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Our Reference: FILE19/155052

Ms Anne Larkins
Director
Dench McClean Carlson
Level 5, 99 Queen St
MELBOURNE VIC 3000

Dear Ms Larkins

I am writing to provide the NSW Government's response to the draft Final Report on the Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law, released on 26 July 2019 (draft Report).

This response represents NSW Government's position which commits to promoting the development of a sustainably competitive eConveyancing market.

The NSW Government considers the national eConveyancing system to be one of the most successful examples of co-operation between States and Territories. Conveyancers, lawyers, financial institutions, electronic lodgement network operators and government agencies across Australia have worked to achieve a world first national electronic conveyancing system. In NSW, now around 95 per cent of all possible conveyancing documents are lodged electronically. This has delivered a more secure, efficient and accessible system.

However, we are at a critical juncture. The decisions we take now will determine whether the true potential of this reform will benefit the users of the land title system.

We do not consider the draft Report provides ARNECC and the participating Governments sufficient advice on a 'fit for purpose' regulatory regime for the future. Promoting a vigorously competitive market in eConveyancing services is a key priority for the NSW Government. To this end, it is critical we put in place now a regime for a competitive ELNO market.

Please contact me on 0428 071 994 or jeremy.cox@customerservice.nsw.gov.au should you wish to discuss any component of the NSW Government's response.

Yours sincerely

Jeremy Cox
Registrar General
12 September 2019

NSW Government response

'Review of the Intergovernmental Agreement for an eConveyancing National Law' draft report

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1. The draft Report does not provide a clear way forward for ARNECC and regulators

The Intergovernmental Agreement (IGA) Review had two tasks:

- 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 eConveyancing"; and

- to "advise whether existing governance and regulatory arrangements are fit-for-purpose for the future and...[to]…make specific recommendations on whether the IGA requires any changes to ensure the IGA remains relevant now and in the future in ensuring the effective oversight and efficient and appropriate regulatory framework for national eConveyancing."

On the first task, NSW agrees with the draft Report's conclusion that, by and large, the IGA has met its objective to facilitate the implementation of a national eConveyancing system. But NSW considers that the draft Report does not deliver on the second task to make recommendations about a 'fit for purpose' future regulatory regime for eConveyancing.

In the body of this response, NSW provides detailed information supporting our positions on specific recommendations relating to a competitive market, interoperability and governance. Annex 1 includes our indicative response to all recommendations in the draft Report. Annex 2 is a list of corrections to the draft report.

2. Detailed response to recommendations 1, 2, 5 and 7

- ***Recommendation 1: The draft report recommends that the appropriate national regulators ie 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. The draft report recommends that 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.***

- ***The draft report also recommends the CFR 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.***

  Paragraphs 5.72 to 5.80

  - **NSW partially supports.**
  - **NSW supports states commencing a national industry working group process now, chaired independently, to investigate solutions for an efficient and secure multi-ELNO environment, and to establish interoperability, drawing on models set out in the draft IGA report, Dr Nicholls report 'Interoperability between ELNOs' dated 25 July 2019 (Nicholls report)) and IPART's draft report 'Pricing regulation of electronic conveyancing services in NSW' (IPART draft report).**
  - **NSW supports the ACCC undertaking a short, targeted industry assessment to inform this process.**

NSW agrees with the draft Report's diagnosis that we do not have the right market settings right now because, when the decision was originally taken to provide for the possibility of competing Electronic Lodgement Network Operators (**ELNOs**), inadequate consideration was given to how to accommodate the challenges of competition within the national eConveyancing regulatory framework.

However, right now, on the ground, competition between ELNOs continues to move ahead.

- Sympli is progressively rolling out services nationwide by the end of 2019;
- Purcell Partners is finalising its plans for market entry;
- lawyers and conveyancers are strongly pushing for a choice between competing ELNOs, but also are worried about how they will cope with competing transactions across multiple ELNOs;
- financial institutions, while acknowledging the benefits of competition between ELNOs for themselves and their customers, raise concerns about duplication and lack of standardisation in their connections with multiple ELNOs;
- the new ELNOs are facing competition against a powerful incumbent with limited constraints on its market power; and
- in the face of these challenges, the Australian Competition and Consumer Commission (**ACCC**) is urging action to ensure that an effective ex ante competitive safeguards regime is in place.

NSW considers the draft Report should put forward a practical and immediate pathway on how to regulate a competitive ELNO market:

- This first draft Report recommendation fails to recognise the immediacy of the challenge to ensure robust competition and consumer protections are in place.

  By the end of this year, subscribers in NSW will be facing the challenges of having to use two ELNOs if they wish to continue to provide conveyancing services across the whole market, whereas the draft Report's proposed CFR review is unlikely to completed until well into 2020. Recommendations will need to be agreed, and may not go to the detail of interoperability that will be achieved by standing up national industry groups.

- NSW is also concerned that the CFR may not be the appropriate body to undertake the competitive safeguards review. The CFR has limited resources and is likely to have a full workload flowing out of the Banking Royal Commission.

