated 13 February 2019, the **IGA Review**). NSW's response to this issues paper is also attached (at Attachment D).

Yours sincerely



Jeremy Cox
Registrar General

8 May 2019

List of attachments

- | | |
|---------------|---|
| Attachment A: | ORG's detailed response to the Issues Paper |
| Attachment B: | ORG's Directions Paper on proposed eConveyancing interoperability regime dated 6 February 2019 |
| Attachment C: | eConveyancing interoperability Technical and Operations Working Group Terms of Reference; and eConveyancing interoperability Regulatory Working Group Terms of Reference, each issued 19 March 2019 |

Attachment D: NSW Government's response to Dench McLean Carlson's Issues Paper dated 13 February 2019 regarding Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law

Our approach to the Issues Paper

In our detailed response to the Issues Paper, set out below, we have commented on the questions regarding market settings, and our specific role as regulator. We have not commented on economic issues such as cost models, or benchmarking – instead, the NSW Government intends to rely on IPART's expert, independent analysis and recommendations in relation to these issues.

Question 1: *Do you agree with IPART's proposed approach for this review? Are there any alternative approaches that would better meet the terms of reference, or any other issues we should consider?*

ORG response: ORG strongly supports the approach that IPART has taken.

ORG is also interested to hear other stakeholders' response to this question and to hear of any other approaches they would recommend, or other issues that stakeholders consider IPART should take into account.

Assessing the eConveyancing market

Question 2: *What are your views on the current state of the market? For example, does the continued availability of paper conveyancing in other jurisdictions constrain prices for eConveyancing? What scope is there for new entrants to offer the full range of eConveyancing services?*

ORG response: In our Directions Paper on interoperability, we stated:

"With the basic operational model for eConveyancing proven, the NSW Government has decided to phase out paper-based conveyancing in favour of eConveyancing, with all mainstream dealings mandated from July 2019. As eConveyancing completely replaces paper, ELNOs will operate electronic lodgement networks of substantial importance to our community and our economy. This is similar to commercial operators running nationally significant communications and energy network infrastructure. For this reason, the Australian Competition and Consumer Commission (ACCC), State and Commonwealth treasuries and the Reserve Bank of Australia (RBA) are interested in this policy debate."

With the advent of mandates in NSW, paper will very soon cease to exist as a competitive constraint. This means competition must come from other sources.

We consider the current regulations may not be sufficiently tailored for the current market. The current regulations were predominantly developed when eConveyancing was nascent, and when lawyers and conveyancers overwhelmingly worked using a paper-based lodgment system.

In the coming months, there will at best be a duopoly in NSW, with PEXA having the overwhelming majority of subscribers and transactions. Therefore, we would prefer stronger regulatory settings to be in place initially – noting that these regulations can be relaxed over time as more ELNOs enter the market, and as market forces begin to operate.

We recognise that we – and other ELNO regulators – also bear responsibility to put in place the right regulatory frameworks to enable competition. This includes identifying and removing barriers to entry, for example:

- having clear guidelines to requirements for becoming an ELNO; and an efficient process to review ELNO applications; and
- considering whether interoperability solutions create (or reduce) barriers to new market entrants – including IT infrastructure; and models for paying for interoperability solutions.

Question 3: *How important are barriers to entry in constraining competition in the eConveyancing market? Are there other barriers or factors that will influence competition in the market?*

ORG response: As regulator, we look forward to hearing stakeholder views on barriers to competition. The NSW Government – through ORG– is currently developing solutions to facilitate competition, including:

- **Interoperability** – ensuring that lawyers, conveyancers and financial institutions are able to choose their ELNO, without one dominant player having the benefit of the network effect to crowd out other players.
- **Separation** – the most recent version of the Operating Requirements (applying in NSW and other States) include provisions requiring separation, so that entities operating ELNs do not have a competitive advantage over other entities.
- **Access** – to encourage innovation, and to limit issues associated with vertical integration, the Operating Requirements include obligations to publish integration terms, and offer equivalent access. We hope this will permit a flourishing market in upstream and downstream services.
- **Licence conditions** – from 1 March 2019, ELNOs operating in NSW must comply with new NSW licence conditions. The licence conditions replace the previous state bilateral agreement. The licence conditions are published on our website bringing greater transparency. This is similar to the approach taken in other competitive markets, such as energy.

Question 4: *To what extent would pricing regulation increase barriers to entry? Should new entrants be exempt from pricing regulation and, if so, what would be an appropriate market share benchmark at which pricing regulation would commence?*

We look forward to hearing stakeholder views on this question, and IPART's analysis of those comments in forming its recommendations.

Question 5: *What factors influence the effectiveness of potential multi-homing or interoperability solutions in promoting competition?*

ORG response: A key factor for an interoperability model to support competition is that ELNOs retain scope for innovation; and the ability to differentiate between each other. We note other factors that should be considered when selecting an interoperability solution include:

- Transparency / ease of useability for subscribers – e.g. will there be a material difference in functionality?
- Data alignment and integrity – e.g. whether it is important that a single workspace (or clearing house) creates a ‘source of truth’.
- Security – e.g. whether synchronisation causes any additional security risks. To assist answer this question, ORG is also procuring an independent security review of proposed interoperability models.
- Liability – e.g. whether unique liability issues arise in some models, over others.
- Cost – e.g. with duplication of back-end systems or whether duplicate costs for practitioners related to training and software in a multi-ELNO market would erode savings created by competition.
- Consistency with national scheme – e.g. whether the changes required to the national regime are limited or extensive.

Each of these factors is being considered in detail at industry interoperability working groups, being led by the NSW Government.

These working groups, chaired by an independent expert, are designed to identify the most appropriate interoperability model; identify issues that will arise; and work towards national solutions. Attendees include PEXA, Sympli, Purcell Partners, the NSW Law Society, the Australian Institute of Conveyancers (NSW and National), and the ACCC. ORG welcomes IPART’s attendance at these working groups.

ORG will also provide IPART with the Report from these working groups, which ORG anticipates will be available in July 2019.

Question 6: *What are the relative costs of implementing the different potential multi-homing or interoperability solutions between ELNOs?*

ORG response: In relation to costs, we would seek comments from stakeholders and do not have a view on this ourselves. As set out in our Directions Paper, we strongly support the solution that meets the following principles:

- The primary consideration must be to maintain the integrity of the land titles register and the Torrens system more generally.
- The interoperability solution should promote competition and consumer choice, including maximising the opportunities for future innovation in technology, service delivery and business models to the benefit of consumers.
- The least complex and most efficient solution to implement interoperability should be preferred.
- Any interoperability solution adopted in NSW must be adaptive to a nationally agreed interoperability solution.

Question 7: *How will vertical integration or the potential for vertical integration influence competition between ELNOs and the efficiency of the conveyancing process?*

ORG response: There is a risk that vertical integration may permit ELNOs to engage in tactics that may undermine competition from other ELNOs.

We endorse the 'separation' and 'access' provisions of the Operating Requirements – noting that depending on IPART's review, we may need to strengthen these provisions further. We also refer to our response to the IGA Review on these issues.

Question 8: *How should the pricing regulatory framework for ELNOs address vertical integration or the potential for vertical integration in eConveyancing?*

ORG response: We welcome IPART's comments on appropriate price settings regarding vertical integration. We also note the separation and integration provisions of the Operating Requirements, which also address vertical integration issues.

The 'separation' provisions in the Operating Requirements provide some protections against vertical integration. ELNOs wishing to offer other businesses must hold these businesses either in a separate corporate entity or in a separate business structure. The ELNO must not give an unfair commercial advantage to the other entity; and must deal with the other entity on an arm's length basis.

The Operating Requirements also include measures to provide access for other entities to the ELNO's ELN, and to treat all who wish to integrate on an equivalent basis. Effectively, ELNOs must provide the same access to their ELN that the ELNO would make available for itself.

ELNOs must also publish their integration terms on their website; and must publish a plan for how they will comply with the separation provisions. Publishing these documents means that industry is equipped to review how the ELNOs are complying with these competition principles – and gauge whether their own experience of working with an ELNO accords with the Operating Requirements.

Enforcement: The Issues Paper also refers to questions on how these provisions would be enforced, if there is a breach. Currently, the legislative framework provides only limited enforcement options for regulators – being suspension or termination of a licence to operate. Regulators may also choose to publish ELNO's breaches of these provisions, using reputational risk as a lever for compliance.

This regime is not sufficient. The NSW Government supports developing a penalty regime for breach of the Operating Requirements and the NSW Licence Conditions. We note the IGA Review Issues Paper raises the importance of an effective penalty regime.

Deciding on and applying pricing methodology for ELNO services

Question 9: *What form of regulation for ELNO pricing do you support? Why?*

ORG response: Our preferred end-state is flexibility to allow ELNOs to compete on price and service offering. However, to reach this end-state, NSW recognises that, given the highly concentrated nature of the ELNO market, tighter protections may be needed for an interim period. It may be therefore be appropriate for more restrictive pricing approaches, until a more competitive market clearly emerges.

NSW also considers that in order to reach the end-state – where ELNOs have flexibility to compete on price without stronger regulation – it is essential for ELNOs to interoperate. Interoperability means that customers (lawyers, conveyancers and financial institutions) can choose an ELNO, rather than having to subscribe to multiple ELNOs.

At a practical level, this may take some time. Regulators and industry need to settle on an interoperability solution; then the solution needs to be implemented through regulatory change; and ELNOs (and other industry members, such as financial institutions) will need to upgrade their IT systems to meet the solution.

Question 10: *If we decide to use an index to adjust the initial regulated prices in the following years of the regulatory period, is CPI an appropriate index? If not, what other index could we use?*

Question 11: *What measures will our pricing framework require to enable flexibility and innovation for new entrant ELNOs?*

Question 12: *Do you consider recommending prices based on the costs of a notional benchmark efficient ELNO is an appropriate way to promote competition in the eConveyancing market? If yes, what is an appropriate set of characteristics for the benchmark efficient ELNO?*

Question 13: *What firms or industries are comparable to a benchmark ELNO in terms of their exposure to market risk? What percentage of debt rather than equity would an efficient ELNO be able to sustain to finance its assets (ie, the gearing level)?*

Question 14: *How should we assess the efficient costs of providing eConveyancing services?*

Question 15: *Should ELNO's assets and costs be shared between states according to the proportion of conveyancing transactions or the number of subscribers in each state? Are there other approaches to sharing ELNO's costs and assets across multiple states?*

Question 16: *Are there benefits to ELNOs having nationally consistent prices?*

ORG response to Questions 10 – 16: We look forward to hearing stakeholder views on these questions, and IPART's analysis of those comments in forming its recommendations.

We note that some aspect of ELNO pricing may include 'pass through' costs – for example, pricing of LRS fees, or insurance. The Operating Requirements and NSW Licence Conditions specifically permit ELNOs to adjust their pricing based on changes to these external factors (see Operating Requirement 5.4.4 and clause 3.1(e) of the General Conditions).

ORG seeks IPART's views on the most appropriate treatment of 'pass-through' costs.

Question 17: *Should eConveyancing customers in states where ELNOs incur lower costs of providing eConveyancing services pay the same price as states that have higher costs?*

ORG response: We are interested to hear stakeholder views on this question, given the varying factors that would contribute to ELNOs' costs in different States.

Question 18: *Are there any other issues relevant for considering whether our recommended NSW pricing regulatory framework could be an appropriate model for a national regime?*

ORG response: We are interested to hear other States' and stakeholders' views on this question.

NSW supports a nationally-consistent regime, given that differences between States can cause friction for purchasers and conveyancing industry participants without any corresponding benefits. We hope that the analysis in IPART's paper and its recommendations can be applied beyond NSW.

In addition to the forums established by ARNECC, Revenue NSW is working with colleagues in other States as part of an inter-jurisdictional group, to share ideas relating to Duties on a national basis. IPART's review and recommendations will be a useful contribution to those discussions.

Question 19: *Who should bear the costs of implementing an interoperability solution and how should the costs be recovered?*

ORG response: As noted in our Directions Paper, NSW Government's preliminary view is that each ELNO should bear its own costs of interoperability as a cost of doing business in a multi-operator competitive market (please see part 5.9 of the Directions Paper).

Our view is that it is not appropriate for a special subscriber charge or loading in subscription to apply for interconnected transactions. The non-lodging ELNO avoids settlement and lodging costs it otherwise would have incurred if the transaction was conducted solely on its ELN and the lodging ELNO receives an allocation of the ELNO charges for conducting the settlement and lodgment.

Question 20: *In an interoperable transaction, should one or multiple ELNO(s) complete lodgment with the land registry and financial settlement with the RBA, and which ELNO(s) should perform these activities?*

ORG response: We are interested to hear stakeholder views on these questions – being the role of the 'lodging ELNO' and mechanics for lodgment and financial settlement. ORG is also supporting industry explore this question as part of interoperability industry working groups.

Whatever solution is chosen, it is essential that the principle of 'delivery v payment' be maintained, such that delivery of title occurs if (and only if) the corresponding payment occurs.

Whether one ELNO performs both settlement and lodgment, or whether these functions are split between two ELNOs, the interoperability rules between ELNOs will need to specify the irrevocable directions required to enable the relevant ELNO(s) to undertake the lodgment or financial settlement task on behalf of the interconnected ELNOs.

If some steps are split between two ELNOs, it will be necessary to validate that revenue office verification should remain linked to the land registry and financial settlement steps.

Question 21: *What are the likely cost drivers of an interoperable transaction?*

ORG response: In relation to costs, we would seek comments from stakeholders – and we are separately pursuing this topic as part of the interoperability industry working groups. We also refer to Question 6, above.

Recommending prices for the services provided by NSW Land Registry Services and Revenue NSW

Question 22: *What is the most appropriate pricing methodology for NSW LRS's services to ELNOs? Are there other alternative approaches we should consider?*

ORG response: The concession of NSW's land titles registry, which commenced in July 2017, established a regime to regulate the fees that the private sector operator could charge customers. ORG considers that IPART should consider pricing methodology in the context of this broader regime.

Generally, NSW LRS's fees are regulated under the legislative framework, as described below, or are prescribed by the Concession Deed. The exception is where NSW LRS develops non-core services, which are new services created after the concession commenced, that are different to existing offerings. Under the Concession Deed, NSW LRS can set a market rate for these new services.

Legislative framework

NSW LRS' customer fees are based on the *Real Property Regulation 2014*, *Conveyancing (General) Regulation 2018*, and *Strata Schemes Development Regulation 2016*. Under these regulations, NSW LRS is permitted to update the customer fees each

Office of the Registrar General's response to *Review of the pricing framework for electronic conveyancing services in NSW*

year based on the change in CPI, being the Consumer Price Index (All Groups Index) for Sydney published by the Australian Bureau of Statistics in the latest published series of that index (see *Real Property Regulation 2014*, Schedule 1, item (7)). These customer fees cover most of LRS' core business, that is registering documents and plans.

The Concession Deed requires the Minister to ensure that these regulations continue to apply in the same way as they currently do, throughout the 35-year term of the concession. This means that the Minister is under a contractual obligation to ensure that, for example, the CPI adjustment continues to apply until 1 July 2052.

IPART's review

IPART's review focuses on two types of fees: lodgment support services (**LSS**) fees; and fees that NSW LRS charges ELNOs for building a system for connection and performing ongoing maintenance.

- LSS fees: LRS charges the LSS fee to ELNOs for feeding Torrens Title data (such as mortgagee names and numbers) into the ELN. There are three types of LSS, varying in terms of the level of service provided by LRS to the ELNO e.g. the top LSS includes initial supply of title data, verification of documents and automated checks for changes in the initial data supplied. Given LSS fees are set out in the *Real Property Regulation 2014*, the LSS fees are already subject to regulation and cannot be increased by more than CPI each year.
- Build & operate fees: LRS would need to obtain the Registrar General's approval to charge fees for building and operating IT systems. ORG will take IPART's review into account when reviewing LRS's proposed pricing.

Relevantly, the Concession Deed requires that NSW LRS does not discriminate between customers. As regulator of NSW LRS, ORG will review how NSW LRS engages with each ELNO to ensure this principle is met.

Question 23: *What firms or industries are comparable to NSW LRS in terms of their exposure to market risk? What percentage of debt rather than equity would NSW LRS be able to sustain to finance its assets (ie, the gearing level)?*

Question 24: *Do you agree with our proposed approach to allocating shared assets and costs? Are there other approaches or issues we should consider?*

ORG response to Questions 23 and 24: We look forward to hearing stakeholder views on this question, and IPART's analysis of those comments in forming its recommendations.

Question 25: *Do you agree with our proposed approach to accounting for any cost savings to NSW LRS arising from the introduction of electronic lodgment services?*

ORG response: We support accounting to NSW LRS. A higher degree of scrutiny is appropriate for a monopoly providers, such as the land titles registry operator.

Question 26: *Should Revenue NSW charge ELNOs for its electronic system?*

ORG response: We consider Revenue NSW should charge ELNOs based on a form of cost recovery. This should incorporate some or all of the costs of connecting a new ELNO and to support on-going maintenance of the ELNO service. Best practice principles for cost recovery should be applied, including avoiding cross-subsidies, ensuring transparency and accountability, and undertaking industry consultation from time to time. This will give current and potential ELNOs greater confidence in the reasonableness of specific cost recovery arrangements

Question 27: *If Revenue NSW were to charge for services to ELNOs, on what bases should the fees be set?*

ORG Response: A cost recovery basis for technical set up (e.g. a proportion of development costs for multi-ELNO platform and systems modifications) and project support to onboard new ELNOs. Consideration could be given to charging for ongoing maintenance. As noted in Question 26, this process should be transparent, and involve industry consultation.

Timeframes and transition

Question 28: *When could businesses implement prices recommended by this review? What factors affect that timing and any transitional measures required?*

ORG response: In light of the continued evolution of the eConveyancing market, ORG strongly wishes to implement appropriate pricing measures as soon as possible after release of IPART's recommendations.

Currently, pricing in NSW is in line with the regime in other States, with a CPI cap. The regime in NSW's licence conditions permits more regulatory flexibility, with the power to impose a pricing cap of 'CPI – Factor', which is set in accordance with IPART's review. If appropriate, ORG will adjust this regime to align with IPART's recommended pricing model.

ORG appreciates the need for ELNOs to have time to adjust their pricing – and for lawyers and conveyancers to adjust their pricing. The NSW Government would expect that lawyers, conveyancers and financial institutions pass any cost reduction onto their clients.

Question 29: *What is the appropriate determination period for ELNO, NSW LRS and Revenue NSW prices? What factors should we take into account when deciding on a determination period?*

ORG response: At this stage of evolution of the market, we believe it is appropriate for IPART to conduct annual market soundings. These would assess the level of concentration in the market, whether the regime is adequate, and whether any distortions are emerging.

This annual review should provide a strong evidentiary basis for a 2-year determination period.

Question 30: *Should the scope of future reviews be similar to the current review, or focus on particular aspects of pricing?*

ORG response: At the present time, industry is still considering models of interoperability; once a model is identified, NSW intends to move to implement this (through regulatory changes as well as overseeing technological developments). As industry implements the interoperability solution, IPART will need to include deeper analysis of this area in its review.

The eConveyancing market may also evolve over time – for example, other entities may wish to provide financial settlement options, separate to ELNOs' lodgment capability; and we anticipate ongoing integration of ELNOs with lawyers' and conveyancers' practice management systems. In the short to medium term, the NSW Government would expect IPART's review to consider these aspects in detail (for example, the impact of vertical integration).

In the longer term, we would anticipate that IPART's review demonstrates a competitive industry is developing – meaning that, over time, the regulatory approach can also become less prescriptive and IPART can reduce the scope and depth of its review.

* * *

Attachment B

ORG's Directions Paper on proposed eConveyancing interoperability regime dated 6 February 2019

[see attached]



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Registrar General

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Directions Paper on proposed eConveyancing interoperability regime

6 February 2019

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Any enquiries relating to this publication may be addressed to Office of the Registrar General.

Context

At the Hon. Victor Michael Dominello MP's, Minister for Finance, Services and Property, Forum on 4 December 2018, stakeholders from across the conveyancing ecosystem gave their views on interoperability and competition, and their expectations of eConveyancing in NSW and beyond. After the Forum, the Office of the Registrar General (ORG) undertook to deliver detailed responses to these issues.

This Directions Paper describes potential models for interoperability, sets out possible liability and insurance structures, and proposes a governance regime as a way forward. It proposes options and solutions.

In parallel to this Directions Paper, Sympli convened a technical working group among stakeholders and developed draft data standards, which they circulated to stakeholders on 1 February 2019.

Some stakeholders responded to the 4 December Forum with open letters. Others provided their comments privately. The Government is grateful for all the time and effort invested in these submissions, and for the benefit of stakeholders' deep experience in eConveyancing. This Directions Paper summarises the concepts raised by stakeholders rather than repeating them in full – while every effort has been made to describe them correctly, clarifications are welcome.

Interoperability is a simple concept, but complex to accomplish in practice. This Directions Paper lists the issues that need to be addressed (these are in boxes throughout the paper, and collated in Schedule 1). A complete list of issues focuses attention on what is important.

The Government invites your comments on these issues – including whether any other issues should be considered. The agenda for the Ministerial Forum on 14 February 2019 will include time for invitees to present their high level responses; Government welcomes more extensive responses in writing to ORG by 21 February 2019.

This Directions Paper recognises the importance the Government places on finding a solution to interoperability in the near future, given the Government's view of the risks that NSW faces in the absence of a solution. The Government equally recognises that such risks vary across other States and Territories, and therefore other Governments may not share the desire for a solution in the same timeframe as NSW. However, the direction in this paper offers a pathway to a national solution, allowing States and Territories to opt-in according to their priorities. NSW will share all material and analysis with colleagues in other States and Territories.

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1 Introduction

The NSW Government is committed to the modernisation of property conveyancing in NSW by migrating from a paper-based world to eConveyancing. This will create a more secure, efficient and innovative conveyancing market to the benefit of NSW consumers, their professional advisers and other participants in the property market.

In 2011, the States and Territories entered into an Inter-Governmental Agreement (**IGA**) to develop a model legislative and regulatory framework for eConveyancing. Nationally uniform laws for electronic conveyancing, the Electronic Conveyancing National Law (**ECNL**) have been enacted by the States and Territories. The NSW Registrar General participates with his counterparts from other States and Territories in the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) to implement eConveyancing through the development of rules and procedures (the Model Operating Requirements and the Model Participation Rules) dealing with the operation of and access to Electronic Lodgment Networks (**ELNs**) and appointment of Electronic Lodgment Network Operators (**ELNOs**).

With the basic operational model for eConveyancing proven, the NSW Government has decided to phase out paper-based conveyancing in favour of eConveyancing, with all mainstream dealings mandated from July 2019. As eConveyancing completely replaces paper, ELNOs will operate electronic lodgement networks of substantial importance to our community and our economy. This is similar to commercial operators running nationally significant communications and energy network infrastructure. For this reason, the Australian Competition and Consumer Commission (**ACCC**), State and Commonwealth treasuries and the Reserve Bank of Australia (**RBA**) are interested in this policy debate.

Competition among ELNOs was a principle from when this reform was first legislated. Now that the market is attracting new players, the NSW Government wishes to focus on creating a regulatory environment that allows a level playing field for ELNOs to compete and succeed. Only then will eConveyancing reach its full potential and deliver more benefits to our community and our economy with true competition among ELNOs. As the Minister for Finance, Services and Property, the Hon. Victor Dominello, has stated¹:

"We are at a critical juncture in the national e-conveyancing journey. The actions we take over the next six months will determine whether we see an incumbent monopoly consolidate its position or set the preconditions for the entry of new platforms and the establishment of a competitive market."

The Government has already decided that a set of competitive and consumer safeguards will be included in the Model Operating Requirements applying to ELNOs, including the existing ELNO, PEXA. These measures are in place to constrain the risk of anti-competitive behaviour by an ELNO. For example, these conditions require an ELNO to provide third parties with access to its ELN equivalent to the access it provides itself, direct the ELNO to operate its ELNO and non-ELNO businesses in separate corporate divisions or entities which are to deal with each other at arm's length, and impose price controls on ELNO charges. IPART is also currently conducting a review of ELNO pricing in NSW.

As part of its pro-competitive reform package, the Government also has been considering whether there should be interoperability between ELNs. Interoperability would allow a consumer (e.g. a vendor) through a subscriber (e.g. a lawyer or conveyancer) connected to one ELN to engage in a conveyancing transaction with another consumer (e.g. a purchaser) through a subscriber connected to a different ELN. The Minister has described the issue of interoperability as follows²:

¹ Public priority in e-conveyancing, The Australian, 23 November 2018.

² Public priority in e-conveyancing, The Australian, 23 November 2018.

“We know and understand interoperability in our everyday lives but often take it for granted. Our mobile phone networks are interoperable, our email platforms are interoperable, as is our banking and even the fuel we put in our cars. Imagine having one mobile for Telstra phone calls and another for Optus, or one email account for Gmail addresses and another for Outlook. Clearly, in a market where more than one platform exists, it is incumbent upon government to ensure competition and interoperability are present”.

On 4 December 2018, the Government convened an initial workshop on interoperability with key stakeholders, including state Registrars, ELNOs, major banks, peak industry bodies, the ACCC, the RBA and the independent reviewer of the IGA.

This directions paper:

- summarises the feedback received from stakeholders on interoperability at the December workshop and subsequently;
- sets out the Government’s response to that feedback and the reasons for its decision to proceed with mandating interoperability;
- outlines and seeks feedback on two potential models for how interoperability could be achieved – direct bilateral ‘interconnection’ between each ELNO or a hub to which each ELNO connects;
- identifies and seeks feedback on the key elements of the governance and regulatory framework for interoperability; and
- sets out a proposed timeline and national approach for the work required to achieve interoperability in NSW in the second half of 2019.

The Government will be holding a further workshop with interested parties on 14 February 2019 on the issues raised for consultation in this paper. Feedback can be provided at the workshop and also in writing by 21 February.

2 Mandating Interoperability between ELNOs

2.1 Views of stakeholders

The Government received mixed feedback on whether to require interoperability between ELNs.

Sympli, a new entrant ELNO, argued that interoperability will benefit consumers and professional service providers by:

- enabling participants to choose the ELNO that best suits them while ensuring a seamless experience when dealing with participants who have chosen a different ELNO;
- promoting efficient competition by removing the structural bias (known as the “network effect”) for the market to gravitate towards a single ELN, which risks over time the emergence of a de facto monopoly provider;
- improving market resilience because there are multiple ELNOs with the capacity to lodge and settle conveyancing transactions; and
- promoting innovation, which is especially important in a new, technology driven market like eConveyancing.

The Law Society supported interoperability, commenting that “an interoperability solution is required in the near future for both our members and for new ELNOs”.

PEXA, which historically has been the only ELNO, argued that:

- the consumer benefits of competition will be achieved without the added costs of investing in the infrastructure required for interoperability because, if ELNOs have to compete on their own platforms, they will have stronger incentives to compete on the price and features of their service;
- as conveyancing transactions would be taking place across two ELNs, there will be higher security risks and complex liability issues;
- given the added costs and risks of interoperability, a cost/benefit analysis should be undertaken to select the best model for consumers and consider alternative models; and
- NSW proceeding with interoperability ahead of other States and Territories would be inconsistent with the State’s commitment to the national electronic conveyancing scheme and could complicate any national solution because other jurisdictions are unlikely to want to be dependent on a solution NSW develops, particularly if that involves creation of a new monopoly provider through a hub model (see below).

