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Ms Jean Villani,
ARNECC Chair
By email: chair@arnecc.gov.au

Heads of State and Territory policy agencies

Dear Chair and heads of State and Territory policy agencies,

ACCC report on e-conveyancing market reform

Please find attached the ACCC's report on e-conveyancing market reform. We have welcomed the opportunity to engage with ARNECC and its members on the matter of e-conveyancing and appreciate their interest in competition and market design.

The ACCC has also met with a range of stakeholders involved in the market and welcomes their interest in the development of their industry, particularly the recognition of the need for competition, the need for clear rules and certainty for stakeholders.

We hope this paper will provide useful material to assist you as policy makers in your consideration of e-conveyancing and the design of this emerging market. As outlined in the paper, the ACCC strongly believes the current uncertainty surrounding current and future market arrangements must end. Further delays in progressing the development of an appropriate market structure will fragment the national market and/or entrench a monopoly service provider model.

If you would like to discuss the ACCC's report further, please contact Matthew Schroder, General Manager, Infrastructure & Transport – Access & Pricing at Matthew.Schroder@accc.gov.au or (03) 9290 6924.

Yours sincerely

Rod Sims
Chair

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ACCC report on E-conveyancing market reform

Executive Summary

The current uncertainty facing the e-conveyancing market needs to end. In light of the mandating of e-conveyancing and the emergence of competition in various state jurisdictions, the regulatory framework for e-conveyancing in Australia is no longer fit for purpose.

This market has been evolving over the past two years without a clear regulatory framework and unless deliberate action is taken by the responsible decision makers to resolve the lack of certainty, competition in the market will falter, which will be to the detriment of end users.

The ACCC has observed that the market is at a turning point and it is essential that decision makers support the market's transition to competition. Should policy makers not undertake the necessary steps to implement a pro competition market model then it is unlikely that new entrants will be able to sustain a presence in the market.

This will leave a monopoly that will need robust regulation for the sake of the interests of stakeholders and end-users. The alternative to competition in this market is an entrenched monopoly, likely with forgone opportunities for innovation, lower costs and improved quality of service. Further, the regulation of a monopoly is a complex, timely and costly process, and is a sub-optimal result.

One option to implement a pro competition market model is interoperability. There are many aspects that need to be worked through before an appropriate model of interoperability can be implemented, and that work needs to be done now by ARNECC and industry.

The ACCC strongly prefers a nationally consistent approach. ARNECC is well positioned as the industry expert to develop and deliver an appropriate regulatory framework that can facilitate competition in the market across all jurisdictions. A fragmented system would be problematic.

For this national approach to occur, however, state and territory governments need to agree upon an approach. ARNECC cannot do this alone.

The ACCC believes ARNECC is the best placed to carry this reform forward and should be resourced to do so. However, the ACCC acknowledges that ARNECC will need the support of their respective Treasuries and other relevant policy agencies in order to be equipped to make the necessary decisions required to adopt a competitive market model, and for that matter how to effectively regulate the market whichever form it takes.

Given the urgency, however, the ACCC believes that if a national approach cannot be achieved soon then individual states and territory governments will and should progress their own preferred approach. It would be preferable that some markets rather than none benefit from facilitating competition.

Over time, other jurisdictions could replicate the developed pro competition market model.

The ACCC encourages action be taken now by ARNECC and each state and territory's relevant policy makers. The ACCC is concerned that further delays in progressing the development of an appropriate market structure will fragment the national market and/or entrench a monopoly service provider model.

1. Introduction: A disrupted conveyancing market

The electronic conveyancing (e-conveyancing) market is a relatively new market enabled by the Intergovernmental Agreement (IGA) for an Electronic Conveyancing National Law (ECNL) and supported by technological advancements. The IGA established the Australian Registrars National Electronic Conveyancing Council (ARNECC) to facilitate the implementation and ongoing management of the regulatory framework for national e-conveyancing.

The e-conveyancing system allows parties in a property transaction to electronically prepare and lodge their property dealings with title registries, transmit settlement funds and pay associated duties and taxes. What once involved the physical exchange of documents can now be completed digitally, in less time than previously undertaken. The electronic lodgement network or networks (ELN) provides the systems and technological platforms that allow the transactions to be lodged and dealt with electronically.

The conveyancing industry has many stakeholders and consumers, including but not limited to state governments, state registry and revenue offices, the Australian Securities and Investment Commission (ASIC), the Reserve Bank of Australia (RBA), electronic lodgement network operators (ELNOs), financial institutions and conveyancing and legal practitioners. The ACCC understands that many stakeholders are concerned about the state of the market.

The ACCC is supportive of e-conveyancing and the benefits it brings to a range of stakeholders, including consumers, practitioners and government agencies. The ACCC recognises the benefits are significant and has observed that while it has not been without considerable cost, to date most stakeholders within the industry have benefited from its rollout. Some examples of these positive outcomes include improved settlement outcomes for end-users, efficiency savings including for government agencies and other stakeholders, improved security of financial transactions and an overall a reduction in the time involved in completing transactions.

While the ACCC has no formal role in establishing the regulatory framework for the conveyancing market, a role that clearly resides with each respective state and territory government, it has become an increasingly concerned observer. As the competition regulator we see the detriment caused to consumers, industry and the broader economy from market failures. Speaking in general terms, in markets where services are provided by a monopolist, the ACCC routinely observes how the service provider has the incentive and ability, over time, to set prices and conditions for its services which unreasonably favour itself over the long term interests of users of the service and ultimately, of consumers.

Considering the damage to consumers and industry of failing markets, a core function for the ACCC is to advocate for, and assist governments in establishing regulatory frameworks that can prevent such failure, particularly in situations where a key asset with market power is corporatized or privatised. The ACCC's recent advocacy engagement has involved advising governments in a range of infrastructure areas, including ports, land title registries and the settlement and clearing of cash equities. Our advocacy work has emphasised the importance of establishing robust regulatory frameworks ahead of privatisation to best facilitate informed investment, to provide confidence in the workings of markets, to promote the development of competition, and ensure the protection of users and consumers. We consider that ex post attempts to correct for poorly designed regulatory frameworks are difficult and generally limited in their ability to address core issues.

On e-conveyancing, the ACCC has been approached by numerous and diverse stakeholders to draw on our experience to provide guidance on designing a new framework which will allow competition to develop in the market. The ACCC welcomes stakeholders'

interests in the development of their industry, particularly the recognition of the need for competition, and the need for clear rules and certainty for stakeholders. The ACCC is pleased to share with industry its experience regulating certain markets and its observations of the e-conveyancing market. The ACCC thanks the industry stakeholders who have shared with it their experience of the market and their thoughts on its development.