NSW requests the IGA reviewer consider the following issues in its final report:

- the expert advice on competition already provided by the ACCC;
- the fact investors are already building competing ELNs and obviously believe they have a business case that allows them to compete on prices;
- that the original decision was to provide for ELNO competition, which was consistent with the commitment all Australian Governments have made to the Hilmer competition reforms. This is clear in clause 9.1.2 of the IGA, which provides that (emphasis added):
  - "the ECNL…will…empower the Registrar…to operate or to authorise **one or more persons to operate an ELN** in respect of land in the jurisdiction"
  - This policy is embedded in section 15(4) of the ECNL which expressly provides for the approval of multiple ELNOs;

- the fact from the outset, ARNECC was engaged with the prospect of competition and the need for future regulatory reforms, including interconnection. In its Regulatory Impact Statement in February 2013 ARNECC says: "Should other ELNOs be approved in the future, interoperability may need to be provided for in the operating requirements;"
- that competition between ELNOs was also the expectation when the participating Governments which were owners of PEXA sold their shares at the end of 2018. NSW had no intention to create a privatised monopoly;
- that in NSW, regulators, corporates and industry bodies have already considered this specific issue – for example, in December 2018, the Hon. Victor Dominello MP convened an industry forum: attendees included the ACCC, RBA, current and applicant ELNOs, land registries, the Australian Bankers' Association and major banks, the NSW Law Society and the Australian Institute of Conveyancers, NSW and the IGA reviewer. The consensus from this forum was general support for competition, with a desire to develop a model for interoperability. Minister Dominello held a second industry forum in February 2019, to consider the further issue of interoperability among ELNOs. The NSW working group process chaired by Dr Nicholls on interoperability arose from this second Forum;
- the benefits of innovation when there are competing ELNOs: the final report could include more analysis of the efficiency and innovation gains realisable from technology which were one of the drivers to transition from paper conveyancing to eConveyancing;
    - As the OECD has stated, while digital markets present regulatory challenges, it is important not to shy away from promoting competition in digital services and platforms because of the wider economic benefits of innovation which can be realised.[1]
- the potential benefits of ELNO competition for financial institutions. For example, given the dynamic and innovative nature of technology markets, it seems highly unlikely that efficiency gains for banks from moving from paper to eConveyancing are a one-time exercise; and that a monopoly can continue to maintain and increase efficiencies over time more than if there are multiple suppliers;

- that land titling offices will realise benefits from competition between ELNOs. The NSW Land Registry Services is one the strongest supporters of both competition between ELNOs and interoperability;[2]
- the costs and complexity of the counterfactual of regulating a monopoly ELNO:
    - The current regime under the Electronic Conveyancing National Law (**ECNL**) (and the Model Operating Requirements (**MORs**)) was drafted on the expectation that there will be more than one ELNO.
    - In the absence of competition from paper conveyancing, or from other ELNOs, it would be wrong to assume that the existing regulatory arrangement would remain as is. Rather, the regulatory regime would need to be strengthened considerably to address issues arising from a monopoly.

[1] OECD, Digital Economy, Innovation and Competition, available at http://www.oecd.org/competition/digital-economy-innovation-and-competition.htm accessed on 14 August 2019

[2] Letter from NSW Land Registry Services to Dr Rob Nicholls, 5 July 2019, pp 1-2.

- In monopoly environments, regulators will face the considerable challenge of functioning as a surrogate for competition in order to drive the pricing, service quality and innovation benefits for customers which competition would otherwise deliver. In NSW's view, while regulating for competition is not a straightforward task, it is worth the effort for Government because it will deliver better outcomes for customers.

NSW also acknowledges the level of concern financial institutions have about the costs of duplicating links with ELNOs. However, it also emerged in Dr Nicholls interoperability working group discussions that there were options to mitigate these costs, including:

- a high level (although not necessarily complete) standardisation of interfaces between the financial institutions and ELNOs;

- potential market solutions where infrastructure-based ELNOs offer competing wholesale services to other ELNOs connecting them to financial institutions for financial settlement; or

- if market-based solutions do not quickly emerge, consideration of a hub through which ELNOs and financial institutions could connect, rather than duplicating bilateral links.

Dr Nicholls commented in his report:

> "One way of avoiding infrastructure duplication is to separate messages and infrastructure. A practical example is having four different email accounts from different providers but only one broadband connection. However, in some cases, duplication is an economically efficient investment in infrastructure. When markets resolve issues by duplication, as opposed to regulatory intervention, these decisions are generally economically efficient. One approach to assisting the economically efficient outcome would be the standardisation of the interfaces with the banks. That is, the use by the retail banks of a common application programming interface would reduce the complexity of duplication and assist in implementing a scalable solution.
>
> [Another] way in which duplication of infrastructure can be minimised and hence become more efficient is by reuse. This is the economically efficient use of infrastructure. Some of the existing infrastructure which connect ASX Limited to the retail banks is likely to form part of the connection between Sympli and retail banks. To the extent that this is the case, the reuse of connections will be another example of separating messaging from infrastructure. In this context, ASX Limited will seek further benefits from its investment in this infrastructure."[3]

In NSW's view, Dr Nicholls' analysis provides a more nuanced and commercially realistic approach to the duplication issue.

