



Our ref: 62251
Your ref:
Contact officer: Matthew Schroder
Contact phone: 03 9290 6924

Level 17, 2 Lonsdale Street
Melbourne Vic 3000
GPO Box 520
Melbourne Vic 3001
tel: (03) 9290 1800
www.accc.gov.au

20 September 2019

Ms Anne Larkins
Dench McClean Carlson P/L
Level 5, 99 Queen Street
Melbourne 3000

By email: alarkins@dmcca.com.au

Dear Ms Larkins

Submission to draft final report for review of InterGovernmental Agreement for an Electronic Conveyancing National Law

We refer to the draft final report prepared by Dench McClean Carlson on the review of the eConveyancing Intergovernmental Agreement (IGA) (the report).

The ACCC welcomes the opportunity to provide its views in response to the draft report. This letter provides the ACCC's views in relation to promoting competition in the e-conveyancing market, and the draft report's recommendation for the role of the ACCC in the development of the e-conveyancing market. The ACCC reiterates its support for developing competition in the e-conveyancing market and the view that interoperability is a key mechanism to facilitate this competition.

Given recent developments in the market, the ACCC welcomes the report's consideration of a need for a regulatory framework that supports competition and the interests of consumers. We consider the e-conveyancing market is at a tipping point in terms of whether a pro-competition regulatory environment can be developed in sufficient time to sustain these developments and benefits that competition can bring. This letter provides the ACCC's comments on the proposed mechanisms and possible market structures. The ACCC however has some concerns about the roles recommended for it in the report and provides further details on these concerns.

Competition

The ACCC notes that the report has considered some of the benefits and costs of competition in the e-conveyancing market. However, much of the discussion focuses on the state of the market with the potential for competition emerging compared to a state of the market with a monopoly provider operating as the sole Electronic Lodgement Network Operator (ELNO). This does not appear to give due recognition to the fact that in some jurisdictions competition exists in the ELNO market following the entry of a second

operational ELNO, Sympli, into the market, and the implications of that existing market dynamic. Sympli has commenced operations in NSW, Queensland, Victoria and shortly WA, albeit these operations are limited. Sympli has established connections with banks, registries and revenue offices and continues to develop further arrangements with these stakeholders.

Further, a third ELNO Lextech has Category 1 approval and, although not currently operational, could commence operations in future. As such, the e-conveyancing market is not operating as a monopoly, despite the significant market share held by the incumbent PEXA across many jurisdictions.

The report also refers to the natural monopoly-like characteristics of an ELN including its essential financial payment and settlement infrastructure, stating that there is little or no benefit to justify the costs of duplication. However, Sympli has already invested in building its ELN and its financial and settlement infrastructure. As such the duplication of infrastructure has already occurred, indicating that entry is possible. Furthermore, Sympli (and the third entrant) entered the market by way of the existing regulatory framework as per the Australian Registrars' National Electronic Conveyancing Council (ARNECC) approval requirements within the Model Operating Requirements (MOR). The MOR have facilitated more than one operator in the market and entertain the prospect of competition within the market.

The ACCC's observation of the current state of the e-conveyancing market is that it is the network effects of PEXA's first mover advantages that give rise to tendencies towards the incumbent ELN being a natural monopoly. This advantage was further reinforced by the mandating of e-conveyancing across various jurisdictions when an appropriate market structure had not been determined. The resulting outcome is a highly concentrated market, albeit one where entry from an alternate provider has occurred.

The ACCC does not underestimate the scope of the challenge ahead to implement appropriate market reform arrangements ex-post, including the important considerations surrounding security and technology. Nevertheless, when considering how best to respond to the current challenges facing the market, particularly interoperability, it will be necessary to do so from a starting point of a market where there is currently more than one player servicing a range of customers across various jurisdictions.

Importantly, the ACCC also acknowledges that entry alone into a market from a challenger does not guarantee robust competition and a vibrant market. Like any market, players in the e-conveyancing market may exit the market. It will be important for ARNECC to consider how the market would function in the interests of consumers if only one ELNO was operating, in one or more jurisdiction. A consideration of regulatory safeguards is discussed further below.

