

NSW Government response to the

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

Issues Paper

Contact details

Name: Jeremy Cox	Position: Registrar General
Business Unit: The Office of the Registrar General	Division: Department of Customer Service
Phone: 02 9219 3600	Email: ORG-Admin@finance.nsw.gov.au

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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**).

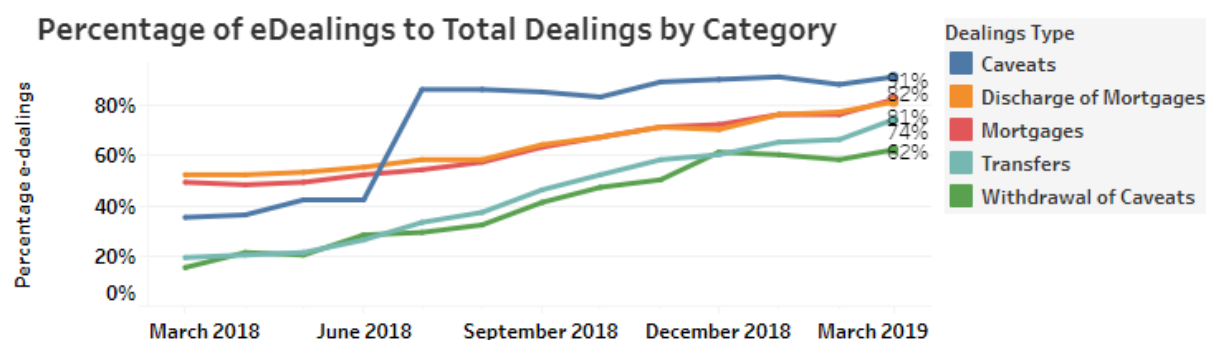
1.1 A lot has been achieved so far

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.

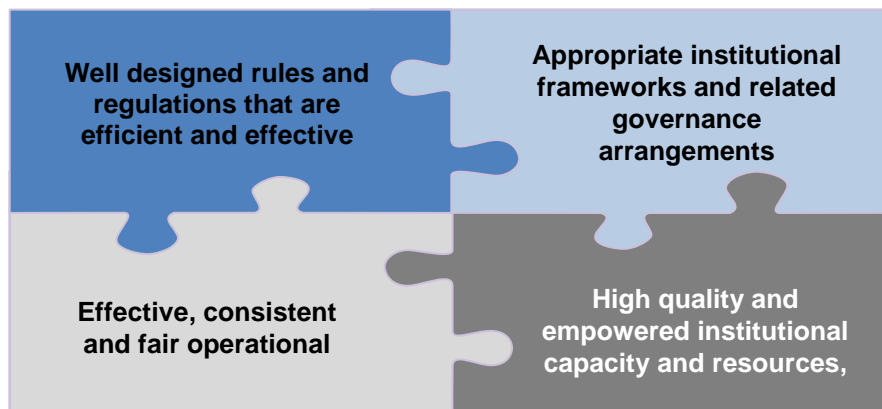
Need for a stronger governance framework for ARNECC

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

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