Interoperability

In the current multi-ELNO market, subscribers want to continue to transact efficiently and securely while only subscribing to the ELNO(s) they choose. Conveyancers and lawyers continue to raise their desire for governments to put in place a solution for interoperability.

[3] Independent Chair of the Interoperability Working Groups, *Interoperability between ELNOs,* Final Report, 25 July 2019, p 120.

NSW believes that the debate on interoperability has moved on from the question of whether there should be interoperability to what form interoperability should take (as noted earlier, NSW raised this issue for discussion in industry forums in late 2018 and early 2019).

By proposing its own interoperability model, the draft Report also itself seems to acknowledge that interoperability can be designed in a way which addresses the concerns which otherwise might be grounds for not requiring interoperability.

On interoperability, NSW asks the IGA reviewer to further consider:

- the strong views expressed by subscriber representative bodies in favour of subscribers having a choice of ELNOs. In NSW view, markets and the policy makers and regulators with responsibility for regulating them should primarily work to benefit customers;

- the ACCC's views on interoperability. The ACCC's submission to the IGA Review expresses the view that interoperability is fundamental to sustainable competition between ELNOs;[4] and commitment to assisting in analysis of interoperability models and economic impact;

- IPART's draft report, which emphasises the significance of interoperability to improve competition in the eConveyancing market and reduce barriers to entry. In IPART's view, the direct connection or an information hub models provide the greatest prospects for competition, differentiation and innovation between ELNOs;[5]

- Dr Nicholls' key findings in his final report, particularly how there was agreement amongst all participants other than PEXA and Purcell Partners that interoperability was the best solution to address the problem statement[6], with the important qualification that interoperability itself not result in additional costs, risks and complexity for subscribers, particularly as many legal practitioners and conveyancers were already operating on fixed fees with thin margins;"[7]

- Dr Nicholls' finding that interoperability between ELNOs also does not, as the draft Report asserts, uniformly involve higher risk than either competing ELNOs operating independently or a monopoly ELNO. This is because interoperability involves two or more ELNs checking the shared data set between them. As Dr Nicholls commented in his Interoperability Report:

> "The report I commissioned from Kinetic IT is consistent with this view. It finds there are a number of IT related risks associated with interoperable ELNs. However, the STRIDE analysis in respect of 'Model B' (direct interconnection) shows that the major increase in risk is repudiation, but that interoperability has the potential to reduce risk in other areas (Denial of Service and Elevation of Privilege)";[8] and

[4] Australian Competition and Consumer Commission submission to Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law Issues Paper, March 2019, pp 5-6.

[5] Independent Pricing and Regulatory Tribunal, NSW, *Review of the Pricing Framework for Electronic Conveyancing Services in NSW*, Draft Report, August 2019, List of draft findings and recommendations [1.4]

[6] Independent Chair of the Interoperability Working Groups, *Interoperability between ELNOs,* Final Report, 25 July 2019, see chapter 2 generally.

[7] Independent Chair of the Interoperability Working Groups, *Interoperability between ELNOs,* Final Report, 25 July 2019, p 8.

[8] Independent Chair of the Interoperability Working Groups, *Interoperability between ELNOs,* Final Report, 25 July 2019, p 124.

- Dr Nicholls' finding that an interoperability model in which one ELNO has responsibility for lodgment and settlement, which was the consensus position, is not overly complex as a matter of IT design or implementation.[9]

Alternative measures to interoperability

NSW notes the draft Report proposes alternative measures to interoperability which it considers will better address (i.e. at lower cost and less risk and complexity) the issues of multi-homing/network effects: cross ELN digital certificate recognition, cross ELN subscriber recognition, and a requirement for ELNOs to publish APIs for the user interfaces so that third party software developers can build user interfaces which work with different ELNs.[10]

While these measures may go some way to easing the burden subscribers face, the fundamental fact remains that subscribers will need to subscribe to and integrate their systems with different ELNs if they wish to address the whole conveyancing market. Therefore, these measures do not alleviate the central concern of subscribers about multi-homing.

In addition, many of the concerns the draft Report expresses about interoperability apply equally to its alternative measures. The draft Report says interoperability would require a complex and resource intensive change management process to ensure that the APIs, other standards and business rules remain up-to-date and that changes that one ELNO makes to its systems could trigger changes being required in other ELNOs' and facilitators' systems (and vice versa). But the draft Report's alternatives also require publication and making of standards, some degree of commonality in onboarding systems and mechanisms to allocate and resolve risk, such as when an ELNO has relied on another's ELNO's error in authorising a subscriber who commits or permits fraud.

The draft Report's initiative in proposing its own model of interoperability (which it describes as the "shallowest" form of interoperability) is welcomed. The draft Report's option needs to be tested amongst industry stakeholders, alongside the other options which have been identified (for example, in the NSW working group process and IPART).

