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9 November 2022

Ms Carmel Donnelly PSM
Chair
Independent Pricing and Regulatory Tribunal
PO Box K35X
Haymarket Post Shop
Sydney NSW 1240

Dear Ms Donnelly

Re: Interoperability pricing for Electronic Lodgment Network Operators Issues Paper 2

The ACCC welcomes IPART's detailed examination of the electronic conveyancing (eConveyancing) market and consideration of the pricing framework for interoperability between Electronic Lodgement Network Operators (ELNOs). We appreciate the complexity of the market, including the challenges stemming from opening the market to competition, considerable barriers to entry, significant market asymmetries, regulatory uncertainty, and the prospect of further national and state-based reform.

As IPART considers these matters further, we wanted to share with you two submissions the ACCC provided to ARNECC in 2021 in the context of its consultation on the Model Operating Requirements. We note extracts of the earlier of the two submissions were published by ARNECC on its website in the corresponding Model Operating Requirements Version 7 Consultation Draft 7 Feedback Table. We hope this information will be of interest to IPART and provides further background information as you continue your detailed investigations.

We also recognise the importance of the ongoing further work and challenges that lay ahead for the eConveyancing market. As noted in IPART's Issues Paper 2 the pricing of electronic conveyancing services (including cross subsidisation) appears problematic. The timing of the rollout of eConveyancing reform (particularly interoperability) across Australia remains uncertain. Ongoing uncertainty regarding the likelihood and detail of this reform will further frustrate industry and stifle the prospect of a competitive eConveyancing market emerging.

Notwithstanding the above matters, we recognise the important regulatory milestones that have occurred since we provided these two submissions to ARNECC, including the recent eConveyancing enforcement reforms in NSW. The successful passage of the *Electronic Conveyancing Enforcement Bill 2022* through both houses of the NSW Parliament is a significant development for the market.

As noted in our submissions it is critical that a meaningful enforcement regime underpins the market. An enforcement regime that provides clear compliance incentives is critical to the development and continued operation of a competitive eConveyancing market.

Yours sincerely

Anna Brakey
Commissioner

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11 August 2021

Ms Jenny Cottnam
Chair
Australian Registrars' National Electronic Conveyancing Council

By Email: chair@arnecc.gov.au

Dear Ms Cottnam

Re: Submission to Model Operating Requirements Version 7 Consultation Draft

The Australian Competition & Consumer Commission (ACCC) welcomes the opportunity to provide comments on the Model Operating Requirements (MORs) Version 7 Consultation Draft. The ACCC has reviewed the amendments and has prepared the following letter to share our views on the current draft of the regime.

The eConveyancing market is in its infancy and ARNECC has the opportunity to develop a robust market for industry, where competition delivers value and innovation to users. As such, we also take the opportunity to highlight our ongoing views on the broader regulatory arrangements.

Overarching regulatory framework for interoperability

The ACCC provided a submission to ARNECC in November 2020 which outlined our view on the need to have a robust regulatory framework in place for the eConveyancing market. The ACCC's views on the framework, the interoperability model and fees, and dispute resolution are unchanged. As such, we have set out only high-level views in this letter and have attached previously provided material for your consideration.

It is important for all stakeholders that the eConveyancing market is launched with a considered and balanced regulatory governance framework. A clear set of principles and obligations are necessary for stakeholders to have confidence in this market. For this reason, it would be beneficial to provide more certainty about the regime to industry as soon as possible. For example, stakeholders currently lack significant detail about the framework because key definitions such as 'interoperability' sit in the Electronic Conveyancing National Law (ECNL) which are not yet available. Likewise stakeholders would benefit from greater explanation around how provisions and obligations across the regime will operate together.

We appreciate ARNECC is seeking to prevent further delays to the overall implementation timetable and is working towards settling the key documents that make up the framework. However, we note stakeholders have expressed some concern that ARNECC has adopted a light-handed strategy with respect to the legislative reform process. We share these

concerns, as set out in our submission in response to ARNECC's regulatory framework consultation paper from last year.

Moving forward, we recommend that ARNECC update and consult industry to ensure stakeholder buy-in. Further timely consultation should help to avoid potential implementation problems and result in a more effective regime from the outset. Accordingly, the process would benefit from stakeholders considering the package of amendments to the ECNL and the MORs to provide commentary on the regime as a whole.

To facilitate change in the market ARNECC must ensure stakeholders are confident that the regime will operate effectively. It is unlikely stakeholders will consider switching if they lack confidence in the framework. Key ways to do this would include:

- setting out a clear legally enforceable set of obligations and expectations for all stakeholders. We believe as much detail about the regime as possible should be set out in the ECNLs;
- setting out further detail about processes, obligations, roles and responsibilities in the MORs. We note many stakeholders have expressed concern that too much of how the regime will operate on a day-to-day basis remains ambiguous; and
- limiting the interoperability agreement to matters specific to the ELNOs interaction with another. ARNECC should be mindful to not delegate particular areas of responsibility to ELNOs that should be carried out by the regulator.

Ensuring the regime is robust now can alleviate uncertainty later and the likelihood of disputes arising as a result.

Information transparency is also critical to ensure stakeholders understand roles and responsibilities. This will be impeded if a significant portion of the regime sits behind a contractual agreement between the ELNOs. Such an outcome will create uncertainty in the market and limit its overall use. Given the propensity for disputes between ELNOs, all users should have access to as much of the agreement as possible, subject to any specific confidentiality concern. ARNECC should have access to the whole of the agreement. Relatedly, ARNECC should consider the duration of any agreement to provide scope for review and to facilitate the prospect of new entrants.

Please see **Attachment A** for further details.

Interoperability model and fees

We consider the best way for ARNECC to navigate pricing decisions is with reference to a clearly articulated governance framework. A clear framework or set of principles should support ARNECC to reach a position on pricing that supports a competitive outcome for the market. Further articulation of the decision making framework will also provide industry a greater understanding of how and why the various ELNOs will incur costs. The potential impact of any pricing determination will affect the overall competiveness of market participants.

Further, we have observed a series of broader risks including that the system rules risk favouring the incumbent and will reinforce its dominance.[1] As we discuss in our paper this risk in part stems from how the bank of the incoming mortgagee determines the role of Responsible ELNO. Due to the significant existing market asymmetries PEXA will likely perform for the role of Responsible ELNO, at least initially, and be entitled to charge new entrants for most transactions. This is despite our understanding that all ELNOs (both

[1] PEXA will also be the only ELNO capable all types of settlements initially.

existing and new entrants) will be required to be capable of operating in an interoperable market, and invest accordingly.

We acknowledge that key aspects of the model and regulatory framework are yet to be determined, particularly around pricing. We note the scope (and therefore materiality) of the costs contemplated as being transferrable between ELNOs is unclear. Further clarification of how the model will work would be helpful to stakeholders. New entrants especially will benefit greatly from more certainty as soon as possible, particularly as they must be contemplating if participation is even viable in light of an unknown pricing regime. The right regulatory settings can support a pro-competitive market outcome.

Please see **Attachment B** for further details.

Dispute resolution provisions

New entrants will need to compete with PEXA's incumbency advantages. ARNECC has also highlighted the need to ensure subscribers and end-users have seamless settlement experiences. As such, we agree with ARNECC that robust dispute resolution provisions will be essential. A clear and well-structured dispute resolution regime provides a good incentive for parties to not frustrate one another (or by inference stakeholders more broadly). Instead by establishing a clear and explicit dispute resolution framework parties are strongly encouraged to negotiate and reach agreement in a timely manner. Such an outcome would support industry transition to interoperability and ensure users concerns are resolved with efficacy should a dispute arise.

One of the benefits of a negotiate-arbitrate regime is that it provides parties flexibility to resolve a series of commercial or operational issues, and if necessary accept certain trade-offs. A clear framework provides parties (and particularly new entrants) confidence to seek to resolve matters using the arbitration mechanism if necessary. Though typically parties resolve the disputes rather than resorting to arbitration or an expert determination mechanism.

The ACCC recently provided staff level views on the proposed drafting of the negotiate-mediate-arbitrate regime in the version 7 of the MORs. We set out how certainty around timing, roles and responsibilities at each step within a dispute resolution process are important. We consider a robust regime in the initial stages of the market will be critical because PEXA has a clear incentive to delay rollout and frustrate Sympli (and other new entrants). We also queried if a mediation regime was appropriate for this market. We understand ARNECC will consider how to amend this aspect of the MORs.

For competition to develop in this market it will be critical that a fair agreement can be reached between the current and also future ELNOs. The negotiating framework must therefore be robust to alleviate the risk that new entrants will have no other choice than enter an agreement that favours the incumbent. Given the efforts of industry as a whole to prepare for interoperability it would be frustrating if the ELNOs failed to reach agreement or a fair agreement was not possible and a competitive market failed to emerge.

Please see **Attachment C** for further details on negotiate arbitrate.

We have also provided further comments on the consultation draft at **Attachment D** that ARNECC may wish to consider.

Should you wish to discuss anything raised in this letter, please contact Katie Young, Director, Infrastructure Transport & Pricing at Katie.young@accc.gov.au.

Yours sincerely

Anna Brakey
Commissioner
Australian Competition and Consumer Commission

Attachments

Attachment A – ACCC response to ARNECC Position Paper on Proposed Regulatory Framework for Interoperability – December 2020

Attachment B – The proposed interoperability model and fees – August 2021

Attachment C – Dispute resolution provisions in MORs – Feedback and thoughts - July 2021

Attachment D – Further comments on draft MORs

Attachment A

ACCC submission in response to ARNECC Position Paper on Proposed Regulatory Framework for Interoperability

Introduction

The ACCC welcomes the opportunity to provide views on *ARNECC's Position Paper on Proposed Regulatory Framework for Interoperability*.

In December 2019 the ACCC provided ARNECC and the heads of State and Territory policy agencies with a 'report on e-conveyancing market reform' (market reform report). In that report the ACCC strongly supported efforts to introduce effective competition into the Australian electronic conveyancing (e-conveyancing) market as soon as is practicable, noting the potential for the further entrenchment of PEXA as a monopoly or near monopoly service provider.

The ACCC also noted at that time that interoperability between Electronic Lodgement Network Operators (ELNOs) represented a potential pathway to competition but that a substantial amount of work needed to be undertaken by ARNECC, policy makers and industry to identify the appropriate interoperability model and the regulatory and/or legislative amendments that would be required to implement it. At the time the ACCC noted that ARNECC was resource constrained and encouraged active engagement and support from relevant policy agencies.

What followed was the important work of the NSW Office of the Registrar General (NSW ORG) and SA Office of the Registrar General (SA ORG), in conjunction with industry, to progress reform through the Interoperability Industry Panel (IIP). The ACCC has been pleased to participate in the IIP.

Importantly the work progressed by the IIP has led to a Heads of Treasuries agreement to support interoperability and a subsequent direction from Ministers to deliver a competitive market structure through interoperability. Specifically and importantly the direction has established clear expectations regarding the steps that will be needed to be taken to implement these reforms and the timeframes for their completion.

The ACCC welcomes the recent decision of ARNECC to assume responsibility for the delivery of the interoperability mandate, including its support for the IIP becoming an ARNECC panel. It is now time critical that ARNECC provide industry certainty over the reform timeline and the obligations that will facilitate interoperability as soon as is practicable.

The Position Paper states that the key design principles of the regulatory regime and several subsidiary issues are still under consideration. To assist with this further consideration the ACCC is pleased to provide views on the principles and issues raised in the Position Paper, drawing upon its experience with developing and administering regulatory regimes (and crucially, how they work in practice). The ACCC would be pleased to provide further views on the proposed regulatory framework at the drafting stage.

On the model specifically, the ACCC acknowledges the majority view of the ITWG that the phased introduction of an Enterprise Service Bus (ESB) model is viable and is its preferred approach to introducing interoperability, and that a Direct Connect (DC) model is a pragmatic solution which can be leveraged as an interim/short-term mechanism to support interoperability between current ELNOs. However a clear process must be set down to ensure the ESB model can be implemented as soon as is practicable, for the benefit of the long-term stability and competiveness of the e-conveyancing market.

The ACCC notes that many of the views expressed in this response are also set out in its market reform report. Where relevant the ACCC has expanded upon these views in response to specific issues raised by the Position Paper. The submission also reiterates views shared by Chair Mr Rod Sims at Ministerial forums on 10 June 2020 and 7 September 2020.

Issue 1: Mandatory obligation to interoperate

ARNECC's Proposal: All ELNOs should be required to interoperate.

The ACCC supports ARNECC's proposal that ELNOs should be required to interoperate. As per the Ministerial direction an interoperability solution should be implemented by December 2021.

As set out in the Position Paper it is essential that subscribers have choice in their service provider. The benefits of interoperability may see subscribers actively test the service offering of one or more ELNO, for example they may elect to use one ELNO for specific transactions or in a specific jurisdiction. When subscribers make their decision they may be guided by price or service or both. The benefit of interoperability is that the subscriber will be able to make the best decision for their operation and their clients.

The ACCC also concurs with the statement in the Position Paper that absent legislative reform via the Electronic Conveyancing National Law (ECNL) interoperability arrangements will not emerge through commercial negotiations. Until these reforms are implemented the incumbent and dominant operator will continue to lack incentives to facilitate the entry of other ELNOs.

The ACCC acknowledges the work of the IIP (and the ITWG) in arriving at the position that interoperability is an appropriate and feasible method of facilitating competition and that a Phased ESB model is the preferred approach for implementing interoperability. On the model, the ACCC has noted that it does not possess the technical expertise necessary to comment on the specifications of the Phased ESB model, but recognises the considered analysis undertaken by industry and the advice of the independent technical specialists which has informed the IIP and ITWG in arriving at their recommendation.