The report calls for further analysis around considering the value of the market to consumers (and other stakeholders) with or without competition. We would caution against analysis of this type which focuses too heavily on estimating and comparing the quantitative costs and benefits of competition relative to a monopoly in the e-conveyancing market, particularly given the current state of the market. The ACCC's view is that considering the promotion of competition also includes evaluative and qualitative judgements about the future conditions and environment for competition. The ACCC has previously publicly stated its view that promoting competition does not correspond to measuring quantifiable increases in competition or the state of competition, instead it expresses a more flexible concept of creating the conditions or environment for improving competition from what it would be otherwise.¹

¹ ACCC Submission to draft Moorebank IMEX Terminal Access Protocol, 12 July 2019.

Reflecting this view, the ACCC's focus is on those regulatory measures necessary to promote effective competition in the current two ELNO market, as well as those measures needed to facilitate entry by potential subsequent new entrants. The ACCC does not have a specific view on how many ELNOs there should be in the market. The ACCC considers that this should be determined by the competitive process, whereby the most efficient and better performing ELNOs will remain in the market. Overall, the ACCC considers there are a range of potential future benefits for the market that will arise from the promotion of competition realised by way of interoperability. We address these issues further below.

The ACCC agrees with the report's view that there are benefits to subscribers and customers from competition in e-conveyancing, including increased innovation, improved productivity of subscribers, lower practitioner and lender fees, and greater supplier choice and responsiveness to practitioner needs. In addition, the ACCC considers that benefits of effective competition also include greater incentives for ELNOs to innovate and to decrease costs, and develop higher quality products for customers. Reductions in barriers to entry and the threat of new entrants that can be achieved by further work on market reform and structure can provide the incumbent ELNO with further incentives to innovate, reduce costs and improve pricing and user responsiveness. Such reform will further constrain the incumbent's ability and incentives to exercise its market power.

In relation to the benefit to property buyers and sellers, the report considers the benefits of price competition on transaction fees are very small on the basis that an individual buyer or seller only transacts every 10 years. However, the aggregate annual value of fees is estimated at approximately \$270M in the report. In our view, the cumulative fees paid by the total number of buyers and sellers in the market is significant and accordingly any saving on fees would cumulatively have more significance. We consider that limiting the scope of the possible benefits as approached in the report ignores the broader future benefits of competition in the market to both buyers and sellers including higher quality products and services.

The ACCC emphasises that the benefits of competition in e-conveyancing need to be addressed on a forward looking basis. As such, we consider that the promotion of competition has the potential to deliver benefits for customers beyond reductions in property transaction fees and include innovation and efficiencies that could improve transaction and settlement experiences for buyers and sellers. Equally, conveyancers, lawyers and other practitioners along the supply chain will also benefit from the promotion of competition, in both the immediate and related markets.

The ACCC notes that the report considers that there are no identified benefits to financial institutions or to the registries and revenue offices from connecting to an additional network, even allowing for price competition. However, consideration needs to be given to the potential benefits for financial institutions and revenue offices that arise from innovation and competition between ELNOs, including the possibility of improved service standards and reliability of the market.

The ACCC notes that, while the financial settlement connections are necessary for ELNOs to operate (and it is likely that the costs of connecting to ELNOs will be offset to some extent by the benefits of lower costs of ELNO services that result from increased innovation and competition), it is not mandatory for financial institutions to connect to more than one ELNO. Accordingly, it is expected that financial institutions will connect with new entrant ELNOs on the basis of commercial considerations. This appears to be the case in relation to Sympli, with a number of financial institutions connecting in various jurisdictions. This suggests there are enough incentives for financial institutions to connect to a second ELNO. Ultimately, ELNOs need to make these investments attractive to financial institutions and make their services affordable. Otherwise ELNOs will not be in a position to meet the needs of their customers by operating across the financial institutions in the market.

