REGULATION IMPACT STATEMENT

Options for promoting competition in the market for electronic lodgment network operators

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Introduction

The introduction of electronic conveyancing has brought major benefits to conveyancing efficiency. However, in the absence of true competition, the Electronic Lodgment Network Operator (ELNO) market is showing a tendency to concentrate market power in one incumbent provider. This has been a matter of concern for many in the industry and government, including the ACCC.

ARNECC now proposes to introduce regulation that mandates interoperability in the ELNO market as the best means to facilitate competition, with resulting benefits for the community. Interoperability enables the seamless exchange of workspace data between Electronic Lodgment Networks (ELNs) to allow participants to complete an electronic conveyancing transaction using different ELNs. Interoperability will allow practitioners to transact efficiently with all other parties, while subscribing only to the ELN(s) they choose.

This regulation follows consultation with members of ARNECC's Interoperability Industry Panel - see Tab A for more information on the Interoperability Industry Panel and its framework and process. This Regulation Impact Statement (RIS) has been prepared as a matter of best practice for a national reform of this nature. It is supported by a cost benefit analysis (CBA) undertaken by the Centre for International Economics (CIE).[1]

The RIS confirms that, of the feasible options, interoperability between ELNs best overcomes the concentration of market power in the ELNO market, and the competition it will generate offers the greatest net benefit to the community.

It supports governments taking necessary actions to require interoperability between ELNs as the most efficient way to sustain competition in the ELNO market.

The sections of the RIS set out reasoning:

1. **Regulation is needed to promote competition in the ELN market.**
    a. While the introduction of electronic conveyancing over the past decade has been a collaborative success, the current market design fails to promote competition and has enabled "network effects" that benefit the incumbent.
    b. Continuing the current market design would lead to poor outcomes for the community and be contrary to the 1995 Competition Principles Agreement and the 2016 Intergovernmental Agreement on Competition and Productivity-enhancing Reforms.[2]
    c. Regulatory reform is needed to make the ELNO market more competitive.
2. **Interoperability, and the competition, it will bring is the best way to make the ELNO market more competitive.**
    a. There are four possibilities to consider: the base case of no action; a single-ELNO market with greater regulation of its pricing and service; regulation to facilitate competition in a standalone multi-ELNO market; and regulation to mandate interoperability between ELNs.
    b. ARNECC identified the criteria to assess the options and the NSW Office of the Registrar General (NSW ORG) engaged CIE to do a comprehensive CBA of the options and considered any non-quantifiable costs and benefits that each option may bring.

[1] The CIE cost benefit analysis final report is available on the website of the NSW Office of the Registrar General - https://www.registrargeneral.nsw.gov.au/regulator/interoperability/reports-and-reviews.

[2] For any state that is not a party to the Intergovernmental Agreement on Competition and Productivity - enhancing Reforms, the 1995 Competition Principles continue to apply.

c. The CBA showed that interoperability is the best option to create a competitive ELNO market and address the concentration of market power within it. The CBA concluded that the competition interoperability would enable would deliver quantifiable net benefits of $83.6m over ten years compared to the base case and compared with $19.7m for price regulation of a monopoly, and also greater non-quantifiable benefits.

3. **ARNECC is working with ELNOs to develop the technical solution and with government to develop the regulatory framework to facilitate and regulate interoperability between ELNOs, in consultation with key stakeholders through the Interoperability Industry Panel.**

   a. ARNECC is considering a clear set of rules to regulate both the interoperability of ELNs and relationships between ELNOs and other stakeholders within the electronic conveyancing industry.

   b. Through the Interoperability Industry Panel, ARNECC is working to update regulatory and technical arrangements in consultation with key stakeholders.

   c. ARNECC proposes to implement interoperability in stages as follows:

      - Initially, ARNECC is working towards achieving a single, de-scoped interoperable transaction – being a re-finance transaction involving two financial institutions and one property owner in Queensland. This transaction will demonstrate interoperability, but will not mean interoperability is available generally to conveyancers, lawyers and financial institutions.

      - Following this first interoperable transaction, ELNOs will continue to build the technology required for interoperability; and ARNECC will work with stakeholders to implement interoperability across all transaction types and in all participating jurisdictions.

   d. The first interoperable transaction is scheduled to occur in September / October 2022; and the rollout of interoperability is scheduled from mid-2023. ARNECC will continue to provide updated information on its website in relation to timing and implementation of interoperability.

Alignment with Australian Government Guide to Regulatory Impact Analysis

Question in Guide	Section of RIS
1. What is the problem you are trying to solve?	1a-b
2. Why is government action needed?	1c
3. What policy options are you considering?	2a
4. What is the likely net benefit of each option?	2c
5. Who did you consult and how did you incorporate their feedback?	2b
6. What is the best option from those you have considered?	2c
7. How will you implement and evaluate your chosen option?	3

Glossary

ACCC	Australian Competition and Consumer Commission
API	Application Programming Interface
ARNECC	Australian Registrars' National Electronic Conveyancing Council
CBA	Cost Benefit Analysis
CFR	Council of Financial Regulators
CIE	Centre for International Economics
CPI	Consumer Price Index
ECNL	Electronic Conveyancing National Law
ELN	Electronic Lodgment Network
ELNO	Electronic Lodgment Network Operator
ESB	Enterprise Service Bus
IGA	Intergovernmental Agreement
IPART	Independent Pricing and Regulatory Tribunal of NSW
ITWG	Interoperability Technical Working Group
NECIDS	National Electronic Conveyancing Interoperability Data Standard
MOR	Model Operating Requirements developed by ARNECC
MPR	Model Participation Rules developed by ARNECC
OR	Operating Requirements determined by Registrars in each of their jurisdictions
PR	Participation Rules determined by Registrars in each of their jurisdictions
Registrars	the Recorder of Titles in Tasmania; the Registrar-General in Australian Capital Territory, New South Wales, Northern Territory and South Australia; and the Registrar of Titles in Queensland, Victoria and Western Australia
Subscribers	Persons authorised to use an ELN (primarily conveyancers, lawyers and financial institutions)