The ACCC acknowledges that the IIP considered a range of models in detail and determined the Phased ESB model would provide a level playing field for future new entrants. The Phased ESB will provide a transparent and clear process for the entry (and potential exit) of future ELNOs. As explained by the ITWG this technology is not bespoke per se and will be familiar to many already in the industry. This is a marked contrast to the current arrangements where both technology and particular legalities (especially around access to certain intellectual property assets) impose a very high barrier to entry for other ELNOs.

Accordingly, even if it is considered unlikely that a third or fourth ELNO could enter the market, the credible threat of new entry made possible by the Phased ESB approach will provide clear incentives for the current ELNOs to provide their best possible offer to the market to deter potential competitors.

On the DC model the ACCC considers that that the adoption of this interim step does appear necessary to facilitate effective competition between PEXA and Sympli as soon as possible. The ACCC notes that the mandating of e-conveyancing delivered PEXA significant market control and absent timely reform such dominance will be difficult to correct.

Finally, the ACCC acknowledges concerns expressed by some industry participants that the deployment of a DC solution risks entrenching a duopoly market. The risks arising from duopoly are well documented. It would be of concern to the ACCC if a duopoly market was

considered the preferred market structure for the long term. However when compared with the status quo the ACCC believes it would be preferable as an interim measure for the ELNO market to progress from a near monopoly market to one in which current (and all future) ELNOs are able to effectively compete. In a duopoly customers can still switch between ELNOs if they find the alternative price and/or service offering more attractive. In addition, if the process of moving to a Phased ESB is clearly set out (and supported by respective governments) the threat of future entry should limit complacency. Appropriate price controls (and potentially constraints around long-term contracting of services) will be important during this period of the reform implementation timeline.

Situations where a mandatory obligation to interoperate may not be necessary to promote competition in the ELNO market

The ACCC notes that the development of effective competition in the ELNO market may not necessitate interoperability in all cases, but in the long term all ELNOs would need access to the ESB to settle transactions with relevant government authorities and potentially financial institutions. It is important for the industry to have a clear timeframe around the delivery of the Phased ESB and the parameters around how entry will be permitted.

The ACCC acknowledges that it would be undesirable if a requirement to interoperate represented a barrier to entry for potential new entrants who would otherwise be able to meet the licensing requirements set down by ARNECC and could satisfy future needs of the market. It may be appropriate to build into the regime scope for exemption for certain operators, subject to the overall benefit to industry that could eventuate from their entry. In the interests of fairness clear guidance would need to be available to industry as to how such a provision would operate.

Issue 2: Changes to the ECNL to support Interoperability

ARNECC's Proposal: The ECNL should be amended to facilitate interoperability.

The ACCC considers that the ECNL should be amended to specify the key requirements of interoperability, including any critical steps necessary to facilitate its rollout. The decision to amend the ECNL to incorporate the key framework for interoperability will provide industry greater certainty to forward plan and confidence around the potential for future enforcement action in appropriate circumstances. The proposed amendments could also set out future reviews of the framework's effectiveness to ensure that it remains fit for purpose.

Importantly progressing reform by way of amending the ECNL will provide current ELNOs greater certainty about their current and future operations over the short to medium term, including the need to engage constructively in the future review processes and prepare their respective businesses to accommodate the new regime.

The importance of achieving legal and regulatory certainty regarding a pathway to competition as soon as practicable

As a starting point the ACCC notes that the sooner certainty over the pathway to interoperability is settled and the various roles and responsibilities of interoperating ELNOs and regulatory/oversight bodies are determined, the better. Providing this certainty will allow industry to commence the critical work that is needed to implement reform and prepare for its rollout. The sooner drafting can commence and the reform roadmap settled, the more time the market will have to provide valuable input through consultation. Consultation on drafting amendments to the ECNL will further signal the legitimacy of the reform process and the need for industry to prepare for the introduction of interoperability. Clear timeframes will instil confidence among both the ELNOs and practitioners (and the market more broadly) to

make certain investments (of both time and money) in related business activity like staff training.

As indicated above the ACCC believes it will be important to ensure critical aspects of the reform measures are set out in the ECNL. Legitimacy and certainty around the reform process may be undermined if critical aspects of the regime are included only in the MOR. As the ACCC has noted the current MOR have limited practicable enforceability.

If a staged roll out of interoperability is contemplated then clear timeframes and/or specific triggers will be needed to keep the process on track and all parties committed to progressing reform. These should be set out in the ECNL to provide both clarity and certainty to industry and ensure government remains accountable to industry to deliver reform as stated. It will also be important to identify if further resources are required to deliver the reform as envisioned and seek support as required.

Striking an appropriate balance between certainty, flexibility and confidentiality

The ACCC notes that in many regulatory regimes a hierarchy of rules and guidance material is established. It will be important to consider how, through the use of the hierarchy of documents, flexibility can be built into the regime without undermining the framework overall. It may be appropriate for some aspects of the interoperability framework to be defined and set out in the MOR, especially around specific processes, reporting obligations and detailed guidance material.

It may also be appropriate for some aspects of the interactions between ELNOs to be subject to commercial negotiation through an interoperability agreement. The duration of any agreement should be considered carefully the agreement should be made available to both ARNECC and industry more broadly in the interests of transparency.

The ACCC can appreciate why industry seems more inclined to support substantial amendments to the ECNL to facilitate the introduction of interoperability, rather than relying heavily on amendments to the MOR. As noted above the preference to see reform delivered by way of amendment to the ECNL appears to be in response to the risk of ongoing uncertainty if there is a chance that the reform measures could be subject to future incremental amendments. This in turn creates further legal risk and doubt around the regime. Potential new entrants will also benefit from understanding the regime is not likely to change significantly as they prepare for entry.

The final or agreed upon interoperability access agreements between ELNOs should be public documents to the fullest extent possible. There may be scope to restrict commercially sensitive material to the parties and ARNECC. It would be to the detriment of the industry as a whole if critical rules and obligations around how the ELNOs will interact with one another (and other key obligations and responsibilities) were to remain confidential. Maintaining visibility over agreements is an effective means by which to promote compliance and dispel any uncertainty around ELNO obligations to other ELNOs and their subscribers. Publication obligations should therefore be included in the proposed amendments.

To ensure that the reforms to facilitate competition are implemented as soon as practicable the ACCC considers that amendments to both the ECNL and the MOR should be progressed concurrently. That is, given the urgency of the task the ACCC considers that it would be undesirable if a separate, later consultation process regarding changes to the MOR led to further delays in the implementation of interoperability. Both sets of amendments should be presented as a package to ensure stakeholders can provide constructive commentary on the regime as a whole. The ACCC acknowledges the considerable time and effort that industry has committed to the reform process to date and the momentum that this process currently enjoys. It would be in the interests of the industry (and a commitment to

mitigating stakeholder fatigue) to ensure consultation processes are not only comprehensive but timely.

Issue 3: How the substantive requirements of interoperability should be settled

ARNECC's Proposal: Interoperability Agreements between ELNOs will be required under the interoperability framework. The primary requirements of interoperability should be specified in the regulatory framework to provide a clear framework for negotiation of interoperability agreements between ELNOs.

As noted in relation to Position Paper Issue 2 the ACCC supports the pursuit of certainty in the legal and regulatory framework for interoperability to the fullest extent practicable. The ACCC therefore agrees with the proposition that there should be a clear framework for negotiation of interoperability agreements between ELNOs.

Establishing the process for negotiating interoperability agreements

At this stage the ACCC would assume an interoperability agreement would cover matters related to interactions between two ELNOs for the purpose of executing a property settlement transaction. Further obligations on the ELNOs to the market and more specifically to ARNECC could be included in the agreement but would be better set out in the MOR or the ECNL. Enforceability and transparency are key factors that should guide where obligations would prove most effective within the framework. The source of authority for various rights and obligations is also important. For example if the interoperability agreement is between the two ELNOs how are their respective obligations to third parties including ARNECC conferred?

The Position Paper notes that there are two alternative models for setting the substantive requirements of an interoperability agreement and interoperability more broadly. One is an 'ex ante regulatory' model where key terms are set up front by the regulator and the other is a 'negotiate/arbitrate' model where parties first attempt to agree to terms commercially and the regulator only intervenes if there is a dispute. It may be that the rules around negotiating an interoperability agreement adopt a combination of these two models and may involve setting certain aspects of this process up front and leaving some to commercial negotiation between ELNOs.

Establishing a standard agreement or default set of minimum terms may be appropriate. Part IIIA access undertakings have generally included a set of standard terms on which access seekers may obtain access. Standard terms (often referred to as an 'indicative access agreement') form a template contract and function as a transparent starting point for commercial negotiation regarding the terms of access (including price). They also serve to level the playing field where one party has greater capacity and resources to enter negotiations (e.g. in some markets the availability of standard terms can reduce the need for legal representation or at least reduce overall costs of a negotiation for the access seeker). Final negotiated access agreements may vary from the standard terms in order to accommodate the particular circumstances and preferences of the parties.

Examples of obligations found in access agreements include information sharing requirements to address information asymmetry, minimum standards of engagement around the completion of certain transactions or services for which access is sought, behavioural obligations like non-discrimination and no hindering access, dispute resolution processes, audit options and record keeping rules. Flexibility to address specific concerns around, for example, the changing nature of systems security and integrity standards may necessitate

routine sharing of information and this could be set out in the agreement. To also support flexibility the agreement may refer to minimum standards or obligations that are defined in the MOR or other supporting documentation.

Behavioural expectations on negotiating parties (such as an obligation to negotiate in good faith) and a clear timeframe or a certain pathway to agreement should be set out in the ECNL (or potentially in the MOR). It may also be appropriate to include rules for assigning or apportioning costs associated with involvement in the process of negotiating access (the ACCC has provided additional views on effective dispute resolution processes in response to Issue 5).

Foremost it will be important to establish via the ECNL (or potentially the MOR) a clear set of rules around how the two parties will negotiate the terms of the agreement and potentially how ARNECC will approve or recognise a finalised agreement. An alternate option would be for ARNECC to have a right to object if the interoperability agreement does not reflect certain principles and standards set out for the arbitration, but otherwise allow the agreement to stand noting the parties reached a commercial outcome either directly or via an arbitrated outcome.

Critical to the process of negotiate/arbitrate are rules regarding the time the parties may take to settle an agreement. It may be appropriate to set certain rules regarding the various stages of negotiation, including timeframes. By way of example, other access type agreements contain rules around the sharing of information to assist with the negotiation, including clear timeframes. The rules of the negotiation as set out in the ECNL (or possibly the MOR) could provide a defined window of time for the negotiation of an interoperability agreement, with backstop provisions around the use of the standard terms until a formal agreement is reached and/or when the parties must proceed to arbitration.

When considering the rules around negotiation, it will also be important to determine how to treat subsequent amendments to an interoperability agreement and whether an agreement should be for a defined term. For example, it will have to be decided whether and when parties should have the opportunity to raise future amendments. Given the proposed Phased ESB approach will result in the market continuing to evolve over the short to medium term, the length of any agreement between the parties (and any risks around creating new barriers to entry for future ELNOs) should be carefully considered. Given the likelihood of ongoing technological change it will also be important to ensure the agreements retain their currency. Accordingly, thought may have to be given to whether ARNECC should be able to impose additional obligations on parties and how this might be achieved.

Irrespective of the model selected, ensuring the regime is drafted with clarity and logic, is essential. Industry buy-in supported by clear guidance material and other forms of educational support can greatly assist industry's transition to the new framework. The credible threat of enforcement should mitigate the potential for post implementation disputes.

<u>Key components of the regulatory framework to apply once ELNOs have entered into an interoperability agreement</u>

In addition to providing a clear process for negotiating interoperability agreements, further guidance and obligations should be set out for the benefit of industry with respect to what subscribers should expect from ELNOs. To ensure effective competition in the ELNO market an effective compliance regime must be established.

In this case the ECNL and the MOR in combination should include clear statements around each party's obligations within a transaction (and more broadly how an ELNO should carry out their responsibilities with respect to the various actors and institutions with whom it interacts). It will also be important to set out how subscriber complaints will be addressed

and an ELNO's general conduct and performance will be assessed. The ACCC notes that equivalents of many of these expectations are already set out in the MOR and might only require updating to reflect the new framework.

Transparency and performance measures

The extent to which ELNO performance is measured may warrant further consideration as the collection of this type of information may inform future policy decisions concerning the market. Maintaining an awareness of the experiences of and costs incurred by subscribers may assist future regulatory decisions ARNECC may need to make. Various industries have moved to regulatory models that provide for greater user group engagement and/or information provision.

The value of information about the market (and the crucial role it can play in being able to monitor the market) should not be underestimated. With this in mind it may be useful to consult specifically with practitioners about the type of information they would like to see reported on (e.g. information relevant to decisions about switching ELNOs, whether to enter into negotiations with the ELNOs on their subscriber fee schedule).

In the absence of appropriate reporting obligations ARNECC may also have limited access to the data it would need to carry out compliance activities and undertake other industry analysis as required.

Compliance framework and dispute resolution

It will also be important when developing the compliance regime and dispute resolution framework that underpins the MOR (and the ECNL more broadly) to set out specifically which matters would be subject to dispute resolution. Of the matters that will be subject to dispute resolution it will need to be decided which of these matters are intended to be resolved by ARNECC and which of may be referred for arbitration. It will also be important for the framework to specify which obligations may attract penalties if breached. Various penalty schedules may be necessary to reflect the severity of breaches by ELNOs of their obligations either to subscribers, other ELNOs or ARNECC.

In its market report the ACCC noted that the use of transparency measures within a regulatory framework can provide stakeholders critical information around service levels and costs incurred. The availability of this information may provide greater confidence to these stakeholders to pursue any discrepancies with the service provider directly or lodge a formal complaint with the relevant oversight body as provided for within the relevant regulatory framework.