Two year moratorium

The ACCC is particularly concerned with measures which significantly delay competition. It does not consider a two year moratorium on the entry of new ELNOs appropriate. A moratorium on new entrants was the approach taken by the Council of Financial Regulators (CFR) in relation to the cash equity clearing and settlement market, this occurred while that market was a monopoly. In contrast, new ELNOs can and have entered the e-conveyancing market. The ACCC therefore strongly cautions against such a pause on the competitive process, particularly considering the investments made by new entrants. In addition, industry as a whole will benefit from greater certainty of the market structure, and an understanding of the likely services available to their customers, in addition to the commercial opportunities for their own operation in a multi ELNO market.

Appropriate regulatory settings should be established up front when a new market structure is being contemplated. The ACCC has consistently observed across a number of industries where governments have sought to commercialise previously state run services that such considerations are essential at the outset of operations. However, the ACCC notes this is no longer an option in most jurisdictions where e-conveyancing has been mandated. Nevertheless the opportunity remains, and significant work has already been undertaken, to progress market reform and articulate how competition will be supported. Given the delays to date, it will be important that this process is not further delayed for unnecessary reasons, considering the potential benefits to the incumbent from further delay. The ACCC is strongly of the view that policy decisions and the regulatory regime should not discourage or prevent competition but rather promote a structure where commercial decisions can be made with confidence about the regulatory regime that will affect those commercial decisions.

Robust regulatory arrangements for a new market model

The ACCC considers that it is necessary for there to be further rules or conditions on ELNOs than what are currently contained in the current regulatory framework of the MORs and licence conditions. If competition continues to develop in the e-conveyancing market then less oversight is warranted. The competitive tension between market participants should constrain prices and ensure good service levels for consumers.

In a highly concentrated market there may be arguments for imposing licence conditions on the dominant player that aim to increase information provision and transparency and reduce the bargaining power gap between the dominant player and users of the services. The ELNO approval process under the Electronic Conveyancing National Law (ECNL) provides that new or additional conditions may be attached to an existing approval of an ELNO, and this may be such a mechanism that could potentially be applied to constrain the exercise of a dominant ELNO's market power.

It may also be appropriate to consider equal information requirements applying to all ELNOs, to reduce advantages from vertical information sharing. Absent such provisions an ELNO could vertically integrate, leveraging network effects in the ELNO market into downstream markets further raising barriers to entry.

Practitioners should also be confident of receiving non-discriminatory service, so that whichever ELNO they select, particularly if they engage more than one ELNO, they can do this on equal terms. For example a practitioner may choose to transact on one network for certain transactions or possibly have a preferred ELNO in certain jurisdictions. The benefit of competitive tension may see one ELNO excel in certain services or locations or offer certain pricing schedules which invite practitioners to subscribe to multiple ELNOs. However, such benefits would be undermined if an ELNO, particularly one in a dominant position, treated the practitioner who used more than one ELNO differently than a practitioner who chose to complete all its transactions on a single ELN. As a practitioner moves between ELNOs they

should be confident they will receive a reliable and timely service and the equal dissemination of information.

In the event robust competition does not emerge or an ELNO exits the market (in one or more jurisdictions) this will lead to a monopoly. Considering the known barriers to entry in the market, the market may then remain a monopoly for some time. Accordingly, appropriate safeguards will be necessary in the interests of all users, including practitioners who will have no option but to transact with the sole operator.

If there is a risk that a monopoly market will emerge in the near future, appropriate regulatory measures should be considered at the present time. These measures should offset the risk of users paying higher prices, receiving lower service standards and finding less innovation than would have otherwise been expected in a competitive market in both the e-conveyancing or related markets. The regulatory tools to be considered include robust ring-fencing requirements, greater transparency with respect to pricing, price controls, service standard commitments, non-discriminatory service, consumer and industry engagement panels and accessible dispute resolution pathways for consumers and information brokers. In the event of such a market structure we would also recommend consideration of appropriate reviews over time to determine how the market should develop and what further development of regulation is required.

The ACCC would encourage the development of these rules within a national regulatory framework.

