



20 June 2019

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Dear Anne

Further response to IGA Review Issues Paper

Following our meeting on 17 May 2019, Sympli Australia (Pty Ltd) (**Sympli**) welcomes the opportunity to provide further comment in relation to the independent review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (**IGA**) being conducted by Dench McClean Carlson (the **IGA Review**).

This letter:

- seeks to address various concerns raised by DMC in recent conversations with Sympli regarding the adoption of a regulatory framework for interoperability between ELNOs; and
- supplements Sympli's previous submission to DMC (dated 28 March 2019), in which Sympli addressed its serious concerns regarding the preliminary findings of the IGA Review and the approach taken in the IGA Review to the issue of ELNO interoperability.

1 Summary

In summary, Sympli is concerned that the IGA Review:

- effectively seeks to re-prosecute the question of ELNO competition and contemplates that ELNO competition will not arise;
- appears to assume that at most, two ELNOs will operate in the market, and suggests that a two-ELNO market may not create effective competition;
- appears to adopt a narrow view of the benefits which would be brought about by ELNO competition without recognising non-price benefits to consumers in the form of innovation, choice, efficiency, resilience, reduction in risk and therefore in turn, diminishes the value of requiring interoperability in order to facilitate ELNO competition; and
- identifies various challenges to achieving effective interoperability between ELNOs but does not express confidence that such issues can or should be overcome.

In response, Sympli submits that:

- **A degree of ELNO competition is a given**, since Sympli has received Category 2 approval from ARNECC and commenced operations in Victoria and Queensland. In that context, the question for the IGA Review (in accordance with its scope) is to *'advise what changes are needed to support a competitive electronic network lodgment operator market'*.

- **In a multi-ELNO market, interoperability is essential to allowing consumer choice** – ie. it is the only viable option to address the desire of market participants for choice between ELNs, without being forced to use a particular ELN.
- **Effective ELNO competition is achievable** through the implementation of effective interoperability between ELNOs, which would reduce the network effects enjoyed by the incumbent which serve as a barrier to entry. Competition enabled by interoperability could also be supported by the potential availability of ‘off-the-shelf’ financial settlement services on a commercial basis to prospective new entrant ELNOs.
- **Effective ELNO competition will promote the welfare of consumers**, not only by ensuring efficient ELNO prices to subscribers but also by incentivising improvements in service quality, promoting innovation and removing single party risk. The benefits of ELNO competition are substantial and should be recognised by the IGA Review.
- **Interoperability cannot be brought about by ELNOs without government intervention.** It must be developed with industry and regulators and implemented by government. As the incumbent which benefits from the lack of interoperability and its associated network effects, the incumbent has no incentive to facilitate interoperability with other ELNOs in the absence of government intervention.
- **Regulating to implement interoperability is consistent with competition policy**, including the Intergovernmental Agreement on Competition and Productivity of 2016.
- **The risks and challenges of interoperability have been overcome in other markets, which should give DMC the confidence that interoperability between ELNOs can be safely and effectively implemented.** This is further supported by the findings of the industry-wide interoperability working groups facilitated by Independent Chair, Dr Rob Nicholls (**Interoperability Working Groups**).
- **Sympli is committed to working through the technical and operational challenges of implementing interoperability with the industry in the Interoperability Working Groups, or similar industry forums established by ARNECC.** Sympli does not suggest that the IGA Review needs to accept the recommendations of the Interoperability Working Groups verbatim, or that those recommendations will resolve all issues related to interoperability. Rather, Sympli submits that the IGA Review should support the efforts of the Interoperability Working Groups and consider the outcomes of that process as a key input to the IGA Review.
- **To the extent that there are risks related to interoperability not addressed in the Interoperability Working Groups, Sympli invites DMC to recommend that ARNECC engage with industry to address those risks and develop a model of safe and effective ELNO competition with appropriate interoperability arrangements.** It is important that the momentum of the investigation into interoperability is maintained, so even if the vehicle used to investigate interoperability changes, DMC should recommend to ARNECC that it addresses the question as a matter of urgency.
- **An appropriate legal framework for safe and effective competition** would combine upfront regulation and negotiation with a regulatory backstop of arbitration. Such a framework should be adopted in a timely and practical way, given the importance and urgency of implementing competition. This objective should not be delayed by the suggestion of an all-encompassing regulator of ELNOs.

Sympli sets out its views in further detail below.