Behavioural obligations

In carrying out their functions ELNOs are responsible to a range of industry stakeholders. As noted above in agreements involving access or service delivery it can be helpful to establish clear behavioural obligations on the service provider. In the case of the e-conveyancing market such expectations may need to apply across various parts of the regime to cover off the various relationships an ELNO may have. One possible inclusion may be a non-discrimination requirement, which essentially requires the service provider to treat access seekers equally. The requirement is considered particularly important in the case of a vertically integrated service provider with significant market power, where an access seeker related to the service provider competes for access with third parties. The ACCC understands stakeholders have expressed concerns around the risks of preferential treatment and the creation of further bottlenecks and market power concerns should ELNOs be allowed to vertically integrate or be able to enter into close commercial relationships with other firms within the e-conveyancing market.

Independent oversight (fulfilment of monitoring, compliance and enforcement roles)

The ACCC considers it important that the regulatory framework acknowledge the important role of the regulator, including its role and responsibilities. It is also important for the regulatory framework to set out clear on matters including how parties can seek information, lodge complaints and provide feedback.

As noted in the ACCC's market report it may be appropriate for industry to lodge complaints directly with ARNECC or an industry ombudsman type body which could consider complaints about ELNOs from subscribers (their customers) and other ELNOs.

Commitment to review

The ACCC reiterates its view that a series of reviews should be included in the regulatory framework. It is important to recognise that the market is likely to continue evolve. For example it may be that the market returns to a monopoly market and/or other ELNOs enter and exit the market. Timely reviews will provide the market opportunities to review the reform process, wind back regulation if effective competition develops or impose further controls if the market reverts to monopoly.

Issue 4: Sharing of the Lodgement Support Services (LSS) package across the interoperable ELNOs

ARNECC's Proposal: The MOR should include a requirement that an LSS package must be shared to the extent necessary or relevant between the interoperable ELNOs and their Subscribers in an interoperable transaction.

As a general proposition the ACCC supports obligations on interoperating parties to share all relevant materials necessary to ensure timely interconnection and that an equivalent level of service is provided to subscribers. It is also in the interests of the market overall that costs are kept to a minimum and shared where possible.

The ACCC considers it appropriate that the MOR set out broadly how costs should be allocated in the interests of transparency. Ultimately it is the practitioners and their clients who are incurring these costs. The ACCC recognises that the specifics of how the ELNOs will incur and recover portions of these costs from one another will most likely be determined by way of negotiation and set out in the interoperability agreement (and ultimately if agreement can't be reached, by binding arbitration).

Given the changing nature of the market the duration of any agreement between the ELNOs should be considered. Costs are likely to change if further ELNOs enter the market.

Issue 5: Resolving disputes between ELNOs over interoperability

ARNECC's Proposal:

(a) There should be a requirement that an interoperability agreement contains a binding dispute resolution process to resolve disputes between ELNOs in interoperable transactions.

(b) This process should be conducted by an independent arbitrator with sufficient knowledge of ELNs, their operation and their purpose.

In relation to Issue 5(a) the ACCC considers that recourse to an appropriately designed and binding dispute resolution process can be effective both in resolving disputes and (where relevant) encouraging parties to agree on any negotiated aspects of an agreement in a timely manner. The ACCC considers that a binding dispute resolution process should be available to address:

- disputes arising during negotiations of interoperability agreements (i.e. the regulatory framework should contain a dispute resolution process that would apply in the event ELNOs have a dispute about negotiable aspects of an interoperability agreement); and
- disputes arising during the term of an interoperability agreement (i.e. interoperability agreements should contain a dispute resolution process).

Why a binding dispute resolution process is necessary

The ACCC considers that recourse to binding dispute resolution procedures is likely to encourage the timely resolution of access negotiations. The inclusion of a dispute resolution framework will provide stakeholders a clear and certain pathway to a final agreement. It should deter the prospect of gaming by way of delay and limit ambit claims.

Furthermore including a biding dispute resolution process will also provide subscribers and potential new entrants a greater opportunity to understand the possible scope and complexity of disputes that may arise between ELNOs and the remedies available to users either directly or undertaken on their behalf by an ELNO.

In developing the timeframe around dispute resolution, interim solutions and remedies may be needed given the time sensitive nature of e-conveyancing transactions.

Designing an effective dispute resolution process

Regarding the design of the dispute resolution process the ACCC notes that some of the access undertakings accepted by the ACCC under Part IIIA include recourse to binding arbitration as the final step in resolving disputes. A dispute resolution process may also build in other options for parties to resolve dispute. For example it may provide for senior managers to meet and attempt to resolve the dispute before referring a dispute to mediation. It could also include a requirement for parties to provide or exchange certain information to assist negotiations, particularly if there is a clear information asymmetry between the two parties.

In addition to providing a clear process and timeframe for the resolution of a dispute the presence of a dispute resolution process encourages parties to reach a negotiated outcome as efficiently as possible and also limits the prospect of regulatory intervention. Regulatory intervention (including arbitration specifically) may be subject to various reviews and potential avenues of litigation. It may also be developed either taking into account previous regulatory rulings and relevant legislative precedent. Negotiated agreements are more likely to provide a solution that is tailored to the specific concerns of the parties.

The ACCC notes that a negotiate/arbitrate regime will usually include a mandatory list of factors which the arbitrator must have regard to in making a determination. The factors that the arbitrator can consider and the discretion given to them is determined by the regime adopted. For example, Part IIIA's traditional regulatory approach is prescriptive in the factors which the arbitrator must consider but this is not necessarily a requirement of regulatory arbitration.

In relation to Issue 5(b) the ACCC considers that industry is best placed to determine the kind of arbitrator (or institute of arbitrators from which an arbitrator should be selected) that would be most suited to arbitrating e-conveyancing disputes. The ACCC does however

consider it appropriate and important that the arbiter be independent and that the outcomes of any arbitration are shared with ARNECC.

Ensuring certainty over costs associated with dispute resolution processes

The design of a negotiate/arbitrate framework should also ensure that costs of participating in a dispute will not act as a distinctive for parties to raise disputes or potentially deter entry. This is crucial to ensure the threat of arbitration remains credible during negotiations.

In commercial arbitration, the parties generally agree on the costs of an arbitration hearing process, including the fees and expenses of the arbitrator/s.[1] However, where parties do not agree on costs, the arbitral tribunal has the discretion to determine and award costs.[2]

Similarly, it is often the responsibility of parties to pay the costs of regulatory arbitration. For example, Part IIIA allows regulations to be made under the Competition and Consumer Act that allow the ACCC to charge parties the costs of conducting the arbitration,[3] and apportion those charges between the parties.[4]

The inclusion of a provision on costs is important to provide certainty to parties seeking arbitration. To avoid vexatious applications, it is important to not only include an assumption of split costs, but also provide the arbitrator with the discretion to apportion costs differently if the arbitrator sees fit. The discretion provided can be broad or could be limited in some ways depending on the particular contextual factors which may influence this decision.

Given its experience with these processes the ACCC would be pleased to provide feedback on the specific dispute resolution process (or processes) once developed.

Issue 6: What regulation should apply to ELNO charges in an interoperable environment?

In an interoperable environment the ACCC agrees that the need for price regulation will be less than what would be required in a monopoly market and will reduce over time as competition grows. However given PEXA's current dominance and existing subscriber relationships, greater transparency over pricing and a level of price regulation may be appropriate, at least initially after interoperability is introduced.

As per other aspects of this regime, it will be important to consider the pricing of ELNO services that sit outside the interoperability agreement once an appropriate length of time has passed. To provide the market certainty such reviews should be written into the ECNL.

While the industry is in a period of transition it will be essential to provide the market adequate information about the costs of accessing ELNO services. In addition to subscribers and their clients, information transparency around pricing is also of benefit to potential new entrants. One approach is to require the publication of fees for standard or prescribed services. Such an obligation would not prevent an ELNO offering discounts and other pricing offerings to their customers.

<u>Whether current price control (e.g. price cap of individual ELNO charges) should be removed</u>

The ACCC acknowledges that as competition develops in the market the competitive tension between two or more ELNOs should lead to lower prices and/or improvements in services offered. However, the Position Paper indicated interoperability may be rolled out

[1] *Commercial Arbitration Act* (various jurisdictions), s 33B.

[2] *Commercial Arbitration Act* (various jurisdictions), s 33B(1).

[3] *Competition and Consumer Act 2010* (Cth), s 44ZN(a).

[4] *Competition and Consumer Act 2010* (Cth), s 44ZN(b).

incrementally. While this may be a pragmatic approach (or a technical necessity to facilitate the) it will mean that the typical drivers around competition may take longer to develop. Accordingly it would seem appropriate to retain the CPI price cap as an interim measure until such time as the level of competition in the market has grown and potentially market shares are further distributed.

In its market report the ACCC also noted that capping price increases to CPI alone may not be in the best interest of users. Absent competition (or in this markets where competition is still developing) an automatic pathway to price increases in line with CPI does not produce the impetus for price reductions.

Further various factors may also influence price over the coming years, including:

- In a technology heavy industry ELNO's costs by all account should be declining as greater efficiencies are realised and further innovations are made possible.
- Companies in active competition for market share typically identify efficiency measures in an effort to lower costs that can be passed through to customers or invested into their operations. Prices should decline for this reason and/or services improved.
- The ongoing trend of mandating e-conveyancing will also ensure current and future ELNOs have access to many more subscribers, further increasing revenue against what are for the most part sunk costs.

Accordingly, the ACCC recommends the inclusion of price reviews to ensure cost-reflective pricing outcomes for the market.

Whether an ELNO should be prevented from charging a differential fee to subscribers for an interoperable transaction versus one conducted solely on its ELN

ELNOs should compete for subscribers on the basis of cost and quality of service. Subscribers should not be discriminated against on the basis of which ELNO they select for any one transaction. To address the risk of differential treatment either explicitly by way of certain charging arrangements and/or potentially covert behaviour, a range of regulatory tools may be appropriate to mitigate concerns. These could include:

- behavioural obligations on ELNOs including a non-discrimination requirement to address any concerns about an ELNO preferencing a transaction conducted wholly on its platform over interoperable transactions including two or more ELNOs
- information transparency measures like reporting against minimum standards to deter differential treatment of settlement transactions, where all things being equal costs incurred are not different and processes are identical
- an audit process triggered at certain intervals or in response to complaints
- a requirement that disputes be reported which may provide ARNECC with a means to maintain an awareness of potential compliance concerns or varying levels of service standards across transactions.

As noted in the Position Paper an interim measure of specific further price controls could be included until such a time as competition develops and subscribers are confident in the level of service one ELNO is providing to another.

Over the longer term however ELNOs may further develop their offers to subscribers which may include bundling services and the development of other types of services (e.g. bulk discounting, geographically distinct pricing, cheaper but less timely service for certain settlements). At this point it would become exceedingly difficult to understand an ELNO's approach to cost allocation absent extensive price control measures. Given the costs

associated with price control regulation (the type of regulation more typically used to regulate monopoly markets) it may be preferable to use transparency measures and obligations to foster compliance from the ELNOs around treatment of interoperable transactions and confidence from the market. If pricing becomes a concern this could be addressed during a prescribed review or possibly by a review initiated by a specific trigger or metric.

Potential vertical integration concerns

Most critically in relation to price the ACCC believes further guidance should be provided around the scope for vertical integration by the ELNOs into related markets. The impact of price controls in one part of the market may be easily offset by decisions in a related market. Several stakeholders have indicated a concern around the movement of ELNOs into related markets. As technology continues to evolve it will be important to set clear expectations and obligations around the services ELNOs may offer and how they interact with related entities at other parts of the supply chain surrounding and supporting e-conveyancing.

Issue 7: Addressing financial settlement in an interoperability environment

Many industry stakeholders, together with ARNECC, have ongoing concerns around the financial settlement processes of an e-conveyancing transaction. The ACCC believes these concerns (real or perceived) should be considered separately to the processes of settling an interoperability model and developing draft legislation. On timing, the ACCC believes it is important that the interoperability reform processes should progress as per the Ministerial direction.

The ACCC notes the CFR/ACCC/ARNECC working group is well placed to consider the market's concerns around financial settlement, including how the existing arrangements or practices (or lack thereof) affect the operation of the broader market. As the working group is tasked to report early in 2021 it must focus its inquiries and consultation on the pre-existing and broad ranging concerns that for the most part are not inherently specific to the interoperability reform process.

ARNECC (and industry more broadly) waiting for the findings of the working group and/or seeking to incorporate its findings into the interoperability reform process appears unnecessary and would certainly lead to further delay to the reform process. Any changes resulting from the work of the working group will take some time and may not in any event involve changes to the existing or proposed e-conveyancing framework.

Attachment B

The proposed interoperability model and fees

Introduction

We have prepared this paper in response to ARNECC's request for more information about possible approaches to pricing for the market. We recognise that industry and ARNECC have worked hard to develop an effective reform process to achieve a competitive market. We think an important next step is to address the remaining issues set out below around pricing to ensure the regime can deliver competitive market outcomes. We have also provided several examples of various approaches to regulatory fee setting that may be of use to ARNECC as it considers next steps on pricing.

As set out below we have identified a series of possible concerns surrounding the proposed interoperability model. It appears the model and the fee have the potential to limit the future competitiveness of the market. Specifically, we consider the allocation of fees has the potential to create significant unintended consequences, especially in the short term, due to the significant asymmetry in this market. We encourage ARNECC to consult further with industry as it considers how to regulate any fees or reach a pricing determination

We note there are short and long term implications of the model for the market. Stakeholders are well placed to discuss how their concerns and priorities. Ultimately the success of the market will rely on stakeholders deciding if and when they can operate successfully under the model. If stakeholders are uncertain about the regime they are unlikely to contemplate switching. We encourage further consideration of the impact on the various approaches to pricing on stakeholders. It will be important to resolve known problems before the regime commences.