Interoperability

As stated in previous public submissions, the ACCC considers that interoperability is a key mechanism by which to facilitate competition in the e-conveyancing market. We understand interoperability can address the issues of multi-homing and the network effects barrier in the e-conveyancing market.

The report considers that interoperability needs to be further investigated, but that the least complex 'shallowest depth' of interoperability could be introduced first. The ACCC also agrees that interoperability and other market models should be considered further and notes its initial comments below are intended to inform further discussion between ARNECC members.

We understand that the 'shallower' interoperability model proposed by the report is a basic level of integration between ELNs. The report considers such a model would involve all authoritative data residing and all processing proceeding on the lodging ELN. The non-lodging ELN reads or writes data provided by its subscribers directly from or to the lodging ELN via an application programming interface (API), and the lodging ELNO has all the connections to the registries and financial settlement. Therefore the subscriber to the non-lodging ELNO needs to sign documents in the lodging ELNO's platform. This arrangement is not dissimilar to an infrastructure ELNO model where monopoly services are provided by the lodging ELNO to the second ELNO. We consider this shallower model may not sufficiently address the network effect issue if the lodging ELNO is PEXA and subscribers are required to sign documents in PEXA's platform.

We note the report's suggestion that the least complex 'shallower' version of interoperability could be introduced first. Whilst this may have some intuitive appeal in terms of a timely response, we caution that introducing interoperability in stages may entrench a sub-optimal solution and make it more difficult to introduce a more effective interoperability model in the future. An appropriate interoperability model for the industry should be developed and implemented without delay to ensure that the broader benefits of competition are achieved.

We have considered the report's view that it would be inefficient duplication for each of the ELNOs to build their own financial payment and settlement infrastructure and connect to the registries and revenue offices. We note that PEXA has already built its own payment and settlement infrastructure and that Sympli has already invested in and is currently in the process of building this infrastructure. We note that the report proposes the use of an existing hub such as PEXA's, or a new government owned hub, to connect ELNOs with land registries and revenue offices. The infrastructure model as proposed would require steps be taken to mandate the market revert to a monopoly from a two ELNO or multi ELNO state. In addition to any concerns we would have with a monopoly service provider model, we note that moving from the current market structure to that proposed by the report is not without financial consequences given that existing ELNOs have made substantial investments to build infrastructure relying on the assumption that competition would be permitted. From a regulatory policy perspective, this would have a significant chilling effect on the incentive of businesses to invest and develop their commercial operations. Instead, consideration should be given to having regulatory measures in place in the event that an ELNO exits the market and leaves a single ELNO providing infrastructure.

The ACCC notes that the Independent Pricing and Regulatory Tribunal of NSW (IPART) has considered the issue of sunk costs of infrastructure in its recent draft report.² IPART's report considers that since there are two ELNOs already in the market, it would not be cost efficient for the industry to ignore the sunk costs of the infrastructure to construct a full central hub. As such, IPART's report considers that a direct connection could be built between the two existing ELNOs in order to maximise the use of existing investments, competition between the ELNOs and innovation.³

The ACCC will consider this useful analysis in its upcoming report, noting that interoperability and the costs associated are complicated, particularly taking into account broader security concerns. Subject to the precise model of interoperability selected by ARNECC, the opportunity exists between members to implement an agreed framework by which the network effects currently benefitting PEXA can be overcome in the interests of creating a competitive environment between the two ELNOs.

The ACCC notes that the report on the review of the IGA also suggests the establishment of an integration hub, either developed under a contract with a third party provider such as PEXA or a new government hub. We would also have concerns for competition should the incumbent ELNO be positioned as the provider of such an integration hub, absent a robust regulatory framework to ensure that other ELNOs can gain fair access. Further, the sole provider of the integration hub would have minimal incentives to innovate its hub services for greater efficiencies or service levels.

Given the current market, at this stage the ACCC considers the bilateral model of interoperability will likely be a more effective model to promote competition by building direct connections between the existing ELNOs (while ensuring the opportunity for new entrants). We note that a bilateral model, as with any model of interoperability, would require the establishment of appropriate technical measures and substantial industry contribution in order to develop and implement an effective model.