2 Interoperability is essential to consumer choice in a multi-ELNO market

In a multi-ELNO market, interoperability is the only viable option which allows subscribers to choose their preferred ELNO.

In the absence of interoperability, a market with multiple ELNOs will require rules for determining which ELNO is to be used in any transaction involving multiple parties. Such rules would effectively require a degree of 'multi-homing', where market participants are forced to use the ELNO preferred by another party in particular transactions and must therefore be ready to use any ELN (and pay the establishment costs of doing so) in order to transact with other parties in a multi-ELNO market. Such rules would also result in market participants being forced to use ELNs which are less efficient or more costly for them (and their clients – the end consumer), instead of their preferred ELN.

An interoperable market would not face these issues. Sympli's view, after having conducted an extensive evaluation, is that interoperability is the only viable option to address the desire of market participants for choice between ELNs, without being forced to use a particular ELN.

The IGA Review Issues Paper acknowledges the problems created in a 'multi-homing' market and appears to acknowledge that interoperability would resolve those problems. However, the Issues Paper also appears to express hesitation regarding whether interoperability could be effectively implemented. It states:

Conveyancing practitioners support competition and have welcomed the recent preliminary entry of a second ELNO, Sympli, into the market. Most conveyancers and legal practitioners do not want to learn two systems but there is significant uncertainty about what an interoperability model would look like. To date ELNOs have not identified a detailed model for interoperability but there will be additional risks and vulnerabilities with multiple parties involved in transactions.¹

Sympli's firm view is that interoperability can be effectively implemented and therefore that the problems arising from a 'multi-homing' model can be avoided. Sympli addresses this further below.

3 Effective ELNO competition is achievable

Sympli considers that effective ELNO competition is achievable, provided that interoperability is mandated and effective. Further, the cost of new entry is not prohibitive, and the availability of 'off-the-shelf' financial settlement services on a commercial basis to prospective new entrant ELNOs will facilitate further new entry and increase the likelihood that the market develops beyond a two-ELNO market. We address these points below.

3.1 Effective ELNO competition is achievable through interoperability

Sympli has commenced operations in Victoria and Queensland and plans to begin operations in NSW, South Australia and Western Australia in 2019. We expect that other competing ELNOs may come to operate nationally and provide a full range of e-Conveyancing services, provided that interoperability is mandated and effective. Interoperability is essential for ensuring effective competition between ELNOs.

Effective interoperability would promote competition by reducing the substantial network effects enjoyed by the incumbent. That is, effective interoperability would reduce the structural bias in the market to gravitate towards the ELNO with the largest subscriber base, regardless of the cost or quality of service of that ELNO. Such network effects would otherwise be a barrier to entry and expansion and would act to entrench the position of the dominant provider.

¹ IGA Review, *Issues Paper* at 1.15.

So much is acknowledged in the IGA Review Issues Paper, which states:

Interoperable ELN characteristics: ...

- *Each participant is free to choose which ELN it uses*
- *Removes barrier to competition created by closed network effects*²

The importance of interoperability for achieving competition is also acknowledged by:

- ACCC, which has stated that:

*In the context of electronic conveyancing, the ACCC considers interoperability to be an important pro-competitive feature. Interoperability is essential to facilitating the entrance of new ELNOs into the market and can prevent an incumbent from becoming further entrenched as the dominant service provider in the market due to network effects. In the absence of interoperability requirements, a new ELNO entering the market will face barriers to entering the electronic conveyancing market.*³

- Independent Pricing and Regulatory Tribunal of NSW (IPART), which has stated that:

*Introducing interoperability would reduce the network effects in the eConveyancing market, making it more viable for ELNOs with smaller user bases to compete.*⁴

- NSW Government, as indicated by the NSW Registrar General:

*[Without interoperability], 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... [this] is likely to adversely impact the competitive dynamics in the marketplace, and in particular the entry of new ELNOs.*⁵

- Law Council of Australia, which as stated that:

With the progress of other entities seeking approval to operate as an ELNO, the issue of interoperability is now critical. While the importance of interoperability is generally acknowledged, the Law Council is concerned at the lack of visible progress towards an interoperability framework.