We also understand that many aspects of the regime are still to be determined, for example:

- It is unclear if ARNECC has considered if and when the market will move towards an ESB platform;
- How and when will interoperable transactions commence next year and will this order of the rollout affect switching; and
- Will ARNECC need more information to support pricing determinations, and should these information requirements be set out in the MORs?

More information around these uncertainties is needed ahead of making a determination on pricing in the market. Sharing this information with industry is also important.

Consistent with the approach taken with earlier papers, the material set out below and views expressed in this paper reflect staff views only and should not be considered legal advice or a formal view of the Commission. We have considered publicly available information and the information presented in the working groups attended by ACCC staff. The information set out in this paper is subject to change upon further information becoming available.

Risks to competitive market outcomes

The interoperability model

ARNECC and industry have worked closely to develop a regime that will support a competitive outcome. We understand that the proposed interoperability model uses current industry norms to determine the role of each ELNO in an interoperable transaction. However, we raise the concerns below because it appears that the interoperability model risks reinforcing PEXA's market dominance.

We understand that under the model PEXA will be the ELNO most often entitled to charge Participating ELNOs the interoperability fee or fees, at least in the short term. We query how this aspect of the regime will operate alongside the obligation that requires all ELNOs to be capable of settling transactions. If ELNOs have invested to be able to settle transactions, what further costs should they incur, especially if they have no capacity to determine who settles a transaction? If PEXA is likely to settle most interoperable transactions for some time, is there a need for certain concessions or incentives to support the further development of the market?

In general ongoing uncertainty around the model favours PEXA who can use this time to consolidate existing relationships across the market. Further mandating also favours PEXA because new subscribers will need to use the ELNO who can service all transactions. The prospect of new entrants being charged a fee may also deter subscriber switching, lest those costs are passed through to the users. Uncertainty around the rollout may also affect Sympli's capacity to build out its system and develop a competitive offer to the market. Finally, the recent development around digital certificates and associated costs also may also limit switching. The more certainty that ARNECC can provide industry about the rollout the greater confidence subscribers will have to consider switching. In turn this may alleviate some of the known concerns with the model and the impact of PEXA's dominance on the market.

Relatedly, it would also be helpful to understand if ARNECC has any data around subscribers' plans to switch or their overall satisfaction with the incumbent. Establishing benchmarks now can aid subsequent decision making. It will be particularly important to understand the likelihood of if and when a competitive market may emerge. Such information may be needed to understand if particular trade-offs may be necessary to support new entrants in the long term interests of end users and overall viability of the market.

Further consultation with industry would also be helpful to ensure the market as a whole has considered the potential implications resulting from the role conferred by the model on financial institutions. If the ELNO with connections to the most banks is likely to be the Responsible ELNO for most transactions, will this affect how ELNOs compete in the market? Will this model result in a hierarchy of subscribers? We also understand financial institutions have indicated they will not enter into direct connections with future ELNOs. Are there any short term implications of this decision that requires further consideration, especially noting the elevation of the banks under the model? Over the longer term we appreciate some of these matters are likely to be addressed via the industry code, and potentially via moving to the ESB.

We also appreciate a clear tension exists between rolling out the regime and do not intend for our comments to slow down the rollout. However ARNECC should ensure the regime is not settled prematurely. If stakeholders ultimately lack confidence in the regime it is unlikely they will switch ELNOs.

Potential impact of interoperability fees

It is important that any pricing determinations are considered as part of the broader architecture of the eConveyancing governance framework. This is because ARNECC's preferred approach to pricing could significantly affect the competiveness of the market overall. We understand ARNECC has stated ELNOs must be capable of operating in an interoperable market.

As noted above pricing determinations can also be time consuming. In many instances the scope of the fee is specifically contested by the regulated parties. This is most likely the case in eConveyancing because of the significant market asymmetry. Under the model proposed the incumbent ELNO will frequently be charging new entrant(s) the interoperability fee. We

note in a symmetrical market, different ELNOs could be expected to perform the role of Responsible Subscriber on a more even basis (with transactions generally likely to net out). In this case system rules then further skew the asymmetry in the market.

Separately we have observed there may be costs an ELNO may incur while providing certain interoperable transaction that should be recoverable. This is particularly the case if an ELNO has not invested in certain technical capabilities or entered into certain commercial relationships. Inadequate or inappropriate fee arrangements may affect PEXA unfairly, especially where it is providing services more akin to typical or more traditional third party infrastructure access arrangements.

Ultimately any pricing determination should be made with reference to a set of regulatory principles and market objectives. The following questions and observations provide some examples of the various issues that ARNECC may need to resolve when considering pricing:

- What costs should be recoverable or transferred between ELNOs? For example do general costs fall within the proposed fee, such as costs associated with system builds or costs incurred as part of typical settlement transactions?
- Does ARNECC envisage any transfer would be limited in nature?
- To what extent will any ELNO fees interact with subscriber charges?
- How will ARNECC determine efficient costs noting the ELNOs may have taken quite different approaches to building their system?
- Taking into account an overarching decision making framework, should fees between ELNOs be limited in the long term interests of end users?
- Will the fee impose disproportionally higher costs on ELNOs with smaller market shares (i.e. Sympli or other new entrants)?
- What are the implications on cost allocation if under the proposed system rules Sympli (or a newly entered ELNO) will routinely be the party who can be charged an interoperability fee by the incumbent at the same time as being required to build out their systems' capability?

Current uncertainties

We appreciate matters relating to scope of the market, costs and pricing may be clearer to ARNECC than to industry at this stage. We note the materiality of any interoperability fees is not yet clear, nor is it clear whether Participating ELNOs are expected to either absorb any interoperability fees or pass these fees onto the subscriber. The ELNOs may also not fully understand the costs they have or will incur noting the uncertainty surrounding the rollout.[1]

Further guidance or discussion with industry on the following will also be helpful to identify unintended consequences related to pricing and build confidence overall in the regime:

- What is the overriding regulatory principle(s) that underpins ARNECC's engagement in the market?
- How will interoperability be defined for the purposes of establishing the costs of interoperability? Will multiple pricing determinations be needed to establish a range of possible fees?

[1] In its recent IPO documents PEXA indicated " …no specific provision has been made in PEXA's financial plan for the implementation costs triggered by interoperability, as the change of requirements and timetable have not yet been clearly specified by ARNECC".

- What are the implications for competition from linking interoperability fees to a role generally performed by the incumbent in the current market? How will the model affect or interact with changes in market dynamics?
- What are the key timing considerations that stem from the delayed rollout of eConveyancing? For example, when will ARNECC be in a position to understand the different costs incurred by ELNOs? At what point in the rollout will fees be allowed?
- Has ARNECC considered the possibility of a moratorium on the allocation of certain fees given the level of uncertainty in the market?
- Could a negotiate arbitrate regime be used for some aspects of pricing? Is the negotiate arbitrate regime set out in the regime capable to providing an enforceable framework to facilitate a timely and fair solution on price?

Establishing a regulatory framework

Regulators can adopt a range of approaches to price regulation, depending on the particular circumstances of a market and its participants. In many regulatory regimes articulation of the scope of costs relevant to a regulatory determination, and how that information should be shared with the regulator and stakeholders is built into the respective governance frameworks. Pricing determinations therefore often reflect pricing principles which have been written into a regulatory framework. For example pricing principles are set out in at Part IIIA (s 44ZZCA) of the *Competition and Consumer Act 2010* (CCA), and provide that access prices should:

- be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access
- include a return on investment commensurate with the regulatory and commercial risks involved
- allow for multi part pricing and price discrimination when this aids efficiency, but not where a vertically integrated access provider seeks to favour its own operations
- provide incentives to reduce costs and improve productivity.[2]

In addition, pricing is also not always considered in isolation. For example, when the ACCC is called on to arbitrate a matter as a result of a Part IIIA access dispute it will consider the appropriateness of the pricing (if that is the subject of the dispute), as well a broader set of matters, including the legitimate business interest of the providers, the public interest in having competition in markets and the direct costs of providing access to the service.[3]

More broadly, regulators should also strive for transparency in their decision making to ensure stakeholders have a high level of confidence in the regime. While many regulated parties may not agree with the particulars of the regime most can agree on the need for clarity. Both in the interests of certainty for their own operations and in the interests of end users. Loopholes, drafting vagaries or unexplained decisions are likely to hinder entry and to favour those capable of exercising market power (or litigating disputes) compared to new or smaller market participants. We encourage ARNECC to set out its decision making processes around interoperability (include any fees) in detail.

Examples of markets with shared characteristics

We have included below a number of examples of regulated services that (at least in some part) share characteristics with the eConveyancing market at *Attachment A*. These examples

[2] https://ncc.gov.au/images/uploads/Access_to_Monopoly_Infrastructure_-_December_2017.pdf

[3] Ibid.

are not intended to provide a template for regulatory settings immediately transferable to eConveyancing. However, they may provide some insight into the decision making processes, necessary trade-offs and factors relevant to setting pricing determinations for an access or interoperability type service. Specifically the regulatory pricing determinations set out in the examples contemplate matters where:

- costs and therefore access fees continue to decline as technology improves, as per the example of mobile phone interconnections
- third party access is provided by a dominant operator and/or a monopoly operator. Their costs are determined on a cost recovery/efficiency basis.
- the benefits of considering a revised fee was deemed disruptive in the case of the fixed line network. Revisiting price was deemed not in the long term interest of end users, noting the limited remaining life of the service; and
- in the case of the Prescription Exchange System a new market necessitated interoperability between market participants in the interests of end users and the industry more broadly.

Conclusion

In this paper we have raised a series of concerns regarding the proposed model and fee arrangements. We also note that stakeholders have expressed concerns with the lack of consultation on these important issues. It will be important to foster ongoing confidence from industry with the regime.

As ARNECC approaches the question of pricing it will be important to consider the interconnectedness of interoperability fee arrangements and competitiveness of the market more broadly. We acknowledge that pricing determinations of this nature are not straightforward, often time-consuming and contested. However absent a clear set of pricing principles or a sound decision making framework ARNECC risks undermining the overall objective of introducing competition into the market.

Currently it does appear that smaller ELNOs are unlikely to be able to compete in the market if they routinely incur costs from the incumbent. Consideration of the system rules may alleviate this and/or consideration should be extended to the overall interoperability obligation if parties who invest have limited opportunity to complete settlements. Ultimately on costs ARNECC may decide some of costs should be borne by each ELNO as a condition of their participation in the market.

In the interests of stakeholders and longevity of the proposed model a successful regime must be comprehensive, defensible and fair. Whatever decision ARNECC makes on pricing, it should also ensure its reasoning is clear to industry. It is in the long term interests of end users that a sustainable regime is established.

Examples of various approaches to regulatory fee setting

The ACCC has provided the following examples by way of illustration of various approaches to fees where parties must in some way interconnect and/or rely on another operator to complete necessary transactions. Direct application of the methodologies used in these examples is not necessarily recommended nor are the quantum of the fees used necessarily like for like with eConveyancing. Rather the examples are intended to illustrate how charges between industry counterparts have been considered, taking into account the specific infrastructure unique to that industry. What is consistent across these determinations was a clear articulation of a relevant governance framework, detailed consultation with industry and a considered and transparent outcome.

Decisions in the long term interest of end users and a balancing of decision making factors

Telstra fixed line services and wholesale ADSL services final access determinations

Over 2018-2019 the ACCC considered final access determinations (FADs) for the seven declared fixed line services provided by Telstra. Fixed line services and wholesale ADSL services are supplied by Telstra over its copper public switched telephone network (PSTN) and digital subscriber line (DSL) network. They form an important input used by retail service providers to supply voice and broadband services to downstream fixed telecommunications markets outside the NBN fixed line footprint and within the footprint during the migration of customers to the NBN.

The inquiry considered the appropriate price and non-price terms and conditions for access for these services. The ACCC conducted its inquiry under Part 25 of the *Telecommunications Act 1997*. Specifically the ACCC must have regard to the matters specified in subsection 152BCA(1) of the CCA when making a FAD. These matters are broad ranging and encompass a range of decision making factors including but not limited to whether the determination will promote the long-term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services, the legitimate business interests of a carrier or carriage service provider and the interests of all persons who have rights to use the declared service.

While the final decision is detailed, overall the ACCC's proposed approach was to maintain existing price relativities for the declared services. The ACCC determined that existing prices and non-price terms and conditions for access to the declared services would in effect rollover into the next determination period.

In reaching this position, the ACCC sought to balance the benefits of stability in relative prices with the potential short-term efficiency losses from prices diverging from their underlying costs in order to produce an outcome that would promote the LTIE. In addition the ACCC determined that it did not consider a full reconsideration of pricing for all of the declared fixed line services was warranted or in the LTIE given, among other things, the potentially significant regulatory costs to industry of contributing to such a review and its uncertain benefits during the remaining period of transition to the NBN. The ACCC also

noted the avoidance of delays in making a final decision for the FADs would also give certainty to the industry and access seekers, which would assist in the migration of services from Telstra's legacy network to the NBN.

Cost based price setting by the regulator

Mobile Terminating Access Service

The Mobile Terminating Access Service (MTAS) is an example of price regulation based on the efficient cost of providing a service, where this cost was relatively low and continued to decline over time.

The MTAS is an essential wholesale service that allows consumers on different mobile networks to make calls to each other, and for consumers on a landline to call another on a mobile network. The MTAS is a declared service under the CCA, which means that an access seeker can seek access to that service and the access provider must provide access in accordance with obligations under the CCA.

The ACCC has the power under the CCA to declare telecommunications services and set regulated terms and conditions for access to declared services. These terms and conditions provide fall back for parties if they cannot otherwise reach commercial agreements on access to the service. In setting the regulated terms and conditions for access, the ACCC is required to have regard to considerations including promoting competition in relevant markets, achieving any-to-an connectivity, and the economically efficient use of and investment in infrastructure, amongst other matters.