Purcell Partners, which has ‘Category 1’ approval from ARNECC to launch an ELNO, considers that requiring interoperability is not the best solution to the problem of promoting competition. They considered that competition would be better promoted by removing the regulatory barriers to entry by new ELNOs (so there is competition) and the barriers to subscribers switching between ELNOs (so that industry participants can take advantage of the competition).

2.2 Government’s view

The Government’s in-principle decision is that interoperability between ELNOs should be mandated in NSW. The Government’s reasons, and its response to the above feedback, are as set out below.

First, participant choice between competing ELNOs (subscribers and through them consumers) would be constrained and cumbersome to operationalise if each conveyancing transaction had to be undertaken end-to-end on a single ELN.

Most conveyancing transactions involve multiple parties each with their own lawyer or conveyancer: in the case of a typical sale and purchase of a residential property, there could be a vendor, purchaser, discharging mortgagee and incoming mortgagee. If conveyancing transactions could only be conducted on a single ELN, each one of these parties would need to use lawyers and conveyancers who are subscribers to the same ELN. If they were subscribers to different ELNs, either one or more of the participants in the conveyancing transaction would have to change their lawyer or conveyancer or their lawyer or conveyancer would have to become a new subscriber to the first ELN. There is also the threshold question about who amongst the parties to a conveyancing transaction makes the decision about which ELN will be used for the conveyancing transaction.

It is not a simple case of a lawyer or conveyancer being able to quickly get access to an ELNO on an ad hoc, per transaction basis as and when needed. Security arrangements, such as digital signatures, require prior arrangements between the lawyer and the conveyancer to be in place. Lawyers, conveyancers and financial institutions also will often integrate their practice management software with the ELNO and need to train their staff to be able to use the ELNO interface.

Therefore, if conveyancing transactions have to be completed on an end-to-end basis on a single ELN, a lawyer or conveyancer who subscribes to one ELNO risks losing out on conveyancing transactions which are conducted by the other ELNOs. Alternatively, the lawyer or conveyancer would have to subscribe to each ELNO in the market place from time to time and face the added costs and complexities of using multiple ELNOs in his or her practice.

The constrained and cumbersome nature of participant choice between competing ELNOs is likely to adversely impact the competitive dynamics in the marketplace, and in particular the entry of new ELNOs. At the outset of competition, the current ELNO, PEXA, is likely to account for a substantial proportion of existing lawyers and conveyancers in NSW, as most by now engage in eConveyancing. A PEXA subscriber may be reluctant to move to a new entrant ELNO because the 'price' of doing so is that he or she will not be able to act in conveyancing transactions which involve subscribers to the PEXA ELN, which is likely to be most subscribers. PEXA benefits from a 'network effect' because it connects a substantial proportion of the existing pool of lawyers and conveyancers.

By contrast, if interoperability is in place, lawyers and conveyancers who subscribe to a new ELNO will not be locking themselves out of acting in any conveyancing transaction whether the other participants use the same ELN or a different ELN.

Purcell Partners argues that the challenge of participant choice is overstated because "[t]he reality is that the incoming mortgagee...will inevitably determine the ELN upon which its transactions are completed, settled and lodged".

The Government does not agree this will always be the case with eConveyancing, much less that it should be embedded as a formal rule. While the practice in the paper-based conveyancing world may have been that the incoming mortgagee often drove the conveyancing transaction, the world of eConveyancing is likely to be more dynamic and flexible and should support more innovation in conveyancing practices. In any event, while the incoming mortgagee's decision may solve the threshold issue of which ELN to use, the problem still exists that lawyers and conveyancers who are not subscribers to the ELN chosen by the incoming mortgagee will not be able to act in that transaction. The 'network effect' benefitting the incumbent or largest ELNO still exists.

The Government acknowledges PEXA's concerns that conducting a conveyancing transaction across more than one ELN could carry its own security and other risks to conveyancing transactions. However, it is also important to bear in mind that the ELNs interconnecting with each other would be separately subject to the security and other risk minimisation requirements of the Model Operating Requirements and other regulatory instruments. The incremental risk is in the exchange of information between two otherwise secure environments. An ELN is already necessarily not a closed system – rather, the current ELN, and future ELNs, need to interface with a range of other systems to manage and complete financial settlement and register the titling documents. The Government considers that risk can be adequately addressed given the experience with managing security risks in the eConveyancing environment, the technology tools available and the limited scope of interoperability which the Government has in mind (see below).

The Government does not accept PEXA's argument that NSW proceeding with interoperability before the other States and Territories is inconsistent with the national eConveyancing regime.

The IGA expressly acknowledges that "National E-Conveyancing may be implemented at different times and at different places across each jurisdiction"³ and that "the National Electronic Conveyancing Law will not prohibit State or Territory based electronic lodgment arrangements"⁴. The ECNL empowers the Registrar in each jurisdiction to make the operating requirements and

³ clause 5.1.

⁴ clause 3.4.

participation rules for his or her jurisdiction, and in exercising this discretion, the Registrar is required to consider the desirability of maintaining consistency with the Model Operating Requirements and the Model Participation Rules. In turn, both the Model Operating Requirements and the Model Participation Rules provide for jurisdiction-based additional requirements. The ECNL also confers a broad discretionary power on the Registrar to attach conditions to an approval to provide and operate an ELN and to impose new or additional conditions on ELNOs following approval.⁵ This power is not constrained by the ECNL, stands independently to the Model Operating Requirements and the Model Participation Rules, and can be exercised by each Registrar separately from the ARNECC process.

The Government anticipates that there would be a considerable delay if it waited until a national interoperability model was developed. EConveyancing is mandated in some but not all jurisdictions – and not yet operational in two jurisdictions. This means the decision-making process for ARNECC is very challenging. Views vary between States and Territories over the importance and timing of interoperability based on their own individual circumstances.

An independent review of the IGA is currently underway. The review is has a broad ambit covering ARNECC's structure, governance and processes. Interoperability has been identified as a topic to be covered by the review. Specifically: *"What, if any, regulation is appropriate to support a competitive ELNO market and the interoperability of ELN systems, including funding options"*.

The challenge the Government has is the review report will not be handed to Ministers until around May 2019, and the process of agreeing to, and implementing, recommendations and the regulatory processes, can be anticipated to take some further time—should all States agree to proceed with interoperability at that point. This longer time risks the consumer benefits to NSW.

With this challenge in mind, and given NSW's stated preference for interoperability in the second half of 2019, this paper aims to provide detailed analysis that can be used in IGA review considerations. NSW will continue to share all material with the IGA reviewer to support that process and the IGA reviewer is included in associated forums. NSW believes these processes can work concurrently, without detriment to the IGA process.

A significant delay in introducing interoperability in NSW after the transition to mandatory eConveyancing to allow for a national solution could result in poor outcomes for competition and consumers. As well as the constraints on consumer choice outlined above, the phasing out of paper-based conveyancing would remove a discipline on any market power of the existing ELNO before the new ELNOs had the opportunity to enter and establish themselves in the market.

The Government believes that its decision to proceed with interoperability in NSW will provide a pathway to a national solution that can be adopted by other jurisdictions, should they choose to. This does not mean that NSW intends its model will pre-empt any national model. Proceeding with interoperability in NSW will provide an opportunity to identify issues, test solutions and develop the interoperability rules in the largest property market in the country. As set out above, a guiding principle is that the NSW model should be adaptive to any national model which comes out of the learnings in NSW. Other states may also wish to implement interoperability in this timeframe.

As discussed below, the Government is proposing that interoperability in NSW can provide a pathway to a national approach, including undertaking the development work between stakeholders within the ARNECC framework.

⁵ section 15.

3 Choosing the right model for interoperability

3.1 Guiding principles

The Government has identified the following key principles to guide decisions about the scope and design of an interoperability regime between ELNs:

- The primary consideration must be to maintain the integrity of the land titles register and the Torrens system more generally.
- The interoperability solution should promote competition and consumer choice, including maximising the opportunities for future innovation in technology, service delivery and business models to the benefit of consumers.
- The least complex and most efficient solution to implement interoperability should be preferred.
- Any interoperability solution adopted in NSW must be adaptive to a nationally agreed interoperability solution.

While the Government's focus is on ensuring effective competition from the outset of mandatory eConveyancing, it is also cognisant of the need for any interoperability model to be adaptive to future changes in the conveyancing sector. While the Government currently anticipates one or two new entrant ELNOs in the short term, over time the number of ELNOs may increase. Therefore, while initially there may be a small number of interconnecting ELNOs, any interoperability solution must be scalable.

How ELNOs choose to compete also may change over time. One of the objectives of moving to electronic conveyancing is to open opportunities for innovation. The current ELNO business and operational model required by the Model Operating Requirements is one of a full service provider covering the range of conveyancing transactions. However, in the future different service models could emerge in which a provider specialises in a particular subset of transactions or in parts of transactions. Interoperability should create, or at least be the first step in creating, a more open environment which facilitates innovative service delivery models.

3.2 Defining the scope and nature of interoperability

The above guiding principles lead the Government to the following views about the scope of interoperability.

Interoperability in a networked or technology setting is a broad concept which can involve increasing levels of shared or common infrastructure and functionality between the interconnected operators. The Government is of the view that mandated interoperability should encompass only the minimum functions necessary to ensure that a conveyancing transaction can be conducted across more than one ELN. In an environment where ELNs are interoperable, this maximises the scope for service and product innovation by individual ELNOs and minimises the scope of incremental risk from interoperability.

The starting point is to understand what interoperability should not be. In the Government's view, interoperability should not involve the following functions:

- the ELNOs establishing any common infrastructure, a common subscriber database or workspaces beyond communication links between their ELNs;
- subscribers to the interconnected ELNOs working in a single 'joint' or 'collaborating' workspace; or

- subscribers to one of the interconnected ELNs using or editing data on the other ELN.

Instead, in the pre-settlement and lodgment phase, interoperability between ELNs would involve use of common APIs to securely exchange information, messages and other data between ELNOs to enable a common and consistent view of data required to settle a transaction where subscribers to a transaction are using different ELNOs. Otherwise, the ELNOs would continue to operate on a standalone basis.

However, when it comes to the settlement and lodgment phase, a higher level of co-ordination is required. If each ELNO lodged its 'side' of the conveyancing transaction with the land registry, the registry would face the challenge of matching the lodged documents, raising the risk of errors. Therefore, one of the interconnected ELNOs needs to be designated as the ELNO responsible for lodgment and the other ELNO needs to provide the documentation to the lodging ELNO in the form required for lodgment (e.g. with the digital signature).

In consultations with the RBA, it has stressed the importance of maintaining the Delivery v Payment (**DvP**) mechanism, which means⁶:

A securities settlement mechanism that links a security transfer and a funds transfer in such a way as to ensure that delivery occurs if and only if the corresponding payment occurs.

The Government considers that the DvP mechanism could be preserved in interoperability between ELNs by designating one of the ELNOs as being responsible for the financial settlement and lodgment of all of the relevant title documents with the land registry. While both financial settlement and lodgment could be undertaken by the same ELNO, responsibility for financial settlement and for lodgment alternatively could be separately undertaken by different ELNOs. Whichever model is adopted, the interoperability rules between ELNOs will need to specify the irrevocable directions required to enable the relevant ELNO(s) to undertake the lodgment or financial settlement task on behalf of the interconnected ELNOs. The interoperability rules also will need to deal with issues such as notifications of fraud, unsigned documents, and rescheduling of financial settlements.

The issue of which of the interconnected ELNOs should be the lodging ELNO is discussed below.

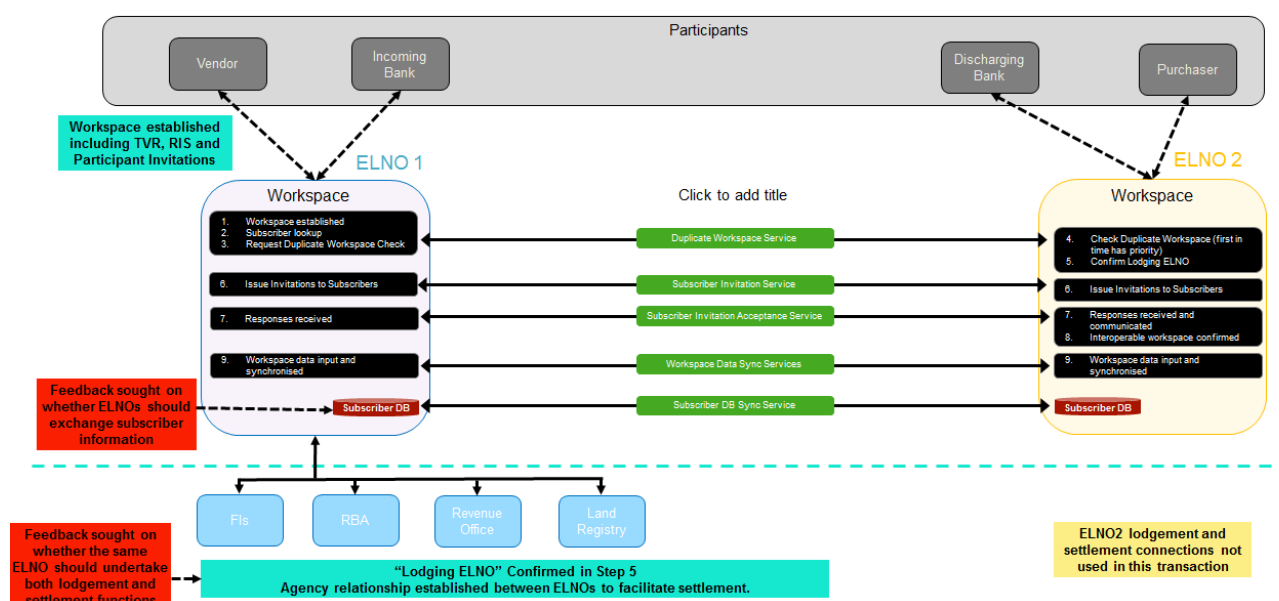
Finally, interoperability will also need rules around how risk and liability are allocated, how disputes are resolved between ELNOs, including over liability for losses which subscribers and customers incur because of failures in the conveyancing process, and consumer protection. These issues are addressed below.

3.3 High level map of interoperability

Figure 1, which is based on work undertaken by Sympli following the 4 December workshop, provides a high level overview of how interoperability could work between two ELNOs. The Sympli model provides for the lodging ELNO to undertake both the financial settlement and lodgment functions, and as noted above, this is an issue on which the Government seeks feedback.

⁶ Reserve Bank of Australia, Standard 10: Exchange-of-value Settlement Systems.

Figure 1: high level mapping of interoperability between ELNOs



The Sympli diagram has been amended to add (in the red coloured boxes) to specific issues on which the Government seeks feedback (discussed below).

Issues for consultation:

- 1 Do you agree with the Government's proposed statement of guiding principles for interoperability?
- 2 Are there any other guiding principles which you consider should be included?

4 Overview of potential interoperability models

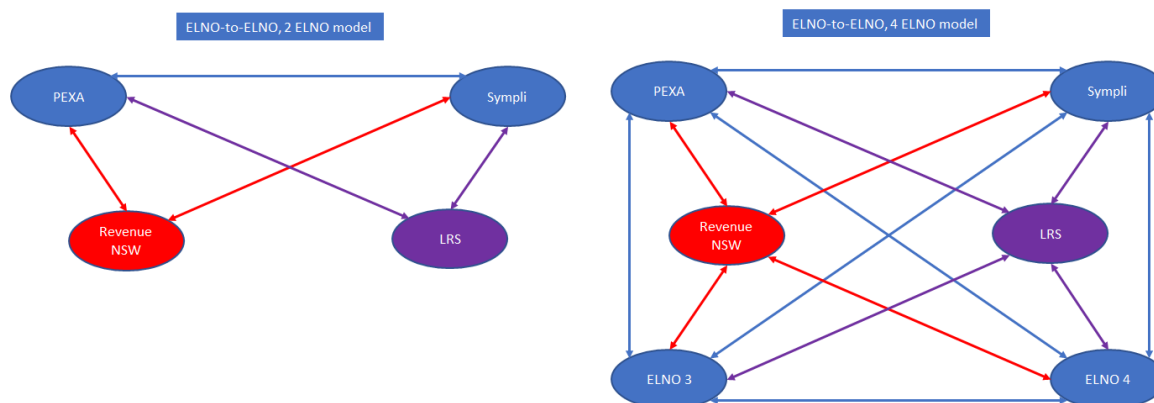
Broadly, there are two possible models to achieve interoperability between ELNs:

- bilateral interoperability; or
- hub-based interoperability.

4.1 Bilateral interoperability

Under the bilateral ELNO interoperability model, each ELNO is required to establish a direct link with each other ELNO in the market. Figure 2 illustrates the bilateral interoperability in a market with two ELNOs and in a market with 4 ELNOs:

Figure 2: Bilateral Interoperability



While each subscriber would continue to work directly in the workspace opened on the ELN to which it is connected, the APIs used between the ELNOs will need to ensure the subscribers have a complete picture of where the conveyancing transaction is up to at any given point in time, what steps or documents are outstanding and then provide a trigger message across the interconnected ELNs that all necessary steps have been completed and settlement can proceed.

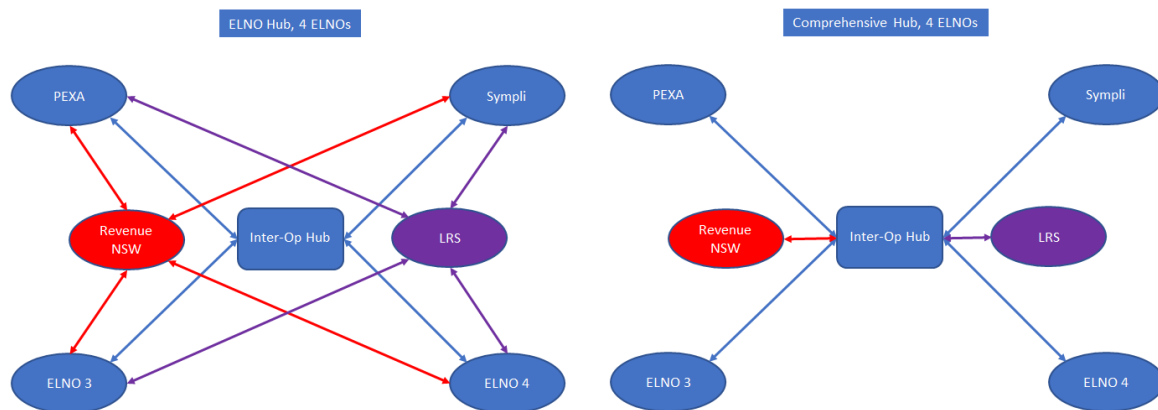
In networked industries, bilateral negotiations of interconnection arrangements, particularly between new entrants and existing operators, have encountered difficulties and delays. However, these can be mitigated if the regulator standardises the technical, operational and commercial arrangements for interconnection, such as through a standard interconnection agreement or an access determination to which interconnecting parties are bound.

4.2 Hub-based interoperability

Under the hub model, each ELNO is required to establish a single connection to a central platform or hub. Through the hub, each ELNO is able to access each of the other ELNOs without establishing its own link to them. As each new ELNO enters the market, it only has to establish a single link to the hub to gain access to the existing ELNOs and the existing ELNOs do not need to do anything further to gain access to the new ELNO.

Figure 3 illustrates two versions of the hub: the first ('ELNO hub') provides message exchange only between the ELNOs and the second ('Comprehensive hub') uses the hub to also exchange messages with other entities involved in completion of a conveyancing transaction, such as the State Revenue Office for the payment of stamp duty.

Figure 3: Hub-based Interoperability



There are a number of options for who would be responsible for establishing and operating the hub:

- one ELNO could operate the hub on behalf of the other ELNOs: however, this would give rise to concerns about one competitor controlling infrastructure which is crucial for the other ELNOs to compete;
- the ELNOs could jointly own and operate the hub: while giving each ELNO stake in the hub, the level of co-operation and information sharing involved between erstwhile competitors could give rise to competition law concerns and the hub might require authorisation by the ACCC, which could cause delay and complexity; and
- the hub could be operated by a third party under an arrangement with the NSW Government. LRS, which operates the land registry, has proposed that it could operate the hub. As ELNOs already have to establish links with LRS for lodgment purposes, there would be some efficiencies in LRS being the hub provider.

In its feedback, the Law Society called for greater clarity on the role of the hub, and in particular whether, as a new entity in the picture, it would perform some of the functions of an ELNO.

The hub could be limited to do no more than occurs through the bilateral interoperability model. All that a hub would do is reticulate through a central message exchange the data that – under the bilateral model - would be exchanged over the direct ELN-to-ELN links. Alternatively, the hub could provide a ‘thin layer’ of centralised functionality to provide a status update on the conveyancing transaction (as noted above, this would need to be done directly between the ELNOs through the APIs under the bilateral interoperability model). However, the hub should not independently fulfil settlement or lodgment functions or perform any other functions of an ELNO. There would still need to be a lodging ELNO which would be responsible for lodging the documentation with the land registry.

A number of stakeholders, including the Law Society, expressed strong concerns about LRS performing the role of hub provider. The concern is that LRS would be extending its ‘monopoly power’ from being the single provider of land registry services further into the conveyancing environment.

If the hub model was adopted, there would have to be safeguards ensuring that the hub operator, whether LRS or a third party, does not exploit its control over the hub as a ‘bottleneck’ facility. These safeguards could include:

- term limiting the contract for the operation of the hub, with the full opportunity to appoint a different hub operator on expiry of the term. The duration of the term would need to be set on the basis of providing the hub operator with a reasonable period in which to recover its

investment and a reasonable return. Given the limited scope of both interoperability and the role of the hub operator, the Government anticipates that this could be a 3-5 year period;

- a price control mechanism to ensure that charges to the ELNOs for use of the hub were based on costs (plus a reasonable return);
- Government ownership of the intellectual property etc. relating to the hub in order to facilitate awarding the hub operator responsibility to another party;
- obligations on the hub operator not to discriminate the access it provides to ELNOs and would be subject to service levels and key performance indicators, such as on availability of the hub;
- restrictions on the hub operator engaging in activities which compete with the ELNOs; and
- a technology change process and roadmap with which the hub operator is to comply so that the ELNOs had more notice of and certainty about changes in the hub which required changes in their systems.

4.3 Assessment of the interoperability models

Figure 3 sets out a comparison of the two models against the guiding principles identified above.

Figure 3: Comparison of interoperability models

Guiding principle	Bilateral interoperability	Hub-based interoperability
The primary consideration must be to maintain the integrity of the land titles register and the Torrens system more generally.	At the applications and conveyancing process level, there does not appear to be a material difference between the risks of the two models for the integrity of the land titles register. The same processes will be applied by each ELNO within its own ELN and by the ELNOs between their ELNs whether the data is exchanged over bilateral links or through a hub.	
	Avoids single point of failure risk of a hub because ELNOs have separate bilateral links.	The hub can create a 'single point of failure'. If LRS is the hub operator and utilises the same links with ELNOs as used for lodgment, the required performance levels under the concession arrangements with LRS that apply to the land titles registry should apply to the hub.
The interoperability solution should promote competition and consumer choice, including maximising the opportunities for future innovation in technology and business models.	<p>In the short term, the bilateral model could be quicker to implement, and therefore deliver competitive benefits sooner, because the hub model would require additional effort to negotiate the hub operator arrangements.</p> <p>The bilateral model also avoids the competitive risks of (and therefore the additional regulatory safeguards needed</p>	<p>In the longer term, the hub model has competitive and consumer choice advantages over the bilateral model:</p> <ul style="list-style-type: none"> • barriers to entry could be lower because new entrant ELNOs to the market would only need to establish one link to the hub to be able to interconnect with all existing ELNOs. The

Guiding principle	Bilateral interoperability	Hub-based interoperability
	to address) creation of a new 'monopoly' provider.	<p>requirement and costs of separate links with each existing ELNO under the bilateral model may be a barrier to entry; and</p> <ul style="list-style-type: none"> the hub model may better support innovation and market development by facilitating the entry of specialist, niche ELNOs.
The least complex and most efficient to implement interoperability solution should be preferred.	<p>The bilateral model may involve more cost and complexity at the technology level because each ELNO has to establish and operate multiple links to the other ELNOs, whereas under the hub model, it only has to provide one line and if LRS is the hub operator, it already has to provide a link to LRS for lodgment purposes.</p> <p>Technology changes in the bilateral model would require more co-ordination and co-operation, requiring all parties to change simultaneously. In the hub model, changes can be sequenced ELNO-by-ELNO.</p>	<p>The cost advantages of the hub model at the technology level will be offset to some extent by the administrative and operational costs of establishing a separate hub operator. The hub operator also may seek some level of minimum revenue guarantee from the ELNOs or the Government.</p> <p>For example, if there were only two ELNOs, they (and therefore users and subscribers) would be paying for the additional costs of a hub to achieve the same outcome as they would achieve at lower costs through a bilateral connection.</p>
Any interoperability solution must be adaptive to a nationally agreed interoperability solution.	<p>As noted above, the conveyancing requirements and processes which generally would be the same between the two models. There may be some differences between the APIs supporting interoperability in NSW compared to those used in other States and Territories for interoperability in a hub model compared to a bilateral model, but they would likely be minor. In any event, there are already differences between States and Territories' eConveyancing requirements under the national regime. This means that processes and rules developed for one State or Territory could be used as a basis for a set of national rules, and for either interoperability model nationally.</p> <p>It also seems possible that technical solutions for interoperability could be developed and based in each jurisdiction. The adoption of a hub interoperability model in NSW would not necessarily preclude the adoption of a bilateral interoperability model in other States and Territories or vice versa.</p>	
	A bilateral interoperability model developed for NSW could be extended nationally, particularly if this future option is taken into	A hub based interoperability solution developed for NSW could be extended nationally, particularly if this future option is

Guiding principle	Bilateral interoperability	Hub-based interoperability
	account when developing the data standards.	taken into account when developing the data standards. From an ELNO perspective, the absence of a national hub would require each ELNO to build connections to each individual hub operated by a State / Territory. It is not assumed that the other States and Territories would automatically accept the NSW hub operator as the operator of a national hub or hubs in other States and Territories. If the other States and Territories were, however, willing to accept the NSW hub operator, the governance framework for the hub operator would need to include the other States and Territories.

The Government has not reached a view on whether the bilateral interoperability model or the hub interoperability model is to be preferred.

Issues for consultation:

- 3 Should the bilateral interoperability model or the hub interoperability model be preferred?
- 4 If the hub interoperability model is preferred, who should be responsible for establishing and operating the hub (i.e. one ELNO, jointly between all ELNOs, or a third party under an arrangement with the NSW Government such as LRS)?
- 5 If the hub interoperability model is preferred, what should be the role of the hub (e.g. should the hub perform some of the functions for the ELNOs such as providing status updates on where the conveyancing transaction is up to)?
- 6 Would it be feasible to start with the bilateral interoperability model and migrate to the hub-based model if more ELNOs entered the market in the future?

5 Common issues for interoperability between ELNs

Whatever the model to implement interoperability, there will be a common set of issues which need to be addressed in the regulatory framework supporting interoperability.

5.1 Reciprocal recognition of ELNO status

The starting point in the design of the interoperability regime should be a recognition by each ELNO that the interconnecting ELNOs are directly subject to requirements, obligations and regulatory supervision equivalent to that which they face today.