The road to the legislation

<table>
<tr><td>IPART Review
November 2019</td><td>Reported that structural elements of the Australian electronic conveyancing market required further examination, in particular its governance, the scope for competition, the regulation of financial settlements and the pricing regulatory framework.</td></tr>
<tr><td>Dench McClean Carlson Review
December 2019</td><td>Commissioned by ARNECC in 2018, the independent DMC review recommended that national regulators determine the regulatory, governance and management requirements for competition in the ELNO market, as a matter of urgency. Advised governments that regulatory action to deliver competition is justified if it will achieve a net benefit.</td></tr>
<tr><td>ACCC Report
December 2019</td><td>Advised governments that the current regulatory framework is no longer fit for purpose, neither constraining the incumbent nor promoting competition in the market. After meeting with a range of stakeholders, the ACCC advised governments on the need for certainty in rules that supported competition as a matter of urgency.</td></tr>
<tr><td>ARNECC action
January 2020</td><td>ARNECC undertakes to compare the costs, risks and liabilities of various electronic conveyancing market structures.</td></tr>
<tr><td>CBA adopted
June 2020</td><td>ARNECC adopts CIE CBA, commissioned by NSW ORG, comparing interoperability with alternative structures.</td></tr>
<tr><td>Ministerial roundtable
10 June 2020</td><td>Roundtable asks ARNECC for a proposal to implement a national interoperability regime, including the benefits and costs of potential regulations.</td></tr>
<tr><td>Ministerial roundtable
7 September 2020</td><td>Roundtable supports interoperability being part of the Electronic Conveyancing National Law (ECNL), after considering:
an independent CBA, supported by Treasuries,
an industry-endorsed secure technology approach, and
an approach to update laws and regulations, developed with Registrars.
New South Wales, Queensland, South Australia and Western Australia also agree to develop the technical and regulatory regime, including for legislation to be in place by mid-2021. Tasmania noted it was taking steps to implement electronic conveyancing locally. Victoria agreed in principle to progressing the reform.</td></tr>
<tr><td>Ministerial roundtable
7 December 2020</td><td>ARNECC updates Ministers on key design requirements of a national interoperability regime, including:
changes to the regulatory framework to mandate interoperability and specify key technical and operational requirements.
industry and government to collaborate to develop an interoperability data standard and business rules.
Ministers supported ARNECC continuing to work towards implementing legislative changes to facilitate interoperability by mid-2021.</td></tr>
</table>

Joint government and industry statement 12 March 2021	Commonwealth, State and Territory Ministers, ELNOs and stakeholder peak bodies publish a joint statement supporting: • the interoperability reform process and collaboration between government and industry; and • the proposed timeframe to implement legislative changes by mid-2021 and going live with a first interoperable transaction by the end of 2021.
Council of Financial Regulators meeting June 2021	The CFR (comprising APRA, ASIC, the RBA and Commonwealth Treasury) publish a quarterly statement expressing its support for self-regulation through an industry code to address gaps in financial settlement regulation. The CFR made this statement after considering recommendations of a working group comprising CFR members, ELNOs and Registrars.
Joint Ministerial and ACCC statement 1 July 2021	Commonwealth, State and Territory Ministers and the ACCC published a joint statement: • acknowledging the progress of the interoperability reform and the significant contributions of stakeholders to the development of the regime; and • noting the proposed timeframe to achieve a first interoperable transaction by the end of 2021 or first quarter 2022.
Ministerial Directions Statement 29 October 2021	Commonwealth, State and Territory Ministers published a joint statement agreeing to the following key dates: • NSW to introduce changes to the national law into NSW Parliament in February 2022; • the first interoperable transaction to occur in the third quarter 2022; and • by mid-2023, all interoperable transactions would be functional, with roll-out commencing in jurisdictions in the second half of 2023.

1. Regulation is needed to promote competition in the market for ELNOs

The current ELNO market design has allowed market power to concentrate in one operator, a situation of concern for industry and government, including the ACCC.

This section of the RIS sets out how:

a. the ELNO market's design has allowed a "network effect" to concentrate market power in an incumbent,

b. allowing this position to continue would be unacceptable, and

c. the preferred way to overcome that market concentration of power is through regulation.

1a. There is a strong concentration of market power in the current market for ELNOs

Electronic conveyancing was introduced as a Council of Australian Governments (COAG) initiative with sound objectives, and a government-owned ELNO was established. Although the Electronic Conveyancing National Law (ECNL) permits multiple ELNOs, the initial market design has made it difficult for new ELNOs to enter the market, and so the incumbent has secured an unintended monopoly in the market.

- **The incumbent has secured an unintended monopoly in the ELNO market**.
  As electronic conveyancing is now mandatory in Victoria, New South Wales, Western Australia and South Australia,[3] practitioners must transact using an ELN—they cannot revert to paper. The incumbent was established as a government-owned entity in 2013 and was fully privatised in 2019. The incumbent maintains concentrated power in the ELNO market - the only other approved ELNO completed its first transaction in October 2019 and is increasing its operations, but currently has few Subscribers.
- **The current regulatory framework does not adequately prevent "network effects" from protecting that concentration of market power.**
  Currently, all parties to an electronic conveyancing transaction must use the same ELN because parties on separate ELNs cannot exchange data to complete a transaction. This makes it difficult for non-incumbent ELNOs to compete – a Subscriber can only transact on the non-incumbent's ELN if all other parties to the transaction agree to use the same ELN. This is unlikely to occur while the incumbent maintains concentrated market power, making it difficult for non-incumbent ELNOs to establish and develop a sustainable market share.