*A lack of interoperability has the potential to negate the efficiencies of electronic conveyancing and to create unacceptable administrative costs for practitioners, financial institutions and clients. Failure to deal with the issue of interoperability has the potential to derail the substantial progress that has been made to date in the implementation of electronic conveyancing. While the Law Council is aware of the substantial obstacles to achieving interoperability, the reality is that these obstacles must be overcome before any other ELNOs commence operations. If ARNECC is not minded to address interoperability issues as a matter of urgency, the Law Council will consider advocating to governments, through the Council of Australian Governments, to address these issues before the system becomes too unworkable and is rejected by practitioners, financial institutions and clients.*⁶

- NSW Law Society, which has stated that:

*...an interoperability solution is required in the near future for both our members and for new ELNOs.*⁷

² IGA Review, *Issues Paper* at 5.97.

³ ACCC, Letter to NSW Registrar General, *ACCC views on interoperability*, 13 February 2019.

⁴ IPART, Review of the pricing framework for electronic conveyancing services in NSW, *Discussion Paper*, p 26.

⁵ Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, pp 7-8.

⁶ Law Council of Australia, Letter to Ms Jean Villani Chair ARNECC, 4 October 2018

⁷ Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, p 7.

- Law Institute of Victoria, which has stated that:
(W)ere ARNECC able to address these (interoperability) issues, many of the other issues raised in the industry forum would be largely resolved by the emergence of competition within the market (such as in relation to pricing and compliance).
- Australian Institute of Conveyancers (National), which has stated that:
*The AIC, in principle, is supportive of achieving interoperability.*⁸
- Australian Institute of Conveyancers WA, which has stated that:
*[AIC WA is] highly supportive of interoperability as a means of driving competition in the ELN marketplace.*⁹
- Australian Banking Association, which has stated that:
[ABA] Members also agree with the view that an effective system for interoperability is essential for a market that has two or more ELNOs.
*A competitive ELNO market is likely to increase market resilience and, as the ACCC has noted, interoperability could be an effective lever to ensure benefits of competition are realised, while simultaneously mitigating potential adverse implications such as market fragmentation and increased operational costs for participants.*¹⁰

In the absence of effective interoperability, Sympli expects that the incumbent will continue to enjoy a dominant position in e-Conveyancing for the foreseeable future, to the detriment of subscribers and consumers more broadly.

3.2 The cost of new entry is not prohibitive

The IGA Review Issues Paper estimates that onboarding costs for a new ELNO to connect to Land Registries, Revenue Offices, Lenders, the RBA and other ELNOs would be between \$20 million to \$200 million.

Through discussions with DMC, we have come to understand that these estimates may include both the actual costs of a new ELNO connecting for payments purposes to those institutions and discretionary costs that could be incurred by those institutions such as the costs of workspace integration and staff training (noting that these costs would not need to be incurred in an interoperable ELNO market). Sympli considers that, in assessing the likelihood of new entry, it is important to distinguish between those types of costs – that is, to distinguish between the entry costs faced by new ELNOs and other costs incurred by institutions at their own commercial discretion (i.e. to deliver efficiencies). To the extent the estimates in the Issues Paper relate to payments connection costs faced by a new ELNO, Sympli confirms that these estimates are significantly overstated. Based on our experience to date as the only new entrant currently making these connections, we estimate the cost of these connections will be below the bottom end of DMC's estimated range. Further, Sympli expects those costs will be substantially less for future entrants, particularly if new entrants acquire 'off-the-shelf' financial settlement services as described below.

3.3 The availability of 'off-the-shelf' financial settlement services will promote new entry

Competition enabled by interoperability could be supported by the potential availability of 'off-the-shelf' financial settlement services on a commercial basis to prospective new entrant ELNOs.

⁸ Australian Institute of Conveyancers, Letter to NSW Registrar General, *Re: NSW Government & Industry eConveyancing Interoperability Forum*, 28 February 2019

⁹ Australian Institute of Conveyancers WA, Letter to NSW Registrar General, 28 February 2019

¹⁰ Australian Banking Association, Letter to NSW Registrar General, *Directions Paper on proposed eConveyancing interoperability regime*, 1 March 2019

The potential availability of these services may arise given the circumstances set out below and as depicted in the flow chart at **Annexure 1**:

- In order to undertake financial settlement through the Sympli platform, Sympli will outsource parts of the financial settlement process to ASX Financial Settlements Pty Limited (**ASXFS**), a subsidiary of ASX. ASXFS will provide financial settlement management services to Sympli, including by acting as a 'batch administrator' to submit batches of net inter-bank positions to be settled, using the batch settlement facility in the Reserve Bank Information and Transfer System (**RITS**). ASXFS has completed testing of connections with the RBA and its first bank client, and is currently establishing the remaining connections and gaining the licences necessary to establish its financial settlement infrastructure for Sympli.
- ASXFS's arrangements with Sympli are non-exclusive, meaning that ASXFS can offer these services to third parties, including potential new entrant ELNOs, on commercial terms. As a result, potential new ELNOs could establish a business case based on a minimum set of commercial arrangements / connections with other ELNs (ie. the Interoperability API), State land registries and revenue offices, and ASXFS. Such new entrants would not need to separately connect with the RBA and integrate with financial institutions – that could be done by ASXFS.
- In response to ASXFS offering such services, the incumbent may also be commercially incentivised to provide such services to new entrants, in competition with ASXFS. Competition on price and quality at this wholesale level may further facilitate new entry and competition between ELNOs.

New entry may also come about through the potential for ELNOs to resell or white-label the services of Sympli, the incumbent or others to subscribers, in the same way that mobile virtual network operators (MVNOs) supply mobile telecommunications services to consumers over the networks of the mobile network operators (MNOs) Telstra, Optus and Vodafone.

Importantly, the potential availability of 'off-the-shelf' financial settlement services may only ever be achieved by supporting Sympli and ASXFS to continue to invest in their services through the establishment of effective ELNO competition. DMC may also consider that an industry structure that includes competing robust 'off-the-shelf' settlement solutions through the RBA could help address the regulatory gap raised in the IGA Review Issues Paper, in relation to ELN financial settlement.

4 The benefits of ELNO competition and interoperability

4.1 The benefits of ELNO competition

Paragraphs 5.72 to 5.93 of the IGA Review Issues Paper appear to suggest that the benefits of competition between ELNOs are limited to price reductions and that these benefits should not come at the expense of service quality. In particular, the Issues Paper states:

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 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.¹¹

In addition, there is a reference in Appendix II of the Issues Paper to competition between ELNOs having the benefit of motivating innovation.

¹¹ IGA Review, *Issues Paper* at 5.78 – 5.79.

In response, Sympli submits that competition between ELNOs will naturally benefit consumers through lower prices, protecting consumers from potential monopolistic behaviour of the incumbent. However, competition will also bring substantial other benefits, as ELNOs will be commercially incentivised to maintain high standards of service quality and to innovate and continually improve their services, in addition to competing on price.

This has been demonstrated by the incumbent's recent product improvements, which could be seen as a response to the threat of competition introduced with Sympli's entry into the ELNO market. In particular:

- changes to the incumbent's platform user interface that reflect features first demonstrated to the industry by Sympli;
- workflow improvements in the incumbent's platform, such as "PEXA Flow", which reflect process improvements first demonstrated to the industry by Sympli and which result in efficiency gains for subscribers;
- introduction of "PEXA plus" with interactive workspace overviews, improvement to workspace access and colour coding workspaces, which reflect features first demonstrated to the industry by Sympli.

Sympli believes that continued and effective competition in the ELNO market will incentivise ELNOs to further differentiate themselves from each other, offering consumers choice and providing new services to meet specific consumer demands. Sympli has identified substantive points of differentiation that it has implemented, or is implementing, into its ELN and services and which address the needs of specific user groups, eg. financial institutions and large law practices.

Some examples of how Sympli is delivering benefits to users and consumers include the following (non-exhaustive) benefits:

- Sympli trials have concluded that workspace and document creation is 25-50% faster in Sympli than the incumbent, offering substantial efficiencies for users.
- Sympli has received feedback from several financial institutions that the Sympli ELN will offer substantial benefits to the incumbent. One example is Sympli's flexible permission structure, which allows a subscriber to configure the Sympli ELN to suit its preferred processes, rather than the subscriber needing to create processes to fit the incumbent's platform.
- Sympli has developed features, such as auto-balance, which will allow users to reduce the number of times they need to interact with the Sympli ELN, by relying on a set of workspace specific limits.
- Sympli is currently building a comprehensive integration layer for connection to bank mortgage origination platforms, practice management systems and document management systems. Based on our research, we understand that Sympli's approach is significantly more effective for users as it is easier to implement and deals with a number of 'pain points' that exist in the incumbent's latest integration APIs.
- Sympli is developing differentiated functionality for practitioners who compete bulk / 'off-the-plan' settlements, in response to many significant 'pain points' in the incumbent's platform.
- Sympli intends to compete with the incumbent in relation to risk allocation. This could include in relation to the vendor guarantee. We understand DMC has views on this issue and we welcome further discussions with you.