The ACCC would welcome ARNECC's timely further engagement with industry on a preferred model, noting this is a complex and multifaceted decision. Whichever framework is chosen by ARNECC and the industry, the ACCC emphasises the importance of avoiding delay in implementing an interoperability framework.

² IPART Review of the pricing framework for electronic conveyancing services in NSW, Draft report, August 2019.

³ Ibid, p31.

Other barriers to entry

The ACCC acknowledges that there are barriers to entry other than interoperability, such as digital certificates and identity, user interfaces and API availability. We agree the removal of these barriers will assist in promoting competition in the market. However the ACCC considers that in the absence of interoperability the removal of these barriers will be likely to be insufficient of themselves to address the competition concerns including network effects and multi-homing.

We also note the report has considered the option of the development of API standards based on PEXA's APIs. We would hold concerns with the incumbent owning and licensing its APIs to new ELNO entrants without sufficiently robust regulatory safeguards in place. We consider there would be the potential for these privately owned APIs to present a further barrier to entry into the market by preventing or delaying access, and a barrier to remaining in the market, if a new entrant's costs are tied to APIs controlled by the dominant incumbent.

Roles of the ACCC

The ACCC notes that the report recommends various roles for the ACCC in the future regulation of e-conveyancing. The ACCC considers that performing these roles would be somewhat unusual for the ACCC, given its role as the national competition and consumer regulator.

Minimum conditions

The ACCC notes that PEXA and Symplic are both currently subject to a range of existing regulation such as the MORs and the licence conditions for approval by ARNECC to operate as ELNOs. In addition, the ELNOs are subject to a range of related regulatory obligations from financial regulators such as, for example, the RBA's obligations on the use of the Reserve Bank Information and Transfer System (RITS) and Exchange Settlement Account (ESA). The ELNOs must also interact with the respective state government registries and revenue offices and adhere within each jurisdiction to certain obligations. The ACCC is not aware that either party has failed to comply, adhere or observe these various obligations.

Despite these existing arrangements, the report recommends that the ACCC and the CFR develop minimum conditions for safe and effective competition for e-conveyancing. It is unclear whether the minimum conditions for the e-conveyancing market proposed by the report would involve amending the MORs or would form a separate set of rules. Given the separate recommendations in relation to the MORs, it appears that the report is considering a separate set of rules.

First, it is important to note the ACCC does not have a legislated or federal government-directed role in the e-conveyancing market in order to create these kind of rules on behalf of the states. The ACCC also does not have expertise on all of the relevant aspect of the e-conveyancing industry. The ACCC can as a competition regulator provide input into the development of frameworks that affect the development of competition and more broadly advise on appropriate market structures for industries where competition may not emerge. The ACCC has indicated its willingness to provide ARNECC with that support.

Second, we note the e-conveyancing market is different from the cash equity clearing and settlement (CS) market. The ACCC has considered whether, as proposed in the report, the work done in developing the conditions for the CS market could be leveraged to develop similar minimum conditions for the e-conveyancing market. The development of conditions for the CS market involved the development of *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia* (Regulatory Expectations), *Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia* (Minimum Conditions – Clearing) and *Minimum Conditions for Safe and*

Effective Competition in Cash Equity Settlement in Australia (Minimum Conditions – Settlement). The Regulatory Expectations apply to the ASX's conduct, including its engagement with, and provision of services to, users of its monopoly cash equity clearing and settlement services, until the time that a committed competitor emerges, after which the scope of the Regulatory Expectations will be reviewed.

The purpose of the CS minimum conditions is to ensure that competition does not adversely affect financial stability or effective market functioning. It does this by giving potential new entrants guidance as to the measures that the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (Reserve Bank) requires before they can advise in favour of the potential new entrant's licence application. Further the intention in the CS market was for appropriate interoperability arrangements to be established prior to a competing cash equity clearing central counterparty (CCP) commencing operations.