- ***Recommendation 1 (continued): The draft report recommends that 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.***

  ➢ **NSW does not support.**

A moratorium on further ELNO approvals itself is likely to have a distorting effect on the market structure. NSW has the following concerns with this recommendation:

- participating Governments would be formalising a duopoly (potentially a triopoly) during the moratorium period, deliver suboptimal outcomes for consumers;

- there is a risk that the moratorium would determine the ongoing market structure after expiry of the moratorium period, regardless of the competition safeguards that are eventually introduced. Either:

[9] Independent Chair of the Interoperability Working Groups, *Interoperability between ELNOs,* Final Report, 25 July 2019, p 122.

[10] The draft Report also proposed a requirement for ELNOs to develop user interfaces which can populate other ELNO workspaces, but it notes that this is a form of interoperability.

- the incumbent and the new ELNOs that got in before the ”boom gate was lowered” would settle into a cosy relationship of limited competition and any other new entrants would be deterred from entering the market on expiry of the moratorium; or

- in the absence of competitive safeguards during the moratorium, the new entrants would be marginalised or fail, and the incumbent’s dominance would be further entrenched, again deterring additional new entrants on expiry of the moratorium;

- the draft Report draws on the example of the CFR’s approach to a moratorium for clearing houses. However, the CFR was able to implement its two-year moratorium because there were no existing entrants already in the clearing house market before it imposed the moratorium (which is not the case for eConveyancing);

- a moratorium may not be possible under law. The ECNL confers on the Registrar a discretionary power to approve a person as an ELNO: with this power is an implied duty to consider all applications without unreasonable delay and to decide every such application on its individual merits. Accordingly, a decision not to consider applications, or to consider applications under an inflexible blanket refusal policy, as would likely be the case under a moratorium, may be seen to frustrate the object of the ECNL and be subject to legal challenge.

In addition, the draft Report implies that during its proposed two-year moratorium, further work needs to be done to be clear that the costs outweigh the benefits of competition: “[p]ut simply the benefits must outweigh the costs to establish a case for regulatory action before addressing a problem.”[11]

NSW asks the IGA reviewer to consider ACCC advice. In its response to the IGA Issues Paper, the ACCC strongly advised against being side-tracked into a formal cost benefit review. While specifically addressing interoperability, the ACCC’s comments apply more generally to assessing the need for a cost benefit review and the potential for such review to result in significant further delays in introducing interoperability. The ACCC’s view was that it may also be difficult to quantify the exact costs to all parties.[12]

NSW also notes IPART has now released its draft final report (published after the IGA draft Report was issued), which emphasises the importance of competition. IPART notes that “[e]ffective competition would drive innovation and lower costs.”[13]

A more pragmatic, phased approach

Instead of a CFR review and moratorium, NSW asks the IGA reviewer consider the following approach:

- ARNECC (and state regulators) are geared up to more rigorously apply the existing safeguards in the MORs, including the vertical separation and equal access requirements. This could involve, as the draft Report suggests, seeking advice from the ACCC on proposals by ELNOs;

[11] Dench McClean Carlson, *Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law*, Draft Final Report, July 2019, p 74 [5.71].

[12] Australian Competition and Consumer Commission submission to Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law Issues Paper, March 2019, pp 3-4.

[13] Independent Pricing and Regulatory Tribunal, NSW, *Review of the Pricing Framework for Electronic Conveyancing Services in NSW*, Draft Report, August 2019, Executive Summary.

- the MORs are amended to require interoperability between ELNOs. This would be a 'bare' requirement, and then industry would be tasked with developing the detailed operational and technical arrangements for approval by ARNECC;
    - This should involve commencing national industry working group process immediately, chaired independently, to report to ARNECC.
- NSW supports the ACCC undertaking a short, targeted industry assessment to inform this process;
- advice should also be sought from the ACCC on interim competition safeguards to address the more blatant risks of exclusionary or exploitative behaviour in the market.
    - These interim measures could include maximum durations for subscriber contracts to prevent lock-in, rights for subscribers to exit contracts without unreasonable cost and no bundling of competitive and non-competitive products. This could be implemented through approval conditions issued by the Registrars or changes to the MORs or the Model Participation Rules.

- ***Recommendation 2: The draft report recommends 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***

  Paragraphs 1.23 and 7.0

  - **The NSW Government does not support. Further information required.**

NSW has a number of concerns with this recommendation.

First, incorporation of ARNECC will solve some of the governance challenges, but it leaves the core governance issues unresolved.

An incorporated ARNECC will be able to hold, licence and manage intellectual property rights in the national eConveyancing data standards (NECDS) and other eConveyancing standards and will be in a better position to hire staff and obtain external advice to better resource its work.

However, a private corporation (even if owned by the participating Governments) cannot, of itself, fulfil the role of a body with powers to enforce regulatory requirements and to make and implement regulation to promote and protect the development of eConveyancing markets. These are functions of an executive government agency and should be conferred and exercised (potentially by a private corporation) within a legislative framework.