Accordingly, the design of the interoperability rules and processes should be based on the following twin propositions:

- an ELNO should be obliged to accept that the data and documents presented by the other party are, on their face, compliant with the Model Operating Requirements and the Model Participation Rules. An ELNO should not be entitled or required to 'look behind' data and documents provided by the other ELNO under interoperability. Of course, there will need to be a process for correcting errors or data mismatches and for jeopardised transactions (i.e., fraud). However, one ELNO should not take it on itself to be a 'private enforcer' of the eConveyancing rules by withholding interoperability. Any concerns with the other ELNO's compliance should be raised with the Registrar General; and
- conversely, in the event of loss, an ELNO should be able to rely on the veracity and legitimacy of the data, documents and instructions provided by the other ELNO.

5.2 A common set of interoperability rules

There will need to be a common set of rules and procedures between ELNOs about how they interact when a conveyancing transaction takes place on more than one ELN. There also will need to be a common API which is developed, maintained and updated.

Ideally, these interoperability rules and the API would be developed by the ELNOs, in consultation with other stakeholders, as they know their systems best and are best placed to decide how they should inter-work. However, any process for competitors to agree on critical requirements for their individual businesses (and those of new entrants) needs to be cognisant of the risks of collusion. Independent regulatory oversight also will be important to ensure that the integrity of the registry and the interests of other stakeholders, including consumers, are taken into account.

A co-regulatory model used in other networked sectors, such as telecommunications, provides for an industry group to develop proposed standards or codes which are then submitted for review and approval by the regulator before they become legally binding. The Government proposes a similar model for development of proposed interoperability rules by ELNOs and their review and approval by the Registrar General.

Another legal mechanism through which to implement the more detailed requirements of interoperability is interconnection agreements negotiated between the ELNOs, which provides more scope for commercial negotiation over regulation. Drawing on interconnection agreements in other networked industries, potential matters to be addressed in an interconnection agreement could include:

- the process for identifying the lodging ELNO;
- data synchronisation, including categories, formats and business rules that apply to the data;
- warranties regarding reliance on ELNO approved processes (such as digital signatures and Subscriber identity procedures);
- providing the necessary assurances regarding an ELNO's authority to share data with other ELNOs and their subscribers (e.g. that all necessary consents have been obtained, and all necessary notices have been provided, under relevant privacy laws). This would include any reasonable limitations on use of any Subscriber data shared for the purpose of facilitating the lookup and invitation sending functionality of an interconnected workspace;
- granting the necessary rights in order for the lodging ELNO to undertake lodgment and financial settlement on behalf of another ELNO, such as granting a limited agency to the lodging ELNO;
- fees between ELNOs for undertaking lodgment and settlement activities;

- requiring notification between ELNOs of certain events (such as potentially jeopardised transactions or Compromised Security Items of a Subscriber); and
- setting out procedures for managing issues relating to financial settlement; allocation of liability as between ELNOs in an interconnected transaction; and internal and external dispute resolution processes between ELNOs.

The Government seeks views on whether, in the interests of achieving interoperability in the second half of 2019, some of the above matters are better addressed by industry recommended interoperability rules approved by the Registrar General rather than being left to bilateral negotiations. Alternatively, an approach used in other networked industries is for the regulator to prescribe core terms and conditions which must be included in interconnection agreements.

In formulating the interoperability rules, it will be necessary to consider how to adapt the current Model Operating Requirements and the Model Participation Rules to interoperability. While the national eConveyancing regime has contemplated competing ELNOs, it is true to say that the current Model Operating Requirements and the Model Participation Rules were developed in an environment where there was only one ELNO and conveyancing transactions were assumed to be completed on an end-to-end basis on one ELN.

The Registrar General has undertaken a preliminary review of the extent to which the Model Operating Requirements might require adapting or supplementing for interoperability, which is summarised at schedule 2. A similar analysis will need to be undertaken of the Model Participation Rules, the client authority form and other instruments for their adaptability to interoperability.

Issues for consultation:

- 7 How should the common set of interoperability rules and procedures between ELNOs about how they interact be developed, and by whom? Is a co-regulatory model that is used in other networked sectors appropriate?
- 8 What matters should be addressed by commonly developed interoperability rules and what matters should be left to commercial negotiation through interoperability agreements?
- 9 In light of the preliminary review of the Model Operating Requirements in Schedule 2, are there any provisions of the current Model Operating Requirements which you consider would need to be modified or supplemented to enable interoperability in NSW?
- 10 Are there any provisions of the Model Participation Rules or other eConveyancing instruments which you consider would need to be modified or supplemented to enable interoperability in NSW?

5.3 The role of lodging ELNOs

As noted above, one of the interconnected ELNOs needs to be designated to undertake lodgment and financial settlement on behalf of the interconnected ELNO. The same ELNO need not be designated to undertake both lodgment and financial settlement, but for the purposes of the discussion of the issues below the Government has assumed that one ELNO ('the lodging ELNO') would do so. Similar issues are likely to arise if the role is split between lodgment and financial settlement.

A crucial threshold question is how to identify which of the interconnected ELNOs should be the lodging ELNO in an individual conveyancing transaction.

Sympli proposes that the lodging ELNO should be the ELNO which is first in time to open an electronic workspace for a conveyancing transaction and send an invitation to the other ELNOs.

Sympli says its 'first in time' approach has the following advantages:

- it's clear, easily objectively verifiable and provides certainty to ELNOs and market participants at the earliest possible time. Sympli argues that other criteria, such as incoming mortgagee's ELNO as the lodging ELNO, creates the risk of uncertainty and complexity because the designation of the lodging ELNO could change over the course of the conveyancing transaction: for example, the purchaser may not initially intend to take out a mortgage but may change his or her mind, or the purchaser may have to find another mortgage if finance is refused; and
- it is fairer between ELNOs because it is not readily susceptible to leveraging or distortion by an ELNO with market power. For example, if the incoming mortgagee's ELNO is designated as the lodging ELNO, an ELNO with entrenched relationships with the major banks will predominate as the lodging ELNO.

If the allocation of the ELNOs' fees to the lodging ELNO is on a cost recovery basis, the interconnected ELNOs, in theory, should be indifferent to which of them is the lodging ELNO. However, this probably understates the other advantages which an ELNO could derive if the rules about who is the lodging ELNO overly favour it. That ELNO could hold itself out to customers and subscribers as having the deeper experience in lodgment and settlement services. The other ELNOs could be reduced to being, in effect, 'resellers' of that ELNO's lodgment and settlement services, with sub-scale capability of their own to perform these services. Also, the asymmetry between two ELNOs in situations where they are the lodging ELNO in conveyancing transactions across their interconnected ELNs could impact their bargaining leverage with each other in interoperability dealings.

The Government considers that the rules designating the lodging ELNO should meet the following criteria:

- the lodging ELNO should be designated at the earliest practicable point in the conveyancing transaction;
- the designation of the lodging ELNO should be subject to minimum change during the course of the conveyancing transaction; and
- as between two ELNOs, there should be broad symmetry in the transactions where they are acting as lodging ELNOs and where they are not.

While Sympli's 'first in time' rule could meet these criteria, the Government is concerned about its arbitrary nature, lacking in any market or transaction logic. The 'first in time' rule also may not be as self-executing as it might appear. While technology systems allow date/time stamping, the resolution of who is the lodging ELNO could turn on fine increments of time and could generate some level of dispute.

The Government seeks views on alternative criteria to establish which of the interconnected ELNOs is to be the lodging ELNO. An alternative might be to link the lodging ELNO to the ELNO of the purchaser or vendor. As this is a larger and more disparate pool, it would not seem to face the same competition risks as tying the designation of the lodging ELNO to the incoming mortgagee.

Issues for consultation:

- 11 Do you agree that lodgment should be undertaken by one ELNO on behalf of the interconnected ELNOs?

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| 12 | Do you agree that financial settlement should be undertaken by one ELNO on behalf of the interconnected ELNOs? |
| 13 | Do you consider that the one ELNO should undertake both the lodgment and financial settlement functions on behalf of the interconnected ELNOs or that these roles should be separated? |
| 14 | How should the ELNO responsible for financial settlement and/or lodgment be identified? |

5.4 Obligations of the lodging ELNO

The lodging ELNO may simultaneously have lodging and/or settlement responsibilities for conveyancing transactions where:

- it is the ELN for all parties to the transaction (i.e. there is no interoperability involved);
- it is the ELN for the purchaser and/or incoming mortgagee and the lodging ELNO (i.e. it is providing the lodging and settlement services where its subscriber is acting for the party who arguably has the greatest risk and interest); and
- it is the lodging ELNO and the other ELNO is the ELN for the purchaser and/or incoming mortgagee.

This raises the question of how the lodging ELNO will manage any capacity or resource constraint to conduct settlements and the rescheduling of settlements across these different types of transactions. While the ELNO has a stake, including reputational risk, in each of these transaction types, the ELNO might also have incentives to prefer some transaction types over others, such as preferring transactions conducted wholly on its own ELN to demonstrate the superiority of that ELN over its competitors. Subscribers also may be more bound to an ELN if they are concerned that the service quality will deteriorate if they are transacting across interoperable ELNs.

The Government considers that lodging ELNOs should be subject to an obligation to deal on an equivalent basis with conveyancing transactions which occur wholly on their own ELNs and conveyancing transactions which are conducted through interoperability. This would be along the lines of the equivalence obligation which will be included in the next version of the Model Operating Requirements, due to come into effect on 25 February 2019.

Issues for consultation:

- | | |
|----|---|
| 15 | Do you agree that the ELNO undertaking lodgment and/or financial settlement on behalf of interconnected ELNOs should be subject to an obligation to deal on an equivalent basis with conveyancing transactions which occur wholly on their own ELNs and conveyancing transactions which are conducted through interoperability? |
| 16 | Are there any other obligations which should apply to an ELNO undertaking lodgment and/or financial settlement on behalf of interconnected ELNOs? |

5.5 Authorisations needed by lodging ELNO

In order to facilitate eConveyancing transactions, an ELNO needs to receive authorisations and instructions from subscribers in respect of a variety of matters, including to transfer funds as part of the financial settlement.

Where more than one ELNO is involved in a transaction, the lodging ELNO will require such authorisations to be passed through from subscribers of the other ELNO in order to perform functions on behalf of other ELNOs' subscribers. For example, the lodging ELNO will require authority to transfer funds from a subscriber's trust account or to transact on an ELNO Source Account.

One issue is whether a bank will agree to an ELNO to which that bank has not subscribed, reserving that bank's funds because there is no direct contractual relationship.

Sympli considers that these issues can be dealt with through a limited standard form agency arrangement between interconnecting ELNOs that appoints the lodging ELNO as agent for the other ELNO involved in an interconnected transaction. This would enable the lodging ELNO to receive and act on instructions from other ELNO's subscribers and financial institutions in circumstances where the lodging ELNO does not have a direct relationship with the subscriber or financial institution. For example, the lodging ELNO could act as agent of other ELNOs in relation to passing instructions to financial institutions in the course of performing financial settlement or in relation to submitting transactions to RITS for the purposes of financial settlement between financial institutions.

Consideration will need to be given to whether there needs to be corresponding changes in the client authorisation form and in the agreements between ELNOs and their subscribers to support the agency arrangement.

More broadly, a question arises as to regulatory oversight of the financial settlement process. Traditionally, financial settlement has been treated as out-of-scope of the Model Operating Requirements, although this does not necessarily mean that there is no legal power under the ECNL to address issues relating to financial settlement. The RBA had significant involvement with PEXA in the design of its financial settlement model and the Australian Prudential Regulation Authority (**APRA**), as the regulator of financial institutions involved in financial settlement, also has an indirect role.

The Government is not inclined to address financial settlement in the interoperability rules beyond mandating the agent for settlement discussed above, unless there are other issues arising from financial settlement specific to the interoperability model that are identified.

Issue for consultation:

- 17 What authorisations or authority would need to be in place to enable one ELNO to undertake financial settlement on behalf of the interconnected ELNOs?
- 18 Do you agree that this can be achieved by a limited agency between the ELNOs or would other authorities need to be in place?
- 19 Do you foresee any other challenges to one ELNO undertaking settlement on behalf of interconnected ELNOs and how might these be addressed?

5.6 Exchange of Subscriber information

The Sympli model proposes that the ELNOs jointly maintain a 'look up' table of current subscribers to each ELNO. The 'look up' table would include basic information about the subscriber sufficient to identify them, such as name and address and ABN. The 'look up' would also detail the ELNO/s to which they are subscribed.

Sympli explains that the purpose of the 'look up' table is to allow a subscriber to invite any market participant into their workspace. Invitations will be directed to the ELNO(s) to which the party is subscribed. If a subscriber is a subscriber to more than one ELNO (e.g. both the inviting ELNO and another ELNO), then the notification will be sent to both ELNOs and the subscriber can choose which

ELNO it will use for the transaction. The 'look up' table would not require a centralised database but could use synchronised databases between the ELNOs.

While Sympli's proposal clearly would facilitate the efficiency and seamlessness of interoperability for customers and subscribers, the exchange of customer information between competitors can give rise to competition and privacy concerns. The ELNOs will have full transparency of each other's customer base. When an ELNO loses a customer, it would know to which ELNO a customer 'switched'. An ELNO will know whether its subscribers were subscribers to another ELNO. All of this would be valuable information to enable an ELNO to target another ELNO's subscriber base or for ELNOs to engage in explicit or tacit co-ordination, such as dividing the customer market between themselves by each targeting a different customer segment.

These are not unknown challenges in other networked industries where a level of customer information needs to be exchanged to make interoperability work, such as with mobile number portability. Sympli proposes that rules could be developed to ensure that the exchanged information is only used for limited purposes.

To address privacy concerns, clear notice would need to be given to subscribers. Consideration would need to be given to whether the exchange of subscriber information should be mandated by regulation (in which case subscriber consent may not be required) or whether ELNOs should be required to seek customer consent, which then raises questions about how to manage interoperability where subscribers refuse consent (e.g. whether there should be an 'opt-in' or 'opt-out' model for subscribers).

Two possible alternatives to a 'look up' database between the ELNOs are:

- a subscriber being required, when notifying its ELNO of a proposed conveyancing transaction, to supply the ELNs of the counterpart subscribers. The shortcoming of this approach is that it shifts additional responsibility to lawyers and conveyancers and inevitably will require additional processes between the ELN and its subscribers when the counterparties' ELNs are mistakenly omitted or are wrong. This would detract from the seamlessness of interoperability for subscribers and customers; or
- a centralised database maintained by a third party to which ELNOs have access only to make individual per transaction inquiries about the counterpart ELN to which the invitation needs to be sent. LRS currently holds information about all lawyers and conveyancers authorised to undertake eConveyancing, and this could be expanded to link each lawyer and conveyancer to a particular ELN.

Issues for consultation:

- 20 Do you agree that ELNOs should exchange subscriber information for the purposes of identifying the counterpart ELNs in an interoperability transaction? If you do not agree, what alternative is there to ensure that the correct counterpart ELN can be identified and invited?
- 21 What safeguards do you consider would apply to the exchange of subscriber information for this purpose?

5.7 Liability

The interoperability regime will need a clear set of rules about the allocation of liability for loss.

The Government is considering the following principles for the liability regime:

- as noted above, each ELNO should be entitled to rely on the data, documents and instructions provided by the other ELNO being accurate, legitimate and in compliance with the eConveyancing requirements;
- the ELNO 'at fault' in a transaction which results in loss should be liable for compensation for the loss. There are likely to be circumstances where both ELNOs have contributed to the 'fault' and the liability regime will need to provide for allocation of the loss;
- claims for compensation by a subscriber (or a client of a subscriber) should be made against the subscriber's ELNO, regardless of whether the transaction was an interconnected transaction or if an interconnected transaction, whether the ELNO was at 'fault' or not;
- the subscriber or subscriber client should be compensated without having to wait for resolution of the responsibility for the loss between the interconnected ELNOs. There should be a short, specified period of time (no more than 3-5 days) following a claim for the ELNO receiving the claim to investigate, including to consider whether neither ELNO was at fault but that the fault lay with the subscriber or client or elsewhere;
- if it is not readily apparent which ELNO is at fault, there should be a pre-established 'root cause' analysis process which can be quickly deployed to determine the fault; and
- if the outcome of the root cause analysis cannot be agreed between the ELNOs, there should be an expeditious, efficient and independent dispute resolution process capable of dealing with disputed questions of fact and law. The Government considers that this role is not appropriately undertaken by the Registrar General, given his supervisory functions over ELNOs and that, as an executive officer, he or she is not necessarily equipped to perform a semi-judicial role.

The Government has sought advice from its insurance advisers, Willis Towers Watson (**WTW**), on whether ELNOs would be able to obtain private insurance consistent with the above principles for an interoperability liability regime, and their preliminary advice is set out at schedule 3. WTW advised that they do not anticipate the information exchange component of interoperability is likely to cause significant concern for the insurance market, provided that adequate steps are taken to address security and procedures as outlined in this Consultation Paper and the Model Operating Requirements. WTW also do not consider that there is a material difference in risk for insurance purposes between the bilateral interoperability model and the hub-based interoperability model.

However, WTW advises that the interoperability model could contain risks not ordinarily assumed by insurers:

- *Reliance principle:* the models assume ELNOs rely on the data provided by the other ELNO. This principle may be inconsistent with insured entities' obligation to take reasonable steps to prevent loss and may remove existing checks and balances; and
- *Claims paid, regardless of fault:* insurers may balk at the requirement to provide what could amount to a financial guarantee; and consequently require higher deductibles, higher premiums and increased policy limits.

In the annexed advice, WTW canvasses the four possible models, summarised in figure 5:

Figure 5: Assessment of interoperability insurance options

Insurance model for interoperability	Advantages	Disadvantages
<p><u>Individual approach:</u></p> <p>Each ELNO is required to negotiate and purchase its own program to meet the insurance requirements specified in the MOR (similar to current model).</p>	<ul style="list-style-type: none"> Each ELNO retains the freedom to negotiate their own policies and terms and conditions, including policy deductibles tailored for their own business, and their own preferred limit of liability, subject to the minimum levels specified by the Registrar General. 	<ul style="list-style-type: none"> Timeliness of policy response and settlement with consumers is still restrained by insurer response. The collective premium pool for individual policies is expected to be substantially higher compared to a single policy/fund covering the collective ELNOs.
<p><u>Registrar General's scheme:</u></p> <p>The Registrar General or its nominated administrator could facilitate a scheme or agreed wording/terms with a single insurer/insurer panel with the insurer to issue an individual policy to each ELNO (similar to current model, but the insurance is negotiated on behalf of all participant ELNOs by the Registrar General).</p>	<ul style="list-style-type: none"> Same insurer covering all insured losses arising from the eConveyancing process goes some way towards overcoming the issues of assumed liabilities between ELNOs as the insurer will be on risk, regardless of where fault lay. 	<ul style="list-style-type: none"> Timeliness of policy response and settlement with consumers is still restrained by insurer response.
<p><u>Group scheme:</u></p> <p>Policies covering liability to consumers or subscribers arising from the eConveyancing model to be covered under a group policy or group scheme (group policy or scheme covering all ELNOs under the single policy/scheme, negotiated by the Registrar General).</p>	<ul style="list-style-type: none"> Insurer concerns about assumed liabilities are alleviated in full, whilst the dispute resolution process becomes less critical from an insurance perspective. All ELNOs have access to the same level of cover as other ELNOs. 	<ul style="list-style-type: none"> Timeliness of policy response and settlement with consumers remains restrained by insurer response. The policy will have a deductible which will need to be paid for by one or more ELNO – investigation and a full resolution process may still be required to apportion deductibles. There will be no ability for one ELNO to claim against another ELNO, due to “Insured vs Insured” exclusions found in most insurance policies.
<p><u>State Fund:</u></p> <p>Fund established to provide a first response to consumers and</p>	<ul style="list-style-type: none"> The fund is established to provide a timely response to consumer complaints, unaffected by the 	<ul style="list-style-type: none"> Administration required by the Registrar General or its nominated administrator.

Insurance model for interoperability	Advantages	Disadvantages
subscribers – similar to the Torrens Assurance Fund (TAF). The fund could operate in a similar manner to the TAF, or could be modified to provide a first response to consumers only (with recovery rights available against ELNOs) or be reinsured or backed by an excess of loss insurance program to reduce the capital required to support the fund.	<p>identification of a responsible ELNO or insurer response.</p> <ul style="list-style-type: none"> Can be funded by a levy on ELNOs or on consumers/subscribers. 	

The Government will give consideration to the role it might or could play in supporting insurance for the liability issues associated with interoperability.

Issues for consultation:

- 22 Do you agree with the proposed principles for the design of a liability regime for interoperable conveyancing transactions?
- 23 Do you have any views on the four options put forward by WTW to the Government for insurance coverage for interoperability?
- 24 Are there other issues relating to liability which you consider need to be addressed in relation to interoperable transactions?

5.8 Regulatory oversight powers

Effective implementation of interoperability requires a robust governance framework with adequate powers for the Registrar-General to ensure the objectives outlined above are met.

To effectively manage and oversee interoperability, the Registrar General is likely to require the following kinds of powers:

- information gathering;
- setting of interoperability fees, including the allocation of ELNO fees to which the lodging ELNO is entitled;
- setting service standards for the exchange of messages between the interconnected ELNOs (e.g. acting on notices of jeopardised transactions) and for performance of the lodging ELNO functions;
- approving interoperability rules and APIs;
- specifying the required terms and conditions for an interoperability agreement between ELNOs, including matters that an ELNO may not insist upon as conditions of interoperability;

- security requirements for messaging between ELNOs (including to be used by the hub if that model is adopted);
- a liability regime;
- a dispute resolution regime, including approval of a panel of suitably qualified arbitrators; and
- a complaints handling process, including complaints from subscribers and users.

Some of the powers which the Registrar General already has, including under the enhanced approval conditions for ELNOs, are capable of being exercised in relation to an individual ELNO both when it is engaged in a conveyancing transaction wholly on its own ELN or in respect of its 'side' of an interconnected transaction. However, the Registrar General's powers may need to be supplemented to deal with interoperability either through approval conditions or through NSW-specific additional requirements to the Model Operating Requirements.

If the hub model is adopted, additional powers of the Registrar General may be required over the hub operator, including:

- criteria by which someone qualifies to connect to the hub;
- a technology change process and technology roadmap for the hub;
- a consultation process between the operator of the clearing house, ELNOs and other interested stakeholders;
- a liability regime where the hub operator is at fault; and
- requirements on where the platform can be located (i.e. data security power).

Issue for consultation:

25 Do you agree with the proposed powers for the Registrar General in relation to interoperability?

5.9 Costs

The Government's preliminary view is that each ELNO should bear its own costs of interoperability as a cost of doing business in a multi-operator competitive market. This is the approach taken to interconnection costs in other networked industries. Where interconnection charges apply, it is for services, such as colocation space, which one operator provides the other operator to support interconnection.

Under a hub interoperability model, there will be the separate costs of the hub operator. These costs should be met by the ELNOs using the hub. There are a number of ways in which the hub operator's costs could be recovered. A per transaction or per message charge could be considered fair between the ELNOs because, in effect, they fund the hub in proportion to their share of the eConveyancing market. However, as the hub operator's own revenue source is from the ELNOs, transaction sensitive charges do not necessarily provide it with assurance that it will recover its costs, given the volatility in the property market. A flat subscription fee per ELNO recognises that there are fixed, non-variable costs which the hub operator needs to recover. But a subscription charge could be a barrier to entry for a new ELNO and unfair between the ELNOs if they pay the same regardless of their market share. A combination of a flat subscription charge and a per transaction charge may strike a fair balance.

The Government does not consider that a special subscriber charge or loading in subscription should apply for interconnected transactions. The non-lodging ELNO avoids settlement and lodging costs it otherwise would have incurred if the transaction was conducted solely on its ELN and the lodging ELNO receives an allocation of the ELNO charges for conducting the settlement and lodgment.

As IPART is currently reviewing electronic conveyancing fees in the lead up to mandatory eConveyancing, it would be well placed to advise on the appropriate allocation of the fees between the lodging and non-lodging ELNOs.

Issues for consultation:

- 26 If the bilateral interoperability model is adopted, do you agree that the costs of interoperability should be absorbed by each ELNO?
- 27 If a hub model is adopted, how should the costs of the hub operator be recovered?
- 28 How should the ELNO with responsibility for lodgment and/or financial settlement on behalf of the interconnected ELNOs be compensated?

6 Removing switching costs

Interoperability is an important element in ensuring a competitive market, but it is not the only one potential measure to facilitate competition. There can be other barriers to competition, including barriers to subscribers switching from their current ELNO which, in the early stages of competition can assist to embed the incumbent ELNO's position. For example, Purcell Partners has expressed concern that the Digital Signature issued to a subscriber, which currently is specific to an ELN, constitute a barrier to switching because the subscriber has to go back through the process of obtaining a new Digital Signature.

The Digital Signature regime is specified in the Model Operating Requirements. Changing the rules to allow one digital key to be issued by a single authority which can be used across multiple ELNOs would reduce the need for subscribers to sign up to multiple ELNOs, and would give subscribers freedom to transact across multiple ELNOs (even if they need to carry out the transaction on their non-preferred ELNO).

However, this should be considered with the following in mind:

- significant changes to the regulatory framework would be required. The changes would probably have to apply on a consistent nationwide basis (and involve the agreement of the other States and Territories) so as not to prejudice interstate subscribers who transact in NSW, and vice versa;
- a third-party commercial organisation would end up being responsible for a significant part of the onboarding of ELNO subscribers and advising each ELNO of their subscriber details including subscriber number, and issuing a digital signing certificate;
- most current subscribers, including those who do not intend to switch to another ELNO, would need to go through the process of changing their Digital Signatures, which is likely to cause significant disruption for subscribers; and
- current participation agreements between subscribers and ELNOs may need to be revised.

The Model Operating Requirements bring a high level of standardisation to the onboarding process, including the issuing of Digital Signatures, which should mitigate the barriers to switching which having to apply for a new Digital Signature may pose.

The Government is not convinced that the competitive benefits outweigh the costs of changing from the current ELNO-specific Digital Signatures to a multi-ELNO Digital Signature.

Issues for consultation:

- 29 Do you consider that the rules should be changed to require Digital Signatures which are capable of being used across all ELNOs?
- 30 Have you identified any other barriers to switching by subscribers between ELNOs and how could these be addressed?

7 Way forward

7.1 Building a governance framework for interoperability

Good governance to oversee the implementation of interoperability is critical to reducing business uncertainty and costs and continuing to attract take-up in eConveyancing and investment from ELNOs.

Consistent with the ECNL, NSW has two options to implement the governance framework for interoperability:

- as conditions of approval under section 17(1) of the ECNL; or
- as jurisdiction specific requirements of the Model Operating Requirements and the Model Participation Rules.

The first option may be more expeditious as the condition making power is recognised under the national eConveyancing scheme as a matter for each jurisdiction not requiring consultation with or co-ordination through ARNECC. However, the second option, while potentially taking some more time, may be seen as more consistent with interoperability in NSW serving as a trial of interoperability nationally on the basis other jurisdictions may not equally see this as a priority right now. It also may facilitate the NSW specific Model Operating Requirements being folded into a future national approach, should other jurisdictions wish to adopt this.

As noted in the introductory section of this paper, the national eConveyancing framework explicitly provides for jurisdiction-specific solutions. The Government proposes that this flexibility be utilised to provide for the development of the interoperability model within the ARNECC governance framework. This means NSW will commit to investing further resources to support design and implementation of interoperability, working with colleagues in ARNECC.