The MTAS has been regulated for nearly 20 years and the ACCC reviews the need for declaration and the regulated terms of access, including price, every few years. Over that time, the regulated price has dropped from 21 cents to 1.19 cents reflecting reductions in the per unit cost of providing the service.[4]

The MTAS enables end-users to communicate with each other regardless of the network to which they are connected, therefore assists in achieving any-to-any connectivity.[5] The regulation of this service requires mobile network operators to connect or 'terminate' calls from other networks. The network originating the call pays the network receiving the call for the MTAS. The originating network recovers the costs of the MTAS in the retail price it charges its customers for providing the call.

In setting the regulated price that a mobile network operator can charge another network operator, the ACCC has used a cost based approach consistent with the total service long run incremental cost plus organisational-level costs (TSLRIC+) pricing principle, which allows for the recovery of common costs incurred in providing the MTAS as well as some organisational-level costs.[6] It was considered an appropriate method of allocating the costs of deploying a mobile network having regard to the legitimate interests of the access providers and is more likely to promote efficient investments in mobile infrastructure.[7]

Typically a cost model would be used to arrive at this cost estimate, as this is generally understood to be a more robust and accurate approach. However, the ACCC has used an international benchmarking approach to derive the cost estimates in the past. In the most

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4 ACCC, Public inquiry on the access determination for the Domestic Mobile Terminating Access Service: Final report, October 2020, p. 4.

5 ACCC, A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010, August 2016.

6 ACCC, Public inquiry on the access determination for the Domestic Mobile Terminating Access Service: Final report, October 2020, p. 5.

7 Ibid, p. 15.

recent MTAS access determination inquiry in 2019–20, the ACCC used an international benchmarking approach based on the cost outputs in nine publicly available cost models from overseas jurisdictions, and adjusted them for specific cost drivers in Australia. This approach was taken because the ACCC considered that a cost model developed at the time would not be able to properly incorporate new 5G technology, and that this would quickly make the cost model obsolete. This means that the extensive investment in time and resources in developing a cost model could not be justified at the time.[8]

In October 2020 the ACCC decided to reduce the regulated price of the MTAS from the rate of 1.7 cents per minute to 1.19 cents per minute from 1 January 2021. The new MTAS price reflected the estimated unit cost of the service. The decision to reduce the price reflected a range of factors, including that mobile network operators upgrade their network technology regularly leading to reduced costs (including the cost of the MTAS). The ACCC has made the industry aware of its expectation that network operators are to pass on the gains from more efficient technologies to consumers.

Industry agreed revenue sharing with government involvement

Prescription Exchange System (PES), an example of interoperability implementation and fee setting

A PES is a computer system that communicates electronic prescription (eScript) information between doctors and pharmacies. An eScript is originally lodged into a PES by a doctor and is dispensed (downloaded) via a PES at the pharmacy. There are currently two PES vendors in Australia: eRx and MDS.

The PES used by the doctor is called the ‘originating PES’ and the prescription exchange system used at the pharmacy is called the ‘dispensing PES’. Interoperability allows electronic prescriptions to be accessed by all pharmacies, irrespective of which prescription exchange system used by the doctor.

Prior to interoperability, an eScript could only be dispensed at a pharmacy using the same PES that it was originally lodged on by a doctor. A PES vendor would charge the pharmacy a fee of 15 cents per dispensed eScript. Commonwealth Government funding was used to assist building interoperability between the two PES vendors. It is now possible for eRx to be the originating PES and MDS to be the dispensing PES (and vice versa).

After interoperability was achieved in 2012, the pharmacist is still charged a 15 cent fee by the dispensing PES. If the originating PES is different, then that fee is shared between both. Interoperability between the parties’ electronic pharmaceutical prescription exchange systems is facilitated by a revenue sharing arrangement between eRx and MDS, which is not allowed under competition laws. However, the ACCC can authorise such an arrangement where it considers that it is likely to result in a net public benefit. Since 2013, the ACCC has granted authorisation for the 15 cent fee to be shared equally between both eRx and MDS when an interoperable eScript transfer has occurred.

The decision by industry to share the fee equally reflects the balance of costs associated with being either the originating PES or the dispensing PES.[9] Government and industry agreed that interoperability is best promoted if neither eRx nor MDS has any incentive to seek to retain the prescription from lodgement down to the point of dispensing (where the fee is collected).

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8 Ibid, p. 5.

9 eRx authorisation application - A91348, Annexure C, p. 4

In this case, the ACCC considers the revenue sharing arrangement is likely to result in public benefits in the form of: increased efficiencies for pharmacies in dispensing prescriptions; greater convenience for patients by being able to access electronic prescription services at more pharmacies; and reduced transcription and interpretation errors of medical prescriptions.[10]

Accordingly, on 10 December 2020, the ACCC re-authorised the revenue sharing arrangement until 30 June 2025.

[10] ACCC Final Determination Decision - AA1000472, p. 2

Attachment C

Feedback and thoughts on negotiate-arbitrate in the MORs

July 2021

Introduction – overall comments

The primary goal of any negotiate-arbitrate regime is to ensure negotiations are well supported and encouraged, and the arbitration mechanism is only used as a last resort if negotiations fail. It is important that there are appropriate thresholds in place to avoid too many disputes going to arbitration, but equally important that the arbitration mechanism is accessible when required. It is therefore a delicate balancing act when drafting the provisions to ensure that these thresholds are appropriately set to provide a credible backstop to effectively encourage negotiations.

While it is possible to introduce an arbitration mechanism into the Model Operating Rules (MORs) after a dispute arises, it is a less than ideal scenario with many of the benefits of the regime unlikely to be realised. For arbitration to pose a credible threat to parties involved in negotiation and/or mediation, the framework for commencing and conducting arbitration needs to be set out clearly in rules/legislation before a dispute arises. Setting out a complete dispute resolution framework including arbitration not only provides a credible backstop to negotiations and/or mediations, but also provides regulatory certainty to parties regarding the process. It will also avoid unnecessarily prolonging disputes where the regulatory framework needs to be put in place before arbitration can commence.[1]

Where appropriate, we have identified regimes in other industries which may offer a useful example for you to draw from. We also refer to our submission to ARNECC's Position Paper on Proposed Regulatory Framework for Interoperability where relevant. We note the material set out below and views expressed in the paper reflect staff views only and should not be considered legal advice or a formal view of the Commission. The information set out in this paper is subject to change upon further information becoming available. We recognise ARNECC has access to a broad range of factors when determining an appropriate framework for eConveyancing. This paper is provided to ARNECC to assist when finalising the MORs.

We have included examples that share some similarities with the current eConveyancing market, namely the presence of a dominant operator or well established incumbent like PEXA. In each example, the incumbents had a strong incentive to delay reaching an agreement for as long as possible. This incentive to delay increases the need to set up a framework to establish clear expectations, timeframes, roles and responsibilities – and is preferable to relying on an enforcement regime to facilitate engagement after the fact and once the incumbent has already benefited from any resulting delay.

In developing this material we have sought to provide negotiate/arbitrate and dispute management examples where relevant to the current eConveyancing market. While there is no single negotiate-arbitrate model which will work in every sector, we believe there are key

[1] See for example, the fast track provisions which were included in the initial National Gas Rules implementing the Gas Pipeline Information Disclosure and Arbitration framework ('Part 23 of the National Gas Rules). The Part 23 commenced operation on 1 August 2017. In late 2017 an access dispute between TGP and AETV Pty Ltd (a subsidiary of Hydro Tasmania) was referred to arbitration. This fast track process was requested by the Tasmanian Government and put in place to enable the parties to access arbitration as soon as possible, noting they had been negotiating for a prolonged period of time and the contract facilitating the supply of gas to Tasmanian customers was due to expire. The fast track provisions expired on 1 August 2018.

aspects of a robust negotiate arbitrate framework which are universal – including clear timeframes, sharing of information and the involvement of appropriate staff. We appreciate ARNECC will need to consider the particular circumstances of the sector and take into account the broader regulatory framework when finalising the negotiate-arbitrate framework for eConveyancing.

Preliminary matters

Pre-contractual – access regime examples used

The examples set out in this paper all involve pre-contractual dispute resolution processes, as they are relating to dispute resolution mechanisms for third-party access regimes. They therefore involve mechanisms which are set out in regulation (i.e. by their very nature they cannot be provided for in contract), but which do not necessarily constitute regulatory arbitration.

Set an objective for the regime and determine the right mechanism

The dispute resolution regime should have a clearly stated objective. For example, GrainCorp's Port Terminal Services Access Undertaking included an objective of 'providing an efficient, effective and binding dispute resolution process in the event that GrainCorp and the Applicant are unable to negotiate a mutually acceptable Access Agreement.'[2]

It is then important to consider which type of mechanism the provisions are hoping to establish, and they could take the form of one of the following:

- Negotiated settlements (no arbitration mechanism, where the regulator has a role in approving an agreement made between parties, such as voluntary undertakings under Part IIIA of the *Competition and Consumer Act 2010* (CCA)). Negotiated settlements do not require a dispute to occur for the regulator to be involved and could be considered as ex-ante regulation.
- Negotiate-arbitrate (or publish-negotiate-mediate-arbitrate/ publish-negotiate-arbitrate) where details around both the negotiation phase and arbitration (and/or mediation) phase are prescribed in regulation. This approach therefore incorporates some ex-ante elements.
- Arbitration/mediation where only details around the arbitration/mediation phase are prescribed in regulation – of which Part IIIA of the CCA is the most obvious example. This approach only introduces ex-post regulation, but the access seeker is given a legislated right of access after declaration of the infrastructure.

Generally a dispute resolution process works for access seekers where there are unequal levels of bargaining power and access to information.

The standard terms that must be included

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[2] See: GrainCorp Operations Ltd 2011 Proposed undertaking 22 September 2010 page on the ACCC website, which sets out the ACCC's assessment of GrainCorp's proposed access undertaking under section 44ZZA of the Trade Practices Act 1974 (known as the *Competition and Consumer Act 2010* (CCA) from 1 January 2011) at https://www.accc.gov.au/regulated-infrastructure/wheat-export/graincorp-operations-ltd-2011/proposed-undertaking.

We note that the ELNOs are working towards entering an interoperability agreement, but that at this stage it is unclear what this agreement will look like and exactly how it will interact with the rest of the regulatory framework. To facilitate this process, it may be appropriate to establish a standard agreement or default set of minimum terms. For example, Part IIIA access undertakings have generally included a set of standard terms on which access seekers may obtain access.

Standard terms (often referred to as an 'indicative access agreement') form a template contract and function as a transparent starting point for commercial negotiation regarding the terms of access (including price). As noted in our submission in November 2020 to the position paper, standard terms also serve to level the playing field where one party has greater capacity and resources to enter negotiations (e.g. in some markets the availability of standard terms can reduce the need for legal representation or at least reduce overall costs of a negotiation for the access seeker).[3] Final negotiated access agreements may vary from the standard terms in order to accommodate the particular circumstances and preferences of the parties.

We note that section 5.7.2 (c) states 'ensure the Interoperability Agreement entered into with each ELNO or Potential ELNO is on the same basis.' We note that 'on the same basis' could be interpreted as the Interoperability Agreement between each ELNO is required to be the same. We understand the provision is likely looking to achieve something similar to a non-discrimination or no hindering clause, which we consider would be more effective.

Section 5.7.3 (b) specifies that the Interoperability Agreement Terms must be included in the agreement. We consider it would be necessary to add clarity around this provision if it is retained. In our view, a better and more robust approach is to develop a 'standard terms agreement' as a fall back and starting point in negotiations (similar to the indicative access agreement approach outlined above), which will be particularly important for new entrants.

Negotiation

Set up the negotiation process

A successful negotiate-arbitrate or negotiate-mediate regime will help to strengthen negotiation processes, usually by setting up requirements and stepping out the process for the negotiation process. Establishing an effective negotiation framework will make disputes less likely to occur and mean arbitration is not required often.

Section 5.7.2 notes that an ELNO needs to receive a request to interoperate, which requires consideration of what 'receives a request' means. It is important to have clarity around what constitutes a request, and the trigger to move to arbitration from negotiation.

The negotiation phase currently sits at section 5.7.2, and requires an ELNO which receives a request to interoperate to 'promptly enter into good faith negotiations with the ELNO Requesting Interoperability to prepare and execute an Interoperability Agreement'. Section 5.7.2 does not include a good faith obligation on the requesting ELNO. You may like to consider if this obligation should apply to both parties. Behavioural expectations on negotiating parties (such as an obligation to negotiate in good faith) and a clear timeframe or a certain pathway to agreement should be set out in the MORs. The second limb of section 5.7.2 deals with what happens after the agreement is formed. It may be appropriate that section 5.7.2 could be refocused on the negotiation phase, and obligations and requirements could be specified more directly. The current subsection 5.7.2(b) which deals with post agreement behaviour may be better dealt with in a different section.

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[3] ACCC, ACCC submission in response to ARNECC Position Paper on Proposed Regulatory Framework for Interoperability, p. 6.

To implement a negotiate-arbitrate or negotiate-mediate approach, a clear set of rules around how the two parties will negotiate the terms of the agreement and potentially how ARNECC will approve or recognise a finalised agreement should be established. An alternate option would be for ARNECC to have a right to object if the interoperability agreement does not reflect certain principles and standards set out for the arbitration, but otherwise allow the agreement to stand noting the parties reached a commercial outcome either directly or potentially via an arbitrated/mediated outcome.