The ACCC hopes the paper can support decision makers and inform stakeholders as they seek to develop the market further and consider the merit of introducing certain regulatory arrangements to promote market based competition. Critically the current regulatory arrangements are no longer fit for purpose, neither constraining the dominant incumbent nor promoting the development of further robust competition within the market. The ACCC hopes the paper will provide useful information around how both these objectives can be realised.

In making the observations set out below the ACCC has also sought to build upon its aforementioned advocacy activities in relation to this market, which have included the provision of three public submissions to recent consultation processes.[1]

However, it should be noted and as explained in our previous submissions to the various reviews on e-conveyancing, we do not have the requisite expertise in land property transactions to provide comprehensive advice on the development of the industry or to reach a conclusive position on market design. A range of other experts are best left to advise on risk, liability, insurance issues, as well as IT standard settings and specifications or APIs.

PEXA

The ACCC understands when ARNECC set about transforming the conveyancing process to an electronic process, the market as we know it today was not initially obvious. Founded by the states, the e-conveyancing market was from the outset developed as a monopoly service provider model, albeit one controlled by governments. This model was likely most appropriate at the time given available technology, and government ownership, and did not necessarily contemplate technology advances nor a view that competition could emerge in the future. However, since that time a number of other key developments have occurred that have disrupted the initial plans for e-conveyancing, including the sale of the previously government owned monopoly service provider (PEXA) and the mandating of e-conveyancing in some states

On PEXA's ownership arrangements, the ACCC observes that what was initially a state owned body has now completed its transition to private interests. The final stages of privatisation occurred in in 2018 when the remaining state government shareholders sold out of the company for $1.6 billion.[2] The ACCC has commented previously that it considers that the privatisation of government assets, if implemented appropriately, can result in greater levels of overall economic efficiency that benefit the interests of users and the wider community.

In the case of PEXA, it has demonstrated great initiative in constructing a service where one did not previously exist. In conjunction with state governments its owners established relationships with regulators, built a platform of complex connections within and between

[1] ACCC, *Submission to Issues paper on Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law*, 20 March 2019, ACCC, *Submission to Draft final report on Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law*, 20 September 2019; ACCC, Letter to NSW Ministerial Forum on interoperability in eConveyancing, 13 February 2019. Available at https://www.accc.gov.au/about-us/consultations-submissions/accc-submissions#electronic-conveyancing.

[2] AFR, PEXA's $1.6b sale raises concern among bankers, 6 November 2018, https://www.afr.com/chanticleer/pexas-16b-sale-raises-concerns-among-bankers-20181106-h17ktx

state and commonwealth agencies. It has delivered practitioners a new and timely way of working and consumers a better service than paper based transactions.

Mandating of e-conveyancing

While paper based conveyancing had initially competed with e-conveyancing, the latter systems mandating in four states left PEXA the sole monopoly provider of key aspects of conveyancing services. Practitioners who had previously employed their own approach to arranging settlement were now required to transact with relevant parties via the electronic system and incurred a new cost to access the service.

This shift in regulatory arrangements has seen PEXA achieve a 60 per cent market share of the Australian conveyancing market[3] and hold a majority share of the e-conveyancing market in each of the four states it operates in (NSW, WA, SA and Vic). PEXA remains dominant with over 90 per cent market share across the mandated locations. PEXA's market share will continue to grow as the registrars shift additional property transactions from paper to electronic settlement. The ACCC understands PEXA also expects to roll out its platform to TAS, NT and ACT (all of which have not mandated e-conveyancing) by 2022.[4]

The entry of Sympli and other new entrants into the market

Sympli commenced its entry into the market several years ago and is seeking to operate services as the second ELNO in several states. Its approach is supported by ARNECC who allows for the staged entry of ELNOs across jurisdictions and types of transactions. The ACCC understands Sympli is advanced in its negotiations with its partner financial service providers. We understand that Sympli has already commenced lodging transactions in select jurisdictions. We further understand that a third ELNO, Purcell Partners had first stage approval for entry and was pursuing plans for market entry.

However absent greater certainty about if and how Sympli can compete in the market the prospect of robust competition emerging remains uncertain. In the interim PEXA has maintained its near monopoly status as the provider of electronic lodgement network services.

Considering the actions and plans of Sympli and Purcell Partners, the ACCC considers that what may once have appeared to be a market with characteristics of a natural monopoly has evolved considerably. Technological advancements and the emergence of nascent competition in various states has confirmed that e-conveyancing services are a contestable activity.

In addition, it appears the market could sustain various classes of ELNOs. This could include certain firms with an expertise in one part of conveyancing services entering only to provide those specific services, while relying on an existing ELNO to complete the remaining facets of a settlement transactions. This potential evolution of the market is an indication of how our current understanding of contestability for settlement processes will be further challenged as technology evolves and new contestable markets emerge.

The ACCC is concerned in relation to the lack of regulatory certainty for all stakeholders. Ongoing delays settling the market model remains a concern at a time when the mandating of e-conveyancing in some jurisdictions, without suitable regulatory coverage, has potentially further entrenched the near monopoly of PEXA. As the dominant incumbent PEXA has

[3] LINK, 2019 Investor Presentation and Strategy Update, 18 June 2019, p82, https://investors.linkgroup.com/FormBuilder/_Resource/_module/YfKsMKLWK0WisyLm5uTWZA/file/reports/LNK-Investor-Presentation-2019.pdf

[4] Deloitte, *Impacts of e-Conveyancing on the conveyancing industry*, May 2018, https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-impact-e-conveyance-pexa-220518.pdf

benefited immensely from the network effects and economies of scale of its first mover advantage.

The existing regulatory arrangements in place for e-conveynacing while they touch on various obligations, overall appear limited. For example the current arrangements have some gaps in coverage and are particularly constrained given they lack a practical and effective compliance and enforcement regime. Of particular concern is how the current MORs require self-monitoring by ELNOs and do not contain a credible threat of enforcement by way of any specific response or sanction for non-compliance.

Given these outstanding issues and challenges the ACCC believes that the key decisions makers must settle future regulatory arrangements for the industry with some urgency. The ACCC is concerned that further delays on progressing the development of an appropriate market structure will essentially prevent the development of competition in e-conveyancing. That is, delay could amount to a decision to prevent effective competition.

When considering what framework to adopt it would be prudent to acknowledge the significant disadvantage faced by current and future new entrants considering the history of the market. The ACCC welcomes the news that further work on the practical aspects of a functional interoperability model is being undertaken by some of the states. We support this further work and encourage its continuation without undue delay.