This ARNECC-based governance arrangement could involve:

- a technical working group comprising all ELNOs, registrars and representatives from private registry operators to finalise data standard and interoperability rules. The RBA would also be invited to advise on the specific issue of payment versus delivery requirements for financial settlement;
- a governance working group comprising all states and including the IGA reviewer, to finalise the regulatory regime for ARNECC's consideration; and
- a commitment to further Ministerial forums, including working with other IGA ministers.

This means interoperability can be readily migrated to a national solution. Governments will own all intellectual property rights in the APIs and other work product developed for the interoperability

solution. This intellectual property will be transferred at no cost to a national data standards body for electronic conveyancing (the establishment of which is currently being considered by ARNECC).

The advantages of developing the interoperability solution within the ARNECC framework are as follows:

- it is a clear, tangible demonstration of the Government's continuing commitment to the national eConveyancing model, and the alignment between the NSW model and any future national model for interoperability;
- it is available for any jurisdiction that would prefer to implement interoperability in this timeframe;
- it utilises the well-established ARNECC processes that draw together key stakeholders to work collaboratively on eConveyancing issues; and
- it brings in the expertise of Registrars in other jurisdictions to the design of the model, which may ease transition to a national model in the future.

If ARNECC prefers not to have the oversight role described above, then NSW will continue to work towards a solution, while also continuing to share information and work with our colleagues across other States and Territories.

7.2 Timing of Implementation

Development of a sustainable interoperability solution requires consultation and engagement with a wide range of industry stakeholders and across governments. While this is rarely easy, it is more challenging when the impact and importance of interoperability to these stakeholders varies so substantially. The Government considers that a reasonable timeframe for the completion of the work required for interoperability would be in the second half of 2019.

This then raises the question of whether, given the transition to mandatory eConveyancing in July 2019, any interim measures are required pending the introduction of interoperability. Figure 6 sets out some of the options the Government has identified:

Figure 6: Potential interim measures pending introduction of interoperability

Potential interim measures	Advantages	Disadvantages
<p><i>Status quo:</i></p> <p>Leave it up to participants to decide which single ELN they all need to use.</p>	<ul style="list-style-type: none"> ▪ Allows stakeholder efforts to be focused on meeting the target for the development of an interoperability model. ▪ Aware of the approaching mandatory eConveyancing start date, most customers already will be making arrangements for the transition. While the full benefits of eConveyancing (including choice) may not be realised in the interim period, mandatory eConveyancing still will be workable. 	<ul style="list-style-type: none"> ▪ Risk that the incumbent ELNO's market position is entrenched, but this may be mitigated to some extent because the new ELNOs will still be in start-up phase during the 4-5 month period pending introduction of interoperability and the availability of interoperability over the near term provides a reference point in marketing their services to potential customers.

Potential interim measures	Advantages	Disadvantages
<p><i>Conveyancing Rules waiver:</i></p> <p>The Registrar General could provide a waiver for where the parties to a mandated transaction are using different ELNs. The waiver means that the parties will fall out of electronic conveyancing and settle in paper.</p>	<ul style="list-style-type: none"> Mitigates against incumbent ELNO's market position being entrenched in the early period of mandatory eConveyancing. 	<ul style="list-style-type: none"> Likely to cause confusion and inconvenience amongst customers who have geared up for mandatory eConveyancing from July 2019, and detract from the Government's efforts to shift the market to mandatory eConveyancing. If the participants are not on the same ELN, no participant gets to use its preferred ELN. Could be open to 'gaming' (e.g. Subscriber 1 is on both ELNO 1 and ELNO 2, Subscriber 2 on ELNO 1 only, but Subscriber 1 elects to use ELNO 2 for the transaction).
<p><i>Industry protocol:</i></p> <p>The Registrar General could work with industry to develop a protocol to identify one participant as the Responsible Subscriber in a transaction to determine the ELN (e.g. either the Subscriber representing the incoming mortgagee or the incoming proprietor if no mortgage).</p>	<ul style="list-style-type: none"> May mitigate the risk of entrenching the incumbent ELNO's market position because new ELNOs can target key financial institutions in the interim period, but the incumbent ELNO also may have a strong existing relationship with them. 	<ul style="list-style-type: none"> As changes in the Model Participation Rules and sale of land contract may be needed, this solution is unlikely to be implemented much before the full interoperability solution is available. May have the unintended consequence that subscribers are forced to join each ELNO, so they are not caught out.
<p><i>New process for subscriber registration to allow use of multiple ELNOs:</i></p> <p>Changing the rules to allow one digital key to be issued by a single authority which can be used across multiple ELNOs reduces the need for subscribers to sign up to multiple ELNOs and gives subscribers freedom to transact across multiple ELNOs.</p>	<ul style="list-style-type: none"> Effective competitive safeguard against the entrenchment of the incumbent ELNO's market position because, pending interoperability, subscribers can participate in conveyancing transactions that occur on any ELN, regardless of which ELN is their preferred ELN. 	<ul style="list-style-type: none"> Involves significant changes to the regulatory framework. Likely to only work if the national rules are changed so as not to prejudice interstate subscribers who transact in NSW, and vice versa. The costs of setting up the regime is likely to far outweigh the benefits given most subscribers will be transacting on the incumbent ELNO and already have their required digital certificates.

The Government is inclined not to introduce any interim measures but to press on with the introduction of interoperability in the second half of 2019.

Issues for consultation:

- 31 Do you consider that interim measures are required pending the introduction of interoperability in the second half of 2019?
- 32 Do you have any suggestions on what interim measures should be put in place?

Schedule 1 – Questions for Consultation

- 1 Do you agree with the Government's proposed statement of guiding principles for interoperability?
- 2 Are there any other guiding principles which you consider should be included?
- 3 Should the bilateral interoperability model or the hub interoperability model be preferred?
- 4 If the hub interoperability model is preferred, who should be responsible for establishing and operating the hub (i.e. one ELNO, jointly between all ELNOs, or a third party under an arrangement with the NSW Government such as LRS)?
- 5 If the hub interoperability model is preferred, what should be the role of the hub (e.g. should the hub perform some of the functions for the ELNOs such as providing status updates on where the conveyancing transaction is up to)?
- 6 Would it be feasible to start with the bilateral interoperability model and migrate to the hub-based model if more ELNOs entered the market in the future?
- 7 How should the common set of interoperability rules and procedures between ELNOs about how they interact be developed, and by whom? Is a co-regulatory model that is used in other networked sectors appropriate?
- 8 What matters should be addressed by commonly developed interoperability rules and what matters should be left to commercial negotiation through interoperability agreements?
- 9 In light of the preliminary review of the Model Operating Requirements in Schedule 2, are there any provisions of the current Model Operating Requirements which you consider would need to be modified or supplemented to enable interoperability in NSW?
- 10 Are there any provisions of the Model Participation Rules or other eConveyancing instruments which you consider would need to be modified or supplemented to enable interoperability in NSW?
- 11 Do you agree that lodgment should be undertaken by one ELNO on behalf of the interconnected ELNOs?
- 12 Do you agree that financial settlement should be undertaken by one ELNO on behalf of the interconnected ELNOs?
- 13 Do you consider that the one ELNO should undertake both the lodgment and financial settlement functions on behalf of the interconnected ELNOs or that these roles should be separated?
- 14 How should the ELNO responsible for financial settlement and/or lodgment be identified?
- 15 Do you agree that the ELNO undertaking lodgment and/or financial settlement on behalf of interconnected ELNOs should be subject to an obligation to deal on an equivalent basis with conveyancing transactions which occur wholly on their own ELNs and conveyancing transactions which are conducted through interoperability?
- 16 Are there any other obligations which should apply to an ELNO undertaking lodgment and/or financial settlement on behalf of interconnected ELNOs?

- 17 What authorisations or authority would need to be in place to enable one ELNO to undertake financial settlement on behalf of the interconnected ELNOs?
- 18 Do you agree that this can be achieved by a limited agency between the ELNOs or would other authorities need to be in place?
- 19 Do you foresee any other challenges to one ELNO undertaking settlement on behalf of interconnected ELNOs and how might these be addressed?
- 20 Do you agree that ELNOs should exchange subscriber information for the purposes of identifying the counterpart ELNs in an interoperability transaction? If you do not agree, what alternative is there to ensure that the correct counterpart ELN can be identified and invited?
- 21 What safeguards do you consider would apply to the exchange of subscriber information for this purpose?
- 22 Do you agree with the proposed principles for the design of a liability regime for interoperable conveyancing transactions?
- 23 Do you have any views on the four options put forward by WTW to the Government for insurance coverage for interoperability?
- 24 Are there other issues relating to liability which you consider need to be addressed in relation to interoperable transactions?
- 25 Do you agree with the proposed powers for the Registrar General in relation to interoperability?
- 26 If the bilateral interoperability model is adopted, do you agree that the costs of interoperability should be absorbed by each ELNO?
- 27 If a hub model is adopted, how should the costs of the hub operator be recovered?
- 28 How should the ELNO with responsibility for lodgment and/or financial settlement on behalf of the interconnected ELNOs be compensated?
- 29 Do you consider that the rules should be changed to require Digital Signatures which are capable of being used across all ELNOs?
- 30 Have you identified any other barriers to switching by subscribers between ELNOs and how could these be addressed?
- 31 Do you consider that interim measures are required pending the introduction of interoperability in the second half of 2019?
- 32 Do you have any suggestions on what interim measures should be put in place?

Schedule 2 – Initial Review of the Model Operating Requirements

This initial review by the Registrar General has focussed on the bilateral interoperability model. Additional changes to the Model Operating Requirements may be required to support the hub-based interoperability model. The following comments in response to ‘How would this operate with interoperability?’ are preliminary observations, opinions and questions to guide further development on more definitive solutions.

Clause	How would this operate with interoperability?
<p>1.1 Insurance</p> <p>1.1.1 The ELNO must obtain the insurance policies required under these Operating Requirements on terms satisfactory to the Registrar in accordance with this Operating Requirement.</p> <p>1.1.2 The ELNO must maintain a policy of:</p> <ul style="list-style-type: none"> (a) professional indemnity insurance in an annual aggregate amount of not less than that set out in Item 1 in Schedule 1; and (b) fidelity insurance in an annual aggregate amount of not less than that set out in Item 2 in Schedule 1; and (c) public and product liability insurance in an annual aggregate amount of not less than that set out in Item 3 in Schedule 1; and (d) asset insurance in an amount of not less than that set out in Item 4 in Schedule 1. <p>1.1.3 The ELNO must obtain its insurance policies from an Approved Insurer.</p> <p>1.1.4 The ELNO must obtain policies of professional indemnity and fidelity insurance that cover the acts and omissions of its principals, officers and employees.</p> <p>1.1.5 The ELNO must ensure that any contractors to the ELNO maintain relevant and appropriate policies of insurance from an Approved Insurer to adequately cover the services provided by the contractor.</p> <p>1.1.6 The ELNO must, as soon as practicable, inform the Registrar in writing of the occurrence of an event that may give rise to a claim under a policy of insurance required to be</p>	<p>Cross-insurances may be required, along with further amendments to the scope of the required policies and aggregate insured amounts.</p> <p>On the broader issue of liability between ELNOs, to consider whether this should be addressed through the MORs, or whether this is best left to the interoperability agreements that will be put in place between ELNOs, with standard clauses approved by the RG.</p>

Clause	How would this operate with interoperability?
maintained under these Operating Requirements and must ensure that the Registrar is kept fully informed of subsequent action and developments concerning the claim.	
<p>2 OPERATION OF ELN</p> <p>2.1 Encourage widespread industry use</p> <p>The ELNO must encourage widespread industry use of the ELN. As a minimum, the Business Plan must set out the ELNO's:</p> <ul style="list-style-type: none"> (a) specific plans to encourage the use of the ELN nationally and in the Jurisdiction; and (b) proposed service delivery model, including the proposed or actual customer base and anticipated market penetration; and (c) timings for the commencement of operations and the anticipated level of service, including matters such as ease of connection and access for different classes of users. 	Generalised obligation to interconnect could be required.
<p>2.2 National system and minimum Document capability</p> <p>Recognising that the implementation of Operating Requirements 5.2(a) and (b) may be staged in accordance with the Business Plan, the ELNO must ensure that:</p> <ul style="list-style-type: none"> (a) the ELN is available to each Land Registry in Australia and to Subscribers in all States and Territories in Australia; and (b) the ELN enables, as a minimum, the Lodgment of those of the following electronic Registry Instruments and other electronic Documents which are 	<p>Key questions:</p> <ul style="list-style-type: none"> • are some transactions not part of operability, given their single party character, such as lodging a caveat? • What if the lodging of a caveat forms part of a larger economic transaction, should interoperability apply to all of the associated transactions? If so, what is part of an associated transaction? Potentially determined by the concept of a "lodging case", noting that it is not

Clause	How would this operate with interoperability?
<p>capable of Lodgment under the Land Titles Legislation of the Jurisdiction in which the ELN is available:</p> <ul style="list-style-type: none"> (i) Transfer; and (ii) Mortgage; and (iii) Discharge/Release of Mortgage; and (iv) Caveat; and (v) Withdrawal of Caveat; and (vi) Priority Notice; and (vii) Extension of Priority Notice; and (viii) Withdrawal of Priority Notice; and (ix) associated Duty Authority notices; and (x) administrative notices required to manage certificates of title. 	<p>always initially clear which Documents are required at the outset.</p> <p>Also need to consider whether each ELNO is required to be interoperable at the point of commencing operations (e.g. if it is only capable of lodging Caveats) or if interoperability only becomes relevant when it starts to lodge particular Documents (e.g. Transfers) that require interconnection.</p>
<p>2.3 ELNO Service Fees</p> <p>2.3.1 The ELNO may charge ELNO Service Fees in accordance with its pricing policy.</p> <p>2.3.2 If the ELNO charges ELNO Service Fees, the ELNO must:</p> <ul style="list-style-type: none"> (a) for each year commencing on 1 July, prepare and publish on its website its Pricing Table; and (b) not charge a fee greater than the amount specified in the published Pricing Table. 	<p>Service Fee will need to be allocated between the relevant ELNOs to reflect role of lodging ELNO – consumer should not pay more.</p>

Clause	How would this operate with interoperability?
<p>2.3.3 From 1 July 2019 to 30 June 2022, the ELNO may increase the ELNO Service Fees as listed in its Pricing Table, once every 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.</p> <p>2.3.4 Notwithstanding Operating Requirement 5.4.3, the ELNO may, at any time, request the Registrar's approval, which may not be unreasonably withheld, for proposed changes to its Pricing Table, including but, not limited to, in the event:</p> <ul style="list-style-type: none"> (a) of any change to the amount of any insurance premium payable by the ELNO in respect of any insurance policy the ELNO is required to hold under Operating Requirement 4.7.2; or (b) that a change in any law gives rise to a change in the ELNO's operating costs; or (c) that additional fees, charges or costs are imposed on the ELNO by the Registrar, Land Registry or any other government agency. <p>2.3.5 If the ELNO Service Fees include Information Fees, following a change in Information Fees, the ELNO may re-calculate the ELNO Service Fees and change the Pricing Table to reflect the re-calculated ELNO Service Fees.</p> <p>2.3.6 The Pricing Table for any year commencing on 1 July, and any changes to it, must be published at least 20 Business Days, or as soon as reasonably practicable, before the Pricing Table, or the changes to it, take effect.</p>	
<p>2.4 Integration</p> <p>2.4.1 The ELNO must prepare and publish on its website a set of Integration terms and conditions which set out the requirements for a Person Wishing To Integrate.</p> <p>2.4.2 The Integration terms and conditions prepared and published by the ELNO under Operating Requirement 5.5.1 must not contain any express or implied terms that could qualify, derogate from or otherwise prejudicially affect compliance with any of the ELNO's obligations under the Operating Requirements.</p> <p>2.4.3 The ELNO must treat a Person Wishing To Integrate or a Person Who Has Integrated on an Equivalent Basis, subject only to differences which are attributable to the type, level</p>	<p>The Integration requirements could provide a framework of ELNO-ELNO interoperability arrangements, including the principle of equivalence.</p>

Clause	How would this operate with interoperability?
<p>or class of Integration with the ELN provided that each Person Wishing To Integrate or Person Who Has Integrated has an equivalent opportunity to choose between those options compared with each other Person Wishing to Integrate or Person Who Has Integrated.</p>	
<p>3 INITIAL TESTING</p> <p>The ELNO must not commence operating the ELN without first undertaking testing of the ELN in accordance with the Test Plan and otherwise to the satisfaction of the Registrar.</p>	<p>Testing of an ELN would need to include testing not only of the ELN on a standalone basis but also testing regarding interoperability.</p>
<p>4 OBLIGATIONS REGARDING SYSTEM SECURITY AND INTEGRITY</p> <p>4.1 Information Security Management System</p> <p>The ELNO must:</p> <ul style="list-style-type: none"> (a) establish, implement, operate, monitor, review, maintain and keep current a documented Information Security Management System that is Fit for Purpose in relation to the ELNO's operations to ensure the security of the ELN; and (b) ensure that its Information Security Management System: <ul style="list-style-type: none"> (i) takes into account the obligations of the ELNO in these Operating Requirements; including, where applicable and without limitation, the obligations in Operating Requirements, 7.11, 7.12, 19.1 and 19.2; and (ii) includes a comprehensive Subscriber security policy with which Subscribers and Users must comply, the purpose of which is to assist Subscribers and Users to understand their obligations in relation to the security of the ELN and which addresses, without limitation,: 	<p>In an interoperability environment, each ELNO still would be responsible for security of its ELN. The Information Security Management System would need to address the interface with the other ELN and the communications link. However, ELNs are already connected to other systems (e.g. for financial settlement) and the reciprocal applicability of this MoR to both ELNs provides a level of assurance on security.</p> <p>It may be prudent to include requirements on interconnected ELNOs to cooperate on security – for example, if an ELNO has information about a security problem affecting another ELNO, it must be required to tell that ELNO.</p>

Clause	How would this operate with interoperability?
<p>A. the technology required to enable Subscribers to access the ELN; and</p> <p>B. the specification of virus protection software required to be installed on a Subscriber's computers; and</p> <p>C. protection of Security Items; and</p> <p>D. training and monitoring of Users in relation to a Subscriber's security obligations; and</p> <p>(c) have its Information Security Management System regularly reviewed by an Independent Expert and implement, as a minimum, any Essential Recommendations of that Independent Expert; and</p> <p>(d) before implementing any material change to its Information Security Management System, obtain an Independent Certification relating to the change that the Information Security Management System will, after the making of the change, continue to be suitable, adequate and effective and otherwise Fit for Purpose, and provide it to the Registrar.</p>	
<p>4.2 Access to ELN</p> <p>4.2.1 Subject to Operating Requirements 7.2.2 and 7.2.3, the ELNO must ensure that only Subscribers registered in accordance with these Operating Requirements and the Participation Rules or Persons properly authorised by Subscribers are able to access and use the ELN.</p> <p>4.2.2 An ELNO will not breach Operating Requirement 7.2.1 if the ELNO permits a Subscriber to use application to application technology for accessing the ELN and data entry provided that the Subscriber does not use application to application technology for the function of Digital Signing or for Subscriber Administrator functions.</p> <p>4.2.3 The ELNO must ensure that only Persons authorised by the ELNO have access to the ELN for administrative purposes.</p> <p>4.2.4 The ELNO must provide access to the ELN on an Equivalent Basis to:</p>	<p>As this requirement restricts who can access an ELN, it might be considered a hurdle to another ELN being connected.</p> <p>However, interoperability does not require "access" as such by an ELNO to another ELNO's ELN – all that is involved is an exchange of messages rather than access to the other ELNO's systems or a common workspace.</p> <p>An interconnected ELNO (or their subscribers) will not be able to directly enter or alter data on the other ELN or</p>

Clause	How would this operate with interoperability?
<p>(a) Subscribers; and</p> <p>(b) Users,</p> <p>subject only to differences which are attributable to the type, level or class of Integration with the ELN, provided that each Subscriber or User has an equivalent opportunity to choose between those options compared with each other Subscriber or User.</p>	<p>work in common workspaces.</p>
<p>4.3 Security of ELN</p> <p>The ELNO must take reasonable steps to:</p> <p>(a) ensure that data supplied to any system connected to the ELN is free from viruses, corruption and any other condition that may compromise any of those systems or any data stored by, or passing into or out of, the Land Registry System or any other systems connected to the ELN for the purposes of carrying out Conveyancing Transactions; and</p> <p>(b) prevent, trap, detect and remove any viruses, corruption and any other condition from its systems and data that may damage the Land Registry System, damage any systems connected to the ELN for the purposes of carrying out Conveyancing Transactions, or damage any data stored by the Land Registry; and</p> <p>(c) prevent unauthorised system use, intrusion and service denial and detect and remove unauthorised system additions or modifications; and</p>	<p>The reference to “any system connected to the ELN” would include other ELNOs’ ELNs, but this could possibly be managed on the basis that reasonable steps may equate to the fact that those ELNOs are regulated by the MORs.</p>

Clause	How would this operate with interoperability?
<p>(d) monitor, and take appropriate action after receiving security alerts from the Land Registry; and</p> <p>(e) do all things reasonably necessary to reduce systemic risk in the ELN and promote the overall stability of each system connected to the ELN for the purposes of carrying out Conveyancing Transactions; and</p> <p>(f) ensure that it does not do or omit to do anything that is likely to have an adverse effect on the operation, security, integrity or stability of the Land Registry System.</p>	
<p>4.4 Data</p> <p>The ELNO must ensure that the ELN:</p> <p>(a) accurately presents and uses data received from a Land Registry or any other source; and</p> <p>(b) does not change data received from a Land Registry other than in accordance with an approval granted under Operating Requirement 19.3(b); and</p> <p>(c) where the ELN checks, collates or processes data from a Land Registry, accurately checks, collates or processes that data.</p>	<p>“Any other source” – could be another interoperable ELN. This does not require that an ELNO ensures that the information it receives is accurate, only that whatever information it receives is accurately displayed by it on its ELN. This Requirement therefore does not require an ELNO to ‘look behind’ data it receives from an interconnected ELNO.</p> <p>However, data received from subscribers can be inconsistent, such as on names. The consequences of an ELNO displaying information received from another ELNO in a different way may include mismatches at the Revenue Office, and the fact that the information ultimately might not be correctly represented in the XML. If there are discrepancies in entries e.g. regarding names, PEXA will</p>

Clause	How would this operate with interoperability?
	<p>currently try to resolve.</p> <p>The problem of data mismatches could be compounded in an interoperability environment because each ELNO may have a different set of data entry rules or conventions: e.g. Sympli may have a different set of name rules to those used by PEXA.</p> <p>These kinds of issues are not unknown in the current environment. For example, the NECDS states that single names go in the first name field but the Revenue Office requires the same name in both fields – this creates an immediate mismatch.</p> <p>This is an example of the fact that to make interoperability work, there are a range of issues at the granular level that will need to be worked through. While PEXA can currently solve these problems internally, when other ELNOs are introduced, external rules must be created in place of internal rules so that everyone is presenting the same categories and formats of information to the Revenue Office and for inclusion in the title system.</p>
<p>4.5 Digital Certificate regime</p> <p>4.5.1 The ELNO must ensure that, where a Digital Certificate is used to Digitally Sign an electronic Registry Instrument or other electronic Document, the Certification Authority is independent.</p>	<p>This Requirement may require clarification that in an interoperability environment each ELN is only responsible for the Documents Digitally Signed by its Subscribers.</p>

Clause	How would this operate with interoperability?
<p>4.5.2 Without limiting Operating Requirement 7.6.1 above, the ELNO must ensure that Digital Certificates used in the ELN:</p> <ul style="list-style-type: none"> (a) accord with the Gatekeeper PKI framework; and (b) are supplied by a Gatekeeper Accredited Service Provider; and (c) are issued under a Certificate Policy which: <ul style="list-style-type: none"> (i) identifies the Subscriber and its ABN; and (ii) binds the Subscriber's Signer as Key Holder to the Subscriber including, without limitation, by naming the Subscriber's Signer in the Certificate Profile. 	
<p>4.6 Verifying Digital Signing</p> <p>The ELNO must ensure that the ELN has an effective means of:</p> <ul style="list-style-type: none"> (a) verifying that any electronic Registry Instruments or other electronic Document required to be Digitally Signed has been executed using a Valid Digital Certificate of the Subscriber authorised to execute the electronic Registry Instruments or other electronic Document; and (b) verifying that at the time of Digitally Signing the Subscriber's registration as a Subscriber has not expired or been restricted, suspended or terminated; and (c) verifying that when an electronic Registry Instrument or other electronic Document is Digitally Signed, the Signer: <ul style="list-style-type: none"> (i) has the signing rights being exercised; and 	<p>This Requirement may require clarification that in an interoperability environment each ELN is only responsible for the Documents Digitally Signed by its Subscribers.</p> <p>Alternatively, "effective means" might be satisfied by reliance on the other ELNO being subject to this Requirement in respect of its Subscribers.</p>

Clause	How would this operate with interoperability?
<p>(ii) has not had their use of the ELN suspended or terminated or their signing rights suspended or terminated; and</p> <p>(d) providing the Registrar with data to verify the matters in Operating Requirements 7.7(a), (b) and (c) and the identity of the Signer.</p>	
<p>4.7 Verifying no alteration</p> <p>The ELNO must ensure that the ELN has an effective means of enabling the Registrar to verify that each Digitally Signed electronic Registry Instrument or other electronic Document presented to the Registrar has not been altered in any way since it was executed.</p>	<p>While the Digitally Signed Documents of the interconnected ELNOs are lodged with the land titles office by the lodging ELNO, because this Requirement also applies to the other ELNO, the lodging ELNO can rely on that to satisfy this Requirement.</p>
<p>4.8 Notification of Jeopardised Conveyancing Transactions</p> <p>The ELNO must immediately notify the Registrar and those of its Subscribers involved in any Conveyancing Transaction which it has reason to believe has been Jeopardised.</p>	<p>The operating rules between the interconnected ELNOs will need to address the obligations of interconnected ELNOs to notify each other of Jeopardised Transactions and whether one of them is to have responsibility for notifying the Registry.</p>
<p>4.9 Obligations in relation to Notification of Compromised Security Items</p> <p>Where a Subscriber notifies the ELNO that:</p> <p>(a) any of the Security Items of its Users have been or are likely to have been Compromised; or</p> <p>(b) the Subscriber is aware or suspects that any of its Private Keys have been used to Digitally Sign any electronic Registry Instruments or other electronic Documents without its authorisation or the authorisation of any Client on whose</p>	<p>If an ELNO is not the lodging ELNO, it will be able to prevent the Registry Instruments or electronic Documents being lodged as contemplated by paragraph (c) – but there is an alternative under paragraph (d) which could apply to the non-lodging ELNO, with modifications.</p> <p>Consideration will need to be given in the operating rules for interoperability whether the non-lodging ELNO would first need to notify the lodging ELNO and, if the lodging</p>

Clause	How would this operate with interoperability?
<p>behalf the electronic Registry Instruments or other electronic Documents are purported to be Digitally Signed,</p> <p>the ELNO must:</p> <p>(c) prevent the presentation for Lodgment with the Registrar or Land Registry of those electronic Registry Instruments or other electronic Documents which the Subscriber advises the ELNO may be affected by the Compromise of the Security Items or Digitally Signed without the authority referred to in Operating Requirement 7.10(b); or</p> <p>(d) if it is not possible to prevent the presentation for Lodgment, immediately notify the Registrar.</p>	<p>ELNO did not confirm it has notified the Registrar within a certain time period, whether the non-lodging ELNO should notify the Registrar.</p> <p>Consideration will need to be given in the operating rules for interoperability about the obligation of an interconnecting ELNO to inform the other ELNO of any concerns or suspicions it has of fraud etc. on the other ELN or by its Subscribers.</p> <p>Consideration also will need to be given to whether and in what circumstances suspension by one ELNO of a subscriber for fraud etc. should result in automatic suspension by other ELNOs. Would or should an ELNO need to look into the applicable circumstances upon being informed or otherwise becoming aware that another ELNO had suspended a Subscriber, and would make its own decision based on that information?</p>
<p>4.10 Data Breach Notification</p> <p>4.10.1 The ELNO must implement appropriate procedures and controls (including training) to detect Data Breaches and possible Data Breaches.</p> <p>4.10.2 If the ELNO becomes aware of a Data Breach, or reasonably suspects that a Data Breach has occurred, the ELNO must:</p> <p>(a) Promptly provide the Registrar and any affected Subscriber all details in respect of that event; and</p>	<p>Supplementary provisions may be needed to deal with two issues:</p> <ul style="list-style-type: none"> • an ELNO becomes aware of or suspects a data breach in the an interconnected ELN; and • a breach in the interconnecting layer/platform between the two ELNs.

