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# ARNECC COMMENT ON IGA DRAFT FINAL REPORT

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## Introduction

In late 2018, ARNECC commissioned Dench McClean Carlson (DMC) to undertake an independent review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA). The IGA has provided the regulatory framework for implementing the Electronic Conveyancing National Law (ECNL) since 2011/12.

The review scope for the IGA review required DMC to:

- Assess whether the IGA has met its objectives of establishing a framework to facilitate the implementation and ongoing management of a regulatory framework for national electronic conveyancing.
- Provide advice on whether existing governance and regulatory arrangements are fit-for-purpose for the future and provide appropriate accountability to participating Governments
- Advise what changes are needed to support a competitive electronic network operator market

ARNECC wishes to acknowledge the extent of research and analysis undertaken by DMC. The report contains valuable findings, recommendations and options for improvement. The following provides areas for further thought and consideration.

## Draft Recommendations Comment

1. **Appropriate national regulators i.e. the Council of Financial Regulators (“CFR”) and ACCC be requested to develop the minimum conditions for safe and effective competition for eConveyancing leveraging off the work done in relation to the ASX.**

**Any investigation by the national regulators involve consultation with the affected regulators. These are the registrars and revenue offices currently actively using eConveyancing, and others that may be likely to progress in the near future.**

**They consider the work done to date in this IGA Review, the work done by the Working Groups in the NSW interoperability process, and the outcome of the IPART pricing review regarding costs of achieving interoperability. Further consultation should occur with identified subscribers in all active jurisdictions and the financial institutions that facilitate payment and settlement.**

**There be a two-year moratorium on the issue of any further approvals for ELNOs while the national regulators develop the minimum conditions and interoperability models are assessed against in accordance with those conditions.**

The further development of the regulatory framework for electronic conveyancing should be achieved through a collaborative approach with key stakeholders and regulatory bodies.

DMC may wish to consider providing further information to help better understand the roles and functions of the relevant regulatory bodies who DMC recommend be involved in the process.

The recent work undertaken for the IGA Review, the NSW Interoperability Report, the NSW IPART report, and any findings emerging from any other work or study should be utilised to this end.

With respect to a moratorium, the market, including regulators may have concerns of any action that is, or is seen to be:

- a) presenting a barrier to new players entering the market
- b) anti-competitive by protecting the incumbent(s)
- c) in other ways opaque to external parties.

DMC could consider providing further clarity in the report as to how a moratorium could be put in place and the legal basis that supports such a recommendation.

**2. The establishment of a new corporate body to provide nationally focused skills and resources, and that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and perhaps subscribers meeting the direct costs attributed to oversight of their operations.**

As per the IGA review scope, ARNECC seeks to understand what role this new corporate body would have (regulatory, coordination or otherwise) and the resources and technical skills required to manage any proposed changes to the regulatory regime as well as potential sources of funding. Further, DMC may wish to highlight the evidence that demonstrates why the establishment of a new corporate body is proposed as the recommended way forward.

With respect to funding, ARNECC is keen to better understand and seeks clarity on:

- a) what funding model DMC deems would be appropriate, cost recovery or otherwise, and whether existing legislation enables the proposed model?
- b) what is a sustainable annual resourcing base?
- c) what are the approximate contributions from specific funding sources to meet this base?
- d) how would differences in jurisdictional size and electronic conveyancing markets be managed on an ongoing basis?

**3. Changes to the category One approval process for applicant ELNOs so that business plan requirements include evidence that costs are understood, and adequate finances are in place, including those costs to meet all regulatory requirements and payment connections to financial institutions. It may be sensible to provide the information to the identified national regulators and the appropriate revenue office(s) to get their assessment on whether the financial allowance made is adequate.**

ARNECC has since published a fact sheet which should assist.

DMC could consider providing additional detail and clarity on this recommendation to provide industry with the direction it needs.

- 4. The approval process includes further requirements for Category Two approval including:**
- i) Approval from RBA that financial settlement system proposed meets RBA requirements**
  - ii) Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments**
  - iii) Approval from all appropriate revenue offices**
  - iv) Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law**
  - v) Confirmation from financial institutions that appropriate payment connections are in place**
  - vi) It may be appropriate that these are separated into a new Category Two (A).**

The proposed role of the ACCC as it relates to this recommendation and the appropriate legislation is unclear. Further information would be helpful to understand the role of the ACCC in the Category 2 approval process and how this fits within the existing competition and consumer law and whether ACCC believes this to be appropriate.

Key stakeholders may find it helpful to have a visual representation of the:

- a) responsibilities of RBA, ASIC, ACCC, and any other relevant regulatory body that DMC assesses should be involved
- b) gaps or exclusions that may require legislative reform and/or Ministerial direction to agencies.

ARNECC encourages DMC to be proactive in soliciting a response from each regulator in relation to this draft recommendation, and to providing additional content and direction on the proposed role of each regulator in the final DMC report.

- 5. An enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach.**

DMC could consider further information and provide direction on how this might occur for both Subscribers and ELNOs. DMC may also wish to explore the following areas further:

- a) the institutional arrangements
- b) the specific penalty regime
- c) how penalties would be applied
- d) how enforcement might occur.

Additionally, how this regime may work in conjunction with existing powers granted under the ECNL and MOR/MPR.

- 6. A national agenda and roadmap should be developed through consultation with stakeholders to identify and prioritise issues for examination to improve efficiency and national consistency where possible.**

DMC may wish to consider what other aspects, aside from efficiency and consistency issues, could form part of this consultation and could also offer more detailed guidance on how best to implement any such consultation process.