2. Current regulation is inadequate and will become a greater problem for consumers if competition does not emerge

In principle, monopoly service providers have the incentive and ability to exert market power to raise prices and this can have a detrimental impact on investment and efficiency in a market.

The original conveyancing market structure conferred upon PEXA monopolist status which allowed it to capture the market and benefit greatly by way of the resulting economies of scale and network effects. These scale and network advantages have largely been transferred from the original paper based conveyancing system to the new e-conveyancing market and have significant implications for the ability of new entrants to compete. PEXA is well established in the market and has invested considerable resources over a long period of time on developing its capacity as a service provider. It therefore has the commercial incentive to build on this history. It also has, by virtue of its status as the dominant incumbent, the ability to exercise market power through its interaction at the front facing retail environment (as customers potentially contemplate switching ELNOs) or via back end connections and associated established relationships it may have with relevant stakeholders including revenue offices and financial institutions.

Should PEXA's market dominance go unchallenged or unconstrained over the longer term it will have few incentives to innovate, to pass through efficiencies (which in a competitive market would otherwise incentivise lower prices to retain or attract customers), or respond to stakeholder concerns with its operations. This may result in greater problems for consumers if competition does not emerge.

A range of benefits are delivered for users and end consumers where a market can move from a monopoly service provider to a robust competitive market. One or more new entrants will provide customers with choice and likely new innovative services or lower prices. First mover ELNOs may initially have greater market dominance, however the threat of new entrants should encourage existing providers to innovate and improve service quality and prices.

While the conveyancing market was initially based on the monopoly service provider model, recent developments have confirmed that it is contestable at various levels (that is, broadly

the notion of wholesale and retail levels) and that competition is a real aspect of the market. The licensing of new entrants and the consideration of more than one ELNO in land registry and revenue offices regulation is evidence that necessary structural reforms are underway. As noted above new entrants have invested in the market and have entered into agreements with regulatory agencies and industry to facilitate their entry.

Given the competitive developments in the market and the introduction of e-conveyancing, the ACCC considers that PEXA's monopoly position should not be maintained. It makes no sense to seek to remove competition from a market. The ACCC is strongly of the view 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 PEXA.

It is the view of the ACCC that where e-conveyancing has been mandated it is necessary that a regulatory pathway is developed which allows and facilitates the development of competition, or at least the threat of competition, to the market. At the moment, the absence of the appropriate regulatory framework means that new entrants are attempting to navigate uncertainties in the market and build a market presence at the same time the dominant provider PEXA is becoming further entrenched.

The ACCC also understands Sympli, and other new entrants must currently acquire certain data standards from PEXA via a commercial licensing arrangement. The ACCC does not have a formal role in the establishment and operation of these arrangements

The current arrangements are not only inadequate in constraining PEXA, but do not facilitate nor promote the development of competition from new entrants into the market. These dual objectives (of constraining the exercise of market power and supporting the development of competition) are not mutually exclusive and are both desirable. The ACCC would be concerned if the current market structure was maintained without additional regulatory measures introduced.

The ACCC considers that without the appropriate imperative or commercial incentive, PEXA will not facilitate the development of a competitive market in e-conveyancing. The ACCC notes the ECLN Model Operating Requirements (MORs) have the ability to determine the requirements against which ELNOs must deliver for connection to land registries and acceptance of lodgements that will lead to a change in title. We also note that each registrar has an agreement or licence arrangement with each ELNO operating in its jurisdiction that acts as a vehicle for enforcing the MORs. The current MORs include some obligations and constraints on service providers. For example, the MOR contains a CPI indexed price ceiling.

3. Monopoly models

There are a range of options for market structures and regulatory arrangements that have been identified by various stakeholders for the e-conveyancing market. The ACCC has considered these options and provides views below from a competition regulator perspective.

Of the range of market models, there have been two models identified by stakeholders that involve a monopoly provider in the supply chain, the infrastructure model and full/central hub model.[5] The ACCC notes there is some variation and overlap in these two models proposed by stakeholders.

In the infrastructure model a vertically integrated 'infrastructure ELNO' provides monopoly services, including the infrastructure for title lodgement and financial settlement, to 'retail

5 IPART, Draft report, Electronic conveyancing services in NSW, August 2019; R. Nicholls, Final Report, Interoperability between ELNOs, 25 July 2019.

ELNOs'.[6] Under the full central hub model as described by IPART, all ELNOs would access the central infrastructure provided by a third party that is a vertically separated monopolist, that provides the infrastructure and connections required to complete financial settlement, lodgement and payment of transfer duties.[7]

An additional third model is the information hub model (as proposed by IPART). The information hub has less functionality than that full or central hub model. ELNOs still use their own infrastructure as per the direct model, and then pass certain information to each other through the third-party hub to complete two-party transactions. There are less connections required than a direct connection model, suggesting an overall lower level of technical complexity required, and there are also fewer concerns with this model compared with a monopoly provider model. However it is not clear such an approach will overcome the network effects of the incumbent in order to effectively promote competition, nor whether such an approach would be viable for new entrants.

We acknowledge that both the infrastructure and full or central hub model reduce the number of connections required between organisations and the number of relationships over which it may be necessary to regulate, in some way. The models also potentially reduce costs for some stakeholders, with both PEXA and Dench McClean Carlson (DMC) in its IGA review draft report) considering that duplication of financial settlement and lodgement infrastructure would be avoided under this model on the basis it is not commercially viable for financial institutions to establish and maintain connections with more than one ELNO. However given Sympli is entering into relationships with the banks this concern may be not be warranted. The Australian Banking Association has recently indicated support for a national interoperability model, subject to clarity on the cost impacts to banks.

The ACCC notes other stakeholders will incur various costs, subject to the model selected; for example the state revenue commissioners have submitted that new entrants to the market will increase costs in providing access to the Duties Verification Process.[8]

Should one of these monopoly models be adopted, the ACCC believes policy makers in the various jurisdictions would also need to mandate the exit of the second ELNO, either completely from the market or from the ELN 'wholesale' sector of the market. The ACCC reiterates that in principle, we would not support proposals which would seek to unwind the emergence of competition in those jurisdictions where new entrants have emerged, nor entrench the monopoly service position of PEXA in those jurisdictions where competition has yet to emerge.

Moreover, the ACCC believes that the implications of imposing an ex post market structure and regulatory framework which would effectively destroy the value of significant past investments, either by PEXA or Sympli should be carefully considered in terms of the "chilling" effect it might have on future investment in e-conveyancing specifically and in infrastructure more generally.

