

Sympli's Perspectives on the Draft Final Report into the Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law ("IGA Review")

The IGA Review has not met ARNECC's requirement to advise on the changes needed to support ELN competition¹, instead questioning ARNECC's decision to establish a regulatory framework for multiple ELNs.

Further, the IGA Review's examination of a multi-ELN market is flawed and has failed to have sufficient regard to:

- The fact that a key feature of the regulatory framework created by the IGA and ECNL is that it allows multiple ELNs to operate in the market and when the IGA and ECNL were established, ARNECC envisaged the need for interoperability in the future
- Sympli's approval to operate as an ELNO and Lextech's Category 1 approval
- Benefits available to the conveyancing, finance and regulators flowing from competition including reduced pricing, innovation, new functionality, improved service and systems redundancy
- Submissions from the ACCC expressing categorical support for ELN competition through interoperability
- The widespread preference of practitioners and financial institutions for interoperability over a multi-homing market framework
- Discussions and submissions made by Sympli, Australia's second ELNO

Delays in implementing an interoperability regime will reduce the likelihood of benefits accruing to the industry.

Sympli's perspectives on the IGA Review are set out in the following pages.

¹ "advise what changes are needed to support a competitive electronic network lodgment operator market" (ARNECC's announcement in relation to the scope of the IGA Review, October 2018)

Sympli believes the ACCC and key industry stakeholders are best placed to advise ARNECC on how to implement safe and effective competition through interoperability

- The IGA Review has failed to “*advise what changes are needed to support a competitive electronic network lodgment operator market*” (ARNECC’s announcement in relation to the scope of the IGA Review, October 2018) but given the IGA Reviewer’s stance on ELN competition, we believe continuing to seek advice from the IGA Reviewer is unlikely to be productive
- However, we support the IGA Review’s first recommendation that establishing the model for safe and effective competition is ARNECC’s highest priority
- We support the ACCC, which has expressed categorical support for ELN competition through interoperability, leading a review into competition and interoperability in the e-conveyancing market. In March 2019, the ACCC submitted to the IGA Reviewer:

“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...”

“the ACCC considers that the models involving multiple interoperable ELNs, whether by direct connection or intermediated model, are the preferred models for promoting competition in the market.”
- We believe key industry stakeholders, such as the Law Council of Australia and the ELNOs, can play an important role in advising ARNECC and ACCC on specific legal and technical recommendations to implement safe and effective competition through interoperability
 - Key industry stakeholders have already been brought together through the Interoperability Working Groups
 - Assuming the ACCC agrees (or is directed by the Federal Government) to conduct a review into the e-conveyancing market, the ACCC could consult with ARNECC, the Interoperability Working Groups and other stakeholders to obtain any specific legal or technical information or advice required to make recommendations regarding interoperability
 - The Interoperability Working Groups would benefit from formal acknowledgement from ARNECC and formally inviting key non-NSW stakeholders (many of whom are already attending or observing). This is consistent with the Draft Report of the Chair of the Interoperability Working Groups, Dr Rob Nicholls, which emphasises that interoperability must be progressed at the national level and suggests this be done by expanding the participation and focus of the Interoperability Working Groups

The IGA Review states incorrectly that the IGA has not met its original intent of a 'single national system' of e-conveyancing due to the existence of multiple ELNOs. This ignores that in entering the IGA and enacting the ECNL, state governments made the conscious decision that a key feature of the regulatory framework for that single national system would be to allow multiple competing ELNs in the market

- The IGA Review states that the IGA has not met its original intent of a single national system of e-conveyancing due to the existence of multiple ELNOs, incorrectly equating the 'single national system' of e-conveyancing intended in the IGA with a 'single national ELNO'. In doing so, the IGA Review does not recognise that while the IGA and ECNL sought to establish a single national system for e-conveyancing, a key feature of the regulatory framework for that system is that it allows multiple ELNOs to operate in the market
- In particular, the IGA provides for the establishment of the ECNL and states the ECNL will allow State Registrars to authorise '*one or more persons*' to operate as ELNOs in their jurisdiction.² This was acknowledged by ARNECC in 2011, which stated that '*the legal framework does not preclude other organisations from applying to become an ELNO*', while stating its view at the time that a second ELNO was unlikely to enter in the short to medium term³
- This is further evidenced in ARNECC's Regulatory Impact Statement ("RIS") from February 2013 states:

"In the view of the participating jurisdictions the establishment work being undertaken with NECDL [PEXA] and the ensuing development of an ELN by NECDL [PEXA] is likely to have the effect of reducing barriers to entry...