Part 23 of the Gas regime

Part 23 allows for a prospective user to make a preliminary enquiry about access to a pipeline service before making an access request. This process is intended to enable a prospective user to find out quickly if the service they seek is available on the standard terms at the time sought or to explore the options available and the costs of any works that may be required before making a formal access request.[4] However, the ACCC has found that prospective user requests are often treated as 'preliminary enquiries' rather than formal access requests, enabling pipeline operators to avoid some of the requirements in Part 23 relating to access requests and negotiations, including response times.[5] It can also slow a prospective user's ability to access arbitration if negotiations fail, because to proceed to arbitration a prospective user must submit a formal access request and go through the access offer and negotiation steps in Part 23. To address this concern, Part 23 will be amended to require pipeline operators to provide an initial response to a preliminary enquiry within a certain timeframe and enable a prospective user who has received an offer in response to an initial inquiry to proceed directly to the negotiation stage.[6]

Negotiate-arbitrate: a credible threat which can encourage parties to reach an agreement

In an arbitration or mediation only type mechanism (third bullet point above), the negotiations are strengthened only by a credible threat of arbitration or mediation. However, in a negotiate-arbitrate or negotiate-mediate regime (second bullet point above), the negotiation phase also has rules.

An effective cessation criteria around the negotiation phase enables the mediation or arbitration process to commence in a timely manner if it is required. For example, in Part IIIA notification under section 44S of the CCA is required to progress a dispute from the negotiation phase to arbitration. Either the access provider or the third party may notify the ACCC of an access dispute. An alternate way to progress disputes from negotiation to mediation or arbitration is to include time limits on the negotiation phase in the regulatory framework.

Another example is GrainCorp's Undertaking, which sets out at section 6.6(b)(iii) that the negotiation phase will cease upon 'the expiration of three (3) months from the commencement of the negotiation period, or if both parties agree to extend the negotiation period, the expiration of the agreed extended period'.

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4 Gas Pipeline Information Disclosure and Arbitration Framework Initial National Gas Rules Explanatory note 2 August 2017, https://gmrg.coagenergycouncil.gov.au/sites/prod.gmrg/files/publications/documents/Final%20Explanatory%20Note%20-%202%20August.pdf, pp 25-26

5 ACCC, Gas Inquiry July 2019 Interim Report, p. 156.

6 Decision RIS https://energyministers.gov.au/sites/prod.energycouncil/files/publications/documents/Pipeline%20Decision%20Regulation%20Impact%20Statement_1.pdf – see page 109, box 8.2

Without cessation criteria for the negotiation phase, one or both parties to a dispute could prolong the negotiation period, delaying progression to mediation and ultimately extending the length of the dispute.

You may wish to consider whether the rules of the negotiation as set out in MORs could provide a defined length of time for the negotiation of an interoperability agreement, with backstop provisions around the use of the standard terms until a formal agreement is reached and/or when the parties must proceed to arbitration.

Information sharing – between parties negotiating, ARNECC or publication for broader market

Negotiate-arbitrate regimes are sometimes called Publish-negotiate-arbitrate where they also include requirements on parties to publish certain information ahead of the negotiation phase.

We note that section 5.7.1 requires an ELNO to publish on its website details of the process for any ELNO Requesting Interoperability to make a request to Interoperate.

In addition, we consider it is important to make sure certain information is shared between parties during the negotiation phase. Not requiring information sharing during the negotiation phase can stall negotiations.

For example, the information disclosure and arbitration regime in Part 23 non-scheme gas pipelines is designed to facilitate timely and effective commercial negotiations between prospective users and operators of non-scheme pipelines. It does this by reducing the information asymmetry prospective users can face in negotiations with pipeline operators, and by providing a credible threat of intervention to act as a constraint on the exercise of market power by pipeline operators.

Under Part 23, non-scheme pipeline operators not subject to an exemption are required to publish certain information on their website, and to make particular information available during negotiations. A commercially-oriented arbitration mechanism is available as the backstop for overcoming disputes that cannot be settled through negotiations.

Part 23 requires arbitration regarding non-scheme gas to be conducted ‘on the papers’. This means that only information that is disclosed during negotiations is able to be relied upon during the arbitration, providing an incentive for disclosure. This aims to remove the need (and undesirable outcome) to proceed to arbitration purely for the purpose of obtaining more information from the other party. It also means the pipeline operator cannot game the process and delay negotiations by failing to provide information, as this will impact them at the arbitration phase as they will not be able to rely on information they have not disclosed (unless leave is provided by the arbitrator). [7] The arbitrator may also draw adverse inferences from failures to fully comply with the relevant information disclosure requirements.[8] Limiting the information able to be considered during the arbitration in this way is designed to enable commercial negotiations to be carried out on a more informed basis than they otherwise might and is intended to facilitate timely and effective commercial negotiations.

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7 *National Gas Rules*, r 568 (1).

8 *National Gas Rules*, r 568 (4).

Information disclosure

As discussed above, setting the correct level of information disclosure to occur during negotiations is critical in promoting effective negotiations. While general transparency provisions apply to making information either publicly available, or available to all access seekers, there is also the option to address remaining information asymmetry within the negotiate-arbitrate model itself by requiring certain information be disclosed between the two parties during negotiations. This may be used in isolation or in conjunction with general disclosure provisions. This would typically apply to more commercially sensitive and specific information which would not be appropriate to require service providers to publish, and is the type of information which would be relied on in the arbitration.

Improving disclosure during the negotiation phase has multiple benefits – it can help to increase the effectiveness of negotiations and in turn reduce the need to seek arbitration, remove the likelihood of gaming the process by delaying disclosure and also improves timeliness. The Port Terminal Access (Bulk Wheat) Code of Conduct (Wheat Code) includes a provision which allows an exporter (access seeker) to request information from the port terminal service provider (access provider) during the course of negotiations.[9] The port terminal service provider must provide this information if all conditions listed in clause 16(2) of the Wheat Code are met. However, the arbitration mechanism in the Wheat Code is not 'on the papers' and further information can be introduced at arbitration.

A negotiate-arbitrate model must be able to effectively promote negotiations if it is to be successful. A non-discrimination and good faith obligation can greatly enhance the negotiation phase by providing a further incentive for the access provider to meaningfully participate in negotiations. This also requires there to be consequences for non-compliance with those obligations.

The National Gas Laws (NGL) include a duty to negotiate in good faith.[10] Such an obligation may be effective in non-vertically integrated industries. In vertically integrated industries, the obligation to negotiate in 'good faith' may not be sufficient to ensure effective, meaningful negotiations and an additional non-discrimination clause may be necessary.

The ACCC provided input into the development of Part 23 which may be of interest. This can be accessed here.

Moving to Mediation and/or Arbitration

Determine the type of mediation, what rules apply and the type of outcome

We consider a mediated outcome, i.e. an outcome agreed to by the parties themselves with the help of a mediator, is preferable to an arbitrated outcome. We note that the MOR provisions, as currently drafted, provide for mediation. There is a timeframe set for appointment of a mediator where the parties cannot agree on the appointment themselves. As discussed below, we consider that setting more timeframes throughout the stages will improve effectiveness of the dispute resolution process. We also note that the parties must be represented in the mediation by a Person having or able to have the authority to settle the dispute, and consider this requirement would also be useful in the negotiation phase.

It would be beneficial to have the rules and procedures for the mediation set out in the MORs, or the MORs to refer to an existing set of rules and procedures. Section 5.7.4(d) is

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[9] Clause 16(1) and (2)

[10] National Gas Law s 216G

currently drafted as the parties having to ‘comply with any rules and procedures determined by the mediator to resolve the dispute’.

Gilbert + Tobin’s paper ‘Interoperability Agreement between ELNOs – Governance Issues Final – 25 June 2021’ provides an example of a dispute resolution process, set out in a section 87B undertaking given by Amalgamated Australian Terminal Holdings and Qube. The undertaking requires mediation (and also arbitration) to be conducted under the Resolution Institute’s rules, and sets out clear timeframes for the stages of the dispute resolution process.

Set an appropriate threshold for mediation and/or arbitration

The arbitration mechanism must be accessible enough that the access provider sees arbitration as a credible threat and that it can be used should a dispute arise.

Section 5.7.4 states that the dispute resolution process applies when the parties are ‘unable to agree’. There is currently no timeframe around this requirement. As such, a party may drag out negotiations and insist that the ‘unable to agree’ requirement has not been met because negotiations are ongoing – despite being issued with a notice from the other party. This can delay the other party from seeking arbitration or mediation. Separately, it may result in a party seeking to go to arbitration or mediation too early in the process, stating that they cannot agree as soon as negotiations commence without having made any effort to resolve the dispute between the parties

National Access Regime (Part IIIA of the CCA)

Under the National Access Regime (Part IIIA of the CCA) there is a broad requirement that parties are unable to agree (i.e. there is a dispute) before a matter is referred to arbitration.[11] When notified of a dispute, the ACCC must be satisfied that the preconditions under CCA section 44S have been met in order to arbitrate the dispute. It is possible that one party to the negotiations may believe that the preconditions for notification and therefore arbitration by the ACCC have not been met. Conversely, it is also possible that a party may notify the ACCC of an access dispute vexatiously. In such instances, the ACCC is able to terminate arbitration under section 44Y of the CCA. The CCA also empowers the ACCC to end arbitration in other circumstances.[12]

Part IIIA also allows for persons other than the provider and third party to apply to be a party to the access dispute where that person is able to demonstrate they have a sufficient interest and this needs to be accepted by the ACCC.

Notification processes like that included in the Part IIIA access regime ensure that only legitimate disputes progress to arbitration. Where the notified body is able to dismiss vexatious notifications and resolve whether a dispute exists without parties being able to appeal these decisions, arbitration can progress (where necessary) in a timely manner.

Ensure timeframes for each part of the process are set

Clear timeframes are a crucial element, as we set out below in our November 2020 submission to ARNECC’s position paper:

> *Critical to the process of negotiate/arbitrate are rules regarding the time the parties may take to settle an agreement. It may be appropriate to set certain rules regarding the*

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[11] Section 44S of the CCA.

[12] Section 44Y of the CCA.

various stages of negotiation, including timeframes. By way of example, other access type agreements contain rules around the sharing of information to assist with the negotiation, including clear timeframes. The rules of the negotiation as set out in the ECNL (or possibly the MOR) could provide a defined window of time for the negotiation of an interoperability agreement, with backstop provisions around the use of the standard terms until a formal agreement is reached and/or when the parties must proceed to arbitration.[13]

Without appropriate timeframes, parties can use delay tactics during negotiation and dispute resolution processes.

We advise setting timeframes for the negotiation (and, where applicable, mediation and arbitration) phase, particularly when there is a threshold in place such as 'unable to agree' which could allow a party to continue to consider, or claim, that they are still in the negotiation phase and so not accept the 'unable to agree' requirement has been met to seek arbitration or mediation (see discussion above on issues relating to 'unable to agree').

As an example, in GrainCorp's Undertaking the parties are given 3 business days to decide on a mediator before one is appointed for them. The undertaking also sets a time cap on the negotiation phase at 3 months (unless otherwise agreed by both parties).

Overall, dispute resolution pathways concluding with a form of negotiate-mediate-arbitrate need reasonable and clear timeframes to minimise gaming and delay tactics.

Determine whether ARNECC wants a role in the negotiation process

The paper provided for the Ministerial Forum proposed 'Relying on ELNOs to negotiate their bilateral contract, noting ARNECC's oversight of this process.' However, the current drafting of the MORs does not make ARNECC's oversight role very clear.

The MORs should establish if ARNECC is to have an oversight role, and specify what this role is. The role does not need to be as an arbitrator or mediator. There are plenty of recent examples which show the benefit of commercial or commercially-oriented, rather than regulatory, arbitration (discussed further below).

We consider ARNECC should maintain awareness of the contents of any and all Interoperability Agreements in place between ELNOs. This is particularly important given the possible intersection of any future enforcement matters and the contents and operation of an Interoperability Agreement.

We also note that it will be difficult for ARNECC to perform its enforcement functions without any kind of notification requirement placed on parties to notify ARNECC of disputes or to notify when they do reach agreement (i.e. ARNECC will not be made aware if the agreement reached does not include all terms in Schedule 8 unless parties are required to provide the agreement to ARNECC).

On this matter, we refer to our submission from November 2020 to the position paper:

Foremost it will be important to establish via the ECNL (or potentially the MOR) a clear set of rules around how the two parties will negotiate the terms of the agreement and potentially how ARNECC will approve or recognise a finalised agreement. An alternate option would be for ARNECC to have a right to object if the interoperability agreement does not reflect certain principles and standards set out for the arbitration, but otherwise

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[13] ACCC, ACCC submission in response to ARNECC Position Paper on Proposed Regulatory Framework for Interoperability, p. 6.

allow the agreement to stand noting the parties reached a commercial outcome either directly or via an arbitrated outcome.[14]

Determine if ARNECC wants a role in the arbitration/mediation process

Many regimes include a provision requiring the parties to notify the regulator if a dispute arises. This will of course be relevant to who the arbitrator is and what type of arbitration will be provided for in the MORs. If regulatory arbitration is prescribed, it will be necessary by default for the regulator to be informed of the dispute.

Where there is a timeframe set for being unable to agree (eg. time limit on negotiation phase), if there is no other way to trigger mediation/arbitration and the parties are at a stalemate, waiting for the negotiation timeframe to run out before the parties are deemed 'unable to agree' would just delay the process.

We suggest the regime set both a time limit on the negotiation phase, and the backstop of a party/the parties being able to notify ARNECC if there is a dispute that needs to be progressed to stop one party not agreeing during negotiation to run down the clock. Both of these elements are required, because as outlined above, there are also issues with implementing an 'unable to agree' provision in isolation.

It is possible under the framework that ARNECC could therefore have a number of roles in this process.