From a practical perspective, there would also be a number of complexities. The sunk costs of existing ELNOs will likely be a source of potential dispute should a forced exit be mandated. It is also not entirely clear how to determine exactly which sections of the ELNO market should no longer be contestable, considering that when applied to this sector retail and wholesale descriptors may prove too broad, given the potential for sub-classes of ELNOs.

The ACCC does not consider that the monopoly models suggested by stakeholders are appropriate in the current market. There are issues of sunk costs incurred by the ELNOs in

6 IPART, Draft report, Review of the pricing framework for electronic conveyancing services in NSW, August 2019, p. 40.
7 Ibid.
8 State Revenue Commissioners eConveyancing Committee, Submission by the State Revenue Commissioners eConveyancing Committee to the IPART draft report, August 2019.

the market as highlighted above weighed against the costs of replicating existing infrastructures.

In regards to the infrastructure model, there is a lack of incentive for a privately owned monopolist to innovate and drive efficiencies. On the other hand, if a hub model is adopted, under government ownership there are also concerns of a lack of innovation and further concerns if the hub is later privatised. The costs of regulating a monopoly tend to be greater than regulating a market where there is functioning competition, where less regulatory measures are required to prevent the exercise of market power.

Regulation of a monopoly

Markets that lack competition generally need to be regulated but the imposition of regulation on a market is not without significant direct and indirect costs. Current examples of monopoly regulation can be found in the case of the NBN, electricity and gas networks and certain rail assets. Clearly it is preferable if a market can thrive and develop subject to the forces of vibrant competition, and in that case less regulation will be required.

In the case of e-conveyancing, if there was only one provider (either through design or through market developments) the ACCC strongly suggests that regulation would be necessary considering that within most jurisdictions the monopoly operator would be controlling a mandatory bottleneck within the conveyancing supply chain. If a monopoly model is adopted by industry then regulators will need to develop an appropriate regulatory regime, including robust compliance obligations and enforcement framework and address vertical integration concerns. There is significant effort required to implement and enforce such regulation and the need for an appropriately resourced regulator to do this.

Key issues that regulators contemplating a monopoly based market structure would need to consider include:

- which segments of the market are contestable, which will revert to monopoly
- where is the value in the market and can a monopoly provider operate in related markets
- what mechanisms can be used to encourages efficiency and investment
- how will prices be set and for what services
- what is required to facilitate a structural separation between wholesale and retail services
- how to withdraw the licences of existing ELNOs and how to fund applicable compensation
- where is the value in the market and at what part of the market should separation be undertaken
- how will long term ring fencing from related markets be implemented and enforced
- what would dispute resolution arrangements for access seekers entail
- what type of compliance regime is necessary
- how can information asymmetry be addressed and mitigated
- what mechanisms for review are required, could this include consumer engagement panels
- what transparency measures and reporting obligations will be required; and
- should a new public entity be created, plans for its subsequent and likely privatisation or long term leasing ought to be considered up front.[9]

[9] See National Broadband Network Companies Act 2011 and Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011, setting out the specific regime governing the possible

In addition to a bespoke regulatory solution, broader general completion law provisions in the CCA would also apply.

Compliance and enforcement regime

Of critical concern when establishing a framework for a monopoly market is the strength of its compliance and enforcement regime. Absent any choice of service provider, consumers will have no option but to use the services of PEXA. If PEXA was the monopoly service provider, in a market with especially high barriers to entry, it will have little or no incentive to provide an appropriate service level commensurate with the fees it charges.

When contemplating the development of a suitable compliance and enforcement regime it is important to consider a range of factors including costs of enforcement, compliance costs to stakeholders, scope for timely review, benefit of enforcement outcomes to industry, access seekers and consumers and the potential for a compliance or enforcement outcome to have a deterrent effect more broadly. By way of example the following regulatory arrangements use a broad range of enforcement and compliance measures some of which may be suitable for e-conveyancing, depending on the model chosen:

- the national electricity market regime (includes independent monitoring and audits, statutory information gathering and court enforcement)
- Part IIIA's negotiate-arbitrate regime includes enforceable arbitration outcomes
- Telstra's Structural Separation Undertaking agreement[10]
- Internet Activity Record Keeping Rules

Pricing

The ACCC has observed that in the absence of competition and with an automatic pathway to increase prices in line with CPI, the impetus for further price reductions, product innovation or service level improvements is foregone. The ACCC notes Sympli, who has recently released its fee structure, has suggested its costs are already 15 to 50% lower than PEXA. On price the ACCC would further recommend periodic price reviews to ensure cost-reflective pricing outcomes, though should competition emerge, the competitive tension between the two ELNOs should lead to lower prices.

Thus whilst there are some controls already contemplated in the MORs, the ACCC remains concerned that without further market reform, PEXA will continue to enjoy significant market power and as a consequence, the benefits of competition, including and beyond price, will not be realised. We encourage ARNECC to consider the use of the MORs as a means of requiring licence conditions relating to facilitating competition. For example ARNECC could consider amending PEXA's current license obligations to include specific upfront requirements relating to price, certain access requirements, the provision of information and particular disclosure requirements. This should be in addition to obligations to participate in dispute resolution processes.

Vertical Separation

E-conveyancing market participants are well positioned to expand their business into related markets (such as information broking, software provider and practice management system

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privatisation of the NBN.https://www.communications.gov.au/what-we-do/internet/national-broadband-network/nbn-legislative-framework

[10] The SSU contains a number of obligations that are designed to promote competition during the interim period from the date that the SSU commenced until the NBN fibre network is complete. If the ACCC considers that Telstra has breached the SSU it may apply to the Federal Court for a range of remedies, including penalties, compensation and any other order that the Court considers appropriate. A breach of the SSU is also a breach of Telstra's carrier licence conditions, which can attract a fine of up to $10 million.

markets) and capitalise on their industry experience, existing stakeholder relations and their sunk infrastructure costs. However the risks to the existing and related markets from entry into these related markets typically outweigh potential efficiency benefits.

The risks to the market of further monopolies developing as a result of vertical arrangements should be considered. For example a scenario where a sole ELNO is also the batch administrator (i.e. PEXA's initial status), or a monopoly batch administrator providing services to 'retail' ELNOs (i.e. similar to the NBN market structure) or if an ELNO moves into downstream information broker services.

Accordingly the ACCC welcomes that separation is currently contemplated in the MORs, an acknowledgement that the e-conveyancing market trades in highly attractive data and transferable services. The MOR appropriately contemplates the need for separation if a related supplier of an ELNO enters into downstream or upstream services, considering the advantages it could receive as a result of its relationship to an ELNO.