Accordingly, whilst it is expected that NECDL [PEXA] will be the only ELNO initially, the ECNL allows for the Registrar to provide an ELN or for the Registrar to approve a person to provide and operate an ELN. In the future one or more ELNO's may be authorised to provide and operate an ELN."

- At the same time, ARNECC also envisaged the need for interoperability in the future. ARNECC's RIS from February 2013 states:

"Should other ELNOs be approved in the future, interoperability may need to be provided for in the operating requirements. However, interoperability will be facilitated by the fact that all ELNOs will be required by the operating requirements to use a data standard set by ARNECC for data communications between themselves and the land registries."

We agree that a data model for interoperability could be underpinned by the National E-Conveyancing Data Standards ("NECDS")

² IGA, Part 9.

³ ARNECC, *Proposed Electronic Conveyancing National Law Discussion Paper, August 2011*, p 12.

- ARNECC reinforced an expectation that it would investigate a pathway to implement interoperability between multiple ELNs in:
 - its Notice to Stakeholders in relation to the Review of Regulatory Framework, dated March 2017:

"ARNECC is investigating and considering issues relating to the ELNO marketplace, including, for example how multiple ELNOs may participate in that marketplace and inter-operate"
 - its announcement of the scope of the IGA Review of October 2018, which required the IGA Reviewer to advise on what changes are needed to support a competitive ELNO market and the interoperability of ELN systems; and
 - its position statement of April 2019 on effecting legislative and regulatory change to support an efficient and effective market with competing ELNOs
- Establishment of a multi-ELN market is important in the context of the the following decisions:
 - The States privatising PEXA, firstly through rounds of private investment commencing in 2011 and a full privatisation in 2019
 - Certain states mandating the use of an ELN, replacing a competitive paper-based industry
 - In November 2018, ARNECC approving Sympli Australia Pty Limited to operate as an ELNO under the Model Operating Requirements ("MOR")
- It would now be entirely inappropriate for the state governments to regress back to a regulatory model that favours a privately owned, lightly regulated, dominant operator over safe and effective competition
- The IGA Review should correct its statements about the intent and establishment of the IGA and should acknowledge that a key feature of the regulatory framework established by the IGA and the ECNL is that it allows multiple ELNOs to operate in the market. Further, the IGA Review should have accepted and emphasised that competition is essential to the sustainable operation of the e-conveyancing market and is consistent with the current market context

An ELN is not a natural monopoly

- The IGA Review incorrectly suggests that an ELN may be a natural monopoly for the following reasons:
 - the approval by ARNECC of Sympli to operate as an ELN
 - the connections Sympli has made and is currently making with land registries, revenue offices and financial institutions
 - the precedent set in Australia's equity clearing and settlement market (which the IGA Review also cites as a relevant precedent)
 - The ASX's equity settlement business is not considered by regulators to be a natural monopoly
 - Since 2017, the Commonwealth Government has a policy of openness to competition in the equity settlement market through interoperability
 - We note that fees generated by electronic property settlement are estimated to be more than 5x larger than the equivalent equity settlement (\$270m vs \$50m)
 - The IGA Review should have highlighted that as the equity settlement market is open to competition through an interoperability-enabled framework, then the states should feel justified establishing interoperability in the ELN market, a market that is materially larger and already contains multiple-ELNs

The cost of implementing interoperability is small in the context of establishing an ELNO. It will drive settlement fees paid by consumers down and lead to increased services and functionality.

- The IGA Review incorrectly represents that the cost of implementing and maintaining interoperability is high and that these costs will be borne by consumers
- The cost of connecting and maintaining connections to financial institutions, land registries and revenue offices ("Third Party Connections"), including the cost of change management, is not attributable to interoperability – these costs are incurred by an ELNO regardless of whether or not there is interoperability
- The direct cost of interoperability primarily involves developing and maintaining an ELN-to-ELN API connection, the cost of which is small in the context of building an ELNO and is far outweighed by the benefits of safe and effective competition
- For ELNs, developing and maintaining API connections is "business as usual". The total cost to develop an ELN-to-ELN API for two ELNs would be incurred by the ELNOs and would be very small in the context of the context of establishing an ELNO
- By comparison, the default multi-homing market framework would cost users and consumers many tens of millions in using multiple ELNs including training, maintaining multiple processes and acquiring multiple digital certificates. Further, as users would not be able to consistently choose the most efficient or cost effective ELN for them, benefits to consumers would be limited relative to an interoperable environment.