NSW acknowledges that designing a national governance framework for a co-operative scheme between States and Territories is not straightforward. NSW has proposed a model along the following lines (as outlined in detail in NSW response to the IGA issues paper):

- ARNECC would remain the "keeper" of national consistency on technical and operational standards and a forum in which Registrars could discuss and co-ordinate their individual decision making, including on competition matters, to the extent these give rise to national problems. ARNECC would, as the draft Report proposes, be incorporated so

that it could hold and manage intellectual property (IP) rights in standards and engage staff to support its work;

- there would be a standing Ministerial Council from participating jurisdictions to be the "keeper" of national consistency in the legislative framework. It would consider changes in the legislative framework, such as to incorporate the types of ex ante competition safeguards recommended by the ACCC in its submission to the IGA Review. The Ministerial Council could seek advice from the ACCC, ASIC, the RBA or other relevant bodies on legislative reform; and

- the Registrars, as they possess executive powers and functions under the ECNL and their state land titling and other laws, would continue to be the primary, 'on the ground' regulators. They would exercise any new powers under the ECNL dealing with competition issues. They would need to develop the expertise and resources necessary to support these new ex ante competition powers.

NSW's preferred model is similar to Model 4 in the draft Report.

Lastly, NSW does not agree with the recommendation to fund regulatory functions through a direct levy on buyers and sellers. This is, in effect, a tax on property transactions. This would be complex to design and controversial to implement.

The more common approach in other sectors, such as telecommunications, is for the industry competitors to contribute to regulatory costs through a levy based on a simpler measure, such as gross revenue from the regulated activities. This ensures a proportional allocation between competitors of the contribution. Individual competitors may choose to pass through the contribution on a per transaction basis but are more likely to absorb the costs into their general overheads.

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

  Paragraphs 2.23, 4.10, 4.15, 4.46, 4.149, 8.15

  ➢ **NSW supports this recommendation, but seeks further information.**

The draft Report does recommend that "[a]n enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach."

However, the draft Report seems to assume that this can be done through contractual arrangements between ARNECC and ELNOs.[14] This ignores the fundamental legal principle that contractual remedies (even in contracts with Governments) cannot be in the nature of punitive penalties.[15]

The Report also does not provide any indication of appropriate penalty regime, nor a pathway to developing one.

[14] Ibid, p 8 [1.21].

[15] For example, see https://www.australiancontractlaw.com/law/remedies.html

NSW's submission to the Issues Paper provided analysis on the range of penalty types that could be considered.[16] We ask the IGA reviewer include more detailed advice in its final report on an appropriate enforcement regime, including required legislative changes and areas a penalty regime should target.

- ***Recommendation 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.***

  Paragraphs 4.52 – 4.60

  - **NSW supports, but further information required.**

This recommendation provides no clear guidance on designing a framework within which the range of regulatory functions relating to eConveyancing will be clearly allocated between ARNECC (or its successor) and other regulators and how those regulators can co-ordinate decision-making.

For example, the draft Report rightly identifies the 'gap' in relation to financial settlement, with those powers being divided between the RBA and ASIC:

> "The key limitation of the regulatory framework is the lack of explicit and defined regulatory arrangements for financial payment and settlement, for the collection of duties and taxes and for market regulation. While the ELNOs have an obligation to comply with all applicable laws nationally and in each state and territory in which their system is available, the key requirements of these laws are not monitored by ARNECC as it does not have the skills or resources to do so".[17]

The draft Report's solutions for this gap are to recommend that the MORs be amended to require ARNECC to seek advice from ASIC and the ACCC in the ELNO approval process; more broadly, that the RBA and ASIC are consulted on a regular basis; and that "[r]recommendations from these regulators should be given effect by registrars in ELNO contracts."

While useful, they are only small incremental steps which leave in place the gaps in the institutional and governance framework for eConveyancing. NSW was expecting that the IGA Review would come up with recommended solutions. NSW asks the final report include recommendations on roles between ARNECC (or its successor) and other regulators.

Conclusion

The draft Report does not provide ARNECC and the participating Governments sufficient advice on a 'fit for purpose' regulatory regime for the future.

Right now, we have the prospect of competing infrastructure ELNOs. This is good for the customer and good for the economy. With a second infrastructure ELNO, we will also have a more resilient system, so if the incumbent platform is not working, we have a back-up system. This benefits all users of the land title system, and our economy.

[16] NSW Government response to the *Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law* Issues Paper, May 2019, pp 12-14.

[17] Dench McClean Carlson, *Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law*, Draft Final Report, July 2019, p 8 [1.19].

The IGA final report must set out an immediate pathway to a sustainably competitive eConveyancing market. There is strong industry support for solving these outstanding challenges now.