Considering the risks, the ACCC considers it is appropriate that these rules will need to be strengthened. This would certainly be the case should the market adopt a monopoly model. Absent competition, the incentive to enter related markets and further raise barriers to entry would be high.

4. Enabling competition via interoperability is the preferred approach

The ACCC emphasises the benefits of competition and the need for a mechanism to enable full competition to emerge in the e-conveyancing market. Despite the establishment of the ECNL and the emergence of new ELNOs into e-conveyancing it has been difficult for stakeholders to navigate the move away from a monopoly market to a market structure which allows and promotes the development of competition. This reflects a number of factors including:

- the lack of clarity around the governance framework, specifically around responsibility for key policy and regulation design features of the e-conveyancing market
- a lack of agreement within the stakeholder groups of the need for competition and the benefits/costs associated with providing a framework that will promote competition
- a lack of agreement on the appropriate market structure model and concerns and practicalities around the complex set of relationships involved in the conveyancing market.

Despite these factors, there is a significant level of acceptance and desire amongst some key stakeholder for competition in e-conveyancing and the development of an operational and regulatory framework that will allow this process. At the same time, there is growing concern that the process towards developing this framework has taken some time and that further delays will stifle the real and present opportunity for developing nascent competition in the e-conveyancing market and by design or default will entrench a monopolist service provider with operating with inadequate constraints.

With respect to industry expertise the ACCC observes that although not specifically market regulators, ARNECC is the authoritative source of information and powers relating to conveyancing, and has a significant ability to direct the shape of the market structure. The IGA has charged it with facilitating the implementation and ongoing management of the regulatory framework for national e-conveyancing. ARNECC has undertaken considerable work in this regard in consultation with key stakeholders.

To assist in resolving some of these challenges facing the market and stakeholders generally, a number of useful industry studies have been completed outlining options for consolidating the opportunity to introduce and facilitate further competition in e-conveyancing and the conveyancing industry more broadly. Several of these studies have advanced the view that interoperability is not only necessary but is currently feasible for allowing a competitive e-conveyancing market to develop. Interoperability is in essence the ability of two or more ELNOs to exchange information and use the information that has been exchanged to complete multi party transactions.

Interoperability

Conceptually, interoperability is not a new or uncommon requirement in technology based industries and has been considered by regulators, including the ACCC, an essential aspect of ensuring the development of effective competition. The ACCC has considered interoperability in other markets including the mobile terminating access service (MTAS) and in the cash equity and settlement market.

In principle interoperability between ELNOs appears a credible mechanism by which to realise competition and thereby ensure the Australian conveyancing market is robust and responsive to the challenges it may face and the service levels that consumers, including practitioners in the industry, will expect. Interoperability will provide new entrants the ability

to compete in the market, subject to the particulars of the regulatory framework and costs. It is a process the second entrant and fully licensed operator Sympli will need in order to complete its entry to the market.

PEXA does not consider that interoperability and duplication of infrastructure is required as one infrastructure could exist and ELNOs could compete at the retail level on the user interface level and subscriber management level.[11] However we consider that as long as subscribers are required to multi-home, given PEXA's strong network effects the market will remain a near monopoly without appropriate measures in place.

The ACCC recognises that interoperability presents an opportunity to introduce a conduit through which a competitive process can emerge in the market. The ACCC does not have the requisite technical skills necessary to comment on nor develop the interoperability model and associated API necessary to facilitate interoperability. There are also a wider range of issues associated with interoperability that will need to be addressed, including technical, financial, cyber security, insurance risk and distribution of further costs between stakeholders. These matters can be resolved alongside the question of market design.

The work undertaken in the IPART report and NSW interoperability working groups report suggests that interoperability between ELNOs is a credible mechanism by which to realise competition. Further consideration in the IGA review draft report has advanced various practical issues to be considered in determining an appropriate model of interoperability as well as raising other key matters that must be addressed in terms of security and risk management of the transaction. Overall, it would appear that that there is a general acceptance that interoperability in some form is both feasible and achievable.

Models of interoperability

The ACCC acknowledges there are a range of interoperability models being discussed by stakeholders (direct connection, information hub, shallower model). Not all stakeholders support interoperability and not all stakeholders agree on a definition of interoperability per se. Overall there is still limited detail available on the interoperability models and are likely to change as stakeholders consider interoperability further.

The following types of interoperability models listed below have been explored in greater depth by stakeholders and all involve some form of direct interoperability or connection between current and possibly future ELNOs:

- direct interoperability (referred to as bilateral interoperability as discussed in the IPART report), where each ELNO builds its own software platform and connections to other participants in the market, including connections to each other ELNO, land registry, revenue offices, RBA and financial institutions.
- a reflective workspaces model as explored in the NSW independent working group process and the Report by Independent Chair Rob Nicholls
- the Lodging ELNO as the authoritative workspace model, also raised in the NSW independent working group process
- the 'shallower model', as proposed by DMC in the draft IGA report

In this paper we consider the direct connection model and the shallower model in further detail as possible examples of interoperability based regulatory regime and explore whether they could facilitate a competitive outcome for the market. The paper also considers how the emergence of various ELNO classes may be possible through interoperability and thus facilitate greater competition in the market.

[11] PEXA, Submission to IPART draft report, 3 October 2019, p. 27, 31.

On the direct connection model we note there are positive features of the arrangements proposed. IPART notes that interoperability can drive further innovation and lower costs. IPART considers that the current evidence presented by Sympli proposes the model will deliver lower costs for end users, greater reliability and certainty of completing a transaction should one or the other ELNO go offline, they submit two operators will drive innovation and provide choice for practitioners (and consumers), resulting in better overall service levels across the industry.[12] The ACCC acknowledges these benefits and has observed similar benefits in other markets were competition has been facilitated. The ACCC also understands not all stakeholders support such claims or believe such outcomes are essential to the future operation of the market.

In addition to the positive features of the direct connection model, it is equally appropriate to highlight possible concerns that may arise should it be adopted. Some initial concerns the ACCC has identified include: vertical and horizontal integration concerns, the prospect of duopoly emerging should barriers remain high for subsequent entrants and noting the prospect of various ELNOs classes, whether access will be provided on fair terms. The ACCC notes specific regulatory arrangements could be developed to mitigate such risks.