- Sympli has identified options to reduce the risk of settlement funds being disbursed to the wrong bank account. We are confident that ELNO competition will help drive a faster and more robust solution to this industry 'pain point'.

Effective ELNO competition will also improve the resilience of the market by eliminating the single point of failure. That is, subscribers have the choice to use another ELN if their ELN has persistent or severe reliability issues.

It is Sympli's view, supported by the ACCC, that competition is far more effective than regulatory intervention, in supporting innovation and reducing risks and costs to consumers.

To the extent that there are risks and challenges in facilitating effective ELNO competition (including through requiring interoperability), Sympli's firm view is that those can be overcome and the benefits to consumers of competition brought about, as discussed below in Section 6.

4.2 Other benefits of interoperability

In addition to facilitating consumer choice and ELNO competition, interoperability will also improve market resilience. For example, in extreme circumstances where an ELN is unable to perform lodgment or settlement, ARNECC / the Registrar General could use an interoperability service between ELNs to temporarily redirect transactions to an alternative ELN without additional effort from market participants (ie. change the lodging ELNO to the ELNO that is available). So much is acknowledged in Appendix II of the Issues Paper, which notes that a benefit of having multiple interoperable ELNOs would be the existence of an '*Alternative available in the event of single ELN failure*'.¹²

In sum, interoperability would allow consumers to capture the full financial and operational savings offered by e-Conveyancing.

5 Implementing interoperability requires Government intervention and is consistent with competition policy

5.1 Implementing interoperability requires Government intervention

Interoperability cannot ultimately be brought about by ELNOs without government intervention. Rather, interoperability must be developed with industry and regulators and implemented by government. As the incumbent which benefits from the lack of interoperability and its associated network effects, the incumbent has no incentive to facilitate interoperability with other ELNOs in the absence of government intervention.

So much is reflected in the NSW Government's view:

*Clearly, in a market where more than one platform exists, it is incumbent upon government to ensure competition and interoperability are present.*¹³

This is also reflected in the views of the ACCC, which has stated:

...an incumbent ELNO has little incentive to voluntarily develop interoperability arrangements. In an emerging market such as the e-conveyancing market, established ELNOs will have an incentive to refuse to provide interconnection to new entrants, or provide it on unreasonable terms...

¹² IGA Review, *Issues Paper* at A2.9.

¹³ The Hon. Victor Michael Dominello MP, Minister for Finance, Services and Property, *Public priority in e-conveyancing*, *The Australian*, 23 November 2018.

See also: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, pp 5-8.

For interoperability to overcome these incentives and effectively address the network effects problem, regulatory measures should be in place to facilitate the establishment of effective interoperability on reasonable terms...¹⁴

5.2 Requiring interoperability is consistent with competition policy

Government action to implement interoperability is entirely consistent with government competition policy. For example, doing so would be consistent with the Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms, as agreed in 2016. That agreement:

- was implemented following the recommendations of the Harper Competition Policy Review conducted over 2014-15 at the direction of the Commonwealth Government;
- notes it builds upon on the achievements of previous Council of Australian Governments (COAG) agreements that supported the National Competition Policy and subsequent reforms, including the Competition Principles Agreement of 1995;
- provides for the relevant governments to prioritise reforms at their discretion to remove unnecessary regulatory barriers to competition;
- provides that, subject to a public interest test, all levels of government will be guided by certain 'competition principles', including that:
 - competition policies, laws and institutions should promote the long-term interests of all Australians;
 - regulatory frameworks and government policies binding the public or private sectors should not unnecessarily restrict competition.¹⁵

Relevantly, in its final report, the Harper Competition Policy Review stated that:

Pro-competitive regulation, combined with governments' general deregulation agendas, will provide a more efficient and effective marketplace that offers consumers better value and choice...

...Competition is desirable not for its own sake but because, in most circumstances, it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end.¹⁶

6 Developing an industry operating model: safe and effective competition and interoperability can be achieved

6.1 Principles for a competitive operating model

The IGA Review Issues Paper sets out preliminary objectives for an industry operating model in a multi-ELNO market, being to:

- (a) maximise service quality and industry productivity;
- (b) minimise costs to consumers and taxpayers;
- (c) minimise risk to titles security; and
- (d) minimise risk to financial settlement.