  This is an instance of the network effect, by which users can only effectively participate in a market by connecting with others on the same network. It tends to make the biggest network (for example, Facebook or Google) a monopoly participant in their market: the more that people use it, the more valuable it becomes, and the less reason there is to use other networks that provide the same service. The electronic conveyancing market exhibits a strong network effect - the more that participants choose one ELN, the more likely it is that others will as well.

  The network effect will protect the incumbent, as it is highly unlikely any competitors will be able to take up market share:

[3] Electronic conveyancing is available but not mandatory in Queensland and the Australian Capital Territory, while Tasmania and the Northern Territory have legislation in place to make electronic conveyancing available.

- Under the current market conditions, Subscribers would likely ignore new entrants as they have already spent money subscribing to the incumbent (a sunk cost). They could subscribe to another available ELN, but 1) that is an additional cost, and 2) they would not be able to use it unless other participants did the same. If a participant wants to use an alternative to the incumbent, it is not enough for them to subscribe to an alternative ELN; they also depend on other users to subscribe to the alternative ELN, or the transaction cannot be completed.
- Given that likely participant behaviour, potential ELNO market entrants are unlikely to invest in alternative ELNs until there is regulation that overcomes this network effect and creates the conditions necessary for a competitive market.

If the ELNOs were able to interoperate with one another, both these problems may be overcome.

1b. Allowing this situation to continue is unacceptable.

The ACCC, the IGA Review and IPART have all called for regulation to overcome this concentration of market power. The current level of concentration is a poor outcome for the community and may contravene the 1995 Competition Principles Agreement and the 2016 Intergovernmental Agreement on Competition and Productivity-enhancing Reforms.

- **It is a poor outcome for the community.** In the past, the incumbent had competitive pressure from paper lodgments, but that competition has been largely removed in most jurisdictions. The ACCC noted in December 2019 that, under current regulation, new ELNOs may be unlikely to sustain a presence in the market. Should the incumbent continue to hold a dominant position in the market, the ACCC noted it may have little incentive to:
  - pursue service or cost innovations,
  - pass through any lower costs or efficiencies,
  - pursue higher service quality, or
  - respond to stakeholder concerns with its operations.

  While many benefits accrue to the single private entity, many risks are shared by the whole electronic conveyancing community. These operational and technical risks are borne by all parties to conveyancing transactions, who must either protect or insure themselves, with their market power to negotiate those risks and costs with the incumbent ELNO reducing over time.

- **It is contrary to the 1995 Competition Principles Agreement and 2016 Intergovernmental Agreement on Competition and Productivity-enhancing Reforms.** These agreements provide that regulation should not restrict competition unless:
  - its objectives can only be achieved by restricting competition, and
  - the restriction has net benefits to the community.

  As this RIS sets out, neither of those conditions apply in this case. While the regulatory framework does not expressly restrict competition, it does not adequately address impediments for non-incumbent ELNOs entering and sustaining a market presence, which has the practical effect of restricting competition in the ELNO market.

1c. Regulatory reform is needed to address concentration of market power

To prevent the existing concentration of market power from delivering poor community outcomes, regulatory reform (through a package of market, operational and enforcement regulation) is needed either to better regulate the existing situation or to enable competition from new entrants.

The current regulation is limited

There is some limited curbing of market power through the ECNL and the OR determined under it, which follow the MOR. However, the December 2019 ACCC report advised governments that they do not threaten any specific response or sanction for non-compliance.

The current restrictions on ELNOs are:

- **ELNOs cannot "cherry-pick" the most profitable parts of the electronic conveyancing market.** The ORs require that ELNOs must be available to all land registries and to Subscribers in all states and territories, and for the priority range of transactions which make up approximately 80% of all transactions (as well as other conveyancing transactions types capable of lodgment in a jurisdiction).
- **ELNOs cannot bundle ELNs with other services.** If ELNOs want to offer other services, they must functionally or structurally separate the ELN business from the business that offers other services. This prevents anti-competitive behaviour by ELNOs in the other markets, but not in the ELN market itself.
- **Price rises are limited to CPI.** ELNOs may set their own base service fees through a publicly available, equitable and transparent pricing policy. Additionally, since February 2019, they can only raise prices once a year on 1 July, and then only up to the year-on-year CPI growth to the previous March quarter.

Regulation is needed to curb concentrated market power

A change in regulation is needed to either better regulate the existing market or facilitate competition by removing barriers to entry for new entrants. The ACCC indicated (Dec 2019) that either or both outcomes are desirable, but that the current regulations do neither. Since the use of an ELN has become mandatory in many jurisdictions across Australia, updated regulation is needed as a matter of urgency.

None of the available options to curb concentrated market power in the ELNO market will occur without regulation.

The ACCC considered that absent appropriate imperatives or commercial incentives, the incumbent will not facilitate the development of a competitive market. Indeed, the ACCC suggests there are commercial incentives for it to resist competition and allow the network effect to maintain its market power. Regulation would also be needed for the two other alternatives considered in Section 2 below.

2. Interoperability is the best solution

Interoperability is the best way to create a competitive ELNO market and address that monopoly power.

This section of the RIS sets out how:

a. There are three alternative forms of market that regulatory reform may promote: a single-ELNO monopoly with price regulation, multiple ELNOs without interoperability ("multi-homing"), and multiple ELNOs with full interoperability.

b. The CBA showed that interoperability is the best option to create a competitive ELNO market and address concentration of power in the ELNO market.