Clause	How would this operate with interoperability?
<p>(b) take all reasonable steps to investigate the event, contain the breach (if the event is a Data Breach) and mitigate against the adverse effect and harm arising from the event; and</p> <p>(c) allow the Registrar to participate in any investigation and mitigation steps under Operating Requirement 7.11.2(b); and</p> <p>(d) provide all assistance and support required by the Registrar to assess the risk of harm arising from the event, and to recover from the event; and</p> <p>(e) implement such additional measures as are required to protect against a similar Data Breach in the future.</p> <p>4.10.3 The ELNO must ensure that:</p> <p>(a) at least once a year, an appropriately qualified independent security professional undertakes a vulnerability assessment and penetration testing of its systems and networks that store or process Land Information; and</p> <p>(b) the independent security professional makes recommendations in relation to that thing which are expressed in writing as either Essential Recommendations or Desirable Recommendations.</p> <p>4.10.4 The ELNO must, at its own cost, Promptly rectify all weaknesses or vulnerabilities identified in the assessment and testing as Essential Recommendations.</p>	
<p>5 RISK MANAGEMENT</p> <p>5.1 Mitigate risk</p> <p>The ELNO must:</p>	<p>The Risk Management Framework should include measures designed to manage risks between the interconnected ELNs</p>

Clause	How would this operate with interoperability?
<p>(a) establish, implement, operate, monitor, review, maintain and keep current a documented Risk Management Framework that is Fit for Purpose to enable the identification, mitigation and management of risks in its operation of the ELN; and</p> <p>(b) have its Risk Management Framework regularly reviewed by an Independent Expert and implement, as a minimum, any Essential Recommendations of that Independent Expert.</p>	
<p>5.2 No increased risk of fraud or error</p> <p>Without limiting any other obligation under these Operating Requirements, the ELNO must use reasonable endeavours to ensure that the use of the ELN for the presentation for Lodgment of Conveyancing Transactions with the Registrar does not result in a greater risk of fraud or error in those Conveyancing Transactions compared to the risk of fraud or error for comparable Conveyancing Transactions Lodged in a paper medium.</p>	<p>The fact that a second ELN is involved in the transaction should not disqualify an ELNO interconnecting under this clause. The requirement for the use of reasonable endeavours would be satisfied by the fact that the other ELNO is regulated under the MORs. There may be some incremental risk in interoperability: e.g. with the communication link between the two ELNs. As noted above, this needs to be addressed by expanding the Requirements for security measures.</p>
<p>5.3 Functionality</p> <p>The ELNO must ensure that the ELN:</p> <p>(a) provides sufficient functionality to enable:</p> <p>(i) Subscribers to comply with the ECNL, Land Titles Legislation and the Participation Rules; and</p>	<p>A general provision about interoperability could be added to paragraph (b).</p>

Clause	How would this operate with interoperability?
<ul style="list-style-type: none"> (ii) the Registrar to comply with legislative obligations relevant to the service provided by the ELNO and policy requirements notified to the ELNO relevant to the service provided by the ELNO; and (b) is designed and provisioned: <ul style="list-style-type: none"> (i) to be reliable, scalable and flexible; and (ii) to use software that is fully supported by the provider of that software; and (iii) so that it is architecturally sound with code design compliant with relevant industry standards; and (iv) so that it is compliant with any relevant industry standards relating to usability and accessibility. 	
<p>5.4 Data Standard</p> <p>The ELN must use the Data Standard to present:</p> <ul style="list-style-type: none"> (a) electronic Registry Instruments or other electronic Documents, including all component data items, for Lodgment; and (b) all system messages exchanged with a Land Registry. 	<p>A new paragraph (c) should be added to cover all system messages exchanged between ELNOs/ELNs.</p>
<p>5.5 Ability to unsign Digitally Signed Documents</p> <p>The ELNO must ensure that the ELN provides the functionality for an electronic Registry Instrument or other electronic Document Digitally Signed by a Subscriber to be unsigned</p>	<p>The operating rules for interoperability will need to address how unsigning will function across the interconnected ELNs – in particular:</p>

Clause	How would this operate with interoperability?
<p>by the Subscriber or its Signer up until the time the Electronic Workspace for the Conveyancing Transaction is locked in the ELN.</p>	<ul style="list-style-type: none"> • it is triggered automatically at present, so it is therefore unclear how an ELNO would unsign a Digital Certificate signed by another ELNO; • there may be a question of time delays, given the only person capable of unsigning would currently be the other ELNO; and • there is a related risk allocation/liability question.
<p>5.6 Document templates</p> <p>The ELNO must ensure that the correct document template supplied and determined by the Registrar is used by Subscribers.</p>	<p>At a general level, this principle will stand, as the ELNOs' Subscribers will each use the document templates supplied.</p> <p>However, the operating rules for interoperability will need to address uniformity and consistency issues. For example, there are rules within PEXA about which document template will be used at a particular point in time – the time at which the first document is signed is taken to determine the other document templates to be used across the Conveyancing Transaction (e.g. old versions may be used instead of new versions issued later, even if they are otherwise implemented before the Conveyancing Transaction has been finalised).</p>
<p>5.7 Presentation following completion of financial settlement</p>	<p>This will be workable in an interoperability environment because there will only be one lodging ELNO.</p>

Clause	How would this operate with interoperability?
<p>The ELNO must ensure that no electronic Registry Instrument or other electronic Document forming part of a Settlement Transaction is presented to the Registrar for Lodgment unless the financial settlement is irrevocable.</p>	
<p>5.8 Presentation following Duty payment or commitment</p> <p>The ELNO must ensure that no electronic Registry Instrument or other electronic Document is presented to the Registrar for Lodgment unless the electronic Registry Instrument or other electronic Document has been assessed for Duty and the Duty Authority is satisfied that, where applicable, the Duty has been paid or an irrevocable commitment to pay has been made to the Duty Authority.</p>	<p>This would still be to be done by the purchaser's ELNO and notified to the lodging ELNO. This is an example of the need to carefully map, as between the two ELNOs, which of the steps in the MORs are the responsibility of the relevant ELNO.</p>
<p>5.9 Land Registry Fees</p> <p>The ELNO must:</p> <ul style="list-style-type: none"> (a) ensure that no electronic Registry Instrument or other electronic Document is presented to the Registrar for Lodgment unless the Lodgment Fees have been collected by the ELNO or an irrevocable commitment to pay has been made to the ELNO; and (b) in the manner agreed with the Registrar, pay to the Registrar all Information Fees and remit to the Registrar all Lodgment Fees collected; and (c) provide all information required by the Registrar for the identification and reconciliation of all Land Registry Fees. 	<p>Currently, PEXA collects fees as the Land Registry's agent. Under interoperability, the lodging ELNO maybe responsible for collecting and remitting fees which are the responsibility to pay of the subscriber of the other ELN. Some fees may be addressed (as currently occurs) as an adjustment between the vendor and the purchaser. Other fees may require a settlement system between the interconnected ELNs: e.g. if the incoming mortgagee is a Subscriber to Sympli, and PEXA is the lodging ELNO, PEXA pays the Lodgment Fee but the money has to come across from the incoming mortgagee.</p>

Clause	How would this operate with interoperability?
<p>6 MINIMUM PERFORMANCE LEVELS</p> <p>6.1 Performance Levels</p> <p>The ELNO must:</p> <ul style="list-style-type: none"> (a) ensure that the ELNO System meets, as a minimum, the Performance Levels; and (b) monitor its performance against the Performance Levels and maintain records of that monitoring. 	<p>Performance Levels may need to include performance levels relating to ELNO-to-ELNO matters – e.g. the ELNO needs to respond within a specified period to another ELNO's request not to proceed with a settlement.</p>
<p>7 BUSINESS CONTINUITY AND DISASTER RECOVERY MANAGEMENT</p> <p>7.1 Business Continuity and Disaster Recovery Management Program</p> <p>The ELNO must establish, implement, operate, monitor, review, maintain, test and keep current a documented, detailed and comprehensive Business Continuity and Disaster Recovery Management Program that is Fit for Purpose to ensure that in the event of an Incident the ELNO can continue to provide and operate the ELN, or so that disruption to the provision of or operation of the ELN will be minimised.</p>	<p>Business Continuity and Disaster Recovery Management Program will need to account for interoperability – e.g. if one ELNO's ELN is disrupted, it will need to set out the procedures to be followed at that time and later, when the ELN recommences functioning.</p> <p>There may be associated testing requirements.</p> <p>If an ELN is disrupted for a long period of time, should there be a right to depart from the primary rule that the first who opens the Electronic Workspace is the lodging ELNO – i.e. first in time?</p>
<p>8 CHANGE MANAGEMENT</p> <p>8.1 Change Management Framework</p>	<p>The Change Management regime will need to address changes which impact interconnected ELNs and, if a bilateral model is adopted, the communications interface</p>

Clause	How would this operate with interoperability?
<p>The ELNO must establish, implement, use, monitor, review, maintain and keep current a documented, detailed and comprehensive Change Management Framework to manage the making of any changes:</p> <ul style="list-style-type: none"> (a) relevant to the ELNO's obligations under these Operating Requirements or a Subscriber's obligations under the Participation Rules in relation to the Subscriber's use of the ELN; or (b) to the operation of the ELNO System, in a planned and managed or systematic fashion. 	<p>and infrastructure between them.</p>
<p>9 SUBSCRIBERS</p> <p>9.1 Subscriber registration</p> <p>The ELNO must establish, implement, review and keep current a Subscriber Registration Process. The ELNO must only register a Subscriber:</p> <ul style="list-style-type: none"> (a) if the applicant to become a Subscriber meets the Eligibility Criteria except where the Registrar has waived compliance with any Eligibility Criteria in accordance with section 27 of the ECNL; and (b) if the ELNO has verified: <ul style="list-style-type: none"> (i) the identity of the applicant, or the Person(s) representing the applicant, to become a Subscriber in accordance with the Subscriber Identity Verification Standard; and 	<p>There should be an obligation for each ELNO to tell an interconnected ELNOs if it has suspended a Subscriber. As discussed above, consideration will need to be given to what the notified ELNO does with that information: should the ELNO decide for itself whether to suspend that Subscriber (according to their own rules)?</p> <p>There are privacy implications regarding this form of sharing of personal information between ELNOs.</p> <p>If an ELNO chooses to ignore another ELNO's notification about a Subscriber and allows the person to continue to be subscribed to the first ELNO's network, the first ELNO will be liable for subsequent fraudulent acts on the part of that Subscriber.</p>

Clause	How would this operate with interoperability?
<ul style="list-style-type: none"> (ii) the authority of the applicant, or the Person(s) representing the applicant, to sign the Participation Agreement; and (c) if the applicant to become a Subscriber has entered into a Participation Agreement with the ELNO which includes an obligation on the Subscriber to comply with the Participation Rules; and (d) if the ELNO has established that the Person(s) signing the Participation Agreement are one and the same as the Person(s) who have had their identity, and authority to act, verified; and (e) who complies with the laws of the Jurisdiction in which the Subscriber intends to conduct Conveyancing Transactions. 	<p>The Registrar General is also able to direct termination of a Subscriber – see 14.8. Subject to any competition law requirements, it might be possible to add an entitlement for an ELNO to ask the Registrar to give a direction about a Subscriber to another ELNO.</p>
<p>9.2 Unreasonable barriers or refusal to accept Subscriber</p> <p>The ELNO must not:</p> <ul style="list-style-type: none"> (a) impose any unreasonable barriers to applying to become a Subscriber or to making use of the ELN; or (b) unreasonably refuse to accept any applicant who is capable of meeting the Registrar’s eligibility criteria for Subscribers set out in the Participation Rules. 	<p>It will not be an unreasonable barrier if an ELNO refuses to accept a person as a Subscriber because another ELNO has told the first ELNO that the person has committed fraud, etc.</p>
<p>9.3 Review of Subscribers and suspension or termination</p> <p>The ELNO must:</p> <ul style="list-style-type: none"> (a) establish, implement, review and keep current a Subscriber Review Process; and 	<p>Again, consideration will need to be given to an ELNO acting on information received from an interconnected ELNO that it has suspended a Subscriber.</p>

Clause	How would this operate with interoperability?
<p>(b) if a review indicates a breach of the Participation Rules, actively assess and consider whether a Subscriber should be restricted, suspended or terminated or if a Subscriber's User's access to or use of the ELN should be restricted, suspended or terminated in light of the then current circumstances; and</p> <p>(c) take appropriate action in relation to the breach of the Participation Rules by a Subscriber including, where a Suspension Event or Termination Event occurs, the restriction, suspension or termination of the Subscriber's ability to act as a Subscriber in the Jurisdiction or a Subscriber's User's access to or use of the ELN; and</p> <p>(d) immediately notify the Registrar in writing if the ELNO knows or has reasonable grounds to suspect that a Subscriber has committed, is committing or is about to commit a Suspension Event or Termination Event or a breach of any of the obligations imposed on the Subscriber in respect of the ELN. The notification must include:</p> <ul style="list-style-type: none"> (i) the name of the Subscriber; and (ii) the details of the material breach or impending material breach; and (iii) the ELNO's reason for that belief; and (iv) the nature of any action the ELNO has taken or intends to take; and <p>(e) where it restricts, suspends, terminates (including when a Subscriber resigns) or reinstates a Subscriber's ability to act as a Subscriber in the Jurisdiction or a</p>	

Clause	How would this operate with interoperability?
Subscriber's User's access to or use of the ELN, Promptly notify the Registrar of that restriction, suspension, termination or reinstatement.	
<p>9.4 ELNO must restrict, suspend or terminate Subscriber if directed by Registrar</p> <p>The ELNO must immediately restrict, suspend or terminate (as the case may be) the right of a Subscriber to participate as a Subscriber in a Jurisdiction if the ELNO receives a direction from the Registrar to do so.</p>	See above.
<p>9.5 Consequences of restriction, suspension or termination</p> <p>If a Subscriber's registration or access to, or use of, the ELN (or that of its User) expires or is restricted, suspended or terminated by the ELNO, the ELNO:</p> <ul style="list-style-type: none"> (a) must ensure that the Subscriber (including any of its Users), from the time of the expiration, restriction, suspension or termination, cannot: <ul style="list-style-type: none"> (i) in the case of restriction, access the ELN other than in accordance with the restriction; and (ii) in the case of expiration, suspension or termination, access the ELN; and (b) may, if the ELNO is satisfied that no Party would be disadvantaged and that the Conveyancing Transaction should proceed, allow electronic presentation of any Electronic Workspace Documents that were Digitally Signed by the Subscriber before the expiration, restriction, suspension or termination (assuming that the Subscriber does not need to do anything more in order for electronic presentation to occur); and 	See above. Paragraph 14.9(b) will require each ELNO to decide for itself. If the ELNOs disagreed, should the Conveyancing Transaction would proceed provided that one ELNO formed the view that it should?

Clause	How would this operate with interoperability?
<p>(c) may allow another Subscriber authorised by the relevant Party to take over the role of the Subscriber whose registration or access to, or use of, the ELN has expired or been restricted, suspended or terminated in any Conveyancing Transaction in which the Subscriber is a Participating Subscriber.</p>	
<p>10 COMPLIANCE MONITORING AND REPORTING</p> <p>10.1 Monitor compliance</p> <p>(a) The ELNO must continually monitor its compliance with these Operating Requirements.</p>	<p>The scope of reporting (and of Independent Certification, Self-Certification and No Change Certification) would need to be expanded to expressly refer to interoperability. In the context of certification, undertaking that exercise in respect of interconnection might require access to another ELNO's ELN on the part of the certifier – to discuss (including whether this would be permitted under the access provisions).</p>
<p>10.2 Notice of non-compliance and remedy</p> <p>The ELNO must:</p> <p>(a) give written notice to the Registrar, as soon as practicable, if it becomes aware that it has breached or may in the future be no longer able to comply with these Operating Requirements; and</p> <p>(b) remedy any non-compliance with these Operating Requirements within 10 Business Days (or such other longer time determined in the absolute discretion of the Registrar having regard to the nature of the breach) from when it becomes aware that it has breached these Operating Requirements; and</p>	<p>It might be the case that both interconnected ELNOs need to do something to fix a problem, or that they might not be able to determine or agree which ELNO is causing the issue. As a result, root cause analysis will need to be part of the dispute resolution regime – the ELNO(s) found to be responsible for the problem or non-compliance will then become subject to 15.7. If root cause analysis determines that both ELNOs are at fault, they will both need to be subject to clause 15.7, and further requirements should be added so that the ELNOs must work together to solve the problem, e.g. by developing</p>

Clause	How would this operate with interoperability?
<p>take such action as is necessary in order to avoid a breach in circumstances where the ELNO becomes aware that it may in the future be no longer able to comply with these Operating Requirements.</p>	<p>and implementing a joint rectification plan.</p>
<p>11 INDEPENDENT CERTIFICATION</p> <p>11.1 Approval of Independent Expert</p> <p>The ELNO must ensure that:</p> <p>(a) before an Independent Certification is given by an Independent Expert, the ELNO obtains the written approval of the Registrar to the proposed Independent Expert; and</p> <p>sufficient information regarding the qualifications and competence and insurance coverage of the proposed Independent Expert is provided by the ELNO to the Registrar at least three months prior to the time at which the Independent Certification must be given to enable the Registrar to determine the Independent Expert's suitability or otherwise to provide the Independent Certification.</p>	<p>The Independent Expert would look at each side of the interconnection.</p>
<p>12 DATA AND INFORMATION OBLIGATIONS</p> <p>12.1 Retention</p> <p>The ELNO must indefinitely retain and retrieve and provide to the Registrar within 10 Business Days of the Registrar's request to provide:</p> <p>(a) all Workspace Data; and</p> <p>(b) all Electronic Workspace Documents, whether:</p>	<p>This Requirement seems sufficient to capture all notifications between interconnected ELNOs are captured. On the definition of "Notification", "any other Person" could be another ELNO (under the ECNL, "person" includes an individual or a body politic or corporate).</p>

Clause	How would this operate with interoperability?
<ul style="list-style-type: none"> (i) Digitally Signed or not; or (ii) Lodged or not with the Registrar or the Land Registry; and (c) all Notifications; and (d) for each Subscriber, each Document and Record received or created by the ELNO in connection with the Subscriber's or User's registration in the ELN. 	
<p>12.2 Generation and retention of Transaction Audit Records</p> <ul style="list-style-type: none"> (a) The ELNO must generate and indefinitely retain Transaction Audit Records and retrieve and provide Transaction Audit Records or any part of Transaction Audit Records to the Registrar within 10 Business Days of the Registrar's request to provide Transaction Audit Records. 	<p>A change made by one ELNO based on another ELNO's notification would be captured in the Transaction Audit Records, with the notification itself captured under the concept of a Notification above.</p>
<p>12.3 Use</p> <p>The ELNO must not, without the prior approval of the Registrar, which may not be unreasonably withheld:</p> <ul style="list-style-type: none"> (a) store any Land Information (or any part of any Land Information) on the ELN or on any other database, except for the purpose of facilitating the presentation for Lodgment of an electronic Registry Instrument or other electronic Document with the Land Registry or complying with Operating Requirement 19.1 and 19.2; or (b) modify or alter any Land Information for a Conveyancing Transaction; or (c) do anything that allows or causes another Person to modify or alter any part of Land Information provided by the Land Registry; or 	<p>If Land Information is stored on another ELNO's ELN, that could fall within the carve out under paragraph (a).</p> <p>On paragraph (c), if one ELNO obtains Land Information from the Land Registry and pushes it through to the other ELNO's Electronic Workspace, would the other ELNO do anything to alter the Land Information?</p> <p>On paragraph (d), the Land Information appears in two Electronic Workspaces and the references to Subscribers apply to Subscribers to both Electronic Workspaces – so amendments might not be required.</p>

Clause	How would this operate with interoperability?
<p>(d) use, reproduce or disclose (or do anything that allows or causes another Person to do any of these things) any Land Information for a Conveyancing Transaction, other than that required or requested by Subscribers to the Electronic Workspace in which the Land Information appears; or</p> <p>(e) create data or other products which are the same as or substantially similar to the Land Information or include the Land Information, or reverse assemble, reverse compile, reverse engineer or recreate or rework the Land Information in any way or otherwise re-use the Land Information for the benefit of the ELNO, Subscribers or third parties.</p>	<p>On paragraph (e), it would not appear to apply to interoperability because (a) to (d) allow use of information for a Conveyancing Transaction.</p> <p>If there are any difficulties applying this Requirement in an interoperability environment, the Requirement also the Registrar to authorise other uses.</p>
<p>12.4 Minimum requirements of a Transition Plan</p> <p>The ELNO must ensure that its Transition Plan provides, as a minimum, for:</p> <p>(a) notice to the Registrar and all Subscribers of the timing and reason for disengagement; and</p> <p>(b) the orderly winding down of the ELNO System, facilities and services; and</p> <p>(c) the manner of finalising any incomplete Conveyancing Transactions; and</p> <p>(d) the transfer of all retained records to the Registrar or at the direction of the Registrar; and</p> <p>the transfer of all licences and intellectual property to the Registrar or at the direction of the Registrar.</p>	<p>Paragraph (c) appears to adequately deal with Conveyancing Transactions between interoperable ELNs that are on foot.</p>
<p>SCHEDULE 1 – INSURANCE</p>	<p>The insurance caps may need to be higher to address the</p>

Clause			How would this operate with interoperability?
1	Professional indemnity insurance	\$20,000,000	proposed liability regime in which the ELNO not at fault compensates the customer and seeks reimbursement from the interconnected ELNO that is at fault.
2	Fidelity insurance	\$20,000,000	
3	Public and product liability insurance	\$10,000,000	
4	Asset insurance	Replacement Cost Value	

Schedule 3 – Insurance Advice from WTW

[see next page]

05 February 2019

Director, Contracts & Regulation
Office of the Registrar General
Better Regulation Division (DFSI) - Department of Finance, Services & Innovation

Dear Danusia,

Office of the Registrar General Insurance Review - e-Conveyancing Interoperability Regime

The establishment of an interoperability model, allowing consumers through a subscriber to connect to one Electronic Lodgement Network (ELN) to engage in a conveyancing transaction with another consumer through a subscriber connected to a different ELN, introduces additional risks and complex liability issues to the current single Electronic Lodgement Network Operator (ELNO) operating model.

Interoperability brings with it additional processes and external transfers of information which create new risks which need to be considered from an insurance perspective. In addition, the interoperability model introduces complex liability issues around reliance, indemnification to consumers by an ELNO regardless of fault and investigation/dispute resolution. These are issues that will be carefully scrutinised by the insurance market as they present some additional risks not ordinarily assumed by insurers and which may not be readily accepted by the insurance market.

We note that two different possible models are being considered to achieve interoperability between ELNs - bi-lateral interoperability or hub-based interoperability. Whilst the hub-based model adds some incremental increase in risk, it also presents an opportunity to reduce risk through with some additional processes.

The insurance clauses detailed in the current Model Operating Requirements (MOR) do not adequately address the liability issues introduced by the interoperability model. A continuation of the current insurance model may require more prescriptive insurance clauses to ensure that each ELNO can demonstrate insurer agreement to the liabilities imposed by the proposed interoperability regime. We have concerns that whilst insurers may initially be willing to work with and support an ELNO cover their obligations under the regime, the continuation of the current insurance model may not be sustainable by the insurance market in the long term. Factors such as the continuing change/evolution in insurance market appetite, the experience of insurers exposed to claims arising from the regime, as well as the number of ELNO participants are likely to impact availability and terms of coverage in the future. There are alternate insurance/risk transfer funding models however which may be more sustainable and aligned with the Government's objectives of reduced complexity, scalability and an efficient claims resolution/payment process for consumers.

Additional Risks and Liability Issues Posed by the Introduction of the Interoperability Model

The introduction of additional ELNOs creates a number of risks and liability issues which do not arise from a single ELNO model. These additional risks are further complicated by the overarching objectives around simplicity and seamlessness.

Exchange of Information

The exchange of information between two otherwise secure environments introduces the risks of error, fraud and cyber-based crime that would not have existed without the external exchange of information.

- § Errors and omissions made by the first ELNO in its instructions/exchange of information to a second ELNO
- § Internal fraud/fidelity loss made by a staff member, either acting on their own or in collusion with a third party, with the transmission/exchange of information creating the opportunity for the fraud.
- § External fraud/crime loss caused by a third party who may be a party to the exchange of information
- § External or internal malicious acts, causing loss of functionality/system availability (denial of access), loss or theft of data, which is created by vulnerabilities in the exchange of information system.

These risks all have the potential to cause loss to a consumer. Whilst they are inherent to the current system, the exchange of information also creates additional opportunities for these losses to occur.

The Government has asserted that these risks can be adequately addressed “given the experience with managing security risks in the e-conveyancing environment, the technology tools available and the limited scope of interoperability”. As is the case under the current MOR, we recommend that these risk mitigation strategies are supplemented by risk transfer in the form of insurance.

We do not anticipate that the external exchange of information between ELNOs will be of significant concern for the insurance market, provided that adequate steps are taken to address security and procedures as outlined in the Position Paper and the MOR.

Reliance

One of the principles identified as a core part of the Interoperability Model is that each ELNO should be entitled to rely on the data, documents and instructions provided by another ELNO being accurate, legitimate and in compliance with the e-conveyancing requirements.

Further, an ELNO should not be entitled to ‘look behind’ data and documents provided by the other ELNO. The inability of ELNOs to be able to verify data and the need to rely upon its accuracy appears to limit the ability of subsequent ELN participants to identify and correct an error before the error is realised in the form of a liability to the consumer.

We anticipate that the loss of key risk mitigation strategies to an ELNO will be considered a material issue for ELNO insurers. A general condition of insurance coverage is that an insured takes all reasonable steps to mitigate against and prevent loss. The proposed Model which takes away a key system of checks and balances which would assist in the discovery and mitigation of loss, and accordingly would be expected to influence policy terms ELNOs are able to negotiate for their fidelity/crime, professional indemnity and cyber policies of insurance. The impact to ELNOs may be in terms of premium levels, deductible levels and/or competition/insurer selection/availability, particularly if claims begin to arise which could have been prevented or mitigated in the absence of this operating principle.

Claims for Compensation from Subscribers against the Subscriber’s ELNO, regardless of Fault.

Claims for compensation by a subscriber (or a client of a subscriber) are to be made against the subscriber’s ELNO, regardless of whether the transaction was an interconnected transaction or if an interconnected transaction, the ELNO was at ‘fault’ or not.