In relation to these principles, Symplici observes that they should be considered holistically, with a balanced approach in assessing the benefits and costs and to align risks with a model that

¹⁴ ACCC, Letter to NSW Registrar General, *ACCC views on interoperability*, 13 February 2019.

¹⁵ See: Intergovernmental Agreement on Competition and Productivity, 2016, available here:

<https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-competition-and-productivity-enhancing-reforms>

¹⁶ Harper Panel, *Competition Policy Review: Final Report*, March 2015, pp 116, 397.

achieves *safe and effective* competition¹⁷. Further, Sympli submits that DMC should take into account the Competition Principles in Part 3 of the Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms of 2016.

6.2 The technical and operational challenges of interoperability can be overcome

To the extent that there are risks and challenges in facilitating effective ELNO competition (including through requiring interoperability), Sympli's firm view is that competition and interoperability can be achieved in a safe and effective manner, while maintaining the high standards set for ELNOs in the Model Operating Rules (**MOR**).

Sympli is committed to working with the industry through the technical and operational challenges of implementing interoperability in the Interoperability Working Groups, or similar industry forums established by ARNECC. Sympli considers there is great value in the outcomes from the Interoperability Working Groups. We note that through this process, the following technical and operational outcomes relevant to interoperability have been considered:

- Process flows, data standards and rules can be defined for the exchange and synchronisation of information between ELNs under different interoperability models - hub and spoke model or a direct interconnection model. This would also ensure the integrity of subscriber's information within an ELN can be maintained as a subscriber can be limited to only updating data for which it is responsible in the ELN to which it is subscribed. There is no opportunity to update another subscriber's data or to gain access to another ELN to which they are not subscribed in an interoperable transaction.
- The ELN (**Lodging ELN**) responsible for the lodging of registry instruments and financial settlement for an interoperable transaction can be readily determined based on clear, simple and objective criteria. The role of the Lodging ELN means that existing payments infrastructure with financial institutions is not impacted and the registration of land titles documents would remain streamlined in one ELN.
- Data standards should be designed to ensure that subscribers would have no less transparency to information, and the same restrictions on information, than is currently available to subscribers when the transaction is on the same ELN. Development of an appropriate governance model can ensure updates to this are managed in a controlled manner.
- There are existing data exchange interfaces in existence in the e-Conveyancing landscape, which can be utilised for interoperability. For example:
 - Interoperability API security can be based on existing security practices currently required under the MOR (e.g. IP whitelisting, multi-factor authentication, encryption, authentication with digital signatures).
 - Interoperability data model can leverage the definitions already in place in the National E-Conveyancing Data Standard (NECDS) or Revenue Office Messaging Service (ROMS).
 - Registry and Stamp Duty practices are defined and common across ELNs.
- Cybersecurity risks associated with lodging documents and financial settlement under interoperability were no greater than those risks that exist in the current ELNO environment.

¹⁷ The achievement of safe and effective competition was the focus of the Council of Financial Regulators in its review of competition in clearing Australian cash equities, in which it found that appropriate interoperability arrangements were a minimum condition for safe and effective competition (discussed below).

- Insurance could provide cover for risks under an interoperability risk model that allocated liability to the ELNO 'at fault' and that allowed for subscribers to claim compensation from its own ELNO regardless of whether that ELNO was 'at fault'.

Sympli does not suggest that the IGA Review needs to accept the recommendations of the Interoperability Working Groups verbatim, or that those recommendations will resolve all technical issues related to interoperability and present a complete answer to the issues relevant to the IGA Review. Rather, Sympli emphasises the position set out in its initial submission of 28 March 2019, being that DMC should consider the outcomes of the Interoperability Working Groups process as a key input to the IGA Review.

To the extent that there are risks related to interoperability which are not addressed in the Interoperability Working Groups, we invite DMC to recommend that ARNECC engage with industry to address those risks and develop a model of safe and effective ELNO competition with appropriate interoperability arrangements.¹⁸ Sympli does not think that task is beyond DMC and ARNECC. Rather, Sympli considers that task is entirely achievable. That is, with determination and commitment and momentum, the outcomes of the Interoperability Working Groups can feed into the IGA Review, which in turn can feed into the development by ARNECC of a safe and effective model of ELNO competition for the benefit of consumers. Sympli would welcome DMC's support of that endeavour.