2a. Three alternatives to address concentrated market power

ARNECC considers there to be three realistic options to address the concentrated market power in the ELNO market, either by facilitating competition in the market or otherwise:

1. **Stronger price regulation in the current market.** This model is based on the assumption that without regulatory change to facilitate competition, the market will continue to be dominated by the incumbent and may devolve to an effective monopoly if current competitors cannot establish a sustainable market presence. In this case, stronger price regulation would be required as a substitute for competition-driven downward pressure on prices.
2. **Minor regulation to support "multi-homing"**, to enable parties to subscribe to multiple ELNOs which do not interoperate. The regulation could however insist on:
    a. cross-recognition of Subscribers,
    b. open digital certificates, or
    c. common user interface across ELNs.
3. **Interoperability between ELNs**, by which Subscribers would only need to subscribe to one ELNO, and any ELN they use would be connected to, and exchange data, with any other ELN to complete a transaction.

The "base case" (no action) and three alternative regulatory options are detailed in the sections that follow.

No action (base case)

If no further government action is taken to address market power, all participants in the workspace (for example, the buyer's representative, buyer's financial institution, seller's representative, seller's financial institution) must select one ELN for their transaction.

This option avoids the costs and complexity that may arise from introducing and enforcing either an interoperability regime or a stronger price regulation regime.

However, it would also maintain the "network effect" that makes it difficult for new ELNOs to compete with the incumbent, entrenching the concentration of market power.

Alternative 1: Stronger price regulation in the current market

With no interoperability, the most likely scenario is a market without sufficiently strong competition to address the market power risks of the incumbent provider. New ELNOs or potential ELNOs would find it difficult to capture enough market share to curb the incumbent's market power, or may leave the market entirely. In this scenario, stronger price regulation than the CPI price caps already in place would be needed. For example, it may be necessary to implement processes to baseline prices for new services, based on recommendations of an independent expert pricing body.

The IGA Review identified some potential benefits of a single-ELNO market with stronger price regulation, including,

- a lower level of technical complexity, and
- reduced costs for financial institutions, land registries and revenue offices who could avoid the costs of duplicating financial settlement, lodgment and duty payment infrastructure, respectively.

However, governments are unwilling to support the current arrangements, given that steps towards a competitive market have been taken, consistent with the legal framework which contemplates a multi-ELNO market. The ACCC also noted in its 2019 report that it is not in the interests of participants, consumers and the broader economy to forfeit the prospect of competition emerging in the market or to entrench the incumbent near monopoly service provider. Supporting the current arrangements would:

- be inconsistent with the 1995 Competition Principles Agreement and 2016 Intergovernmental Agreement on Competition and Productivity-enhancing Reforms,
- unwind any competition in those jurisdictions where new entrants have emerged or entrench the concentrated market power of the incumbent where competition has yet to emerge,
- destroy the value of past investments made by the non-incumbent ELNO in building connections to land registries, state revenue offices and banks, and
- signal a risk to future investment in electronic conveyancing.

Price control to manage limited competition

Under this scenario of limited competition, CIE considered the net benefits of stronger price regulation to prevent the incumbent operator from charging excessive prices. While the regulatory framework for electronic conveyancing already applies a price cap on what ELNOs can charge, with the cap increasing by CPI each year, CIE modelled a more comprehensive approach to price regulation. This would generally involve a periodic price investigation or inquiry, involving public consultation and the opportunity for ELNOs and other stakeholders to provide written submissions.

Alternative 2: Multi-homing with no interoperability

In theory, practitioners may subscribe to additional ELNs (for example, the incumbent and newer ELNOs or Potential ELNOs) if the price is low enough. However, for multi-homing to work, it would need to address both the additional costs and additional rules that would be needed. In this scenario, all parties to the transaction would need to use the same ELN to complete a transaction – and therefore Subscribers would likely need to subscribe to all available ELNs, to be able to complete transactions on their non-preferred ELN. The regulation would be targeted at removing or lessening the burden of multi-homing.

Three methods have been suggested to address these issues through regulation, without resort to interoperability: cross-recognition of Subscribers, open digital certificates which can currently be used in all ELNs, or using a common user interface across ELNs.

Each of these methods is considered below. While they may make it easier to switch between ELNs, they may be disruptive or costly or both, and do not change the fundamental concern about multi-homing: that Subscribers would need to subscribe to multiple ELNs if they wish to access the whole electronic conveyancing market. For these reasons, CIE concluded that none of the options are viable alternatives to achieve a competitive market.

Issues for multi-homing to address

The two issues that would need to be addressed are:

- **Additional costs for each ELN used.** For each ELN used, the Subscriber would face the time and costs of applying to be a Subscriber and retaining that status, the time and cost of training staff, the time and cost of integration with practice processes and practice management systems, the inconvenience of switching between different systems, and the increased chances of rework if ELNs operate very differently.
- **Additional rules to determine which ELN to use in a transaction.** If there are multiple ELNs available, parties to a conveyancing transaction would have to choose which ELN to use for their transaction. A typical transfer of land has a buyer, the buyer's financial institution, the seller and the seller's financial institution. Each party (or their representatives) will have a preferred ELN. The alternatives to choose which ELN should be used are:
  - Rules that identify the "Responsible Subscriber", so that the buyer's financial institution (or buyer's representative for a non-financed purchase) would most likely choose the ELN for all parties. This would mean that financial institutions would have disproportionate influence in determining the ELN for a transaction.
  - Registrars may develop alternative rules to determine which ELN should be used in particular conveyancing transactions, or which party should have the determining choice, based on other policy and operational considerations.

Alternative 2a: Multi-homing with cross-recognition of Subscribers

This option would allow conveyancers, lawyers and financial institutions to register with one ELNO and have their Subscriber status recognised by other ELNOs. Cross-recognition could include matters such as verification of identity and eligibility requirements (such as insurance and character requirements).

This approach would benefit both Subscribers and ELNOs, who would save the time and cost of repeated onboarding for a single Subscriber.