The ELNO claimed against will be required to compensate the subscriber or subscriber client with opportunity given only for a short investigation which would need to consider, amongst

other items, whether the fault of the loss originates from the ELN Model or whether the fault lay with the subscriber or client or elsewhere.

As the subscriber or subscriber client is to be compensated without having to wait for resolution of the apportionment of responsibility for the loss between the interconnected ELNOs, it is expected that, subject to the insurance excess/deductible, each ELNO's insurer will be asked to provide indemnity regardless of the fault of their insured ELNO. Unless the ELNO is prepared to settle with the consumer prior to being granted full, unreserved indemnity from its insurer, the insurer will also be asked to provide this indemnity in a short period of time.

We anticipate that the insurance market will have concerns with the:

- § assumption of liability which pushes the insurer beyond the concept of 'indemnity' (given they will be asked to indemnify without a legal liability);
- § ability of the insurer to be able to recover the loss from the ELNO(s) who are at fault or contribute to the loss in an efficient, transparent manner which they are able to control;
- § timeliness required by the Model to settle with consumers which doesn't allow for adequate investigations prior to settlement, or even where fault with another ELNO has been identified prior to settlement, the ability to be able to join the other ELNO to proceedings.

If insurers are to agree to provide what could amount to a financial guarantee, on the terms required by the model, we expect:

- § deductibles will be set at a high level to avoid working losses – administration and claims handling costs will be prohibitive for frequency losses;
- § premiums may be set at a higher than normal level to account for an ELNO's insurer funding claims arising from the whole ELN network, regardless of their insured's market share;
- § Policy limits may need to be increased to allow for large claims reserves arising from the whole network, and not just those caused or contributed to by the insured ELNO.

Mechanisms for Apportionment of Liability and Recovery

A three stage investigation and arbitration system has been proposed to identify and apportion fault between the ELNOs, including:

- 1) a short investigation period (3-5 days maximum) which includes identification of whether the fault originates from the ELN Model or if the fault lay with the subscriber or client or elsewhere;
- 2) a pre-established 'root cause' analysis process to be used where fault cannot be readily established by the initial investigation. This will be designed to be deployed quickly to determine where the fault lays;
- 3) an efficient and independent dispute resolution process to be used where the outcome of the root cause analysis cannot be agreed between the ELNOs. We note that this will include a panel of suitably qualified arbitrators, who will make binding decisions.

Critical to achieving insurer agreement, where insurance is to be obtained by each ELNO, will be a system of investigation and arbitration which is open and transparent, with ready participant co-operation and a binding outcome which is acceptable to all parties, including their insurers.

Without this process in place, aligned with insurer requirements, we believe that insurance covering each ELNO's assumed liability to other ELNOs will be difficult to achieve and potentially unsustainable in the medium to long term, particularly when the number of ELN participants increases. The cost to insurers in legal fees, forensic investigators, loss adjusters and the like will be a significant burden on insurers in the absence of a robust process.

Potential Interoperability Models

Two possible models have been proposed to achieve interoperability between ELNs:

- § bi-lateral interoperability, where each ELNO is required to establish a direct link with each other ELNO in the market ; or
- § hub-based interoperability, where each ELNO is required to establish a single connection to a central platform or hub.

We do not see a material difference in the insurable risk profile between the two models proposed. Each model retains the risks associated with the external transfer of information, reliance on data quality, assumption of liability and investigation and arbitration process.

The hub model may incrementally increase risk in the process, with additional transfers of data/information and a proposed 'thin layer' of functionality, but it does not appear to introduce any additional risks.

We note that the hub model could potentially be utilised to reduce the risk generated by reliance by enhancing its role to include some review of the accuracy, legitimacy and compliance of data received from an ELNO.

Insurance Requirements for ELNOs to be specified in the Model Operating Requirements

The current MOR specifies certain minimum levels of insurance required of the ELNO, summarised as follows:

- § Professional indemnity insurance, with an annual aggregate limit of liability of \$20,000,000
- § Fidelity insurance with an annual aggregate limit of liability of \$20,000,000
- § Public and product liability insurance with an annual aggregate limit of liability of \$10,000,000
- § Asset insurance for not less than the Replacement Cost Value

Apart from the specified minimum limit of liability, and a requirement that the insurer is deemed an "Approved Insurer", there are no prescriptive requirements for included coverage or maximum deductible levels within the current MOR.

We do not believe that the current insurance clauses above are adequately detailed, with the expectation that insurers may look to exclude certain elements of cover that are critical to support the operation of the Model, notably in the areas of assumed liability and involvement in the claims resolution process.

We recommend that the clauses include prescriptive requirements which address these concerns to ensure that insurers do not simply exclude the risks that they are not comfortable with.

We recommend that the insurance clauses in the revised MOR are more prescriptive to give the Registrar General and all ELNOs more certainty over coverage inclusions.

The classes of insurance which should be considered as a mandatory insurance coverage are:

- § Professional indemnity insurance, covering third party financial loss arising from the errors' or omissions' of the ELNO in performing professional services. The relevant insurance clause should specify that cover is required to be held for the duration of the ELNO's contract and for a period of not less than 7 years following termination
- § Crime insurance, covering direct loss sustained by the ELNO resulting from theft, fraud or dishonesty of an employee as well as certain losses resulting from third party fraudulent activity. The policy should contain a third party or client coverage extension

which covers loss sustained by a client (customer or subscriber) arising from employee fidelity.

- § Public liability insurance, covering the ELNO's legal liability to pay compensation in respect of personal injury and/or property damage arising from business activities.
- § Cyber Liability insurance, covering third party liability arising from a failure to prevent a network security, privacy or confidentiality breach, as well as the costs of restoring, updating, repairing, recreating, or replacing damaged data or programs.

Optional

- § Property insurance, covering physical loss or destruction of or damage to property belonging to the ELNO. We do not view this as being a critical requirement. We consider the requirement in the MOR for an ELNO to have an independently tested, fit for purpose Business Continuity and Disaster Recovery Management Program to be of more importance than property insurance coverage. Co-operation between ELNOs in the development of Business Continuity and Disaster Recovery Management Program should be included to minimise disruption to e-conveyancing process and to other ELNOs.

Limit of Liability

The limit of liability to be specified for the Professional Indemnity, Crime, Public Liability and Cyber Liability policies may depend on insurance structure established, and will need to be tailored to the relevant risk exposure. In assessing or considering an appropriate limit of liability for each required policy of insurance, we recommend that the following factors are contemplated:

- § The potential financial impact of a single loss or series of losses, which in the case of fraud losses in particular, could occur over a significant period of time;
- § The aggregate exposure over a 12 month period. Professional Indemnity, Crime and Cyber Liability policies typically feature aggregate limits of liability. These may be higher than the single claim limit specified (eg. the limit of liability could be \$20m any one claim and \$40m in the aggregate for any one 12 month period);
- § Whether allowance needs to be made for assumed liabilities before recovery has occurred - ie. if an ELNO's insurer is required to reserve/pay a significant claim for which their insured ELNO is not responsible for, the reserved or paid amount will erode the remaining coverage available for the ELNO until the funds have been recovered. The limit needs to consider the possibility of a drawn-out investigation or arbitration process, particularly for large or complex claims;
- § Whether a policy limit may be shared with the ELNO's other operations, and the risk of the limit available being eroded by claims arising outside the scope of the e-conveyancing operations of the ELNO;
- § Whether an any one claim or aggregate limit of liability covers both first party (ie. ELNO) and third party (ie. other ELNOs, LRS, consumers etc) losses. This may be applicable to the Crime and Cyber Liability policies, which are designed to provide cover for both first and third party losses.

Insurance Structure

There will be a number of alternative ways to structure the risk transfer or financing of exposures arising from the ELN Model. Any solution needs to be sustainable in the long term, scalable, depending upon the number of ELNOs operating and cost effective for all participants. The following methods of insurance or risk transfer may be considered applicable to the interoperability model:

- § Each ELNO is required to negotiate and purchase its own program to meet the insurance requirements specified in the MOR (similar to current model);
- § The Registrar General or its nominated administrator could facilitate a scheme or agreed wording/terms with a single insurer/insurer panel with the insurer to issue an

individual policy to each ELNO (similar to current model, but the insurance is negotiated on behalf of all participant ELNOs by the Registrar General);

- § Policies covering liability to consumers or subscribers arising from the e-conveyancing model to be covered under a group policy or group scheme (group policy or scheme covering all ELNOs under the single policy/scheme, negotiated by the Registrar General);
- § Fund established to provide a first response to consumers and subscribers. This may be similar to the Torrens Assurance Fund in NSW, which is available to compensate persons who have suffered loss in relation to title and other errors in connection with property. The fund could operate in a similar manner, or could be modified to provide a first response to consumers only (with recovery rights available against ELNOs) or be reinsured or backed by an excess of loss insurance program to reduce the capital required to support fund.

Each ELNO negotiates and purchases its own program to meet the insurance requirements specified in the MOR.

Advantages

- § Each ELNO retains the freedom to negotiate their own policies and terms and conditions, including policy deductibles tailored for their own business.
- § Each ELNO may have different business interests covered under the same policy, leading to lower coverage costs as the premium paid by the ELNO is contributed to by other parts of its business.
- § Minimal administration required by the Registrar General or its nominated administrator.
- § Each ELNO is able to purchase their own preferred limit of liability, subject to the minimum levels specified in the MOR, which will not be eroded by the actions of others (subject to insurers being able to fully recover from other ELNO's where their ELNO is not at fault).

Disadvantages

- § The collective premium pool for individual policies is expected to be substantially higher compared to a single policy/fund covering the collective ELNOs. With each insurer asked to fund losses which fall outside the fault or control of its insured ELNO, and with a recovery process which may not be palatable to insurers (who ordinarily prefer to control the process), it is expected that both premiums and deductible levels will be higher under this insurance structure.
- § Aggregate limits of liability for the professional indemnity, crime and cyber liability policies may be shared with other, unrelated parts of the ELNO's business, potentially reducing access to policy response when needed.

Challenges

- § The Australian insurance market is currently seeing changing conditions across most classes of insurance, with premiums and deductible levels increasing and capacity and coverage levels contracting. In this environment, insurers favour risks/accounts which are low risk with comprehensive, proven risk management controls, and importantly, profitable for the insurer in the long term. Risks/accounts which are difficult to understand from an insurer's perspective, or without proven risk management practices, will suffer from a lack of appetite in the market, leading to less than optimal results.
- § We anticipate that the extended coverage required to cover the issues highlighted may be negotiated with a single or handful of insurers, but it is not expected to be appealing to the broader market that will look to deploy their capacity on safer risks thus in turn reducing competition and potentially increasing cost. The introduction of more ELNOs compounds this risk, as insurers may prefer to limit their exposure to the e-conveyancing market. Some ELNOs, particularly new entrants, will be at a distinct disadvantage in being able to secure the required insurances on commercially-sensible terms (ie. may contain prohibitively high premiums or deductibles).

- § Long term sustainability of cover for all ELNOs may not be achievable if we see further deterioration in the market, multiple claims arising from interoperability and/or difficulties experienced with the dispute resolution/investigation process.

Insurance Clauses in MOR

- § The insurance clauses in a revised MOR should incorporate the following:
- Professional Indemnity insurance, with an aggregate limit of liability, at least 1 reinstatement of the limit of liability and an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model.
 - Crime Insurance, including full cover for third parties/clients arising from employee fidelity. It should also contain an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model. Where the limit is aggregated, at least 1 reinstatement of the limit of liability is required.
 - Public Liability insurance. It should contain an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model.
 - Cyber Liability insurance, covering third party liability arising from a failure to prevent a network security, privacy or confidentiality breach, as well as the costs of restoring, updating, repairing, recreating, or replacing damaged data or programs. It should have an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model.

The Registrar General or its nominated administrator facilitates a scheme or agreed wording/terms with a single insurer/insurer panel with the insurer to issue an individual policy to each ELNO.

Advantages

- § Greater opportunity for a single insurer to be involved in the process and gain comfort with the risk profile and dispute resolution process.
- § Same insurer covering all insured losses arising from the e-conveyancing process goes some way towards overcoming the issues of assumed liabilities between ELNOs as the insurer will be on risk, regardless of where fault lay.
- § Single insurer may not require as thorough a dispute resolution process, as it becomes more so a method of distributing/allocating claims for premium rating purposes

Disadvantages

- § There may need to mandate that cover is purchased with the insurer for insurer to agree to terms (ie. the insurer may require all ELNOs to generate the scale and overcome the reliance and investigation/dispute resolution concerns which are otherwise addressed by this model.
- § Timeliness of policy response and settlement with consumers is still restrained by insurer response.
- § Administration required by the Registrar General or its nominated administrator.

Challenges

- § The Registrar General may not be able to mandate which insurer/s an ELNO must obtain cover.
- § If a particular ELNO starts having lots of losses then there is the potential for the insurer to refuse to renew cover for that ELNO or all and/or make renewing unappealing/uneconomic for one or all ELNOs.
- § Each ELNO may elect to take different deductibles/limits which could affect apportionment.
- § Program may not be sustainable if ELNOs do not agree with the insurer's determination on apportionment.

Insurance Clauses in MOR

§ The insurance clauses in a revised MOR should incorporate the following:

- Professional Indemnity insurance, with an aggregate limit of liability, at least 1 reinstatement of the limit of liability and an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model.
- Crime Insurance, including full cover for third parties/clients arising from employee fidelity. It should also contain an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model. Where the limit is aggregated, at least 1 reinstatement of the limit of liability is required.
- Public Liability insurance. It should contain an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model.
- Cyber Liability insurance, covering third party liability arising from a failure to prevent a network security, privacy or confidentiality breach, as well as the costs of restoring, updating, repairing, recreating, or replacing damaged data or programs. It should have an endorsement noting that third party claims are to be settled in accordance with the process agreed as part of the interoperability model.

Policies covering liability to consumers or subscribers arising from the e-conveyancing scheme to be covered under a group policy or group scheme

Advantages

- § All ELNOs have access to the same level of cover as other ELNOs.
- § Administration of the policies could be managed by a single party.
- § Insurer concerns about assumed liabilities are alleviated in full, whilst the dispute resolution process becomes less critical from an insurance perspective.

Disadvantages

- § Coverage for Professional Indemnity, Crime and Cyber Liability will be subject to aggregate limits of liability. These aggregate limits are eroded by claims made and reserved. The limit can be eroded in full, reducing access to cover for the participating ELNOs.
- § Timeliness of policy response and settlement with consumers remains restrained by insurer response.
- § The policy will have a deductible which will need to be paid for by one or more ELNO – investigation and a full resolution process may still be required to apportion deductibles.
- § There will be no ability for one ELNO to claim against another ELNO, due to “Insured vs Insured” exclusions found in most insurance policies.
- § Administration required by the Registrar General or its nominated administrator.

Challenges

- § Each of the ELNO’s must voluntarily enter these arrangements, failure of multiple ELNO’s to enter may result in this arrangement becoming unsustainable and unprofitable in the longer term resulting in the failure of the arrangement.
- § The cost of premiums and administrative charges needs to be borne either from the ELNOs, requiring an agreed premium allocation model, or through a levy charged to other parties (eg. consumers or subscribers).

Insurance Clauses in MOR

§ The insurance clauses in a revised MOR should incorporate the following:

- Professional Indemnity insurance, with an aggregate limit of liability containing at least 1 reinstatement of the limit of liability.

- Crime Insurance, including full cover for third parties/clients arising from employee fidelity. Where the limit is aggregated, at least 1 reinstatement of the limit of liability is required.
 - Cyber Liability insurance, covering third party liability arising from a failure to prevent a network security, privacy or confidentiality breach.
- § Public liability, First Party Cyber (data reproduction etc) and property insurance may still be included as an insurance requirement of each ELNO.

Fund established to provide a first response to consumers and subscribers

Advantages

- § The fund is established to provide a timely response to consumer complaints, unaffected by the identification of a responsible ELNO or insurer response.
- § Can be funded by a levy on ELNOs or on consumers/subscribers.
- § Fund could be established to cover all claims, removing the need for recovery from an at fault ELNO. We would recommend that prescriptive requirements from a security and fidelity perspective, including external audit for compliance, are mandated to protect the interests of the fund.
- § The fund could transfer the risk above a certain threshold back to the insurance market through an excess of loss or reinsurance placement. This would allow the fund to meet consumer response expectations, but at the same time have protection from large individual losses and aggregated losses.

Disadvantages

- § Administration required by the Registrar General or its nominated administrator.

Challenges

- § Depending on retained risk and overall limits, excess of loss and/or reinsurance carriers could well still take issue with liability to indemnity being imposed as opposed to allowing individual determination of liability.
- § Fund could be given powers to recover from ELNOs once negligence has been proven. This would necessitate the continued inclusion of insurance requirements for ELNOs but would streamline the process for the consumer. ELNO insurers would still need to agree to the investigation and arbitration process
- § Clear scope of cover for the fund would need to be established to give ELNO's confidence on what is/is not covered so that they can make their own decisions on any supplementary insurance they may wish to hold.

Insurance Clauses in MOR

- § The scope of the fund should incorporate third party liability to consumers, including the following as a minimum:
- arising from the error's and omissions' of ELNOs (Professional Indemnity)
 - arising from fraud and dishonesty (Crime)
 - arising from a failure of an ELNO to prevent a network security, privacy or confidentiality breach (Cyber Liability)
- § Public liability, First Party Cyber (data reproduction etc) and property insurance may still be included as an insurance requirement of each ELNO.

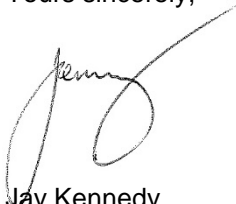
The insurance market will struggle to provide a sustainable solution for the proposed interoperability model, with the increased risks of reliance and, in particular, the requirement to indemnify even where their insured is not at fault of a claim (even where rights of recovery are retained). The rapid resolution process is also a significant hurdle, one which will not be overcome. Insurers are expected to require significant input into the investigation and dispute resolution/arbitration process.

The concept of the establishment of a fund, similar to the TAF in NSW, designed to provide a first response to consumers and subscribers in the event of a loss arising from the e-conveyancing model, appears to provide a solution which best meets the requirements of the Government in respect of an efficient claims resolution/payment process and in terms of co-operation between ELNOs (dispute resolution process may become less important if losses are paid for by the fund, rather than the ELNOs).

Note that the scope of Willis Towers Watson's review has been limited to our analysis of the issues and risks highlighted in a draft of the Office of the Registrar General's (ORG) Directions Paper on the Proposed e-Conveyancing Interoperability Regime. We have not approached the insurance market for their feedback, and our review should be understood to be general observations based solely on our experience as insurance brokers and should not be relied upon as legal advice, which we are not authorised to provide.

We understand that the purpose of ORG's paper is to elicit feedback and identify other issues. Upon receipt of this feedback, and further opportunity to consider the issues identified with the insurance market, we will be in a position to confirm the indicative views set out in this paper.

Yours sincerely,



Jay Kennedy
Account Director



Geoff Babbage
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About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has over 40,000 employees serving more than 140 countries. We design and deliver solutions that manage risk, optimise benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas — the dynamic formula that drives business performance. Together, we unlock potential. Learn more at willistowerswatson.com.

eConveyancing interoperability Technical and Operations Working Group Terms of Reference; and eConveyancing interoperability Regulatory Working Group Terms of Reference, each issued 19 March 2019

Regulatory Working Group Terms of Reference

Purpose

The NSW Government, state and national peak industry groups, and regulatory bodies have identified the need to:

- investigate baseline eConveyancing interoperability requirements that contribute to a nationally consistent 'end-state';
- develop workstreams that can be considered with the Inter-Governmental Agreement (IGA) review; and
- focus on promoting competition, consumer choice and national consistency in the area of eConveyancing.

The Regulatory Working Group (**RWG**) has been established to provide industry and government stakeholders with a forum to present their views and provide their expertise on this complex topic. The views presented at these meetings will be available to all parties, including the IGA reviewer, ARNECC and decision-makers in each state and territory.

Desired outcome

The outcome will be an independent report from the Chair and working group participants on a base-line model for a national interoperability solution. This process is designed to help inform decisions about the way forward with interoperability. By bringing together experts to develop a much deeper understanding of an interoperability solution, and a pathway to implementing it, this process aims to achieve interoperability more efficiently, and in consideration of wide-ranging expertise.

In addition to the RWG, a Technical and Operations Working Group (together, the **Working Groups**) is examining these issues from a technical and operational perspective. The intermediate goal of both Working Groups is to identify the appropriate model for interoperability: a 'hub' or a bilateral 'ELNO to ELNO' model. Until that decision is made, the Working Groups will seek to solve issues that are common to both models.

Scope of Regulatory Working Group

The RWG has been established to support the above outcomes by:

- reviewing a liability regime;
- reviewing insurance and security issues;
- identifying principles for inter-ELNOs contracts;
- reviewing potential updates to model operating requirements (MORs); and

- considering relevant issues of the February Directions Paper.

Composition of Regulatory Working Group

Independent Chair: Dr Rob Nicholls

Secretariat: Gilbert + Tobin

Members: Nominees of the stakeholders listed in Tab A. The Chair may from time to time invite other stakeholders to nominate members to the Working Groups.

Each Member represents the stakeholder that nominated them.

Meetings

The RWG will meet approximately every three weeks, with the first RWG meeting held on 27 March 2019.

Minutes from each meeting will be circulated within 5 Business Days.

Members can nominate a proxy to attend the meetings. The nominated proxy is responsible for providing relevant comments/feedback of the Committee member they represent at the meetings. Members may also invite other representatives from their organisation to address specific agenda items.

Materials

The Secretariat will make all supporting materials available via a HighQ site.

Reporting and publicity

The Chair will report outcomes and issues of the Working Groups to each member of the Australian Registrars National Electronic Conveyancing Committee and to the reviewer of the IGA (being Dench McClean Carlson).

This Terms of Reference may be reviewed at the request of any member.

* * *

Technical and Operations Working Group

Terms of Reference

Purpose

The NSW Government, state and national peak industry groups and regulatory bodies have identified the need to:

- investigate baseline eConveyancing interoperability requirements that contribute to a nationally consistent 'end-state';
- develop workstreams that can be considered with the Inter-Governmental Review (IGA) review; and
- focus on promoting competition, consumer choice and national consistency in the area of eConveyancing.

The Technical and Operations Working Group (**TOWG**) has been established to provide industry and government stakeholders with a forum to present their views and provide their expertise on this complex topic. The views presented at these meetings will be available to all parties, including IGA review, ARNECC and to decision-makers in each state and territory.

Desired outcome

The outcome will be an independent report from the Chair and TOWG participants on a base-line model for a national interoperability solution. This process is designed to help inform decisions about the way forward with interoperability. By bringing together experts to develop a much deeper understanding of an interoperability solution, and a pathway to implementing it, this process aims to achieve interoperability more efficiently, and in consideration of wide-ranging expertise.

In addition to the TOWG, a Regulatory Working Group (together, the **Working Groups**) is examining these issues from a regulatory and liability perspective. The intermediate goal of the Working Groups is to identify the appropriate model for interoperability: a 'hub' or a bilateral 'ELNO to ELNO' model. Until that decision is made, the Working Groups will seek to solve issues that are common to both models.

Scope of Technical and Operations Working Group

The TOWG Group has been established to support these outcomes by:

- developing business rules;
- further developing data standards, building on the material prepared by the technical working groups convened by Sympli in December 2018 – January 2019;
- considering security issues; and
- considering relevant issues of the February Directions Paper.

Composition of Technical and Operations Working Group

Independent Chair: Dr Rob Nicholls

Secretariat: Gilbert + Tobin

Members: Nominees of the stakeholders listed in Tab A. The Chair may from time to time invite other stakeholders to nominate members to the Working Groups.

Each Member represents the stakeholder that nominated them.

Meetings

The TOWG will meet approximately every three weeks, with the first TOWG meeting held on 27 March 2019.

Minutes from each meeting will be available on HighQ within 5 Business Days.

Members can nominate a proxy to attend the meetings. The nominated proxy is responsible for providing relevant comments/feedback of the Committee member they represent at the meeting. Members may also invite other representatives from their organisation to address specific agenda items.

Materials

The Secretariat will make supporting materials available via a HighQ site.

Reporting and publicity

The Chair will report outcomes and issues of the Working Groups to each member of the Australian Registrars National Electronic Conveyancing Committee and to the reviewer of the IGA (being Dench McClean Carlson).

This Terms of Reference may be reviewed at the request of any member.

* * *

Attachment D

NSW Government's response to Dench McLean Carlson's Issues Paper dated 13 February 2019 regarding Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law

[see attached]

NSW Government response to the

***Review of the InterGovernmental
Agreement for an Electronic
Conveyancing National Law***

Issues Paper

Contact details

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1 Introduction

The New South Wales Government welcomes the opportunity to provide its response to the Issues Paper for the review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (the **IGA Issues Paper**).

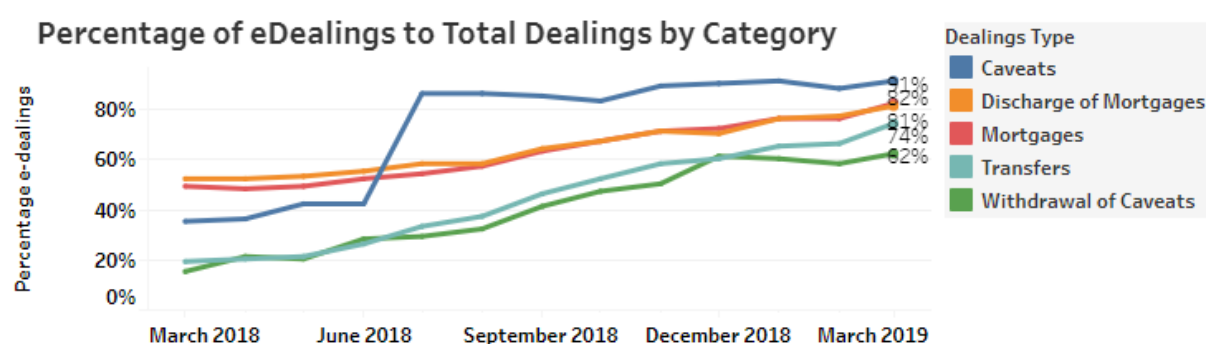
1.1 A lot has been achieved so far

The States and Territories, Australian Registrars National eConveyancing Council (**ARNECC**), Property Exchange Australia Ltd. (**PEXA**), the financial institutions, lawyers and conveyancers can be proud of what has been achieved since the Intergovernmental Agreement (**IGA**) was signed in 2011/2012. eConveyancing is now available in five jurisdictions, soon to be six. We also have a uniform National Electronic Conveyancing Law (**NECL**) and a detailed set of operational and participation rules, which have gone through several iterations. With private and state funding, PEXA has built a fully established Electronic Lodgment Network (**ELN**) operating at scale, and other Electronic Lodgment Network Operators (**ELNOs**) have recently entered or are proposing to enter the market.

eConveyancing has enhanced the integrity and security of the titling system, which is its essential feature and the basis of public confidence. The improvement in the integrity of the system is illustrated in comparing the payouts from our Torrens Assurance Fund since electronic lodgments commenced in 2013. Since 2013, the NSW Registrar General has paid more than \$2.1 million for errors made in paper transactions, and over \$7.3 million for fraud. In comparison, during the same period, not one single payment has been made to compensate any of the over 360,500 electronic lodgments.