6.3 That safe and effective competition is achievable is recognised in other contexts

That safe and effective competition between complex networks is achievable can be seen in other contexts.

For example, interoperability exists in the mobile telecommunications context in the form of 'any-to-any connectivity', which allows end-users to communicate with each other regardless of the mobile network to which they are connected. This is facilitated by the ACCC's declaration of 'mobile terminal access services' under the Telecommunications Access Regime, which allows access seekers to obtain access to those services on reasonable terms.

As a further example, Sympli notes that the review of competition in clearing Australian cash equities carried out by the Council of Financial Regulators and the ACCC in 2015:

- favoured a policy approach that is open to competition;
- acknowledged that competition in clearing could have cost, risk and efficiency implications for the functioning of markets, financial stability and access for unaffiliated market operators and clearing and settlement facilities; and accordingly
- recommended legislative changes to facilitate a set of *minimum* conditions for *safe and effective competition* in cash equity clearing, including conditions requiring appropriate interoperability arrangements between the incumbent clearing and settlement facility and competing cash equity central counterparties.¹⁹

The Commonwealth Government has since endorsed those conclusions and the Council of Financial Regulators has published a policy statement on the proposed minimum conditions for safe and effective competition, including appropriate interoperability arrangements.²⁰ Further, Sympli understands that the Council of Financial Regulators and the ACCC have been working with the government to develop legislative changes to support that policy.

¹⁸ As an example, one issue which could be considered in that process is whether there is a need for an enhanced residential guarantee by ELNOs.

¹⁹ See: <https://treasury.gov.au/consultation/review-of-competition-in-clearing-australian-cash-equities>

²⁰ See: <https://www.cfr.gov.au/publications/policy-statements-and-other-reports/2016/minimum-conditions-safe-effective-cash-equity/>

This is a clear demonstration of the importance of interoperability to competition and the fact that potential issues with interoperability can be overcome in order to promote competition in important markets. On the same basis, Sympli considers that interoperability is essential (or a 'minimum condition') to effective competition between ELNOs and is confident that any challenges to implementing interoperability could be overcome in order to bring about competition for the benefit of consumers.

7 An appropriate legal framework for interoperability and competition

In this Section, Sympli addresses the key elements of a legal framework for safe and effective interoperability and potential paths for implementing such a legal framework. Sympli emphasises that implementing such a framework should not be delayed by the suggestion that there need be an all-encompassing regulator of ELNOs.

7.1 A legal framework for interoperability

Sympli agrees with the ACCC that an appropriate regulatory framework for ELNO interoperability would combine upfront regulation, negotiation of interconnection agreements between ELNOs and a regulatory backstop of arbitration. In particular, the ACCC has suggested that:

- upfront regulation would require all ELNOs to have in place baseline interoperability functionality (which will depend on the interoperability model adopted), and to negotiate interconnection agreements with other ELNOs in good faith, on reasonable terms and on a non-discriminatory basis;
- an arbitration mechanism could be used when ELNOs are not able to agree the terms of interconnection agreements which are not covered by the upfront requirements (the baseline interoperability functionality). This mechanism could be conducted by an independent commercial arbitrator or a regulator.²¹

Importantly, Sympli considers that the upfront regulation would stipulate mandatory provisions for interconnection agreements between ELNOs, including provisions relating to key technical, governance and operational aspects of interoperability such as the allocation of liability between ELNOs and a regime for resolving disputes arising in relation to interoperable transactions. Sympli would be happy to engage further with DMC on the detail of these provisions.

Such a legal framework could be achieved in a number of ways, as discussed below.

7.2 Paths to implementing a legal framework for interoperability

Two options for implementing a legal framework for interoperability are canvassed in the Directions Paper issued as part of the Interoperability Working Groups.²² Those options are to implement a legal framework for interoperability:

- as conditions of approval to operate as an ELNO; or
- as provisions of the Operating Requirements made by the Registrar in each State and Territory, based on the MOR determined by ARNECC.

In addition, other potential options could involve:

- adopting national uniform legislation – potentially as an amendment to the Electronic Conveyancing National Law as it applies in each State and Territory; or
- the Commonwealth regulating to implement a mandatory industry code under Part IVB of the *Competition and Consumer Act 2010* (Cth).

²¹ See: ACCC, Letter to NSW Registrar General, *ACCC views on interoperability*, 13 February 2019.

²² See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, pp 29-30.