Issues that would need to be addressed include:

- **The governance and costs of new subscriptions.** ELNOs would have to rely on the onboarding processes of other ELNOs, with little oversight as to their level of compliance, leading to risks where one or more ELNOs had poorer compliance rates and a higher risk tolerance than others. As Subscriber onboarding takes time and has costs associated with it, the ELNO that undertakes that task would need to be compensated by each other ELNO for that time and cost. It might be difficult to ascertain what the fee would be, and who would pay it and how it should be allocated across ELNOs.

- **The maintenance and service of continuing subscriptions.** Subscribers engage with ELNOs beyond the sign-up stage for any number of reasons: for example, to ask questions about functionality and training. As well, ELNOs have to ensure Subscribers continue to meet the eligibility criteria to participate (including good character requirements, professional registration or licensing and insurance). It would not be clear which ELNO would be responsible for monitoring those conditions and answering Subscriber queries, and for their associated costs.

Alternative 2b: Multi-homing with open digital certificates

To sign documents on an ELN, a Subscriber must have a digital certificate which enables encrypted digital signing. They could use an "open" digital certificate that can be used in any ELN[4], or a "closed" (community) digital certificate which is tied to the ELNO that provides it. The incumbent offers its Subscribers a closed digital certificate. The ORs require that an ELNO permit the use of open digital certificates which makes it easier for Subscribers to switch between ELNs, and so supports competition.

While the ORs require an ELNO to accept open digital certificates, this does not resolve the issue of cost to Subscribers. Open digital certificates have an initial cost of around $650 and ongoing costs of around $300 every two years. There are additional costs for a Subscriber to obtain further certificates and "tokens" for multiple users within a conveyancing or legal practice. This means that for any Subscribers who do not have any open digital certificates, moving to open digital certificates will result in switching costs because:

- they are more expensive than the incumbent's closed digital certificates, which are around $156 per certificate valid for three years, including USB token; and
- in moving to an open digital certificate, Subscribers will lose the value of any unexpired closed digital certificates that they hold.

Additionally, open digital certificates only address one small aspect of the time and cost burden of multi-homing – participants will still need to subscribe to multiple ELNs, with the associated administrative burden.

Alternative 2c: Multi-homing with a common user interface across ELNs

Another possibility is to mandate a common user interface across ELNs. Under this approach, ARNECC could require that each ELNO builds and maintains a user interface that is prescribed by ARNECC. Subscribers would then be able to switch between ELNs more readily, as they would already be familiar with the common user interface. ELNOs who could deliver the common user interface more efficiently would be better able to compete on price.

However, by definition, a common user interface would mean there is minimal differentiation between ELNOs, and no incentive for any ELNO to innovate to improve user experience. Indeed, ELNOs would have to agree on what changes to make to the common user interface, which would require coordination and agreement and could lead to disputes. This alternative also does not address integration costs associated with connecting to ELNs, even if the common user interface is the same, Subscribers wishing to integrate systems will still have to bear this cost.

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[4] In Victoria, open digital certificates can be used in the *Surveying and Planning through Electronic Applications and Referrals* (SPEAR) system, being an ELN for lodging survey-based instruments, as well as in the ELNs known as PEXA and Sympli.

CIE's conclusion is that none of these three options are viable alternatives to achieve a competitive market and address monopoly power, and so multi-homing was not included in the CBA.

Alternative 3: Interoperability between ELNOs

Interoperability means that any ELN used must be able to interconnect and communicate with any other ELN, so that Subscribers using different ELNs can participate in and complete a transaction. It would enable Subscribers to choose the ELN they like the best, and use that to interact with all other participants in the electronic conveyancing market. With interoperability, there is no need for a common user interface or cross-recognition of Subscribers, and Subscribers could use either an existing open digital certificate or a closed digital certificate provided by their ELNO.

Interoperability is well tested in other industries: for example, mobile phones of any make can use any network to connect and operate with any other mobile phone. A system that allowed interoperability would allow a user to participate in conveyancing transactions using their preferred ELN, regardless of the ELN used by other participants. Interoperability is therefore the only option to comprehensively address the network effect as a barrier to market entry for new and emerging ELNOs. Regulators of communication, financial and other digital markets consider interoperability to be essential for competition.

2b. A rigorous process to assess the alternatives

To identify the best path to a competitive ELNO market, in consultation with industry, governments have:

- identified the criteria to assess the alternatives,
- engaged CIE to do a comprehensive CBA of the options, and
- considered the non-quantifiable costs and benefits that each option may bring.

Consultation with the Interoperability Industry Panel through the assessment

ARNECC members and industry have worked together since 2018 on developing a proposal for a national interoperability regime. In doing so, formal advice received has been reviewed, and options have been tested with affected businesses, peak body organisations and individuals over a two-year period.

To inform its advice to governments, ARNECC has considered:

- the Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA Review),
- the ACCC report on electronic conveyancing market reform, and
- the papers of the Interoperability Industry Panel.

In conducting the CBA, CIE consulted with all stakeholders that may be impacted by the proposed regulation. These include:

- Registrars, revenue offices and treasuries,
- private operators of land titles registries, where applicable,
- ARNECC,

- the ACCC, IPART and other government bodies who have previously considered interoperability,
- industry bodies, including the Australian Banking Association, the Australian Institute of Conveyancers, and the Law Council of Australia, and
- ELNOs and potential ELNOs.

CIE met with these stakeholder groups, considered written submissions, considered qualitative feedback, and compared empirical evidence from other relevant industries.

Criteria to assess the alternatives

The Interoperability Industry Panel agreed on both quantifiable and non-quantifiable benefits and costs that should be included as criteria to assess the alternatives.

Benefits considered

The following criteria would indicate the community benefit delivered by the alternatives:

a. integrity of land title
b. efficiency (time and cost) for participants in the conveyancing market
c. efficiency (time and cost) for regulatory implementation and enforcement
d. potential for further innovation
e. privacy of data
f. resilience against failure of single platform
g. national interoperability.