Determine when mediation process ends and arbitration begins

Should an arbitration process be developed in the MORs in addition to mediation, it will be necessary to specify when mediation ceases and when arbitration becomes available. There are again some relevant examples in other industries where mediation is provided as an intermediate step, and arbitration – including the example used in Gilbert + Tobin's paper 'Interoperability Agreement between ELNOs – Governance Issues Final – 25 June 2021' which sets out the dispute resolution process in a section 87B undertaking given by Amalgamated Australian Terminal Holdings and Qube. In this example, if a dispute cannot be resolved by mediation within 28 days of a mediator being appointed, either party may then refer the dispute to arbitration or expert determination. Other examples include Chapter 8 National Electricity Rule (NER) and Part 15C National Gas Rules (NGR) dispute resolution process which involve WEMDRA (example explored further below) and are divided into two stages:

- Stage 1 – encourages the exploration and joint resolution of the disputes by direct commercial negotiation, or assistance through a facilitated, or non-binding expert process.
- Stage 2 – is geared towards a binding decision (which is subject to judicial review) by a panel of one or more experts.

Enable an ability to dismiss vexatious or trivial matters

Contingent on a requirement for ARNECC to be notified of a dispute, it would also be useful for ARNECC to be advised of the subject of the dispute and to have the power to dismiss a dispute that is deemed vexatious or trivial. There would of course need to be work done to provide guidance around this.

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[14] ACCC, ACCC submission in response to ARNECC Position Paper on Proposed Regulatory Framework for Interoperability, p. 6.

The arbitration mechanism could include a similar ability to dismiss disputes of a trivial nature.

Design the type of arbitration and type and scope of arbitrated outcome

While the above outlines some various approaches to promoting negotiations, there will still be circumstances where these negotiations breakdown and a dispute arises. In which case, the arbitration mechanism must be designed to:

- provide a credible backstop;
- facilitate ease and speed of process; and
- facilitate sound arbitration determinations which reflect what would occur in an effective negotiation/competitive environment (an efficient outcome, or an outcome that reflects a competitive market where a commercial agreement is reached).

Arbitration is a process under which parties submit their dispute to an arbitrator who then makes a determination that is binding on the parties. There are different types of arbitrators, arbitration and arbitration determinations.

On who can be the arbitrator, options include a regulator, an independent 'commercial' arbitrator (appointed by the regulator, mutually chosen by parties, or potentially by an arbitral body), or an industry expert.

Some key differences between commercial and regulatory arbitration include:

- If commercial arbitration, the arbitration is governed by the Commercial Arbitration Act (CAA).
- If purely commercial arbitration, the arbitration role will be found in contract.
- If pure regulatory arbitration, the decision will be considered an administrative decision and as such be subject to review under the ADJR Act.

Certain features from commercial arbitration frameworks can still be adopted in a regulatory setting in what has been termed 'commercially-oriented' arbitration. Regulation needs to provide dispute resolution for the initial contract formation process (either denial of access, disagreement on terms), as distinct from disputes over breaches or interpretations of contracts already in place, which falls under commercial arbitration (such as what is proposed in Schedule 8 of MOR) – discussed above in the 'pre-contractual' section.

The approach taken in relation to non-scheme gas pipelines incorporates features from both commercial and regulatory models – including a commercial arbitrator- but maintains other features of regulatory arbitration. Arbitration under Part 23 is considered to be 'commercially-oriented' arbitration and as such the regulator is not the arbitrator. There are a mix of features from both commercial and regulatory arbitration (arbitration timeframes are short, which is more like commercial arbitration; arbitration principles apply, which is more like regulatory arbitration; and the arbitration outcome is only partially transparent, which is not confidential like commercial arbitration but not detailed transparency like a regulatory determination).

To ensure that determinations reflect the objectives set for the regime and consider the broader implications of interoperability agreements, it is possible to include a list of requirements the arbitrator must consider when making a determination. For example, under Part IIIA arbitration, section 44X lists the matters that the ACCC must take into account when making final determinations, and the ACCC is unable to depart from these principles.

Of relevance, section 44X requires the ACCC to consider the public interest. Such factors also provide parties with some assurance as to the potential outcome of the arbitration.

As another example, frameworks for dispute resolution are set out in Part 15C of the NGR and Chapter 8 of the NER and the Dispute Resolution Adviser role includes assisting participants to select the most appropriate process. The Adviser must select and maintain a pool of persons from which the members of a dispute resolution panel may be selected to constitute any dispute resolution panel that may be established.[15] Under the NGR and NER, the dispute resolution panel consists of members drawn from the pool by the Advisor (unless there are no eligible or sufficiently skilled and experienced persons in the pool), and must be an expert if the field to which the dispute relates, or experienced or trained in dispute resolution.

Costs

Dispute resolution processes need to consider costs to access seekers, access providers, end users and the regulator.

Dispute resolution in an interoperable transaction

Schedule 8 of the MORs requires interoperability agreements between ELNOs to include appropriate dispute resolution processes to address disputes which may arise in an interoperable transaction. In our view, the considerations set out in this document are also relevant to the formulation of dispute resolution frameworks in interoperability agreements.

We also note that, as interoperability agreements are required to include dispute resolution processes, it would be appropriate to also require ELNOs to notify ARNECC of any interoperability agreements and their contents to ensure compliance.

[15] See: https://www.aer.gov.au/about-us/dispute-resolution/wholesale-energy-market for further details on the WEMDRA.

Attachment D

Further comments on draft MORs

Definitions

Many definitions in the MORs refer back to the definitions in the ECNL which industry have not seen. As outlined above, we consider it is essential that affected stakeholders are provided a meaningful opportunity to consider the definitions and provide input on the regulatory governance arrangements in concert.

By way of example, the definition of 'ELNO requesting interoperability' does not explain what is meant by a 'request'. This issue has arisen in the non-scheme gas pipelines context and issues could arise where there is a dispute around whether a request has been made.[1] Such a dispute can delay negotiations and also delay information sharing between parties.

Further detail is also needed in order to better understand the scope of any interoperability fee and the potential materiality of the fee on the prospect of competition emerging in the market. For example the revised MORs define a Responsible ELNO as 'the ELNO involved in an Interoperable Conveyancing Transaction that is responsible for Lodgment of the Interoperable Lodgement Case and completion of any Associated Financial Transaction.' In this example the meaning and scope of the transaction are unclear because the definition of an Interoperable Conveyancing Transaction sits in the ECNL (which stakeholders have not seen) and the meaning of Interoperable Services fees is uncertain.

In addition, once an approach to pricing is made further detail is needed in the MORs and across the regime more broadly. By way of example Operating Requirement 5.4 only briefly references the concept or option of an Interoperability Service Fee and states the fee will be 'no greater than the amount specified in the published Pricing Table'. It is not clear whether any further requirements will be set down and where across the regime. In addition, the interaction of any interoperability fees with ELNO subscriber charges warrants further consideration in the MORs. It will be important for stakeholders to be consulted on this matter given the limited information available to date.

Timeframes

Operating Requirement 5.2.2 sets a 31 December 2022 date for when ELNOs need to have electronic registry instruments and documents that can be lodged. Provision 5.2.4 however outlines that this can be staged. We consider there is a need to improve clarity here to state how this staging interacts with the 31 December 2022 date. We also query whether ARNECC will undertake a role in ensuring ELNOs meet certain stages leading up to this date. In addition, a range of stakeholders are engaged in facilitating the entry and capability of ELNOs to compete in the market. It may be that the ELNOs capacity to reach certain milestones is constrained by the capacity of others in industry, including other government agencies to complete key steps of the implementation program.

Relatedly this obligation on ELNOs may be unfair if the parties are unable to reach agreement on the interoperability agreement for some time. It also illustrates why the interoperability agreement shouldn't be expected to essentially do the heavy lifting for the regime if it leaves the ELNOs to negotiate significant aspects of the regime that should be included in the legislation or the MORs.

While noted above this issue again highlights the need for a robust negotiate arbitrate framework. If the broader rollout is delayed or the parties enter into the dispute resolution

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[1] ACCC, Gas Inquiry July 2019 Interim Report, p. 156.

framework, the incumbent is likely better placed to respond to an abbreviated implementation schedule. It will be critical that the dispute resolution process can resolve disputes in a timely manner. In our earlier paper on dispute resolution we provided examples of why an explicit regime is needed.

Finally it is unclear exactly what type of penalty regime would reinforce the timeframe obligation. The threat of licence revocation or suspension is not realistic, particularly in relation to the incumbent on whom the market relies to operate. There is a clear incentive on the incumbent to delay or frustrate the entry of their competitor and the regime overall. If a clear timeframe remains appropriate, then a strong enforcement measure is appropriate to deter game playing or strategic delay from the incumbent.

Roles of ELNOs

Operating Requirement 5.8 which outlines the interoperability roles of ELNOs is very limited and does not provide a good sense to the subscribers and end users on what the full extent of roles are on each ELNO when interoperating. The roles which are set out in further detail in the interoperability agreement should be made publicly available.

Compliance and transparency

The amendments made to the 'Schedule 3 – Reporting Requirements' do not include any documents to be produced in relation to Operating Requirement 5.7. We also note that the only revision to include 5.7 is in Category Three. We consider that the final or agreed upon interoperability access agreements between ELNOs should be public documents to the fullest extent possible (noting the need to restrict commercially sensitive material to the parties and ARNECC).

If critical rules and obligations around how the ELNOs will interact with one another (and other key obligations and responsibilities) remain confidential it will be to the detriment of the industry as a whole.

We also consider that compliance issues could arise without such transparency, and therefore the inclusion of a reporting requirement which includes documents to be produced for each new agreement in relation to 5.7 seems crucial. Maintaining visibility over agreements is an effective means by which to promote compliance and dispel any uncertainty around ELNO obligations to other ELNOs and their subscribers. Publication and reporting obligations should therefore be included in the proposed amendments, and Schedule 3 could be updated to include such items.

Transparency of the agreements is also of importance in relation to supporting new entrants into the market. Potential new entrants will benefit from understanding the regime as they prepare for entry, which will be made difficult if interoperability agreements are not made transparent. We note that while 5.7.2 and 5.7.5 (a) have been included in the framework with the intention of ensuring that agreements are entered into 'on the same basis' and that ELNOs must interoperate with all ELNOs 'on the same basis', these requirements will not be sufficient for new entrants without transparency of the agreements with other ELNOs ahead of negotiations.

It is critical ARNECC has access to the agreement reached by the ELNOs and this obligation is captured in the regulatory framework. ARNECC should also be updated by way of reporting obligations on the ELNOs interactions with one another, and industry more broadly. These types of transparency and reporting provisions are also important for when ARNECC considers the appropriateness of future new entrants and reviews the effectiveness of the regime.

Schedule 8 – agreement contents

As outlined above, overall we consider that the scope of the interoperability agreements is too broad. It is likely that many issues need to be included in some way across each pillar of the regulatory framework. Stakeholder feedback has emphasised the need to ensure matters are not siloed between documents and segments of the market.

Even if the current approach to scope of the agreements is retained, we consider it is critical that at least some elements are included as standard terms rather than a matter for negotiation. One clear example of this is privacy.

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6 December 2021

Ms Jenny Cottnam
Chair
Australian Registrars' National Electronic Conveyancing Council

By Email: chair@arnecc.gov.au

Dear Ms Cottnam

Re: Submission to Model Operating Requirements Version 7.1 Consultation Draft

The Australian Competition & Consumer Commission (ACCC) welcomes the opportunity to provide comments on the Model Operating Requirements Version 7.1 Consultation Draft (MORs).

The ACCC has provided detailed feedback to the Australian Registrars' National Electronic Conveyancing Council (ARNECC) on Version 7 of the MORs in August 2021. We have also provided ARNECC with feedback on the consultation draft of the Electronic Conveyancing National (Adoption of a National Law) Amendment Bill 2021 (ECNL Draft Bill). We acknowledge the effort ARNECC has made to ensure stakeholders have been able to provide views on the regime as a whole.

The following represents the ACCC's views on key matters in the revised draft of the MORs. The views build on (or reiterate) views previously expressed in relation to the regulatory framework for electronic conveyancing (e-conveyancing) and should be considered with regard to our previous submissions on these matters. The ACCC's views on the MORs have also been informed by its recent consideration of the ECNL Draft Bill.

Key milestones and timeframe for the introduction of interoperability

The ACCC was pleased to see at the 18 October 2021 Ministerial Forum that ARNECC and governments have made significant progress on the e-conveyancing interoperability reforms. Having all interoperability transactions functional by the first half of 2023 and live in some jurisdictions during that year provides stakeholders with much needed certainty. We also support the NSW Government's decision to support the nationally agreed timetable by updating its licence conditions for Electronic Lodgement Network Operators (ELNOs) to make the timetable enforceable.

We consider the ECNL should specify the key steps and milestones needed to ensure interoperability is delivered in the specified timeframe. If milestones are not established in the ECNL, they should be set out in the MORs to promote accountability and ensure continued progress towards a competitive interoperable market. We also consider the

regulatory framework should include mechanisms to review the implementation of reform measures and identify any outstanding matters (including related fee arrangements). This is particularly important given that the current approach to interoperability (Direct Connection) is expected to be an interim step in the transition to a more competitive ELNO market. Ideally, scheduled reviews should be established via the ECNL, with further detail set out in the MORs.

We have previously advised that there should be more certainty about when and to what extent ELNOs will be required to offer interoperable transactions. While noting ARNECC's view that ELNOs should be able to stage the implementation of interoperability in accordance with their business plans, we consider establishing an implementation timeline within the regulatory framework would provide greater certainty.

The ACCC does not consider the requirement that ELNOs supply their business plans to Registrars as part of annual reporting (MOR 15.4.(c)(I)) provides sufficient transparency and certainty to ensure continued progress. Matters relating to the importance of transparency around introduction and implementation of interoperability are discussed more broadly below.

Transparency and reporting

Transparency is an important part of the reform process. It will help promote compliance by ELNOs with key obligations, as well as dispel uncertainty for industry and ARNECC. Transparency of ARNECC's decision-making processes will in turn promote industry's confidence in the reforms.