Annex 1

NSW Government's indicative response to recommendations and proposals of the draft Final IGA Review Report

Draft Report Recommendations

No	Recommendation	NSW indicative response
1	We recommend that the appropriate national regulators ie 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. We recommend that 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. We recommend 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. We recommend that 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. Paragraphs 5.72 to 5.80	**NSW partially supports.** NSW supports states commencing a national industry working group process now, chaired independently, to investigate solutions for an efficient and secure multi-ELNO environment, and to establish interoperability, drawing on models set out in the draft IGA report, Dr Nicholls report 'Interoperability between ELNOs' dated 25 July 2019 (Nicholls report)) and IPART's draft report 'Pricing regulation of electronic conveyancing services in NSW' (IPART draft report). NSW supports the ACCC undertaking a short, targeted industry assessment to inform this process. Mandating interoperability does not need to wait for a competitive safeguards review. In NSW's view, based on industry consultation, the debate about interoperability has moved on from whether there should be interoperability to the form interoperability should take. A 'bare' mandatory interoperability requirement could be introduced in the MORs and an industry process stablished to develop the detailed requirements. NSW opposes a two-year moratorium on further ELNO approvals as the moratorium could have a distorting effect on market structure – either allowing a cosy duopoly/triopoly to emerge or further entrenching the incumbent's dominance because with the delay in competitive safeguards, the new entrants are marginalised or fail. It may be beyond scope of the Registrar-General's powers under the ECNL to impose a moratorium on new ELNO applications: a refusal

No	Recommendation	NSW indicative response
		to consider or grant an ELNO application on the basis of the proposed moratorium may be open to legal challenge. The ACCC is more appropriate than the CFR to undertake the competitive safeguards review.
2	We recommend 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. Paragraphs 1.23 and 7.0	**NSW does not support. Further information required** Incorporation as a private company does not, of itself, solve the core institutional deficiency in the current regulatory regime: the absence of a regulator with the institutional powers and capacities to develop, implement and enforce regulatory requirements. It will be necessary to establish other measures to address these gaps. NSW also disagrees the costs of regulation should be recovered from buyers and sellers. ELNOs should be required to contribute to regulatory costs. NSW's alternative proposal for institutional arrangements is set out in this main submission and in NSW's earlier response to the IGA issues paper.
3	We recommend 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. Paragraph 6.14	**NSW partially supports. Further information required.** NSW agrees that the process could be strengthened but is concerned that this recommendation is overreach and would delay market entry by competitors. NSW considers that ELNOs will only understand the true costs involved once they get full access to the NECDS/interface specs/ROMS, and that an access regime should be made a priority. NSW consider reference to an "adequate" dollar amount, as too

No	Recommendation	NSW indicative response
		ambiguous. Instead, NSW prefers drawing applicants' attention to IPART's analysis on costs of a benchmark efficient ELNO.[18]
4	We recommend that the approval process include further requirements for Category Two approval including: • Approval from RBA that financial settlement system proposed meets RBA requirements • Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments • Approval from all appropriate revenue offices • Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law • Confirmation from financial institutions that appropriate payment connections are in place It may be appropriate that these are separated into a new Category Two (A) Paragraphs 2.23, 4.13, Section 6.0	**NSW partially supports.** Again, NSW agrees that the process could be strengthened, but this recommendation could be refined to provide a more targeted proposal. In relation to confirmation from financial institutions, NSW is concerned that this recommendation as currently provided is overreach and would delay market entry by competitors. The current ELNO, PEXA, does not connect to all financial institutions. How many financial institutions would need to certify that a new ELNO has connections with them to clear this approval hurdle? NSW is concerned that this obligation could become a regulatory barrier to entry. A new entrant on day one of service provision inevitably will not have connections to as many financial institutions as the incumbent, and it will incrementally add connections as its business expands (as PEXA itself did). The consequences of not being connected to particular financial institutions is a business matter for the ELNO because it will not be able to undertake the financial settlement involving the financial institution. As a consumer safeguard, ELNOs should be required to fully inform subscribers of the financial institutions to which the ELNO has connections.

[18] Independent Pricing and Regulatory Tribunal, NSW, *Review of the Pricing Framework for Electronic Conveyancing Services in NSW*, Draft Report, August 2019 pp37 – 39 [5.2].

No	Recommendation	NSW indicative response
5	An enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach. Paragraphs 2.23, 4.10, 4.15, 4.46, 4.149, 8.15	**NSW supports. Further information required.** The draft Report fails to provide any guidance for the institutional arrangements within which this could be achieved. The draft Report also does not address what a fit-for-purpose penalty regime could look like, or a process for establishing one. The recommendation for incorporation of ARNECC as a private company will not solve the enforcement problem because enforcement is a function of executive government agencies and should be undertaken within a clear legislative framework. But at the same time, the draft Report dismisses options which expand the role of Registrars but offers no institutional alternative.
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. Paragraphs 3.27, 3.28 and 4.113	**NSW supports.** NSW supports consultation with stakeholders and transparency as to how issues are identified and resolved.
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. Paragraphs 4.52 – 4.60	**NSW partially supports.** The final report should include recommendations on an institutional framework which clearly allocates responsibilities between ARNECC, the Registrars, ASIC, the RBA and other relevant regulators and which provides formal mechanisms for joint or co-ordinated decision making, enforcement and accountability. The final report should also advise who is responsible for documenting this governance process, in what form and under whose authority.