Sympli submits that, given the importance and urgency of implementing interoperability, it would be appropriate to adopt the most timely and practical option for implementing a legal interoperability framework, such as through the conditions of approval or amendments to the MOR. Under such a system, the backstop role of arbitrator if ELNOs could not negotiate an interconnection agreement would be filled by an independent commercial arbitrator.

This is consistent with the views of the ACCC, which has stated:

...[such regulatory measures] should be in place prior to new ELNOs entering the market, to ensure they are able to compete effectively at the outset...

...[the arbitration mechanism] can be conducted by an independent arbitrator rather than by the regulator, and in a commercial manner to facilitate swift and targeted resolution of disputes.²³

Over time, the industry could also work towards a more detailed legal framework implemented through an amendment to the Electronic Conveyancing National Law, under which the backstop role of arbitrator if ELNOs could not negotiate an interconnection agreement could be filled by a national regulator such as the ACCC, in the same way that the AER is the regulator in each state which has adopted the National Electricity Law. That would be an appropriate form of regulation, given that ELNOs operate (or will operate) on a national basis, and would ultimately benefit from consistent national regulation of interoperability matters.

The ACCC would ultimately be an appropriate national regulator for such matters, as the existing national competition regulator with significant experience in infrastructure regulation, interoperability issues and access disputes. However, Sympli emphasises that a national regulator of interoperability disputes (such as the ACCC) is a long-term objective, which should not hinder the adoption of a timely and practical option for a legal interoperability framework for the short to medium term.

Further, the implementation of safe and effective interoperability should not be delayed or complicated by the suggestion that there must be an all-encompassing regulator of ELNOs, as discussed below.

7.3 Interoperability should not be delayed by the suggestion of an all-encompassing regulator of ELNOs

Chapter 6 of the IGA Review Issues paper sets out a range of issues for an ELNO governance and regulatory framework to address, and states that ARNECC does not have all the skills necessary to regulate the wider business environment in which the ELNO operates.

The Issues Paper then sets out three options for e-conveyancing governance bodies, being: (a) the status quo; (b) a new body to advise ARNECC; and (c) a new national regulator. In respect of the 'national regulator' option, the Issues Paper states:

- there does not appear to be any existing regulator that is a good fit for all aspects of eConveyancing; and
- some stakeholders nominated the ACCC as the most appropriate regulator but acknowledged the ACCC was not equipped to regulate land titling matters.

In response, Sympli emphasises that there is no need for an all-encompassing regulator of ELNOs – and in particular, it is not necessary that any regulator of interoperability issues (or an arbitrator for where ELNOs cannot negotiate interconnection agreements) also be the regulator of other aspects of ELNO operations such as technical matters or titling issues.

Rather, it is efficient and normal for a complicated industry to be subject to multiple regulators. For example, ELNOs are currently regulated by ARNECC (in relation to land titling matters), and

²³ ACCC, Letter to NSW Registrar General, *ACCC views on interoperability*, 13 February 2019.

the ACCC (under general competition law) and participants carrying out financial settlement process for an ELNO are regulated by APRA, ASIC and RBA. Similarly, under the model for safe and effective competition in clearing cash equities recommended by the Council of Financial Regulators, clearing agencies will be regulated by:

- ASIC and the RBA – in respect of various matters including licencing, financial regulations and operational standards; and
- the ACCC – as the arbitrator of interoperability access disputes, and also in its normal role as the economy-wide competition regulator.

In that context, the implementation of safe and effective interoperability should not be delayed or complicated by the suggestion that there should be an all-encompassing regulator of ELNOs. Instead, as indicated above, the achievement of safe and effective interoperability is urgent and necessary for competition between ELNOs, and could potentially be achieved through licencing conditions or amendments to the MOR.

Further, Symplic submits that DMC should recommend that ARNECC engage with industry to develop a model of safe and effective competition (with input from the Interoperability Working Groups) and should also recommend to ARNECC the appropriate regulatory changes needed to support a competitive ELNO market and ELNO interoperability. Symplic considers that such an approach is required by the scope of the IGA Review, in which ARNECC directs the IGA Review to consider what regulation is appropriate to *'support a competitive ELNO market and the interoperability of ELN systems'*.

Please feel free to contact me on 0407 406 014 if you would like to discuss any of these matters further.

Yours sincerely



David Wills
Chief Executive Officer

Attachment

Annexure 1: Potential 'off-the-shelf' financial settlement services structure