Some of these could be directly quantified in the CBA modelling:

- **Lower prices as a measure of net efficiency gains,** or conversely, the marginal excess burden on society from prices that exceed an efficient level.
- **Time savings for Subscribers as a measure of service quality,** i.e., ease of integrating the ELNO's platform into practice management software; ease, organisation and reliability once installed; and the level of Subscriber support.
- **Potential for further innovation and associated productivity improvements,** which over time could further reduce prices and/or improve service quality.

Other benefits could not be quantified:

- **Greater resilience,** i.e. the capacity for transactions to continue if an ELNO becomes unable to operate. This may be temporary, with urgent transactions proceeding through an alternative ELN, assuming each Subscriber is subscribed to multiple ELNs. It may be permanent, if the only ELNO in a market unexpectedly exited, in which case electronic conveyancing transactions would be unable to proceed. However, this situation would be unlikely, as the most likely cause of an unexpected exit would be insolvency, which would seem unlikely for an ELNO with concentrated market power in such a strong underlying conveyancing market. The benefit of resilience was not quantified due to the uncertainty around the risks of an ELNO not operating.

Costs considered

In calculating the net benefit of the option, identifiable costs were deducted from the community benefits. These costs included:

- **Establishment and operating costs to ELNOs**, including the costs to establish a direct connection (through APIs), migration to the ESB, testing and delivering product updates, and servicing Subscribers.
- **Operating costs to Subscribers** (conveyancers, lawyers and financial institutions), including the costs of onboarding, training, compliance and professional indemnity insurance.
- **Operating costs to other parties involved in the conveyancing transaction** (financial institutions as payment providers, land registries, state revenue offices), including the costs of connecting to the ELNs and testing new product releases. They may also include the cost of contractual changes for financial institutions whose current contracts refer specifically to the incumbent rather than ELNOs in general (as they would need to under interoperability).
- **Costs of price regulation**, including regulator costs as well as the costs to ELNOs and related parties for preparing submissions.
- **Costs of dispute resolution,** potentially between ELNOs, land registries, ESB operators and financial institutions. It is not clear to what extent interoperability would increase the frequency and costs of disputes and litigation compared to electronic conveyancing conducted on a single ELN.

In calculating the identifiable costs, CIE also included the potential costs of establishing and operating ESB infrastructure. This would be the cost to governments and/or other stakeholders of testing and developing infrastructure and ongoing maintenance of the infrastructure. Whether or not the ESB model will be adopted has not yet been determined. Any costs associated with an ESB would need to be considered as part of the transition from the direct connection model.

Cost-benefit analysis by the Centre for International Economics

CIE was commissioned to undertake a CBA of the three alternatives to create a more competitive ELN market. Its modelling was based on data and direct input from all affected parties, based on assumptions that could be changed to test sensitivities. Where benefits (such as resilience) were difficult to quantify, CIE looked to industries such as taxis, share trading, retail electricity and home broadband to provide further insights.

Assumptions and sensitivities tested

Core assumptions used in the CBA are:

- **Five or ten-year time frame.** The choice of time period for a CBA is largely arbitrary. However, where the costs are mostly incurred upfront for a stream of future benefits (as is the case for mandating interoperability), it is reasonable to choose a longer period over which to measure the benefits. In this case, the benefits of Options 2 and 4 were estimated to outweigh the costs, regardless of whether a five-year or ten-year period is used.
- **Phased ESB Model.** The CBA estimates the costs and benefits of the phased ESB model, the stakeholders' preferred technological solution (discussed further at Section 3). While the CBA factors in the costs of transitioning from direct connection to an ESB, it does not separately assess the benefits of direct connection as compared to an ESB, as any additional benefits will only be realised in the event of a third market entrant.

- **Competition from a paper-based market.** The CBA has modelled a hypothetical scenario in which Subscribers could revert to a paper-based conveyancing transaction, potentially reducing the benefits of interoperability. The assumed benefits of electronic conveyancing, by any means, included less time attending settlement rooms and lodging paper documents, and less data entry errors. Where electronic conveyancing is mandated, Subscribers do not have to run dual paper and electronic processes, generating further savings. In those jurisdictions, Subscribers have confirmed these time and cost savings as a result of transitioning to a purely electronic environment.
- **Additional entrants.** The CBA has modelled only the availability of the existing two ELNOs. Any additional operator would bring further benefits, but it is unclear when and whether there would be a new entrant and what the associated benefits would be (i.e., the results potentially understate the benefits of additional ELNOs).

2c. Interoperability delivers the greatest net benefit

Competition should not be sought for competition's sake, but only if its net benefits outweigh the alternatives. In this case, the interoperability option does deliver greater net benefits. Both of the modelled alternatives delivered net benefits compared to the base case: over 10 years, net benefits of $83.6m for interoperability and $19.7m for price regulation.

Additionally, the analysis suggests a benefit-to-cost ratio of 3.0 for interoperability: i.e., every dollar spent by stakeholders would deliver $3.00 in benefits to society. Accordingly, the costs to stakeholders to implement interoperability are proportionate to the objectives of the regulation.

- **The net present value of interoperability benefits (relative to the status quo base case) is estimated at $83.6 million over 10 years, using a discount rate of 7 per cent.**

  The main costs of interoperability are those incurred by ELNOs in establishing the connection and associated APIs. There are also significant costs to participants, however these have either already been incurred (establishment costs for a second ELNO) or are likely to be incurred even if interoperability is not mandated.

  These costs are significantly outweighed by the anticipated benefits of competition, including lower prices for consumers, the twin innovations of efficiency improvements to reduce ELNO transaction costs and quality improvements to save time for Subscribers, and continuing innovation over time.
- **A net present value of the benefits of more comprehensive price regulation are estimated at $19.7 million over 10 years, using a discount rate of 7 per cent.** The major benefit is in capping the price of access to and use of ELNs to increases in the Consumer Price Index. There is unlikely to be the same price benefits as competition, or the quality improvements or innovation over time.