- For the avoidance of doubt, the cost that Sympli will incur in connecting and maintaining Third Party Connections and interoperability has already factored into Sympli's business case. As Sympli's overall cost to enter the market will be lower than the incumbent, Sympli has been able to offer prices to consumers which are 15-50% lower than the incumbent (see our fee schedule at <https://www.sympli.com.au/wp-content/uploads/2019/07/Sympi-Pricing-Schedule.pdf>)
- To the extent financial institutions, land registries, revenue offices or other ELNOs also incur costs in establishing connections to Sympli, we are not aware of any evidence to suggest that these costs will be passed onto consumers
- The argument in the IGA Review that costs should not be duplicated in a competitive industry is ill-considered as it is an argument against competition in any industry
- The IGA Review should therefore conclude that the cost of implementing and maintaining interoperability is small in the context of establishing an ELN and based on the evidence available, will drive settlement fees paid by consumers down

Despite the supportive views of the ACCC and widespread preference from users, the IGA Review questions whether the benefits of interoperability would outweigh the costs

- We believe it is self-evident that the relatively small cost to establish and maintain an ELN-to-ELN API connection is far more secure, cost-effective, efficient and pro-competitive than a multi-homing model which would require all users to potentially use multiple ELNs for settlement
- As previously stated, the cost of connecting and maintaining connections to financial institutions, land registries and revenue offices is not attributable to interoperability
- In March 2019, the ACCC submitted to the IGA Reviewer:

"the ACCC considers that the models involving multiple interoperable ELNs, whether by direct connection or intermediated model, are the preferred models for promoting competition in the market."
- In April 2019, the Law Council of Australia submitted to the IGA Reviewer:

"The Law Council supports competition in the ELNO marketplace. In the Law Council's view, competition in this market will drive innovation for improved products and services for Electronic Lodgement Network (ELN) users and maintain pressure on prices... The Law Council considers interoperability to be a non-negotiable feature of the future of the eConveyancing market."

The IGA Review incorrectly concludes that the benefits of competition to homeowners must be small and without taking into consideration the benefits of reduced fees and innovation that will flow from competition

- In March 2019, the ACCC submitted to the IGA Reviewer:

"In the ACCC's experience, competitive pressure in a market generally promotes lower prices, increased efficiencies and innovation, and better quality services.

We would caution against the assumption that the cost advantage to consumers must necessarily be small from competition, as appears to be implied by [the Issues Paper prepared by the IGA Reviewer]. The benefits of competition need to be assessed on the basis of a forward-looking assessment and consider the potential future changes in prices and benefits of innovation from competition."
- In addition to placing competitive pressure on ELNO prices, competition will bring other substantial benefits, as ELNOs will be incentivised to maintain high standards of service quality, innovate and continually improve their services. In June 2019, Sympli submitted to the IGA Reviewer a non-exhaustive list of near-term benefits that users and customers will gain from competition including:
 - Trials have concluded that workspace creation, document preparation and lodgment is 25-50% faster in Sympli than the incumbent, offering substantial efficiencies for users
 - Feedback from several financial institutions and large law firms indicates that competition will offer substantial benefits over having a dominant incumbent. One example is Sympli's development of flexible options within the Sympli ELN which allows a subscriber to configure it to suit their preferred processes, rather than the subscriber needing to establish new and sometimes cumbersome processes to fit the incumbent's platform
 - We have developed features which will allow financial institution users to avoid unnecessary interactions with the Sympli ELN
 - We are currently designing and building a comprehensive integration layer. Based on our research, we understand that our 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
 - Competition will promote the development of differentiated functionality for practitioners who compete bulk / 'off-the-plan' settlements, in response to many significant 'pain points' in the incumbent's platform
 - We have also identified options to reduce the risk of settlement funds being disbursed to the wrong bank account. We are confident that ELN competition will help drive a faster and more robust solution to this industry 'pain point'
- The IGA Review concludes that risk and liability will increase under an interoperable model. This is not substantiated in any way and fails to consider that safe and effective competition through interoperability would eliminate a currently unacceptable and unnecessary single party risk to the industry
- In addition to the example of Australia's equity clearing and settlement market, there are other global systems such as Automated Clearing Houses in Europe⁴ that interoperate
- The IGA Review should be amended to reflect a more balanced view

⁴ For example, in Europe, payments are processed by Automated Clearing Houses in each country and banks may be members of one (or more) Automated Clearing House. A non-profit industry association sets out open standards for business processes and messaging between Automated Clearing Houses so that they can coordinate and recognise each other's members to process payments across Europe quickly and efficiently. See European Automated Clearing House Association, EACHA Interoperability Framework, May 2016