**7. The regulatory framework for financial payments and settlement should be documented and the governance processes for annual audit and monitoring established in consultation with the national regulators, RBA and ASIC.**

The involvement of national regulators in regulating electronic conveyancing, including in respect to how financial payments and settlement is undertaken, as well as a clear and linked-up regulatory framework that articulates the responsibilities of all relevant regulators, including ARNECC, would likely be of benefit to all parties involved in electronic conveyancing.

As has been mentioned already, DMC may wish to consider further discussion and analysis of existing regulatory functions and any gaps that would need to be filled.

**8. ARNECC should facilitate engagement with other regulators to ensure an efficient regulatory process for ELNOs and other regulators.**

As mentioned previously, it is suggested that DMC consider:

- a) adding additional content and diagrams on potential regulatory oversight by ACCC, ASIC and RBA under existing legislation
- b) further analysing and documenting legislative and regulatory gaps that may pose risks.

**9. A system-wide change control process should be developed to coordinate system change and manage priorities and risks between ELNOs, registrars, revenue offices, financial institutions and any other connected entities.**

ARNECC understands that there is value in establishing better alignment between different entities, given the breadth of the electronic conveyancing ecosystem, and the potential flow-on consequences of changes in one part of the system. It is also understood that a level of coordination and transparency may be valuable.

ARNECC suggests that DMC could provide additional analysis on:

- a) what a *system-wide control process* might involve
- b) which entities would have what role in the process
- c) how the process would be resourced and lead.

**10. The rules in the MOR for ELNOs operating in the wider market be reviewed by a qualified economic regulator (e.g. ACCC) in the near future to ensure they are clear and there is no abuse of market power.**

ARNECC reviews the MOR regularly and invites the views of stakeholders and regulators (including the ACCC) to ensure they are clear, relevant and appropriate. ARNECC notes that legislation already exists to prevent abuse of market power.

ARNECC also notes that the market impacts of an ELNO will vary from state-to-state depending on the number of operators in the marketplace, and local operating agreements or licences.

These jurisdictional differences could be more clearly factored into how the DMC report discusses market influence and market power.

**11. eConveyancing pricing remain capped until there are three or more fully operational ELNOs and competition is assessed as effective.**

DMC may wish to detail who they deem the appropriate regulator to be, how this mechanism would be managed and ultimately who and by what standard would the competition be assessed as effective. The work undertaken in the IPART review could be a useful reference for consideration of this recommendation.

**12. Conditions in contracts between ELNOs and governments should be made public if they impact on conveyancing practitioners and their clients.**

It should be noted that some jurisdictions already have in place mechanisms that deliver this outcome.

## Draft Options for Improvement Comment

1. Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process.

ARNECC understands that vertical integration is a concern to industry and that the matter may warrant further attention. DMC may wish to consider this in the roles and responsibilities of each regulator.

2. Consider establishment of a Stakeholder Committee with ARNECC members, stakeholder representatives nominated by industry including financial institutions and other regulators as appropriate, and agree an ongoing consultation process to develop a proactive agenda for eConveyancing improvement.

3. Establish stakeholder consultative processes for coordination of industry wide changes and for industry input into the implementation plan for those changes.

As mentioned previously, ARNECC would welcome detailed guidance on a best practice consultation model.

4. Consider developing a system wide risk management framework including risk mitigation strategies such as minimum mandatory residential guarantees, insurance provisions to ensure timely resolution for homeowners, clear liability rules to protect consumers, a dispute resolution framework.

ARNECC believes resolving risk mitigation is part of ensuring an effective, shared regulatory regime, with updated role definitions and responsibilities defined for not just ARNECC, but also ACCC, ASIC, the RBA and any other relevant regulator.

5. Stakeholders operating nationally want jurisdictional variations that drive high operational complexity, risk (including missed settlements) and cost for no consumer benefit, to be considered and harmonized where possible.

It should be noted that there are presently, and will be in the future, differences in conveyancing related legislation and practices across the jurisdictions. Further evidence of the issues raised would be helpful to clarify the remedy.

6. Consider forming a risk and compliance committee comprising ARNECC and external experts to review audit results on a national basis and to develop improvement programs – the committee could also consider regulator action for ELNOs or subscribers that fail agreed thresholds.

As per the response to draft option for improvement #4, it is suggested that DMC provide greater detail on this option and how it may form part of the collaborative work involving ARNECC, stakeholders and the identified, relevant regulatory bodies.

- 7. Consider developing formal consultative arrangements with federal government cybersecurity experts to enable development of strategies to counter threats. Consider whether future certification of practitioners should require a reasonable level of competence in operating in an electronic environment and a good understanding of cybersecurity.**

ARNECC acknowledges that cybersecurity is an important issue that needs to be proactively managed and monitored. However, it is noted that cybersecurity experts that can add value to the electronic conveyancing landscape exist beyond the federal government. ARNECC suggests that DMC considers the potential benefits from formal and informal arrangements with both the private and public sectors, nationally and internationally including practitioner regulators and insurers as well as the respective professional bodies.

- 8. Consider developing a process that allows subscribers to register once in the eConveyancing environment.**

ARNECC acknowledges that the issue of subscriber registration is a concern to industry in a multi-ELNO environment. Further work is required on this and other issues relating to a multi-ELNO environment before a way forward can be agreed.

- 9. Consider developing a privacy regime for eConveyancing that clearly identifies requirements, identifies a complaint process and provides for penalties for privacy breaches.**

Most jurisdictions, including the Commonwealth, have privacy legislation. ARNECC would welcome further information from DMC identifying any gaps in existing arrangements that would impact electronic conveyancing.

- 10. ARNECC could consider requiring all ELNOs to provide a standardised set of APIs that allow third-parties the ability to populate the ELNOs workspace.**

Further work is required on this and other issues relating to a multi-ELNO environment before a way forward can be agreed.