No	Recommendation	NSW indicative response
		If, as the draft report points out, ARNECC has no direct legal power over financial settlement, this proposed recommendation cannot be implemented through the MORs.
8	ARNECC should facilitate engagement with other regulators to ensure an efficient regulatory process for ELNOs and other regulators. Paragraph 2.22	**NSW partially supports. NSW makes the same point as for recommendation 7.**
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. Paragraphs 4.8 and 4.164	**NSW supports. Further information required.** NSW notes that the complexity of managing change is one of the criticisms that the draft Report makes of competition and interoperability. However, in a system with multiple participants and the need for common processes and standards, change management processes are inevitably required, as the draft Report here acknowledges. Other industries successfully manage change management across multiple interconnected players, such as in the telecommunications industry. The recommended change management process will require significant resources. The draft report should address who will manage this process, how participants should be involved and how it should be resourced.
10	We recommend that the rules in the MOR for ELNOs operating in the wider market be reviewed by a qualified economic regulator (eg ACCC) in the near future to ensure they are clear and there is no abuse of market power. Paragraph 5.245	**NSW partially supports.** The ACCC's submission to the IGA Review endorsed both vertical separation and equal access models. The current MOR provisions were modelled on similar requirements in other industry sectors administered by the ACCC. While the ACCC's advice should be sought, ARNECC should administer these existing provisions, with the assistance of external expert advice as necessary. The current MOR provisions can be

No	Recommendation	NSW indicative response
		reconsidered in the proposed review of competitive safeguards, but in the meantime they provide a measure of protection against anti-competitive conduct and should not be held in abeyance. Any competition review should consider what regulatory settings are appropriate to minimise the potential for future abuse of market power, in an evolving competitive environment.
11	We recommend that eConveyancing pricing remain capped until there are three or more fully operational ELNOs and competition is assessed as effective. Paragraph 5.36	**NSW partially supports.** NSW notes the presence of three or more ELNOs should not be an absolute requirement but a 'rule of thumb'. It is possible to envisage circumstances where the market is vigorously competitive with two ELNOs: e.g. where there is a high risk of market entry by other competitors. NSW asks the IGA reviewer consider IPART's draft report finding that the eConveyancing market be monitored at least every 2 years, ideally by a national regulator such as the ACCC (or on a state-by-state basis by regulators including IPART), to assess the effectiveness of competition and inform governance and pricing policy decisions.
12	Conditions in contracts between ELNOs and governments should be made public if they impact on conveyancing practitioners and their clients. Paragraph 1.17	**NSW supports. NSW conditions of approval are already public.**

Draft Report options for improvement

No	Options for improvement	NSW indicative response
1	Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process. Paragraphs 3.11 and 5.237 – 5.245	**NSW partially supports.** This recommendation appears to assume there is no oversight process, but the MORs already contain one. The IGA Review could consider whether this existing process is adequate, or whether refinements could be made. As set out in the ACCC's response to the IGA Issues Paper, its preference is for a full vertical integration which prevents the regulated entity participating in the downstream market through related entities, which would go beyond the separation provision in the MORs. While this issue should be considered in the proposed competitive safeguards review, this is no reason not to enforce the current MORs provision as this would mean there were no constraints at all on ELNO vertical integration.
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. Paragraph 4.95	**NSW supports. Further information required** The draft Report should provide recommendations on an institutional framework which integrates the regulators involved in eConveyancing.
3	Establish stakeholder consultative processes for coordination of industry wide changes and for industry input into the implementation plan for those changes. Paragraph 3.14	**NSW supports.**

No	Options for improvement	NSW indicative response
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. Paragraph 4.131	**NSW supports, but notes that:** • NSW already has a mandatory residential guarantee regime (NSW Approval Conditions, Schedule 2 (General Conditions) clause 9.1). • Liability as between ELNOs and subscribers is already covered by the participation agreement.
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. Paragraph 3.26	**NSW supports. Further information required** It would be useful for the IGA Review to list out these problematic jurisdictional requirements. In future, identifying these variations could be part of the stakeholder engagement (options 2 and 3, above).
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. Paragraph 4.179	**NSW partially supports.** ARWG already has a subscriber compliance committee which reports back to ARWG with quarterly reports on subscriber compliance. Every jurisdiction issues the same checklist to subscribers for compliance audits. How each jurisdiction audits is operational in nature and does not need to be shared amongst different jurisdictions especially where some are commercialised, and some are not. The reference to regulatory action against ELNOs that fail agreed thresholds begs the question of the institutional arrangements for enforcement, which the draft Report fails to address.