There have been significant efficiency benefits for conveyancers and solicitors, and through them, citizens buying and selling property. It is estimated that practitioners are saving up to 70 per cent of their time per transaction compared to a paper-based transaction.¹

Such is the confidence in the eConveyancing system that a number of States, including NSW, are prepared to move away from the long history of paper-based conveyancing to mandate eConveyancing. In NSW in March 2019, 80 per cent of all possible dealings in NSW were lodged electronically, and we are on track for 100 per cent of mainstream dealings to be lodged electronically by the end of June 2019.



Over the relatively short time since the IGA was signed, eConveyancing has become central to our land title system. As eConveyancing completely replaces paper, ELNOs will operate electronic lodgement networks of essential importance to our community and our economy—just like the commercial operators running communications and energy network infrastructure.

¹ Electronic conveyancing - analysis of the benefits of electronic conveyancing to lawyers and conveyancers in NSW, February 2018, KPMG, https://www.registrargeneral.nsw.gov.au/_data/assets/pdf_file/0003/331095/eConveyancing-Final-Report.pdf

1.2 A different challenge lies ahead as the land title system goes through substantial market and digital change

The governance framework that was successful in developing eConveyancing is not the governance framework which will be successful in managing eConveyancing markets going forward.

The process of getting eConveyancing off the ground required a substantial joint development effort between the States and Territories. ARNECC's collaborative decision-making approach and a remit tightly focused on achieving national consistency was well suited to that challenge.

As eConveyancing moves into its next phase, Governments need to be focused on establishing robust and well-regulated market structures that encourage innovation, deliver lower costs and provide their citizens with more choice. A different set of regulatory skills, powers and institutional arrangements is needed to deal with this shift in role.

Institutional change that requires a new regulatory approach has already occurred. While the direct participation of some of the States was needed to get the first ELN off the ground, PEXA has now transitioned to full private ownership. Its privatisation avoids a potential conflict of interest with those States' role as regulator as new ELNOs enter the market.

In 2017, the NSW Government granted a long-term concession of the right to operate the land title registration system to a private sector consortium. Since then, new commercial entities are now operating the South Australian and Victorian registries. Other jurisdictions may also move to a private operator in the future.

The commercialisation of land registries means private operators of registries will also compete directly with ELNOs in value added services and have commercial arrangements with ELNOs. In this changing landscape, decisive regulatory action is needed to protect the customer and to facilitate competition among ELNOs. Incremental approaches will not be enough.

As the Minister for Customer Service, the Hon. Victor Dominello, has stated²:

“We are at a critical juncture in the national eConveyancing journey. The actions we take over the next six months will determine whether we see an incumbent monopoly consolidate its position or set the preconditions for the entry of new platforms and the establishment of a competitive market.”.

This submission sets out the NSW Government's views on how the IGA should be adapted to provide a robust framework to manage emerging competitive markets in eConveyancing services.

Our focus is on delivering citizens a competitive, secure and fair marketplace in the NSW land title system, transferring a 150-year-old paper system to digital, with increased customer focus. With eConveyancing replacing paper by 1 July 2019, the Government is committed to creating conditions for a competitive ELNO market, so lawyers, conveyancers and customers get the benefits of competition: innovation, pressure on pricing, and better customer service.

2 The importance of taking a customer-centred approach

In undertaking any review, it is important to clearly articulate the key objective or measure against which the effectiveness of the current model is being assessed.

² Public priority in e-conveyancing, The Australian, 23 November 2018

The NSW Government recently commissioned an independent review of how regulatory policy should be made. The Report concluded that³:

“Design thinking approaches on how government achieves its desired outcomes should always start with the experiences and needs of end-users... Citizens increasingly expect a user-centric focus in the services and infrastructure they receive from government, particularly with technology enabling greater social connectivity and access to information. Recognising this, some agencies are adopting ‘human-centred’ design as part of their design of regulatory schemes. This draws on the principle that the user experience should be the starting point for the design and implementation of regulatory schemes.”

The IGA Issues Paper does identify the relevance of consumer or user interests to the review, but NSW is concerned that they are too narrowly framed⁴:

“We believe rigorous standards are essential when government is endorsing or mandating a system that deals with homes and other real property. Australians expect that their land titles are secure and that governments stand behind the accuracy and security of their land title registries.”

Stakeholders in NSW have consistently identified the need for a greater focus on competition and consumer safeguards:

- It has been a fundamental principle of public policy since the Hilmer Report⁵ that competition promotes the long-term interests of consumers. Competition among ELNOs is a cornerstone of the Government’s eConveyancing reforms with choice of ELNO being crucial to the success of the mandates.
- But as market forces alone may not be sufficient to deliver outcomes for consumers, Governments retain a role in developing and enforcing protections for consumers. In the context of eConveyancing, this can include minimum service standards, or minimum consumer guarantees to ensure consumers who suffer loss are quickly compensated. NSW welcomes PEXA’s move to improve consumer protection following the “MasterChef incident” in June 2018⁶, but consumer protection issues in eConveyancing need to be considered on a more systemic and comprehensive basis.

In NSW’s view, the outcome of this review should be recommendations on a new regulatory framework in a world where eConveyancing is fast becoming the dominant lodgement method. That new framework must strike a balance between the long-term benefits to consumers of allowing new entrants to establish themselves in a market and protecting the public against new risks. It requires flexible and adaptable regulatory interventions, enabling and requiring new providers to operate within appropriate legal frameworks.

3 The value to customers in promoting competition

Given NSW’s view on the importance of promoting competition, we are concerned that the IGA Issues Paper is equivocal about the benefits of competition between ELNOs.

The IGA Issues Paper states⁷:

“Currently the largest PEXA fee is for a Transfer by a Third Party and this cost is \$112.64. Therefore, the cost advantage to consumers from competition must be less

³ NSW Regulatory Policy Framework, Independent Review, Final Report (Greiner Review), August 2017, at pp.33 and 34.

⁴ IGA Issues Paper, at 5.74.

⁵ Hilmer Report 1993 National Competition Policy, Report by the Independent Committee of Inquiry.

⁶ “MasterChef finalist caught in conveyancing hacker attack”, Sydney Morning Herald, 22 June 2018.

⁷ IGA Issues Paper, at 5.78.

than \$112..... While it is important that consumers are not subject to inflated prices that lack of competition can bring, lower prices should not come at the expense of lesser quality. We note also that all participating jurisdictions both registry bodies and revenue bodies incurred significant costs to connect to the first ELN. For some jurisdictions the costs to connect to the second ELN will again be substantial – both the development costs and the ongoing maintenance costs.”

The IGA Issues Paper frames the benefits of competition to consumers in terms of price only. The benefits of competition need to be viewed holistically, with consideration given to the following principles:

- the disciplines of a competitive market compel efficiencies in business conduct, which in turn contributes to the productivity and competitiveness of enterprises;
- strong competition encourages innovation;
- the ability for consumers to exercise informed choice improves their lives;
- multiple operators help ensure our economy is agile, flexible and robust to future challenges and opportunities; and
- new entrants in a market can lower prices which benefits consumers.

Innovation is well recognised as one of the primary benefits of competition in technology-based industries.⁸ The shift to eConveyancing should create opportunities for innovation in ELNO services as well as in downstream services, such as practice management software and amongst lawyers and conveyancers.

NSW agrees with the IGA Issues Paper that “rigorous standards are essential when government is endorsing or mandating a system that deals with homes and other real property.” However, NSW is concerned about the potential inflexibility to future change because of the way the IGA Issues paper then goes on to apply that principle⁹:

“These rigorous standards can be interpreted as barriers to entry, but we do not believe it is acceptable to lower these standards to advantage private sector operators potentially leaving liabilities to be borne by ordinary Australian homeowners.”

While development of a single model for eConveyancing was necessary to achieve the break from the long history of paper conveyancing, technological change will present different, and potentially better, ways of conducting property transactions. There are already significant innovations and competition in payment systems and in contracting through technologies such as block chain. Arguments about the need to adhere to existing standards and not dilute service quality are typically arguments raised by incumbents to preserve the status quo, and experience in other sectors suggests they are usually not borne out.

Of course, those who advocate for new models for eConveyancing, most of which require some form of interoperability between ELNOs, must demonstrate how their approach preserves security of title, the defining feature of the Torrens system. NSW strongly believes the IGA report should be more expansive in its consideration of the opportunities for future technological innovation. The purpose of moving to eConveyancing was not to trade one fixed, entrenched way of doing conveyancing for another, even if it is digitalised.

⁸ A current example is technology companies in wealth management: ‘the highly competitive nature of the Australian wealth management industry... forced the companies to be fleet footed in order to keep up with the demands of banks, industry super funds, fund managers, administrators and brokers’: ‘Politicians can’t kill innovation’, AFR Weekend, 13-14 April 2019, p48.

⁹ IGA Issues Paper, at 5.77

4 The challenges in achieving competition

There are two challenges in promoting competition in the current market structure for eConveyancing.

First, is the challenge faced by new entrants ELNOs. Undoubtedly, much of the success of eConveyancing today is attributable to PEXA's substantial efforts in assisting ARNECC develop the rules and more broadly in supporting the industry moving to digital. However, as PEXA is the incumbent ELNO, new ELNOs seeking to enter the market face a powerful competitor, with monopoly status under the current system. It is also important to be alive to the risk that there may be a level of symbiosis between the PEXA business model and the national rules which could limit the degree of innovation in the business cases and platforms of new entrants.

IPART in its issues paper on eConveyancing fees in NSW describes the competitive challenge faced by new entrant ELNOs in the following terms¹⁰:

"The eConveyancing market can be characterised as a two-sided market. For many property dealings (such as transfers, and mortgage refinances), ELNOs provide intermediation services between solicitors/conveyancers and financial institutions on behalf of property vendors and purchasers. In these transactions, ELNOs provide services to two distinct sets of users (solicitors/conveyancers and financial institutions). Each set of users faces different costs, which has implications for both competition and pricing. The competitive dynamics in two-sided markets, including whether they tend to be monopolistic or oligopolistic in the long run, are influenced by the 'network effects' in the market. The eConveyancing market exhibits positive network effects, because the value of an ELNO's services provided to any one user increases as more solicitors/conveyancers and financial institutions use that ELNO's services. This means that larger and more established ELNOs have a competitive advantage over smaller new entrants, since their users can connect with a larger number of other users to complete transactions."

NSW asks the IGA review to consider this analysis as it provides a robust rationale for regulatory safeguards, including interoperability (see below at section 6).

Secondly, NSW agrees with the IGA Issues Paper that another dimension of the competitive challenge in the current market structure for eConveyancing services is vertical integration. NSW agrees with the stakeholder views expressed to the IGA review that "consumers may be disadvantaged in the long term if vertical integration occurs and ELNOs business units or related entities move to delivering conveyancing services or related services."¹¹

In sections 5 and 6, NSW presents how these competitive challenges should be addressed.

5 Addressing the challenge of achieving competition

As the IGA Issues Paper notes, the Model Operating Requirements (**MORs**) have been amended to introduce requirements for ELNOs to undertake structural or functional separation of competing non-ELN businesses, to provide competitors of those businesses with equivalent access to the ELN to that which it provides itself and to apply a price cap to ELNO pricing.

5.1 Separation and equal access as competition remedies

The IGA Issues Paper states that:

¹⁰ Independent Pricing and Regulatory Tribunal of NSW, Review of the pricing framework for electronic conveyancing services in NSW, Issues Paper (IPART Issues Paper), at 4.2.1.

¹¹ IGA Issues Paper, at 6.24.

“[the separation and equivalence] rules in the MOR for ELNOs operating in the wider market need to be reviewed by a qualified economic regulator in the near future to ensure that they are clear and there is no abuse of market power.”¹²

NSW would be concerned if this suggested that the IGA review is considering whether these new remedies should be removed or wound back. This would, so soon after their introduction, be a step backwards because these new MORs measures provide some of the only industry-specific powers available to address competition issues.

The use of separation and equal access requirements has been the preferred tools to address market power in network industries since the Hilmer Report, over 25 years ago. The Harper Review compared the experience of using structural separation and equal access in rail with telecommunications as follows¹³:

“Structural separation was extensively pursued in rail. The main interstate freight network was brought together under the ownership of the Australian Rail Track Corporation, while above-rail 277 freight operations have been privatised. Jurisdictions have access regimes in place for regional freight lines. Although competition in above-rail services has emerged on some routes, on many others volumes have been too low to support competitive entry. Parts of the rail freight sector face strong competition from road transport. The major ports have also been reformed with port authorities now typically acting as landlords for competing service providers rather than directly providing services.”

“Although competition was introduced in telecommunications, the dominant fixed-line provider, Telstra, was privatised without being structurally separated. Instead, reliance was placed on providing third-party access to Telstra’s fixed-line network. On the face of it, this has seen less fixed-line retail competition in telecommunications than might have been expected. Dissatisfaction with access arrangements also led Optus to build its own hybrid fibre-coaxial network. Over time, changes in technology have strengthened competition in telecommunications. Data rather than voice is now the dominant form of demand in the market, and wireless technologies compete effectively with fixed-line technologies in many applications.”

The telecommunications sector now has embraced structural separation, with the establishment of the National Broadband Network and the decommissioning of the Telstra fixed networks.

Separation and access models need to be adapted to the particular conditions of the particular regulated industries. While PEXA possesses significant competitive advantages, it remains at an early stage of development and is a much smaller organisation than the utility companies to which full structural and ownership separation has been applied. Alternative industry models currently under discussion in relation to interoperability, for example if PEXA, or future ELNOs, were to operate as a hub for all ELNOs, may require a stricter separation model to be considered.

5.2 Improving the MOR separation and equal access measures

While NSW considers the separation and equal access provisions added to the MORs to be the minimum necessary safeguards and to be irreversible, we acknowledge they can be improved in the following ways:

- the MOR requirements of separation and equal access are skeletal compared to the rules which apply in other sectors, such as energy and rail. As a result, they provide

¹² IGA Issues Paper, at 6.27.

¹³ Competition Policy Review, Final Report, March 2015 (Harper Review), at pp.191-2

little guidance on implementation to both the regulated entities and competitors relying on these safeguards.

- the MOR requirements of separation and equal access could be more fleshed out and be able to respond to a future environment where stricter separation and equal access measures are required.
- the MOR provisions are limited to high-level principles, with guidance notes on how ARNECC expects the ELNOs to implement them. However, that raises questions, as the IGA Issues Paper identifies, of ARNECC's institutional capabilities to provide guidance on competition-related matters.
- as the IGA Issues Paper notes, powers to monitor and enforce the separation and equal access rules need to be developed. While enforcement needs to be resolved as part of the new institutional arrangements, it is also useful to consider the enhanced opportunities which the transition to digital technologies provides for innovative compliance and enforcement measures.

The Greiner Review made the following recommendations on use of new digital tools by regulators¹⁴:

“Advances in digital technologies not only enable better use of data to achieve regulatory outcomes but can also help regulated entities better understand their regulatory context and obligations. Regulation technology ('RegTech'), the application of digital and information technologies to regulation, can relieve some of the burden of regulatory monitoring, reporting and compliance, and improve end-users' experience of regulation, reducing the perception of red tape.

For example, RegTech can provide end-users with data analytics and increased efficiency when assessing the compliance impacts and costs of regulation. It also enables automation of more mundane compliance tasks and reducing operational risks associated with meeting compliance and reporting obligations.”

“RegTech allows end-users to easily survey quantitative and information based obligations with risk identification and management tools, which may include regulatory gap analysis, compliance overviews, health checks, regulatory reporting, and case management.”

“Adopting RegTech can make compliance easier by reducing disputes in compliance activity through preventive and real-time information, while making compliance and enforcement activities faster, cheaper and easier for both regulators and regulated parties. The cost-effectiveness of regulatory inspections should also improve with the increasing adoption of new technologies in this area.”

The MORs provide for a fairly traditional annual reporting process, which will now include compliance with the new separation and equal access requirements. There is an opportunity, particularly in reporting on equal access, to use RegTech to achieve more direct, current information about equal access compliance, such as comparison of performance metrics. This will help alleviate concerns about the effectiveness of regulatory requirements, such as equal access, which have difficulties in clearly establishing what is occurring on the ground: it is one thing to require a regulated business to treat its competitors on an equal basis to its own operations, but in practice often what happens inside the regulated entity can be a 'black box' to regulators.

¹⁴ NSW Regulatory Policy Framework, Independent Review, Final Report (Greiner Review), August 2017, at pp.33 and 34.

While this area is still developing, one example is Austrac's use of technology to collaborate with industry (through an innovation hub) to track regulatory compliance and identify risks.¹⁵ Another example is Liquor & Gaming NSW's Centralised Monitoring System, which is a regulatory tool that connects all gaming machines in NSW registered clubs and hotels to monitor and ensure the integrity of gaming machine operations, and calculate a venue's gaming machine tax.¹⁶ These approaches demonstrate how technology can provide a new way of regulatory engagement.

5.3 Price control

NSW agrees with the comment in the IGA Issues Paper that "[i]t is likely that price control will be needed for the foreseeable future given that some jurisdictions have mandated the use of electronic conveyancing for some or all transactions and others may follow."¹⁷

NSW supported the price cap measure in the MOR because, in the absence of a detailed analysis of costs, it represented a pragmatic balance between achieving a level of price security for users while not risking adverse impacts on ELNO investment incentives.

The NSW IPART is currently conducting a thorough review of pricing issues, including inter-operator pricing. NSW welcomes IPART's robust analysis and will use IPART's review to set prices in NSW.¹⁸

6 The role of interoperability

As the IGA Issues Paper correctly notes, "[t]he introduction of a second ELN gives rise to an evaluation of potential options for operating models and selection of the most suitable model for the next period of eConveyancing operation."¹⁹ The IGA Paper then goes onto identify the following objectives against which to assess potential models²⁰:

- Minimise risk to titles security;
- Minimise risk to financial settlement;
- Maximise service quality and industry productivity; and
- Minimise cost (to consumers and taxpayers).

The IGA Paper concludes on the topic of interoperability by stating "[g]iven that the benefits from implementing an interoperable system are not certain and the costs significant, if an interoperable solution is preferred then an in-depth analysis to better understand the total cost and likely outcomes is warranted."²¹

In NSW's view, interoperability is crucial to the establishment of a competitive ELNO market. NSW is concerned that the IGA Issues Paper's objectives place a 'thumb on the scale' for the status quo of ELNOs operating as closed networks.

In its issues paper, IPART identifies the importance of interoperability as follows:

¹⁵ The impact of new and emerging information and communications technology, Submission 30 - Parliamentary Joint Committee on Law Enforcement, Inquiry into the impact of new and emerging ICT – Submission by Austrac, page 9

¹⁶ <https://www.liquorandgaming.nsw.gov.au/operating-a-business/running-your-business/managing-gaming-machines/centralised-monitoring-system-cms>

¹⁷ IGA Issues Paper, at 1.21.

¹⁸ See NSW conditions of approval, General Conditions, clause 3.1(c) and (d).

¹⁹ IGA Issues Paper, at 6.30.

²⁰ IGA Issues Paper, at 6.33.

²¹ IGA Issues Paper, at 6.48.

“The competitive dynamics in two-sided markets are also influenced by users’ willingness to use more than one service provider (known as ‘multi-homing’). In the eConveyancing market, several factors may limit users’ willingness to use multiple ELNOs, including:

- The costs to users of having to learn more than one ELNO’s systems (i.e., efficiency losses);
- The costs to lawyers/conveyancers of obtaining separate security certificates for each ELN; and
- The costs to financial institutions of building network connections with each ELNO.”²²

“As noted above, one key factor likely to influence the future competitiveness of the eConveyancing market is whether or not ELNs are interoperable. Interoperability refers to ELNOs’ systems being able to communicate with each other, so that users can use different ELNOs to complete a property transaction together. Introducing interoperability would reduce the network effects in the eConveyancing market ..., making it more viable for ELNOs with smaller user bases to compete.”²³

“Where there are multiple ELNOs in the market but no interoperability, users would have to agree which ELNO to use for a transaction involving multiple users (such as a property transfer). To solve this coordination problem and allow these transactions to occur in an orderly way, market practices around which ELNO to use for each transaction would need to be established by the industry. In the absence of interoperability, multi-homing would become important to maintaining effective competition in the market. That is, users (conveyancers, solicitors and financial institutions) would need to subscribe to the services of multiple ELNOs, which would require financial institutions to connect their systems to multiple ELNOs and for all users to obtain security certificates for multiple ELNOs. However, if users prefer not to multi-home (for example, if multi-homing involves high costs), the lack of interoperability could lead to a single or small number of ELNOs being used for transactions that involve multiple users. This could result in competition being concentrated on transactions that involve a single user (such as lodging caveats on title)”.²⁴

Interoperability will not happen without regulatory intervention. Industry support is also critical to ensure that the best model is chosen and implemented. NSW has established a process for broad based industry working groups to work through interoperability models that can be applied on a national basis.

The working groups are chaired an independent expert and have been established to provide industry and government stakeholders with a forum to present their views and provide their expertise on this complex topic. Specifically, stakeholders have identified the need to:

- investigate baseline eConveyancing interoperability requirements that contribute to a nationally consistent ‘end-state’;
- develop workstreams that can be considered with this IGA review; and
- focus on promoting competition, consumer choice and national consistency in the area of eConveyancing.

The terms of reference for the working groups is at Annexure A.

²² IPART Issues Paper, at 4.2.1.

²³ IPART Issues Paper, at 4.3

²⁴ IPART Issues Paper, at 4.3.1.

NSW is sharing and will continue to share with the IGA reviewer and ARNECC the analysis being done in these industry working groups on interoperability.

While NSW considers interoperability to be crucial to the development of a competitive market, it may not be the only business model for a new entrant ELNO. It is possible that potential entrants will develop alternative business models that do not rely on workspace interoperability. Rather, the decision not to introduce interoperability is itself a decision to choose a particular market structure, one in which transactions can only be conducted end to end on ELNOs operating as 'islands'. Interoperability widens the range of possible business models available to competitors.

7 Clarify regulation of financial settlement

The IGA issues paper notes the ECNL has failed to regulate the financial settlement function and a number of stakeholders have commented that there needs to be a financial regulator for eConveyancing.²⁵

NSW agrees that closer regulation of financial settlement is essential, given it is an integral part of many conveyancing transactions. In our view, regulation should extend to both technological aspects (to ensure rigorous process and security), as well as regulation of pricing, given the lack of competitive restraints.

Regulators such as ASIC and APRA have oversight of aspects of financial settlement, ASIC is essentially responsible for market conduct and consumer protection issues in the financial sector. APRA is responsible for the licensing and prudential supervision of Authorised Deposit-taking Institutions. The Reserve Bank of Australia (**RBA**) also plays a critical role in operating and regulating the platform on which financial settlement occurs between financial institutions.

In NSW's view, the immediate task for the IGA review is to delineate the scope of existing regulation of financial settlement and the effectiveness of these existing regimes and identify gaps where further regulation and clarity are needed.

As to the identity of an appropriate regulator, NSW acknowledges the specialist expertise of ASIC, APRA and the RBA. We suggest it would be appropriate to confirm ASIC and APRA's expectations of their discrete roles in this regulation – and these discussions could be part of the IGA review. However, NSW also believes that because financial settlement is so connected with conveyancing that State and Territory the IGA review should consider whether registrars should also have some oversight responsibility (as discussed further in Section 9.1 below). By analogy, ASIC oversees the ASX and the delivery versus payment obligations in relation to stock exchanges.

Assuming regulatory responsibilities for financial settlement are to be divided or shared between regulators, NSW also seeks the IGA review's consideration on how the approaches of these regulators can be co-ordinated.

Given that views on determining who is the appropriate authority to regulate financial settlement vary greatly, it may be appropriate to amend existing legislation to clarify this point. These changes to the ECNL could be part of updates to enable penalties (discussed in Section 8 below).

8 Civil penalties and enforcement

The IGA issues paper notes stakeholder views on the need for the regulations to include the ability to impose fines and penalties on ELNOs. The IGA Issues Paper goes onto state²⁶:

²⁵ IGA Issues Paper, at 3.4.

²⁶ IGA Issues Paper, at 5.35 and 5.36

“In the eConveyancing governance framework, powers are needed to direct ELNOs and to apply fines or other penalties for transgressions. The existing ability to suspend or terminate is not practical especially in jurisdictions that have mandated use, though it should be maintained for serious matters”, and “The power to revoke approval or not renew a contract is something of a sledge hammer tactic and could lead to significant and perhaps unnecessary disruption. If only one or two jurisdictions wanted to revoke or not renew approval, the ongoing operation of eConveyancing could be very complex to arrange.”

NSW agrees with the IGA Issues Paper’s approach to enforcement and seeks further consideration by the IGA reviewer on the most appropriate enforcement ‘tools’. These could include some or all of the following:

- **Pecuniary penalties:** these are monetary administrative penalties, the amount and application of which are determined by legislation. These are closely aligned to fines and are distinguished from civil damages. While civil damages aim to compensate for the consequences of the breach, pecuniary penalties (and fines) are intended to be punitive: they are aimed at deterrence and are payable irrespective of whether any harm has been caused by the breach. In some cases, the liability to pay a pecuniary penalty may contribute to a finding of fault in a separate civil or criminal action.
- **Infringement notices:** these are typically used for low-level offences and where a high volume of uncontested contraventions is likely. A regulator may issue an infringement notice when the regulator has reason to believe the entity has breached a civil penalty provision. If the recipient pays the specified penalty, the liability for the alleged contravention is discharged. If the recipient does not pay the penalty, the regulator may apply to the Court, which determines whether any contravention is established.
- **Enforceable undertakings:** these are not strictly a penalty, but a regulatory tool. After investigation by the regulator and extensive negotiations, the entity undertakes to cease certain conduct, take certain action, or implement a compliance program to prevent recurrences. Enforceable undertakings can cover similar matters to what a court might order and address similar behaviour, but they provide for greater flexibility. Enforceable undertakings are enforceable by the regulator in court (unlike informal commitments).
- **‘Quasi-penalties’:** these include penalties such as the revocation or suspension of a licence, variation of licence conditions. The MORs already contain these powers.

The IGA review should also consider what areas of an ELNO business or services should be subject to penalties, and what actions attract the maximum penalty and which attract a lower penalty. Relevant considerations might include:

- the efficient operation of the ELN;
- the immediate impact and long-term interests of consumers;
- the size of any possible economic benefit or detriment that could be caused by a breach of a requirement or condition;
- the importance of the provision to the operation of the register;
- the impact of any breach on the integrity of the register or collection of state revenue; and
- the difficulty in investigating and enforcing breaches of the provision.

A related regulatory tool is publishing breaches, which may encourage ELNOs to adopt compliant behaviour rather than risk damage to their reputation. NSW seeks further analysis of this tool from the IGA reviewer, for example, how and when other regulators publish breaches and the effectiveness of this approach.

It is likely that an amendment to the NECL would be required to authorise Registrars to implement an enforcement regime, together with provisions (in the MOR, or elsewhere) with details of the enforcement regime itself. NSW seeks further recommendations from the IGA reviewer on how to structure and implement an appropriate enforcement regime.

9 Regulatory and governance arrangements

NSW agrees with how the IGA Issues Paper frames the issues around the institutional arrangements for the national eConveyancing scheme²⁷:

“There are a range of governance and regulatory matters to be managed in eConveyancing especially for a mandated process. Stakeholders expect that a system endorsed by government such as the ELN is fit for purpose and will not expose the community to greater risk and liability than was present in the paper system it replaced. To date, ARNECC has focused in the main on regulating the land titling components of eConveyancing. However, it is clear that all stakeholders expect that governments will provide regulatory and governance oversight on all of the matters impacted by the change to eConveyancing.”