On the 'shallower model' (proposed by DMC in the draft IGA review report), DMC has proposed the benefits of this model as lower complexity and lower costs. Under the model one of the ELNs is chosen as the lodging ELN. Subscribers to any other ELNs can use those ELNs to enter data, which is shared with the lodging ELN. However, all signing of documents for the transaction must be done using the lodging ELN. PEXA agrees with DMC that the shallower model minimises the duplication of connections and settlement and lodgement infrastructure, and that it is likely to be the least complex, and therefore the solution that involves the lowest cost and risk. However, at the same time PEXA also considers it is crucial that the technical, financial and legal complexities of this model would also need to be fully understood and addressed.[13]

We note that the shallower model still requires subscribers to subscribe to multiple ELNs. We also note that it fails to recognise the sunk costs of the new entrant Sympli, and may leave value in the supply chain with the wholesale operator. It is not clear how this model would be financed or regulated, and also not clear that PEXA or Sympli would welcome this approach for different reasons. New entrants will have less scope to innovate if only providing retail services and lower costs are unlikely if a new entrant can't build or negotiate preferred entry. There may also be less incentive for new entrants to continue with the existing entry approach of 'user pays', including a range of costs incurred by government agencies and financial institutions.

Retail-only or partial ELNOs

There is the potential that some ELNOs entering the market do not need to develop their own infrastructure, but would rather choose to use the infrastructure of existing ELNOs in order to participate in the market and perform certain settlement functions.

The MORs do not require an ELNO to have its own financial settlement infrastructure. In order to allow innovation in this evolving market it is unlikely to be desirable for regulation to require new entrant to have their own infrastructure. IPART has contemplated this type of arrangement and commented that direct or bilateral interoperability mechanisms would not preclude new entrant ELNOs from entering into such arrangements with existing ELNOs. [14] The ACCC however considers that there should be a regulatory framework in place to govern the access arrangements between this new class of ELNO and the existing infrastructure ELNOs.

[12] IPART Draft report; Sympli, Submission to IPART draft report, 1 October 2019.

[13] PEXA, Submission to IPART draft report, 3 October 2019, p30.

[14] IPART Draft report, p40.

PEXA has submitted that should the market develop to accommodate this type of entry, it would need to manage the complexity of both bilateral connection and an access regime which would significantly increase the complexity, risks and costs associated with settlement.[15] PEXA also considers that it would require vertical and horizontal interoperability between reseller ELNOs and interoperability at the wholesale infrastructure level, which would introduce unacceptable risk and costs.[16]

We consider there is an overarching concern around the involvement of various classes of ELNO emerging under this hybrid model. We note there is not consensus within industry on the identified benefits and risks of this emerging model and impact of potential new entrants on the market, some have expressed concerns around constraint on innovation, in addition to liability and security matters. Equally, the ACCC is familiar with the constraint and competitive tensions retail type service providers have brought to various markets including in telecommunications and energy. The ACCC has extensive experience considering the operation of access regimes, of which certain learnings may assist if this model is further contemplated.

Costs of APIs

The paper will now consider how interoperability can be achieved and the role of APIs. Specifically, the ACCC understands a key cost involved in facilitating interoperability between ELNOs are the costs associated with the development, implementation and maintenance of an API via which the ELNOs would exchange information.

To date the ACCC understands Sympli considers that APIs are commonly used communication protocols and represent business-as-usual activity for any ELNO, so an ELN-to-ELN API would be built and maintained alongside the dozens of other API connections that ELNOs already have in place with land registries, revenue offices, banks and third-party software providers. Sympli estimates that the cost of building an ELN-to-ELN API would be $1-5 million per ELNO and should be absorbed by the connecting ELNOs.

IPART estimates that for two ELNOs, the additional capital expenditure is similar for the direct connections, information hub and infrastructure ELNO models. Expenditure would be considerably higher for the full central hub model due to the infrastructure required for it to provide lodgement and settlement services for all ELNOs in the market. For three ELNOs, the additional capital expenditure is similar under the direct connections, information hub and full central hub models. It is lower under the access regime because no hub is built and the new entrant utilises the lodgement and settlement infrastructure of one of the two existing ELNOs.[17]

PEXA however does not consider that the additional costs of interoperability are small for PEXA, industry or consumers. In addition to the costs of APIs, the costs include rebuilding PEXA's platform to synchronise with another platform, and other costs to integrated service providers.[18] PEXA's view is that the estimated cost across the industry to introduce the bilateral method of interoperability between PEXA and another ELNO is between $96-$160 million, and that there would be further costs to introduce additional ELNOs into the bilateral interoperability model.[19]

Sympli states that the potential fee savings arising from interoperability relate to the choice of ELNO so that users can choose the ELNO that offers the greatest value to them.

Sympli states that comparing its existing transaction pricing schedule to PEXA's pricing demonstrates that the potential fee savings for consumers from interoperability (from choosing Sympli's platform over PEXA's) are around $65 million per year. Sympli states that the potential savings from

[15] PEXA, Submission to IPART draft report, 3 October 2019, p9.
[16] Ibid.
[17] IPART Draft report, p 28.
[18] PEXA, Submission to IPART draft report, 3 October 2019, p9.
[19] Ibid, p5.

interoperability in the e-conveyancing market is worth more than the total annual equity settlement market of around $50 million.[20]

The ACCC notes as per the IPART report and submissions made to the ACCC by stakeholders, the technical costs and arrangements surrounding the introduction of interoperability including the development of an API appear not unreasonable, particularly when considered relative to the overall size of the market, and the sunk costs of current industry participants.[21] For example NSWLR has already invested in an API to allow multiple ELNOs to connect to the land registry[22], and several financial institutions have already or will shortly be connected to more than one ELNO). However, given there remains considerable distance between some parties on APIs clearly further work is required. Clarity from decision makers on the appropriate market model and what types of obligations might be placed on ELNOs with respect to API development will in turn inform the discussion around what type of API may be required, the regulatory arrangements necessary and the costs involved.

The ACCC also notes the concerns of other stakeholders, for example the state revenue offices who submit their costs have not been fully considered, must also be explored when considering how interoperability would operate in practice for all stakeholders.

Further work is required

As stated above, the ACCC is not the appropriate technical expert to resolve the mechanics of interoperability. What is clear, however, is that a key next step is to do so; only when mechanics and costs are broadly known can decisions be made. Existing commentary from experts suggest the implementation of interoperability is manageable. We note there is a willingness from many stakeholders to develop a suitable regime to accommodate interoperability, such as the Law Council of Australia, IPART and the SA and NSW Registrars.[23]

Baseline regulatory framework for interoperability

Once interoperability issues are settled, a model can be selected by the relevant policy makers and industry stakeholders. The ACCC can then provide further advice on how to develop an appropriate regulatory framework for the specific model.