As indicated above, the ACCC considers that the key steps needed to ensure interoperability is delivered in the specified timeframes should be included in the ECNL (ideally) or the MORs (at minimum). This will provide industry with clarity about the milestones that need to be achieved, enable progress to be monitored and will promote accountability.

In our submission regarding MORs Consultation Draft 7.0 we noted that the proposed amendments made to 'Schedule 3 – Reporting Requirements' did not include any documents to be produced in relation to the interoperability framework (MOR 5.7). We welcome the proposed requirement that ELNOs must promptly publish executed (or determined) Interoperability Agreements on their websites, with agreed commercially sensitive material redacted (MOR 5.7.3(a)). While acknowledging the potential for commercial sensitivities, we consider it important that the Interoperability Agreements between ELNOs be made public to the fullest extent possible.

Transparency around these agreements will ensure industry and ARNECC understand the roles and responsibilities of ELNOs in the context of interoperability. This is particularly the case in the event that the contractual agreements between ELNOs are not limited to matters specific to the ELNOs' interaction with another. We have expressed concerns in this regard in our submission regarding MORs Consultation Draft 7.0. While ARNECC is considering providing more information on the roles of Participating and Responsible ELNOs in the MOR Guidance Notes, and the National Electronic Conveyancing Interoperability Data Standards also set out the roles and functions of each ELNO in an Interoperable Electronic Workspace, we reiterate the importance of transparency of roles and responsibilities.

ARNECC should also give further consideration to how ELNO performance will be monitored and reported on in the context of an interoperable market. Information about the performance of the market, particularly a developing market, can be extremely valuable to regulators and industry participants. Future policy decisions (and monitoring activities) will benefit from this information, while Subscribers will be better placed to decide whether to switch ELNOs or to negotiate fees with their current ELNO. Further, obligations on ELNOs to

report on their performance could be established via amendments to Schedule 3 of the MORs.

We also note that increased transparency around all aspects of the reforms, including the content of Interoperability Agreements, will help to address information asymmetries within the market (and especially between the ELNOs). It will also give access seekers (including potential future ELNOs) greater confidence to enter into agreements.

Matters relating to the negotiation and detail of Interoperability Agreements are discussed further below.

Negotiation of Interoperability Agreements

As previously indicated, the ACCC considers a clear and explicit dispute resolution framework for ELNO Interoperability Agreement negotiations will encourage ELNOs to negotiate and reach agreement in a timely manner. A robust dispute resolution process is needed to support the timely rollout of interoperability given the incentives PEXA has to delay competition.

We are pleased to see that an arbitration provision has been added to the MORs to apply to disputes which are not resolved via mediation within 20 business days, unless extended by agreement (MOR 5.7.6).

As indicated in our August 2021 submission on MORs Consultation Draft 7.0, we consider certainty around timing, roles, and responsibilities at each stage of a dispute resolution process is important. The introduction of clear timeframes (such as the newly-introduced 20 business day limit to the mediation phase) in the dispute resolution process will limit the ability of parties to engage in delaying tactics when negotiating Interoperability Agreements.

We also raised concerns in our August 2021 submission that under the MORs Consultation Draft 7.0 an ELNO's ability to utilise the dispute resolution process hinged on an ELNO 'receiving a request', without defining what a request to interoperate meant. We are pleased to see that further detail has subsequently been included in the MORs in relation to these requests (MOR 5.7.1).

The ACCC is also pleased to see that obligations in relation to the sharing of information between ELNOs when negotiating an Interoperability Agreement (MOR 5.7.2(b)) and a publication obligation (subject to confidentiality concerns) (MOR 5.7.3(a)) have been introduced into the MORs. We also support the extension of the good faith obligation to both ELNOs (MOR 5.7.2(a)).

The ACCC notes that the threshold for proceeding to mediation remains tied to an 'unable to agree' requirement, rather than a defined timeframe within which negotiations must be completed. The 'unable to agree' threshold risks delays in settling Interoperability Agreements (as one party can insist that negotiations are ongoing despite the other party's notice). It would therefore be preferable if the MORs established a defined timeframe (and appropriate notification requirements). We also note that the MORs still do not require ELNOs to notify ARNECC in the event of a dispute.

We consider the proposed introduction of commercial arbitration (MOR 5.7.6) will likely support the Interoperability Agreement negotiation process, and that the list of matters which the arbitrator would be required to take into account (MOR 5.7.6 (c)) appears appropriate. That said, the importance of arbitration decisions not raising barriers to entry for new entrant ELNOs is significant. As such, these decisions should take into account their potential impact on new entrants. As the MORs require all Interoperability Agreements to be entered into on an 'equivalent basis,' the agreement between the two current ELNOs will effectively

function as a default standard agreement. If this agreement establishes onerous standards it may lock future entrants out of the market. It may therefore be appropriate for an arbitrator to also have regard to competition and the public interest when considering a dispute.

While industry is likely best-placed to provide feedback on the specific arbitrator suited to e-conveyancing disputes, it is also important that ARNECC consider the appropriateness of the rules that will apply to the arbitration process (including costs and timeframes) to ensure it provides a credible backstop to the negotiation of Interoperability Agreements.

Interoperability Agreements

As previously indicated, the ACCC considers the ECNL or the MORs are the appropriate vehicle in which to establish the general obligations of ELNOs to the market (and more specifically to relevant industry participants) and to ARNECC in the context of interoperable e-conveyancing transactions. Given the potential implications for competition and the public interest, it is important that the content of Interoperability Agreements is limited to those matters specific to the relevant ELNOs interaction with each another.

We note the MORs continue to require that Interoperability Agreements include terms that deal with the Interoperability Agreement Matters (MOR 5.7.4(b) i.e. the matters set out in Schedule 8 of the MORs). We remain of the view that there would be benefit in establishing a standard Interoperability Agreement or a default set of minimum terms that all Interoperability Agreements must contain or at least could serve as a backstop for parties as they negotiate access. For example, we consider that the processes for fee allocation to Subscribers and resolving disputes between ELNOs represent important inclusions in all Interoperability Agreements. We note that by establishing a benchmark or limiting the scope of matters to be negotiated through using standard agreements or minimum terms can also lead to more efficient negotiations, reduce the costs of ELNOs entering into agreements and help level the playing field where ELNOs have different capacities to negotiate agreements.

We note that the relevant provisions in the MORs (MOR 5.7.2) have been clarified to require that ELNOs:

- promptly provide all information reasonably required to understand the basis on which an ELNO is prepared to interoperate promptly; and
- enter into Interoperability Agreements with all other ELNOs on an equivalent basis (i.e. that all agreements contain the same terms and conditions in relation to price (or the same method of ascertaining price) and implementing interoperability, as well as the same processes and systems for implementing interoperability.

Despite these clarifications, we consider the use of standard agreements or minimum terms in combination with behavioural obligations (such as non-discrimination obligations) would better support the negotiation of agreements.

The duration of Interoperability Agreements should also take into account broader timing considerations, including any planned reviews. Unnecessarily long agreements may make it difficult to for ARNECC to respond to technological change or implement changes in response to any future reviews. This includes the transition from Direct Connection to any future connection model. Interoperability Agreements with lengthy durations may constrain how and when future new entrants can meaningfully interoperate. While neither the ECNL nor MORs currently set out any review processes, the review timelines, if adopted, should inform the length of Interoperability Agreements.

Compliance and enforcement

The ACCC considers it critical that the regulatory framework for e-conveyancing establishes robust and credible enforcement measures (and appropriate penalties for breaches) as soon as possible. Such measures will promote compliance with a number of key obligations including timeframes for the introduction of interoperability, and with general obligations set out in the MORs. The credible threat of enforcement action has a broad range of potential benefits, including deterring delays in the negotiation of Interoperability Agreements, reducing the potential for disputes during the term of Interoperability Agreements, and supporting the entry of new participants into the market (i.e. providing new entrants with confidence that they will be able to compete on merit).

We understand that ARNECC remains committed to an enforcement regime but has made a pragmatic decision to delay this work due to the difficulties associated with developing a multi-jurisdiction regime. While acknowledging that this is a complex area of reform, we see the establishment of an enforcement regime as critical to the market reform that will provide industry with certainty to meaningfully participate in an interoperative market. We recommend that the timeline for developing the enforcement regime should be set out in the ECNL. Absent the presence (or clear prospect) of an enforcement regime, it is not clear that Subscribers (or future ELNOs) can reasonably be expected to engage in an interoperable market.

Interoperability fee arrangements

We note that the current version of the MORs both defines and prevents ELNOs from charging 'Interoperability Service Fees'. We also note that the CPI cap on the access fees charged to Subscribers by ELNOs ('ELNO Service Fees') has been extended to 30 June 2023. Interoperability fees have the potential to significantly affect the dynamics of the ELNO market. Any pricing determinations should be made with reference to a clear set of regulatory principles and broader market objectives. The relevance of other fees and charges enabled by the regulatory framework (such as ELNO Service Fees) should also be considered.

The ACCC is not aware of the reason(s) for ARNECC's position in relation to interoperability fees. However, while PEXA retains a large market share, the structure of fees (and in particular the absence of a fee) would impact PEXA, particularly if it bears asymmetric costs. While we recognise that initially this could act to level the playing field between the incumbent and new entrants, we consider that the fee structure should create good incentives and promote competition in the long term.

In our August 2021 submission we set out a range of questions and provided several examples (including in relation to cost recovery) that could assist ARNECC in considering its approach to interoperability fees. The submission also indicated that further consultation with stakeholders may be needed in relation to fee arrangements, including around the role of financial institutions in determining the Responsible ELNO. The ACCC considers that stakeholder confidence in, and certainty around, the proposed (or any) approach to interoperability fees is best supported by appropriate consultation and the clear communication of the principles or reasoning behind any pricing determinations.

Notwithstanding the above, the ACCC acknowledges that establishing a framework for price determinations can be time-consuming and resource intensive We therefore appreciate that there may be tensions between rolling out the reforms and establishing the detailed regulatory arrangements. It is important that ARNECC balance the challenge of progressing reform in a timely manner, with the need to ensure transparency, certainty, and stakeholder

confidence in the regime. Given that the Direct Connection model is a pragmatic interim solution to interoperability, stakeholder confidence in the proposed approach to interoperability fees (as well as the basis on which future pricing will be determined) has the potential to influence market outcomes both now and in the future.

Further certainty around pricing in the market could be established through the establishment of upfront consultation, supported by subsequent timely reviews. It may be there is scope for certain fees to be determined by way of the negotiate arbitrate arrangements, subject to adhering to articulated pricing principles.

Vertical-integration

Some stakeholders have expressed concerns around the risks of ELNOs with significant market power being allowed to vertically integrate (or to enter into close commercial relationships with other firms) in markets related to e-conveyancing. We consider there is a clear need for the regulatory framework to include appropriate behavioural obligations to address the potential for discrimination by ELNOs in favour of related entities. It is not clear that the current separation requirements (MOR 5.6) are sufficiently robust, particularly in circumstances where regulatory decisions in one part of the market, such as price controls, could potentially be offset by a vertically-integrated ELNO's decisions in related markets. Similarly an ELNO with close relationships in related markets may be able to frustrate the entry of future competitors using a range of levers from across its broader operations.

We also note that good faith obligations are unlikely to be sufficient in vertically-integrated contexts. Non-discrimination obligations may also be needed to ensure all access seekers are treated equally by service providers. The presence of robust non-discrimination obligations supported by an effective enforcement regime is particularly important in circumstances where third parties are in competition with the related entity of a vertically-integrated service provider with significant market power.

Given the developing nature of the market and relevant technologies, suitable and clear expectations and obligations on the extent to which ELNOs may expand their operations into related markets (and how they must interact with other parties in these markets) must be established as soon as possible.

Financial settlement

Under the amended draft of the ECNL, an ELNO's operating requirements (i.e. the MORs) may require it to participate in an industry code relating to associated financial transactions. The current version of the MORs does not contain any provision in relation to participation in the industry code. We understand that this reflects that the code is yet to be developed by the industry steering committee chaired by the Australian Payments Network. As such, we query whether further detail about this obligation will be set out in the MORs, including interaction with the enforcement measures that will underpin this obligation.

Digital certificates

We note that stakeholders have raised concerns about the use of digital certificates across different ELNOs. We also note that the under the MORs ELNOs are required to permit Subscribers to use open Digital Certificates (subject to reasonable security related requirements). It is important that the costs or complexity associated with obtaining and maintaining Digital Certificates do not result in unnecessary barriers to competition (i.e. by making it difficult or costly for Subscribers to switch between ELNOs). We also consider that issues around the recognition and/or transferability of Digital Certificates are likely to increase if other ELNOs enter the market. Any solution should be conscious of supporting competition between the current ELNOs and not hindering future entry.

Potential competition concerns

In addition to the above discussed matters, the ACCC considers it important that ARNECC (and ELNOs) are mindful that certain matters set out in Interoperability Agreements have the potential to raise competition concerns in relation to the *Competition and Consumer Act 2010* (CCA). For example, the CCA prohibits contracts, arrangements, understandings or concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market. Where businesses are concerned that their proposed conduct may give rise to a breach of the competition provisions of the CCA, they can seek authorisation from the ACCC. Broadly, the ACCC may grant authorisation if it is satisfied that the likely public benefit from the conduct would outweigh the likely public detriment. The authorisation process is public and transparent and the ACCC generally must make a decision within 6 months of receiving the application. Some Commonwealth, state and territory Acts may also specifically permit conduct that would normally contravene the CCA.

Should you wish to discuss the matters raised in this letter or in previous submissions, please contact Katie Young, Director, Infrastructure Transport & Pricing at katie.young@accc.gov.au

Yours sincerely

Anna Brakey
Commissioner