In CIE's view, there may be significant uncertainty around these estimates (reflecting uncertainty as to how the market for ELN services will evolve either with or without interoperability). However, scenario and sensitivity testing suggest that these findings – and in particular the relative value of the two sets of benefits – are likely to be relatively robust.

3. ARNECC will develop, test and implement interoperability

ARNECC is working with current operators to develop the technical solution and with government to develop the regulatory framework to facilitate and regulate interoperability between ELNOs in consultation with the Interoperability Industry Panel.

This section of the RIS sets out how ARNECC will develop, test and implement interoperability, commencing with a single, de-scoped transaction before proceeding to implement interoperability more broadly across all transaction types and operating jurisdictions.

Clear set of interoperability rules

Technical and regulatory approaches have been developed over the past two years with industry and independent assistance, building on the existing national electronic conveyancing framework. Specifically, ARNECC is settling a preferred regulatory approach that involves:

- changes to the ECNL to impose a core obligation for ELNOs to establish interoperability between ELNs,
- substantive requirements for interoperability set out in national MOR, which will then be determined by Registrars in each state and territory, and
- creation of an interoperability data standard.

Design of technology and regulations to avoid risks

To ensure that introducing interoperability did not introduce new risks, or create additional barriers to entry beyond two operators, the IGA Review recommended that the models for interoperability should minimise risk to land titles security or data, including consumer data.

ARNECC will continue to work with industry to finalise the data standard and business rules that meet or exceed current best practice.

Technical approaches to achieve interoperability

There are two technical approaches to achieve interoperability in the ELNO market:

- directly linking ELN back-end systems, or
- enabling two or more ELNs to communicate through an ESB, avoiding the need for multiple direct links between ELNs.

The Interoperability Technical Working Group (ITWG), comprising key government and industry stakeholders including ELNOs, considered options for the best technical solution to achieve interoperability. The ITWG prepared a report which recommended a phased ESB model as follows:

- The first phase is the development of standardised APIs and business rules to facilitate communication and exchange of data directly between ELNs, to support interoperability between the current ELNOs.
- The second phase would be to leverage these APIs and business rules to transition from direct connections between ELNs to a cloud-based ESB, to support a future market with more ELNOs.

Government and stakeholders are currently focused on developing the technical solution for the first phase, to facilitate competition between the two current ELNOs. The timing for the transition to the second phase is considered below under *Evaluation.*

Updating the ECNL to enable targeted requirements relating to financial settlement in electronic conveyancing

Conveyancing involves both *lodgment* (of registry instruments) and *settlement* (payment of funds required for any associated financial transaction). The ECNL primarily deals with the lodgment component for electronic registry instruments, reflecting the historical position that Registrars are responsible for overseeing lodgment and registration of registry instruments under land titles legislation. The IGA Review concluded that there is currently a "gap" in the regulation of the financial settlement component, stating that *"the regulatory framework is not clear on responsibility for establishment and governance of appropriate financial payment and settlement systems".*

ARNECC recognises that Registrars lack expertise in financial settlement and payment systems, which are also subject to separate oversight by ASIC and the RBA.

In July 2021, the CFR discussed the recommendations of a review of the regulatory framework for electronic conveyancing, conducted by a working group comprising CFR agencies, the ACCC and Registrars. The CFR and the ACCC support addressing regulatory gaps through self-regulation under a payments and settlement industry code, to be jointly developed by ELNOs and financial institutions under the governance of an industry steering committee facilitated by Australian Payments Network Limited.

To support this self-regulation, the ECNL will be amended to empower Registrars to determine ORs which require ELNOs to participate in and comply with the payments and settlements industry code.

Intellectual property in the interoperability rules and API data standards

Interoperability requires a data standard comprising API specifications and associated business rules to govern the exchange of data between ELNs. This data standard is known as the NECIDS. The NECIDS is being developed by a working group comprising the two current ELNOs and jurisdictional representatives. The NECIDS will operate in conjunction with the NECDS – National Electronic Conveyancing Data Standard – which governs the exchange of data between ELNs and land registries.

A government-owned company limited by guarantee will be incorporated to maintain and curate the NECIDS and the NECDS. This will ensure that all ELNOs have equal access to these data standards and that those standards are effectively managed. The company's costs of managing and curating the data standards will be met by each operating ELNO paying a fee in exchange for a non-exclusive licence to access and use them.

Both current ELNOs have agreed that all intellectual property rights in the NECIDS will vest in the company limited by guarantee, at no cost. Other intellectual property rights in data standards that arise as a result of interoperability will also vest in or be assigned to this entity.

Guidance from other interoperability frameworks

Given that electronic conveyancing as it operates in Australia is essentially a "world first", it is useful to consider other contexts in which interoperability is used to enhance competition. For example, interoperability is at the heart of the new European Union digital strategy, which seeks to protect large online platforms from accumulating large amounts of data, and with them competitive advantages. The European Union is therefore seeking to apply standard and shared compatible formats and protocols as part of a strengthened European Interoperability Framework.

Steps to implementing interoperability

ARNECC envisages four major milestones of implementation before interoperability is available after mid-2023:

- update the regulatory framework (ECNL, MORs and MPRs) and technical (API) arrangements by the end of the first quarter 2022,
- test the interoperability technical requirements in the lead up to the first transaction,
- achieve the first interoperable transaction by September / October 2022, and
- implement interoperability more broadly after mid-2023.

ECNL amendment process to support interoperability

The proposed legislative and regulatory amendment process is set out below.

The ECNL is an applied law scheme, which commenced in New South Wales and was then adopted by Victoria, Queensland, Tasmania, Australian Capital Territory. Corresponding legislation was then enacted in Western Australia, Northern Territory and South Australia (though South Australia and Northern Territory can amend their legislation in line with amendments made by New South Wales by way of passing Regulations to adopt the amendments as a Schedule to their local ECNL adoption Act).