In the interim, the ACCC considers the following baseline regulatory arrangements necessary for a developing interoperable market:

- a clear set of rules for how parties interoperate and interact
- compliance and enforcement provisions
- independent oversight
- industry involvement
- a flexible framework to cater for future market development, including the possible exit of participants
- scope for review

A clear set of up front rules

A clear set of up front rules will provide the industry with regulatory certainty to support appropriate investment and planning.

Should ELNOs interoperate, clear rules are necessary to regulate both the act of interoperation and the management of relationships between the ELNOs and industry

[20] Sympli, Letter to ACCC, 7 November 2019.
[21] IPART Draft report; Sympli, Submission to IPART draft report.
[22] NSW Land Registry Services, Submission to IPART draft report, 1 October 2019.
[23] The Australian, Breaking e-conveyancing 'monopoly', 18 October 2019'; NSW Office of the Registrar General response to IPART draft report, 8 May 2019.

stakeholders more broadly. Where two or more ELNOs' work practices intersect, clear rules are necessary to establish processes in addition to behavioural expectations. Further guidance is equally necessary around how ELNOs in concert or on an individual basis engage with other critical market participants.

At a minimum this would involve standard terms for how parties interoperate, how pricing of certain roles are determined, what compliance and enforcement mechanisms are needed, how disputes are managed and what type of information must be shared for the benefit of the industry between participants and consumers more broadly. Subject to the development of the market, provisions for access to certain services may also be necessary.

The ACCC notes some of these concerns are addressed, at least in part, in the MORs. The capacity to set and adjust licence conditions as applied by ARNECC on ELNOs in part already confirms certain expectations and obligations. They may provide further scope for setting additional upfront requirements on ELNOs. It also may be appropriate to tailor conditions for future new entrants in an effort to level the playing field should various classes of ELNOs emerge in the market.

By way of comparison the ACCC has considered the regulatory settings required for interoperability in other industries such as in telecommunications and the equity settlement markets. Of value to the discussion surrounding ELNOs is the development of the mobile telecommunications market and the regulation of mobile terminating access services (MTAS).

The mobiles market, not unlike the ELNO market, relies on the capacity of participants within the market to share information; in the ELNO market this is to complete transactions, in the mobiles market it is needed to enable calls between many firms and their customers. Not unlike each ELNO, each mobile network operator (MNO) has exclusive access to subscribers on their network, however without interoperability it will be the MNO with the largest subscriber base which would capture the market due to network effects.

In the mobiles market absent regulation setting out an arrangement for interconnection (including technical standards and cost based pricing arrangements), the dominant MNO has the incentive and ability to set unreasonable terms of access to terminating voice calls on their network, including by setting inefficiently high price for providing voice termination. In the absence of cost-based pricing the opportunity for typically smaller disrupter firms to enter a market diminishes. Through cost-based pricing access, providers can recover the cost of providing the declared service, encouraging them to invest in efficient technology and infrastructure, and ensuring that their legitimate business interests are taken into account.[24]

In the ELNO market cost based pricing will allow ELNOs and specifically the lodging ELNO to recover the cost of providing the service. The MORs already require that ELNO services should be cost reflective but they have not yet considered the costs of interoperability and the costs of the lodging ELNO, for example under the direct connection model. Through the establishment of a clear regulatory framework the costs of interoperability can be decided and allocated appropriately between ELNOs in order to drive efficiencies. IPART considers that the ELNO that is responsible for lodgement would bear more costs, third party fees should be shared, and that a cost-reflective transfer price should be set to ensure the costs are shared between the lodging and non-lodging ELNO.[25]

Rules for transparency

The ACCC considers that rules around transparency are important, particularly transparent pricing and access. The ACCC has advocated for information disclosure requirements in

[24] ACCC, Public inquiry on the access determination for the Domestic Mobile Terminating Access Service, Discussion paper, August 2019. https://www.accc.gov.au/system/files/MTAS%20FAD%20Discussion%20Paper%20-%20August%202019%20-%20PUBLIC.pdf)
[25] IPART Draft report, p33.

other industries. Transparency can provide access seekers, industry participants and consumers with the opportunity to properly assess and determine whether the terms put forward by the service provider are reasonable, an important first step in determining when and how to enter a market.

In the wholesale gas industry, the ACCC considered the effectiveness of any information disclosure arrangements in directly affecting parties' incentives to reach commercial agreement (or to utilise an access dispute regime when commercial negotiations break down).[26] The principal problem was that shippers seeking access to pipeline services had unequal levels of bargaining power and access to information.[27] To address these issues, Part 23 was introduced into the National Gas Rules as part of the Gas Market Reform Package in 2017. The ACCC considered the proposed approach to the information disclosure requirements was likely to achieve the objective of the information disclosure framework to reduce information asymmetries, in order to enable shippers to identify the exercise of market power and negotiate more effectively with pipeline operators.[28]

Another example of the importance of transparency in a market is the Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia, which provide that the ASX should publicly commit to an appropriate minimum level of transparency of pricing across its range of monopoly cash equity CS services. It also provides that the pricing of these services should not discriminate in favour of ASX-affiliated entities (except to the extent that the efficient cost of providing the same service to another party was higher).[29] These expectations are however not legally enforceable. In the context of e-conveyancing, it would be preferable for enforceable rules to be developed by the states to govern transparency and information disclosure of price and non-price aspects.

Terms not covered by up-front requirements

In addition to clear up front rules, there may be scope to include within a regulatory framework a mechanism of negotiation and arbitration, as a back stop should parties not be able to reach agreement in negotiations relating to terms not covered by the upfront requirements. The ACCC has observed that often the threat of further intervention is more than sufficient a means by which parties will work together to reach an agreeable outcome. Such a mechanism has been effectively used in the gas industry, where the decision to opt for commercial arbitration if required has delivered timely outcomes for market participants.

In the context of the bulk wheat port terminals, a publish-negotiate-arbitrate model was also employed as a way to introduce less prescriptive regulation. This was important considering the industry was in transition, the appropriate level of regulation required was unclear and such an approach would keep costs lower, as the costs of regulation are only incurred if and when a dispute arises. [30] In the context of e-conveyancing, which is an evolving market and the scope of future products and services may be unknown, such a mechanism could be useful, particularly where parties need matters resolved promptly.

Importance of independent oversight

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[26] ACCC, ACCC submission on Gas Pipeline Information Disclosure and Arbitration Framework Implementation Options Paper, 2017.