In the e-conveyancing market, a new entrant has already commenced operations, and interoperability arrangements have not been established. As a result, the same market conditions that applied when the CFR and the ACCC developed the Regulatory Expectations, Minimum Conditions – Clearing and Minimum Conditions – Settlement, are not applicable to the e-conveyancing market, although there may be many shared concepts. Accordingly, the Regulatory Expectations applied to the incumbent in the context of CS may not be appropriately transferred into the e-conveyancing market. A more appropriate time for establishing an approach like that of CS would have in the e-conveyancing market been prior to the entry of Sympli, and after the establishment of interoperability arrangements.

Review of the MORs

The report recommends the ACCC review the rules in the MOR for ELNOs operating in the wider market to ensure there is no abuse of market power.

The ACCC has previously provided input on the review of the proposed MOR version 5 conducted by ARNECC, and could provide input and comment on future reviews. However, it's not clear that the ACCC should separately review the rules in a specific inquiry on market power.

ELNO approval processes

The report recommends that the ACCC be formally involved in the ELNO approval process from the perspective of consumer protection and national competition law.

The ACCC can provide views from the perspective of its role as the national competition and consumer law regulator on vertical integration issues and how general competition and consumer law may apply to ELNOs. The ACCC does not however consider it is appropriate for it to provide ex-ante approval of an ELNO in relation to compliance with consumer and competition law.

It would be a highly unusual role for the ACCC to approve compliance in this way ahead of any conduct occurring. The consumer and competition law are ex-post regulation designed to be applied after the conduct has occurred. The ACCC would not be able to provide approval of proposed structures or proposed business plans, for example to assess and approve that the ELNO once it has entered the market will comply with consumer protection and competition law.

Enforcement, monitoring and compliance

The ACCC welcomes the development of an enforcement regime to include appropriate penalties for ELNOs instead of the only recourse being suspension or termination of ELNOs.

The ACCC encourages the development of an enforcement and compliance framework with appropriate penalties and monitoring by an independent body. The ACCC does not have a view on the regulatory framework for financial payments and settlement.

The ACCC agrees that it would be appropriate for an independent body to regulate e-conveyancing nationally.

The ACCC considers a government body would be appropriate, however we understand from the report that there is no legislation that supports such a national government body for e-conveyancing. If a corporate body is formed, the ACCC has concerns about the ability of a private corporation (even if owned by the participating governments) to enforce regulatory requirements against ELNOs. The report does recommend a type of enforcement regime which includes penalties. However the enforcement relies on contractual arrangements between ARNECC and ELNOs. It is unclear how the penalties would be applied and how effectively these would be enforced.

The ACCC has previously publically expressed that it considers contractual enforcement regimes may not be sufficiently robust. There are a number of concerns with a contractual enforcement regime, including it may not involve robust and objective assessment by an independent party. Fundamentally, regulatory regimes may be ineffective in the absence of independent monitoring as there is no way to ensure that the regulated entity is complying with its obligations.⁴ Further, it is unlikely to provide transparent and public oversight and may not take into account public submissions from industry stakeholders.⁵

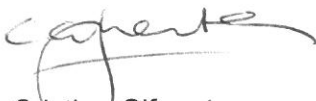
Further engagement

The ACCC is willing to provide ongoing assistance to ARNECC on areas within the ACCC's expertise as the industry develops.

As part of its willingness to assist the industry, you may be aware that the ACCC has also recently announced its intention to undertake a short piece of work considering competition and market structure in e-conveyancing in Australia. The ACCC's intention is for this work to provide assistance to ARNECC and to industry to develop a national market framework. The ACCC understands that ARNECC is soon to commence establishing national working groups. The ACCC is willing to provide input into these proposed working groups within a defined scope, to be set following the release of ARNECC's terms of reference for the working groups.

If you have any questions, please contact Matthew Schroder on 03 9290 6924. We are happy to further discuss the issues raised in this submission or other issues you are considering in drafting your final report.

Yours sincerely



Cristina Cifuentes
Commissioner

⁴ ACCC Submission to draft Moorebank IMEX Terminal Access Protocol, 12 July 2019.

⁵ Ibid, p4.