With some exceptions, the ECNL does not set out substantive obligations for electronic conveyancing;[5] instead, it establishes high-level principles and facilitates Registrars to determine substantive regulatory obligations through ORs for ELNOs and PRs for Subscribers. ARNECC develops MORs and MPRs to maintain national consistency, which are then implemented at a state and territory level by individual Registrars.

Proposed ECNL amendments

The proposed amendments to the ECNL will:

- impose a core obligation for ELNOs to interoperate with one another,
- create additional powers for Registrars to determine ORs, which establish the substantive requirements for interoperability and require ELNOs to participate in and comply with a payments and settlements industry code, and
- extend the statutory reliance regime for digital signatures to cover interoperable transactions.

Proposed MOR amendments

Registrars will use additional powers conferred by the ECNL to determine ORs which will establish the substantive requirements of the interoperability framework, addressing matters including:

- requiring ELNOs to enter into agreements with one another to address matters such as dispute resolution and change management, amongst other things,

[5] Exceptions to this are that the ECNL establishes a statutory regime for reliance by parties on digital signatures and an obligation for ELNOs and Subscribers to participate in compliance examinations.

- establishing a dispute resolution process for ELNOs unable to agree the terms of their agreements,
- requiring current ELNOs to ensure that all electronic registry instruments are capable of being lodged as part of an interoperable transaction by a specified date,
- requiring ELNOs to use the NECIDS to conduct interoperable transactions,
- restricting the disclosure, storage or use of information that an ELNO receives from another ELNO involved in an interoperable transaction.

Evaluation of the interoperability regime

The regulatory and technical changes to implement interoperability are key steps in promoting effective competition in the ELNO market. ARNECC will assess the effectiveness of interoperability on an ongoing basis, as it is rolled out after mid-2023 and as the ELNO market continues to develop and evolve.

Matters that will require consideration in the future are set out below.

Technology to support a market of three or more ELNOs

The CIE CBA considered the "phased ESB" model, which proposes a transition to a central ESB to reduce the complexity of multiple direct connections and facilitate new entrants in the ELNO market. However, the benefits of an ESB are only realised in a market with three or more ELNOs – in the current two ELNO market, an ESB model involves additional cost, with no benefits over direct connections.

The most appropriate technology to support a market of three of more ELNOs needs to be considered further. As the ELNO market develops, ARNECC will continue to consider technological approaches and any associated cost to government or stakeholders.

ARNECC will maintain a watching brief on pricing of ELN services.

The CIE CBA concluded that interoperability would deliver the greatest net benefits to stakeholders, primarily due to fee reductions as a result of effective competition. The current regulatory framework provides that ELNOs can only increase ELNO service fees once a year and by no more than the increase in the CPI over the previous year.

ARNECC will continue to monitor ELNO service fees to ensure that the interoperability reform achieves competition outcomes, including downward pressure on fees.

References

Australian Competition and Consumer Commission, *Report on E-conveyancing Market Reform*, 2 December 2019.

Centre for International Economics, “Cost Benefit Analysis for Addressing Market Power in Electronic Lodgment Service”, 1 September 2020.

Dench McClean Carlson, *Final Report on the Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law*, 18 December 2019.

Dr Rob Nicholls (Independent Chair of the Interoperability Working Groups), *Final Report on Interoperability Between ELNOs*, 25 July 2019.

Glenn Archer, “Identifying a Preferred Technology Model to Support a National Interoperable electronic conveyancing Marketplace”, 31 August 2020.

Interoperability Technical Working Group (ITWG), work to assess technical options for interoperability, including various minutes and presentations, 2019-2020.

IPART, *Final Report on the Review of the Pricing Framework for Electronic Conveyancing Services in NSW*, November 2019.

Willis Towers Watson, “Insurance Review of Interoperability Approach”, 26 August 2020.

Submissions received from industry peak groups, including the Australian Institute of Conveyancers and the Law Council of Australia.

Tab A – Interoperability Industry Panel

Background

The Interoperability Industry Panel (the **Panel**) was established in early 2020 for the purpose of addressing the following problem question:

> *In a multi-ELNO environment, subscribers should be able to transact efficiently and securely while only subscribing to the ELNO(s) they choose. Any interoperability solution should be able to be applied at a national level, rather than solving for a particular jurisdiction*

The Panel operates as an open, consultative body that reports directly to ARNECC. It is chaired by the NSW and SA Registrars, and seeks to leverage cross-jurisdictional expertise to inform a national solution to the problem question above.

Panel Members

The Panel comprises the Australian Banking Association, the Australian Institute of Conveyancers, financial institutions, current ELNOs, financial institutions, the Law Council of Australia and most Registrars. In addition to panel members, the Australian Competition and Consumer Commission, the Digital Transformation Agency, remaining Registrars and State Revenue Offices attend as observers.

The broad representation of members on the Panel is a key feature, as it is integral to facilitating industry engagement across Australia.

Consultation process

As identified in the Panel's Terms of Reference, its role is to:

- ensure that key stakeholders are informed of all work, including where they are not directly involved in reviewing a particular issue;
- assist a co-ordinated review of discussion papers and other deliverables by industry; and
- advise on the most effective approach to address and solve issues, and identify gaps in approach or analysis.

As a matter of process, specific issues related to the development of an interoperability solution are identified, and arrangements made for the appropriate stakeholders to be involved in the exploration and resolution of that issue, often through targeted working groups or expert reports. The findings of these working groups and reports are then communicated to ARNECC for decision.

The Panel is not designed to provide expert advice itself, rather, it is intended to be the conduit to experts across the country, and their feedback and information is then provided to ARNECC to support its decision-making processes.