As noted above, NSW believes that while the current consensus-based ARNECC model worked well in the development phase of eConveyancing, it is no longer effective in addressing competition and consumer issues. In NSW’s view, a national consensus-based body is not the appropriate forum to regulate competition and consumer issues given the different speeds at which jurisdictions are adopting eConveyancing, the different market conditions which apply in each jurisdiction and the different policy priorities of each Government.

Before turning to consider the range of possible governance models, it is useful to unpack and address some of the key underlying issues in order to determine the principles to be applied in the design of possible governance models.

9.1 Principles to be applied in design of governance model

NSW views the following principles as central to designing any governance model to deal with the complexities and dynamic nature of the eConveyancing market.

Collective decision making by jurisdictions vs responsibilities of individual jurisdictions

Any federated regulatory model like the national eConveyancing scheme requires a balance to be struck between the responsibilities which the federated members agree should be decided collectively and the matters which remain in their individual responsibility. It is unlikely that there will be a static, fixed allocation of responsibilities within a federated regulatory model. The balance will need to be struck to deal with changing conditions in the regulated markets to which the federated model applies.

In deciding the appropriate balance in a federated regulatory model, it is also important not to forfeit one of the well-recognised benefits of a federal system of government: the scope for experimentation at the individual jurisdiction level (i.e. competition federalism). This gives each jurisdiction scope to adapt regulatory models to suit the local variations in market conditions, citizen expectations and Government priorities. It also enfranchises one jurisdiction to act as a ‘test bed’ for innovations, which other jurisdictions can observe and decide whether to adopt.

²⁷ IGA Issues Paper, at 6.1 and 6.2.

If too much responsibility is subject to consensus decision making at the federated state level, then there are real risks that it will take too long to reach a consensus; or the consensus will form around the lowest common denominator, usually the views of the most conservative jurisdiction or jurisdictions.

From the outset the IGA recognised that some scope for individual decision making by the States and Territories was appropriate given the differing conditions and priorities in each jurisdiction. The IGA provides that “[t]he Parties acknowledge that National eConveyancing may be implemented at different times and at a different pace across each jurisdiction”²⁸. The NECL also allocates responsibilities between the collective process and individual jurisdiction. The registrar in each jurisdiction retains the power to make the operating requirements in his or her jurisdiction but is to have regard to the MORs when doing so. By contrast, the registrar has power to impose conditions on the authorisation of an ELNO to operate in his or her jurisdiction, without any requirement to have regard to any collectively developed requirements.

Now that we are well beyond the development or start-up phase, the participating jurisdictions need to come to agreement about the level of common and individual decision making that is appropriate to the challenges that lie ahead. It would be a mistake to assume that new competition and consumer rights necessarily need to be folded into a common decision-making process between the participating jurisdictions, whether ARNECC or some new national regulator.

Need for ex ante regulation on competition issues

NSW agrees with the views of the ACCC, as reported in the IGA Issues Paper, that²⁹;

“Reliance on competition law is not an acceptable alternative to regulation where there are inherent monopoly characteristics. It is preferable to have specific provisions that address concerns that may arise in the ELNO context.”

The competitive challenges in eConveyancing markets require an industry-specific solution:

- while there is a bedrock of common principles of competition law that should apply across all industry-specific regulatory models, there will be specific or unique competitive issues which need to be addressed through tailored requirements and remedies appropriate to the conditions of the eConveyancing industry; and
- industry-specific regulation provides the opportunity for the development of upfront or ex ante regulation: basically, to set the ‘rules of the road’. Reliance on ex post intervention, which is how general competition law works, can result in delay, piecemeal decision making about what is not permitted, and irreversible damage occurring in the market place by the time intervention is justified. In markets where the extent, shape and direction of competition is still emerging, ex ante regulation can be the more effective approach, for incumbents and entrants alike, because of the certainty it can provide.

Problems in separating responsibility for industry specific competition regulation from titling regulation

NSW does not believe that industry-specific competition regulation of eConveyancing can be feasibly separated from responsibility for land titling generally. Decisions about what is permitted or not permitted from a competition perspective in eConveyancing markets need to take account of the impact on the land titling system, and particularly in relation to the integrity of the register.

²⁸ IGA, clause 5.1.

²⁹ IGA Issues Paper, at 5.22.

Equally, with the commitment to competitive delivery of ELNO services, registrars need to take account of the impact of their titling-related decisions on competition. Separation of these responsibilities into different regulators will result in jurisdictional confusion and overlap, and potentially poorer outcomes for competitors, consumers and the titles registry.

These issues will be exacerbated if the allocation of responsibilities for eConveyancing competition issues and land titling issues is made across jurisdictional boundaries: for example, if competition issues are the responsibility of a national regulator while the land titling continues to be a State or Territory responsibility. Real property law will remain a central constitutional responsibility of the States and Territories.

It follows that industry-specific competition and consumer regulation of eConveyancing must be the responsibility of each State and Territory. Each State and Territory Government is accountable to its citizens for how its real property laws operate. As a result, each Government needs to be able to take a holistic approach to the supply of conveyancing services within its jurisdiction, including in relation to the effectiveness of competition and the impacts on consumers.

While there may be some benefit in consistency in the high-level requirements or principles, such as the MOR provisions on separation and equal access, jurisdictional power over competition and consumer issues is most appropriately exercised at the State and Territory level to account for and reflect these differing market and operating conditions.

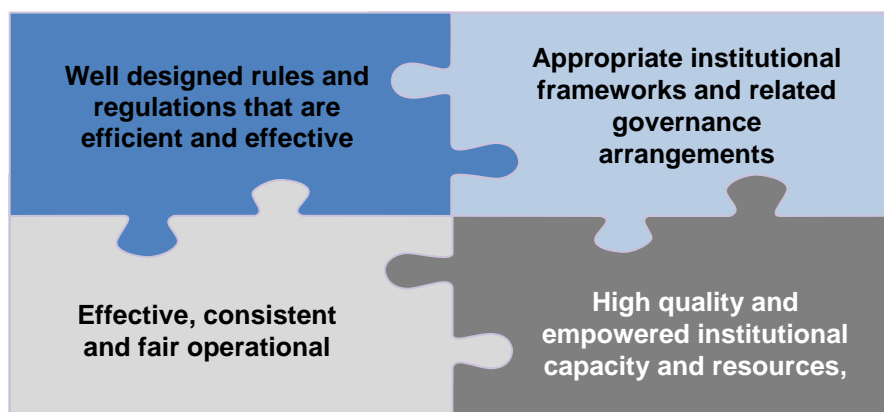
Need for a stronger governance framework for ARNECC

Under any option, there will continue to be a role for a national body comprised of the registrars with responsibility for the technical and operating requirements. As ARNECC (or its successor) will be a continuing part of the eConveyancing landscape, more attention needs to be paid to a suitable governance framework for ARNECC.

The OECD has described the importance of strong governance frameworks for regulators in the following terms³⁰:

“How a regulator is set up, directed, controlled, resourced and held to account — including the nature of the relationships between the regulatory decision-maker, political actors, the legislature, the executive administration, judicial processes and regulated entities — builds trust in the regulator and is crucial to the overall effectiveness of regulation. Improving governance arrangements can benefit the community by enhancing the effectiveness of regulators and, ultimately, the achievement of important public policy goals.”

The OECD depicted the interlocking elements of good governance for a regulator as follows:



³⁰ OECD, Principles for the Governance of Regulators, 2013, at para.5.

ARNECC in its current form was set up for the start-up phase of eConveyancing. ARNECC, as any regulator, needs to evolve now to fulfil an ongoing role as rule-maker.

First, there should be a clearer delineation between policy matters, which should be the responsibility of the participating Governments, and its implementation, which should be ARNECC's responsibility. Now that that initial policy direction has been fulfilled with the development of a national eConveyancing model, the Ministers need to reset the future policy direction for national eConveyancing, including to agree on what should be a collectively decided matter and what should be left to the individual jurisdictions. Registrars do report back to their individual Ministers and that can determine positions the registrars take at ARNECC. However, an important dimension is lost if Ministers do not meet on a regular basis to collectively discuss national policy issues on eConveyancing and do not collectively set policy directions to guide ARNECC's decisions.

Therefore, an ongoing mechanism is needed for Ministerial oversight of ARNECC and to set these future policy directions. At a minimum, the Ministers should meet annually. As the economic significance of eConveyancing grows, this forum also would provide the opportunity for input from other State and Territory agencies on aspects of their responsibilities which may be relevant to eConveyancing policy, such as the Premier's or Chief Minister's department, Treasurer and consumer protection agencies.

Second, there should be more transparency in ARNECC's processes and decision making. Meeting agendas and key outcomes should be made available online. ARNECC should publish reasons for its decisions. ARNECC's organisational structure, including the role of working groups, and the process by which the MORs are reconsidered and varied, including how ARNECC goes about consultation, should be publicly available. ARNECC should set and publish an annual work plan which identifies its priorities for the coming year.

Third, as the OECD comments, "[s]elf evaluating regulatory decision, actions and interventions is a key first step in the process of the regulator understanding the impact of its' own actions and helps to drive improvement in performance and outcomes."³¹ ARNECC should set itself key performance indicators against which it assesses its performance on an annual basis, such as time to consider and make variations to MORs, MPRs and relevant reviews.

Need for clear regulation on financial settlement

NSW also believes that the financial settlement component of eConveyancing cannot be separated from the 'lodgment' component of eConveyancing – which is at the heart of the 'delivery v payment' principle. For this reason, NSW believes that registrars should have clearly defined responsibilities to ensure the security of financial settlement systems, to complement the frameworks managed by other regulators such as ASIC and APRA, and by the RBA.

As both ELNOs and financial institutions operate at a national level, there is a stronger argument for a national rather than a local approach to regulation of financial settlement. However, it is essential that decision-making structures pull regulation up to the 'high water mark' of rigour, rather than being set to a lowest common denominator. In practice, this is likely to mean that jurisdictions should be free to act to include appropriate protections for their citizens in relation to financial settlement, as well as for competition and other consumer protections.

Searching for more innovative approaches to regulation

Lastly, in making recommendations about future governance models, the IGA Review should take into account new approaches to regulation. This was a central focus of the Greiner Review, and NSW recommends the IGA Review study the full report. The central theme of the

³¹ OECD, Principles for the Governance of Regulators, 2013, at para.20.

report was to adopt a 'regulatory stewardship' approach, which the review described as follows:³²

"Regulatory stewardship requires government to treat regulation as they would any public service or public asset.... This means that government agencies have a duty to develop and manage regulation as stewards to deliver net benefits over time, having a deep understanding of the performance of those regulations and actively testing that they are appropriate and in the public interest both now and in the future.

Managing the stock and flow of regulation requires active monitoring on a continuous basis under regulatory stewardship to ensure that they produce the outcomes required. This is a sharp contrast to the current framework which allows a 'set and forget' approach, reliant on a limited five-year staged repeal process. Stewardship also recognises that attention must be given not only to the review of regulations, but also their development and implementation. The regulatory policy framework will need to recognise this duty throughout the lifecycle and promote greater ownership by agencies for the regulations they administer, by setting out clear expectations and accountability to enable a shift in their culture and practices."

Regulatory stewardship involves a different approach to policy development, and the role of consultation in that process. The review stated that³³:

"An agency that is regularly accessible to its stakeholders will be in a better position to identify emerging problems and risks and consequently be a better regulator. A new approach needs to be taken to engagement and regulators should consider:

- **Consultation** must begin early and not after policy options have already been refined. Agencies should consult not just on the what (i.e. what the regulatory outcomes should be), but on the how (including using regulatory and non-regulatory tools). In some cases, the consultation should ask even more basic questions about why (i.e. what is the policy objective or the 'question we are trying to answer');
- In many cases, traditional approaches to consultation should be replaced by a much more user-centred commitment to '**look, listen and learn**' with those impacted by proposed or current regulations."

NSW has endeavoured to adopt this approach to interoperability between ELNOs by establishing broad-based industry working groups on interoperability. We are seeking to engage a diversity of industry stakeholders on the "why, how and when of interoperability."

One of the strengths of the ARNECC process in the development of the eConveyancing model has been the use of working groups. However, on a Regulatory Stewardship approach, the eConveyancing regulatory regime does not 'belong' to any group of stakeholders. While the registrars and titling offices are currently represented at the working groups, those working groups could also include competing ELNOs and user representatives to ensure sufficient stakeholder engagement.

The ARNECC working groups could also be revised to include formal representation of the revenue offices. To date, lack of representation has led to challenges, particularly in effective prioritisation of work planning and the efficiency of revenue offices' system changes. For example, changes requested by revenue offices have been more difficult to prioritise given the focus on adding additional transaction types – yet these requested changes typically impact the

³² NSW Regulatory Policy Framework, Independent Review, Final Report (Greiner Review), August 2017, at p20.

³³ NSW Regulatory Policy Framework, Independent Review, Final Report (Greiner Review), August 2017, at p30.

user base a whole. We suggest the IGA review also consider this issue when proposing overall governance reforms.

Against this background, NSW will now turn to discuss its views on the appropriate governance model.

9.2 Comparison of Governance Models

We have reviewed the three options proposed by the IGA Issues Paper and added another option we have developed. Our view is that this fourth option is the best way forward for governance arrangements.

Model 1: Status quo

Proposed by the IGA Issues paper as an option.

Advantages	Disadvantages
<ul style="list-style-type: none">• Known process which has delivered operational requirements for eConveyancing.• Because ARNECC continues to have no binding decision making powers and with recognition in the existing IGA of flexibility for individual jurisdictional decisions on implementation, this model maintains degree of scope for independent action by individual jurisdiction (although not without controversy and dispute which could impact viability of model).	<ul style="list-style-type: none">• ARNECC remains a committee of State and Territory officials with no authority beyond that of its members, whose powers depend on legislation in their own jurisdictions, whose remit and interest is to focus running (or supervising in the case of private participation) their own registries.• ARNECC currently lacks the full suite of skills to regulate competitive market, including competition law skills.• ARNECC decision making processes can be slow given multiple jurisdictional input, and means problems are not addressed at the pace the market expects for the market to work efficiently.• Formal or de facto consensus model potentially holds back jurisdictions with agendas for eConveyancing more suitable to their local circumstances.• Revenue offices not currently recognised in the governance model

Model 2: Enhanced status quo

Proposed by the IGA Issues Paper as a model:

“In discussion with stakeholders we have proposed the creation of a new body to assist ARNECC with the regulatory and governance matters identified above.”

“A new body would be resourced with the skills needed to provide expert advice to ARNECC on all the matters outside the direct land titling matters and would provide resources to resolve efficiency and business process matters in a timelier manner than can be achieved by staff employed in other full-time positions in registrars’ offices.”

It is unclear whether this model would involve a unit with full time employees (the work volume would not seem to justify that) or an advisory council with a panel of part-time competition, economic and other relevant experts (which would seem a more viable approach).

Advantages	Disadvantages
<ul style="list-style-type: none"> • Goes some way towards addressing the skills and resourcing gap in ARNECC. • As with Model 1, maintains some scope for independent action by individual jurisdiction. But expert panel could cut either way: if ARNECC refused to act on advice of expert panel, an individual jurisdiction could point to expert opinion in acting on its own. If expert opinion was contrary to proposed course of action of an individual jurisdiction, this could have practical effect of restricting scope for individual jurisdiction action. • Would not require changes to NECL as advisory committee has no decision-making powers. 	<ul style="list-style-type: none"> • This does not address the current structural problems of different positions among States and Territories. • While receiving more expert input, the lack of competition amongst ARNECC members in understanding and making decisions on that advice may still mean that the right policy outcomes are not achieved. • May slow ARNECC decision making process by adding a second layer of review before reaching ARNECC. Because many matters before ARNECC will have potential competition or consumer aspects, proposals may need to be considered at the existing working group process and by the advisory committee before going to ARNECC. • Does not address concerns about lack of statutory powers of the registrars on competition and consumer related matters. To the extent that the registrars can use their ELNO authorisation powers to address these kinds of issues, these powers are independent of ARNECC's role and therefore the advisory committee as an input to ARNECC is not targeted as the decision maker.

Model 3: National Regulator option

Proposed by the IGA Issues Paper:

“A potential option for governance is to create a new national regulator for eConveyancing and to regulate the impacts on related markets.”

“There does not appear to be any existing regulator that is a good fit for all aspects of eConveyancing. It is also difficult to see how a national regulator would be able to direct statutory office holders such as registrars (and perhaps revenue offices) in relation to their statutory decision making.”

The IGA Issues Paper does not explore how this model would constitutionally be achieved, but two options are:

1. A referral of powers by the States to the Commonwealth under the Australian Constitution (section 51(xxxvii)): this power has been used in the past to refer State powers over corporations to the Commonwealth to create a uniform and comprehensive national companies law.

It is likely that any referral would need to be comprehensive in respect of property transactions and must consider the following issues:

- it may be difficult to limit the referral just to eConveyancing, given the substitutability between electronic and paper processes;
- it may be possible to delineate between regulation of the ELNs and the titling system itself (i.e. to avoid a general referral over real property), but as the IGA Review notes this could then create jurisdictional issues in directing the registrars (and conversely for the registrars in ensuring that the ELNs functioned in a way that preserved the integrity of the titling system);
- it would be difficult to limit the referral to the non-titling aspects of an ELN because of the overlap between competition, consumer and operational issues.

Historically, the Commonwealth has no policy role or power over land titling and the operation of the Registrar General, and is unlikely to wish to participate in this referral model. Even if the Commonwealth would participate in a referral to achieve national consistency, the consequences for the residual political and constitutional roles of the States relating to real property would make this option unrealistic.

2. A co-ordinated scheme between the States to establish a shared regulator. This would involve the participating States legislating to confer State jurisdiction on the same body which they establish between them (formally organised under the law of one State).

This option would be similar to the approach to the National Companies and Securities Commission, the ASIC predecessor. This body was established under Commonwealth law and then each State enacted legislation providing for the NCSC to be the regulator in its State (exercising power in the right of that State) on the matters agreed to be within the NCSC jurisdiction. This approach may be easier from a political and constitutional standpoint than the referral model, but it would involve similar difficulties in limiting the jurisdiction of the national body in a way which did not involve it absorbing the titling role of the registrar in each jurisdiction. The NCSC also proved to be cumbersome to administer and was one reason for the States and Commonwealth moving to a referral model.

Advantages	Disadvantages
<ul style="list-style-type: none"> • Establishes a single nationwide regulator, which can be staffed with range of skills, has power to make binding decisions and can take enforcement action. • Therefore, represents most comprehensive solution to current ARNECC shortcomings. 	<ul style="list-style-type: none"> • Politically and constitutionally difficult and would require significant legislative change. • Risks creating overlapping/dysfunction jurisdictional boundary issues between the national eConveyancing competition regulator and the registrars of title. • Eliminates or substantially reduces scope for individual jurisdiction to innovate. However, depending on governance arrangements within regulator (e.g. whether jurisdiction individually represented on board and voting), the independence of new regulator may mean that reform is not necessarily held to lowest common denominator.

Model 4: Expanded registrar powers to address competition and continued ARNECC process dealing with operational rules

This model was not proposed by the IGA Issues Paper.

The model could work as follows:

- the NECL is amended to expand the powers of the registrars of title to regulate a competitive market by amending the scope of either or both the authorisation conditions or the MORs to explicitly cover competition and consumer issues. The advantage of using the authorisation conditions as the vehicle for non-operational issues is that these issues would fall outside the ARNECC process. As noted in Section 8, the NECL should also be amended to add enforcement powers. It may also be necessary to amend the NECL to clarify authority to regulate financial settlement.
- the regulators would ensure that they each have the skills and expertise to address competition and consumer matters. The registrars could do this either by directly engaging staff or by drawing on the expertise and advice of other state agencies with competition expertise, such as IPART in NSW; and
- ARNECC's role either could be limited to operational issues or it could fulfil a consultative role when consumer or competition issues have national implications. This could be documented by protocols agreed by ARNECC members: these protocols should be reviewed periodically, to ensure they remain fit for purpose.

Advantages	Disadvantages
<ul style="list-style-type: none"> • Creates within each jurisdiction a regulator for eConveyancing with the range of skills and legal powers required to regulate across the titling, competition, consumer and operational issues. • Avoids jurisdictional boundary issues that would arise if titling remained at State level but responsibility for competition and consumer issues or eConveyancing sits at the national or trans-jurisdictional level (as in Model 3). • Focuses the requirement for national consistency on operational issues and allows scope for individual action in each jurisdiction on consumer and competition issues, acknowledging that there are likely to be important market differences between jurisdictions. 	<ul style="list-style-type: none"> • Risks inconsistent decisions on non-operational issues not otherwise justified by differences in a jurisdiction. • There is not a neat division between operational issues (which remain ARNECC's development responsibility) and competition and consumer issues (which would be dealt with by each registrar). • Does not solve problems with ARNECC decision making in relation to operational issues. • Expanding the registrar's role to cover competition and consumer issues may overlap with other regulators (e.g. the ACCC), although other industry-specific regulators co-exist with the ACCC. • Expanded role may not be consistent with the character and nature of the registrar role as 'keeper of titles', although land titles office private concessions are already driving the registrars in this direction. • Requires amendment of the ECNL.

On balance, NSW prefers option 4 because:

- it ensures a holistic approach can be taken to eConveyancing regulation, with the one regulator considering land titling, competition and consumer issues;

- it avoids regulation across jurisdictional boundaries;
- it strikes the right balance in the federated regulatory model for eConveyancing by vesting ARNECC with substantive responsibility for the basic operational model, which should remain nationally consistent, while allowing scope for individual innovation at the individual jurisdictional level; and
- as State-based regulators are closer to the market, better facilitates the Regulatory Stewardship approach to involvement by stakeholders in the “why and how” of regulation.

10 Conclusion

The regulatory framework needs to build appropriate safeguards to protect and promote vigorous competition. To do this it must require equivalent access to key standards and inputs required to complete. It must also ensure users have real choice between ELNOs. This must be done while maintaining the security and stability of the underlying system, separate to the performance and longevity of any given ELNO.

Having an independent, credible, stable and well mandated regulatory framework will give confidence to users and businesses.

Users’ interests are served by a strong regulator to ensure operators are not able to exploit consumers, while businesses benefit from stability and the knowledge that sensible investments can expect a fair risk-weighted return without undeserved government intervention. This can be most effectively achieved by regulating these matters at the State and Territory level, where responsibility for legal titling issues will remain.

With new ELNOs entering the market, the need for regulatory change is pressing. We cannot afford to take an extended time to embed competition among ELNOs: not least of all because paper as an alternative, competition pressure, is rapidly being phased out.

Submission Issued: 8 May 2019

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Annexure A

Regulatory Working Group Terms of Reference

Purpose

The NSW Government, state and national peak industry groups, and regulatory bodies have identified the need to:

- investigate baseline eConveyancing interoperability requirements that contribute to a nationally consistent 'end-state';
- develop workstreams that can be considered with the Inter-Governmental Agreement (IGA) review; and
- focus on promoting competition, consumer choice and national consistency in the area of eConveyancing.

The Regulatory Working Group (**RWG**) has been established to provide industry and government stakeholders with a forum to present their views and provide their expertise on this complex topic. The views presented at these meetings will be available to all parties, including the IGA reviewer, ARNECC and decision-makers in each state and territory.

Desired outcome

The outcome will be an independent report from the Chair and working group participants on a baseline model for a national interoperability solution. This process is designed to help inform decisions about the way forward with interoperability. By bringing together experts to develop a much deeper understanding of an interoperability solution, and a pathway to implementing it, this process aims to achieve interoperability more efficiently, and in consideration of wide-ranging expertise.

In addition to the RWG, a Technical and Operations Working Group (together, the **Working Groups**) is examining these issues from a technical and operational perspective. The intermediate goal of both Working Groups is to identify the appropriate model for interoperability: a 'hub' or a bilateral 'ELNO to ELNO' model. Until that decision is made, the Working Groups will seek to solve issues that are common to both models.

Scope of Regulatory Working Group

The RWG has been established to support the above outcomes by:

- reviewing a liability regime;
- reviewing insurance and security issues;
- identifying principles for inter-ELNOs contracts;
- reviewing potential updates to model operating requirements (MORs); and
- considering relevant issues of the February Directions Paper.

Composition of Regulatory Working Group

Independent Chair: Dr Rob Nicholls

Secretariat: Gilbert + Tobin

Members: Nominees of the stakeholders listed in Tab A. The Chair may from time to time invite other stakeholders to nominate members to the Working Groups.

Each Member represents the stakeholder that nominated them.

Meetings

The RWG will meet approximately every three weeks, with the first RWG meeting held on 27 March 2019.

Minutes from each meeting will be circulated within 5 Business Days.

Members can nominate a proxy to attend the meetings. The nominated proxy is responsible for providing relevant comments/feedback of the Committee member they represent at the meetings.

Members may also invite other representatives from their organisation to address specific agenda items.

Materials

The Secretariat will make all supporting materials available via a HighQ site.

Reporting and publicity

The Chair will report outcomes and issues of the Working Groups to each member of the Australian Registrars National Electronic Conveyancing Committee and to the reviewer of the IGA (being Dench McClean Carlson).

This Terms of Reference may be reviewed at the request of any member.

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Technical and Operations Working Group Terms of Reference

Purpose

The NSW Government, state and national peak industry groups and regulatory bodies have identified the need to:

- investigate baseline eConveyancing interoperability requirements that contribute to a nationally consistent 'end-state';
- develop workstreams that can be considered with the Inter-Governmental Review (IGA) review; and
- focus on promoting competition, consumer choice and national consistency in the area of eConveyancing.

The Technical and Operations Working Group (**TOWG**) has been established to provide industry and government stakeholders with a forum to present their views and provide their expertise on this complex topic. The views presented at these meetings will be available to all parties, including IGA review, ARNECC and to decision-makers in each state and territory.

Desired outcome

The outcome will be an independent report from the Chair and TOWG participants on a base-line model for a national interoperability solution. This process is designed to help inform decisions about the way forward with interoperability. By bringing together experts to develop a much deeper understanding of an interoperability solution, and a pathway to implementing it, this process aims to achieve interoperability more efficiently, and in consideration of wide-ranging expertise.

In addition to the TOWG, a Regulatory Working Group (together, the **Working Groups**) is examining these issues from a regulatory and liability perspective. The intermediate goal of the Working Groups is to identify the appropriate model for interoperability: a 'hub' or a bilateral 'ELNO to ELNO' model. Until that decision is made, the Working Groups will seek to solve issues that are common to both models.

Scope of Technical and Operations Working Group

The TOWG Group has been established to support these outcomes by:

- developing business rules;
- further developing data standards, building on the material prepared by the technical working groups convened by Sympli in December 2018 – January 2019;
- considering security issues; and
- considering relevant issues of the February Directions Paper.

Composition of Technical and Operations Working Group

Independent Chair: Dr Rob Nicholls

Secretariat: Gilbert + Tobin

Members: Nominees of the stakeholders listed in Tab A. The Chair may from time to time invite other stakeholders to nominate members to the Working Groups.

Each Member represents the stakeholder that nominated them.

Meetings

The TOWG will meet approximately every three weeks, with the first TOWG meeting held on 27 March 2019.

Minutes from each meeting will be available on HighQ within 5 Business Days.

Members can nominate a proxy to attend the meetings. The nominated proxy is responsible for providing relevant comments/feedback of the Committee member they represent at the meeting. Members may also invite other representatives from their organisation to address specific agenda items.

Materials

The Secretariat will make supporting materials available via a HighQ site.

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