No	Options for improvement	NSW indicative response
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. Paragraphs 4.18, 4.150 and 7.12	**NSW supports** ARNECC/ARWG is currently working on amendments to the Model Participation Rules in response to the Kinetic IT security report. These amendments will be released later this year for public consultation. They include a requirement for subscribers to undertake cyber security awareness training.
8	Consider developing a process that allows subscribers to register once in the eConveyancing environment. Paragraph 5.188	**NSW partially supports.** Most of the participants in the NSW interoperability working groups, including subscriber representatives, were of the view that only interoperability between ELNO will meet this objective. The alternatives considered by the draft Report may go some way to reducing the challenges of multi-homing, but subscribers would still face the challenge of learning to use and integrating within their systems more than one ELNO. It is not clear that the alternatives proposed by the draft Report would involve any less complexity because they would be necessary to define (and provide for change to) standards and onboarding processes, to allocate risk arising from errors in onboarding or customer identification by ELNO and to provide for dispute resolution between ELNOs. For clarity, NSW does not agree with any proposal that would shift responsibility for on-boarding subscribers from ELNOs to Registrars, or to a central regulatory authority. Paragraph 4.8 of the Report appears to suggest that oversight of subscribers should move to an independent regulatory entity (as well as moving system change to an independent regulatory entity).

No	Options for improvement	NSW indicative response
9	Consider developing a privacy regime for eConveyancing that clearly identifies requirements, identifies a complaint process and provides for penalties for privacy breaches. Paragraph 4.200	**NSW seeks further information** It would be useful to understand in what respects the IGA Review considers the current Privacy Act requirements (including penalties) to be deficient in an eConveyancing environment. NSW is not in favour of doubling up sector specific regulation where general legal requirements are adequate. As the ACCC's recent Digital Platforms Inquiry report illustrates, the draft Report is over-simplistic in its analysis that increased privacy and cyber-security risks are a potential cost of competition and interoperability. Competitors may seek to establish a competitive advantage over each other by investing in technology and systems which show they provide a higher degree of privacy and security than their competitors.
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. Paragraph 5.211	**NSW does not support.** NSW does not agree that this is an adequate substitute for interoperability in addressing the multi-homing problem. The MORS already address third party access issues.

Annex 2

Errors in the draft Final IGA Review Report

Paragraphs	Errors
1.17, 2.18 (diagram)	In NSW, ELNOs are not granted a license, nor do they enter into an Operating Agreement. Rather, they are granted an Approval. NSW has attached conditions to that Approval, and the conditions are publicly available on the NSW Office of the Registrar General's website.
1.18	The definition of subscribers included in the report is incorrect. Subscribers are anyone who passes the eligibility criteria and are subscribed to the ELNO. This can be lawyers, conveyancers, banks, developers, etc. Subscribers are defined in section 3 of the ECNL, as follows: '"subscriber" means a person who is authorised under a participation agreement to use an ELN to complete conveyancing transactions on behalf of another person or on their own behalf.'
1.18	The agreement is not necessarily based on the Model Participation Rules (**MPRs**), as there is no defined template that a participation agreement should take.
3.24	The power of the Registrar to attach conditions to approval is not new and has always existed under the ECNL.
4.3, 4.11, 4.13	ARNECC is not a 'special purpose entity': it is a committee. The MORs and MPRs do not form the basis of an Operating Agreement (**OA**) in NSW. Further, NSW does not have an OA. NSW's Approval Conditions specifically require an agreement be in place with Revenue NSW.
4.14	An ELNO already does not need to meet the Minimum Document Capability from the outset. Introduction can be staged (MOR 5.2).
4.17	NSW's Approval Conditions for each ELNO are published on the NSW ORG's website.
4.120	Homeowners continue to be protected by the Torrens Assurance Funds in the electronic system, to the same extent as they are in the paper system.
4.124	The NSW Approval Conditions require an ELNO to provide a residential seller guarantee.
4.131	Liability as between ELNOs and subscribers is already covered by the participation agreement.
4.194	The proposed client personal data objective is already an existing requirement under the Australian Privacy Principles (APPs). The APPs already apply to ELNOs. That is, that personal information may only be used for the purpose for which it was collected (subject to exceptions).

4.196	There are specific prohibitions in the APPs. In any event, where an ELNO uses personal information for a secondary purpose, ELNOs must comply with the APPs which require consent (see APP 6.1). Further prohibitions on ELNOs apply in NSW under the Approval Conditions which require ELNOs to apply for use of Land Information. This prohibition also exists in the MORs (see 19.3).
4.200	There are already penalty provisions under the *Privacy Act* and the *PPIP Act*, to which ELNOs are subject.
5.6	The contents of the table are not “products and services”, and the regulator of Registry updates should be Registrars not ARNECC.
5.16	The ECNL allows for these services to be unbundled – and the separation and access regimes in the MORS promote competition in Downstream and Upstream Services.
5.33	CPI price caps were not part of the NSW Operating Agreement that was in place before the NSW Conditions of Approval took effect – price caps were not necessary before the introduction of mandates, because paper-based conveyancing provided effective competition
5.64	NSW Approval Conditions contain provisions for change controls by ELNOs. NSW’s concession agreement with NSW LRS also contains change control provisions in relation to technology changes by NSW LRS.
6.2	NSW Approval Conditions require the ELNO to enter into an agreement with Revenue NSW as well as with NSW LRS within 20 Business of the date of the Approval, or such later date as approved in accordance with the Conditions.
6.3	Financial settlement functionality is not a requirement under the ECNL or the MORs.
6.10, 7.11	Both the approval process and change control for Revenue NSW are covered by the NSW Approval Conditions.