[27] Available at http://gmrg.coagenergycouncil.gov.au/news/gas-pipeline-information-disclosure-and-arbitration-framework-initialnational- gas-rules

[28] ACCC, 2017, ACCC submission on Gas Pipeline Information Disclosure and Arbitration Framework Implementation Options Paper.

[29] Council of Financial Regulators, *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia*, September 2017.

[30] ACCC final decision, 2009, https://www.accc.gov.au/system/files/ACCC%20-%20Final%20Decision%20on%20GrainCorp%20Undertaking%20-%2029%20September%202009.pdf; *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014*.

As outlined above the ACCC considers it is important there be a robust regulatory framework developed to support the governance of ELNO interactions with one another in particular, if not with other market participants. We would have concerns of the market adopting self-regulation without independent oversight, particularly given the current uneven state of the market.

The ACCC has also highlighted concerns with access arrangements that rely solely on contractual negotiations. The ACCC has previously publically expressed that there are a number of concerns with a contractual enforcement regime, including that 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.[31] Further, it is unlikely that contractually based access type arrangements will provide for transparency and public oversight and may not take into account public submissions from industry stakeholders.[32]

In the market there is also scope for the involvement within the industry of an appropriate independent ombudsman-type body. This body could receive complaints about ELNOs from end users and complaints from ELNOs about other ELNOs. This will be particularly important in an environment where there is a range of ELNO types that emerge which are subject to potentially different or varying regulation. Options for cost recover could be explored as per other industry ombudsman. By way of example in relation to financial services, the Australian Financial Complaints Authority provides consumers and small businesses with assistance in resolving complaints and in the telecommunications sector the option for firms to seek recourse via the ombudsman with respect to wholesale service providers has recently been introduced.

Active industry involvement

The development of the regulatory framework should involve active participation from industry and the interests of end-users reflected in the regulatory framework. Industry experts are best placed to determine certain technical matters and standards concerning their own industry. Industry is well placed to share its insight into how rules might operate in practice, identify regulatory gaps in certain scenarios and advice on compliance costs.

As mentioned above, there also needs to be significant industry involvement in developing the financial regulation and technological aspects of e-conveyancing and interoperability.

A worthwhile example to consider at this time is Communications Alliance. An industry body in the telecommunication industry that seeks to best progress the industry in the interests of all members. Communications Alliance members brings direct competitors together and other industry stakeholders to work together, including via specific working groups for the benefit of the industry and for the most part in recognition that within the telecommunication industry managing the task of interoperability cannot be realised without cooperation.

A flexible framework and scope for review

A competitive interoperable ELNO market may further evolve over time as ELNOs enter and exit the market via a series of bespoke access or commercial agreements, particularly considering the prospect of various classes of ELNOs. Overtime these agreements may cease or be varied. In addition further contestable services may emerge or new products become apparent. Specifically the industry and decision makers need to explore how a competition based model can adapt to accommodate one, two or more ELNO while meeting the expectations of industry (including around costs) and the interests of consumers. Considering the market intersects with Australia's financial sector, new obligations may also

[31] ACCC, Submission to draft Moorebank IMEX Terminal Access Protocol, 12 July 2019.
[32] ACCC, Submission to draft Moorebank IMEX Terminal Access Protocol, 12 July 2019, p4.

emerge from relevant regulators and the ELNO regime will need to ensure these are reflected in arrangements as required.

Accordingly, a cautious approach should be taken against locking the market into a model that may not be fit for purpose as it evolves. Embedding future reviews into the framework will be a useful mechanism and signal to market participants that a regime may change over time. As per the bulk wheat ports industry it may become apparent that regulation where no longer warranted can be withdrawn or obligations reduced.

A regulatory framework should incorporate reviews and take into account the possibility of the market evolving. It should provide mechanisms to wind back regulation if effective competition develops, which may be through the removal of regulation entirely or mechanisms to reduce regulation in controlled stages.

Conclusion

The ACCC recommends that the industry and relevant policy makers settle as soon as possible the issues associated with interoperability so that decisions can be made on market design. Then they can settle the baseline regulatory arrangements necessary for the chosen market model. These are: a clear set of rules for all participants, rules to promote transparency and address information asymmetry, importance of independent oversight, promote active industry involvement, a flexible framework to allow for innovation and new services to develop, scope for relevant reviews and mechanisms to ensure barriers to entry are not raised for future prospective entrants.

5. Conclusion: There is a pressing need to reach consensus on interoperability and provide the market with certainty

It is the view of the ACCC that competition in e-conveyancing is preferable to a monopoly based approach. If a monopoly based market structure is adopted it will be more costly and the outcomes for consumers poor compared to a competitive market based solution.

Mandating e-conveyancing was a worthwhile endeavour but the implications on the market were not appropriately considered by the relevant regulators and policy makers before mandating. The current regulatory framework is inadequate for the current market, one of a near monopoly with a second ELNO having commenced entry into the market.

The prospect of competition emerging via the implementation of an interoperability based model appears to be a practicable means to realising competition in the market. The direct connection model could be the appropriate model, though further work and detail around how subsequent new entrants are regulated is required. The ACCC is concerned that further delays on progressing the development of an appropriate market structure will essentially prevent the development of competition in e-conveyancing.

Policy makers, ARNECC and industry must do further work on interoperability. This work needs to be done urgently before the near monopoly becomes further entrenched and so decisions can be made. The ACCC acknowledges that there are many challenges in transitioning a market to a new framework. It is aware from discussions with stakeholders that many participants, in particular the ELNOs and the financial and settlement institutions that support their activities, are finding it increasingly difficult to plan their long term investment in the industry while regulatory structures and market design issues remain unresolved. In the absence of further analytical work and the identification of a clear pathway forward it is clear the market will falter and opportunities for a range of stakeholders including end users will be forgone. We anticipate this analytical work would involve exploring the costs to industry and the technical mechanics of how interoperability will work in practice.

The ACCC considers that competition will be most effective if a national approach is adopted and reform efficiencies are realised across jurisdictions. If interoperability is mandated by some jurisdictions and not others, there is a risk of further fracturing of the market. However in order to reach a national approach, the ACCC supports further work being done by the states on progressing the development of interoperability models and the need for this work to be done now.

The ACCC acknowledges that ARNECC may not have the resources or powers to resolve this issue. ARNECC's capacity to regulate effectively into the future would be enhanced if it had access to appropriate regulatory tools and greater resourcing. State and territory governments need to determine a workable solution for the industry as a whole. This will be required in particular if a significant reform agenda is needed to achieve interoperability, or alternatively this is not achievable and significant regulatory reform is required to address PEXA's position in the market.