



Our ref: 62251

Land of the Wurundjeri people of the Kulin Nation
Level 17, 2 Lonsdale Street
Melbourne Vic 3000

Your ref:
Contact officer: Katie Young
Contact phone: [REDACTED]

GPO Box 3131
Canberra ACT 2601
Tel 03 9290 1800
www.accc.gov.au

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Mr Moston Neck

Associate
Synergies Economic Consulting

Email: [REDACTED]
Copy to: [REDACTED]

Dear Mr Neck

Re: Review of the Separation Regime in Operating Requirement 5.6

The Australian Competition & Consumer Commission (ACCC) welcomes the opportunity to provide comments on the Issues Paper: Review of the Separation Regime in Operating Requirement 5.6 (issues paper). As Australia's national competition regulator, the ACCC considers it important to ensure effective, fit-for-purpose regulation is in place as required to facilitate competitive markets.

The purpose of this letter is to set out the ACCC's high level views on the importance to competition of robust, transparent and enforceable separation arrangements with reference to the electronic conveyancing (eConveyancing) market. It draws on the ACCC's experience with regulatory and competition issues in a range of industries and builds on (or reiterates) views expressed in previous submissions to ARNECC in relation to its eConveyancing regulatory framework.

Economic and competition issues with vertical integration

Vertically integrated businesses, particularly those with market power, have the ability and incentive to favour related parties in upstream and downstream markets, to the detriment of competitors in those markets. For example, a vertically integrated Electronic Lodgement Network Operator (ELNO) may share information, staff or systems between related entities in order to stifle or frustrate competition developing in the eConveyancing market or across related markets. An ELNO may also deny or hinder competitors (from across relevant supply chains) access to certain data or services. Additionally, an ELNO may only offer access at higher prices, provide a reduced service quality, or provide services to market participants under less favourable conditions compared to those offered to its own related party.

Advantages that vertically integrated businesses can gain from their position across related markets include access to information about how their competitors operate (including greater visibility of their intellectual property, processes and customers). Equally a vertically

integrated business may have access to data regarding a market in its entirety which other market participants cannot access or can only access at a later point in time potentially for a fee. These information advantages are particularly relevant in emerging digital markets such as the eConveyancing market, especially noting the significant first mover advantage held by the dominant incumbent and in light of its market share (and the information it has access to as a result).

Functional separation or ring fencing

The ACCC's preferred regulatory structure is complete vertical separation between an ELNO and upstream and downstream providers, as it removes the incentive to discriminate on both price and non-price terms. However, if an ELNO is permitted to vertically integrate to offer downstream or upstream services (such as conveyancing, legal services, information brokering and land information products) then it is necessary to have robust and enforced functional separation requirements or ring fencing. Whilst such arrangements will not remove an ELNO's incentive to discriminate, they may constrain the ELNO's ability to do so.

Functional separation requirements may include separation of resources, employees, systems, contractor arrangements and support functions. In addition, cost allocation and accounting separation obligations may be needed to prevent an ELNO from gaining competitive advantage in related markets by using revenue from its eConveyancing business to cross-subsidise and artificially lower the prices charged for services provided in upstream or downstream markets.

It is also important to ensure that these requirements are in place and effectively enforced prior to a firm's expansion into related markets to avoid initial gains from information or other advantages. The enforcement regime must then be effective on an ongoing basis (as discussed below).

Effective separation regime

The ACCC considers the following to be important elements of an effective separation regime:

Information barriers

Information barriers separating an ELNO from its related entities in upstream or downstream markets are necessary to ensure that related entities do not obtain an advantage over competitors and hinder competition in these markets. There may be emerging markets related to eConveyancing that cannot yet be foreseen. It is important that existing ELNOs are not able to take first mover advantage in such new markets by sharing information with related upstream or downstream entities that would not be available to new entrants without a related ELNO business.

Non-discriminatory access

It is also necessary for functional separation or ring-fencing requirements to include obligations on ELNOs to provide non-discriminatory access to downstream users such as conveyancers and to interact with all participants on equal terms. Such access should include equal treatment on non-price terms such as the same quality, reliability and timeliness of service, and equal dissemination of information to all participants. We also note that "good faith" obligations regarding non-discrimination are unlikely to be sufficient in vertically integrated contexts.

Increased transparency/reporting requirements

An annual compliance report or other routine reporting obligations should be required to provide all parties certainty regarding the separation obligations and adherence to them. These reports should be published in a timely manner. The regulator should also be provided with information gathering powers as necessary to support the compliance and enforcement regime.

Increased transparency and accountability measures regarding an ELNO's operations in adjacent and related markets will enable the regulator to identify, monitor and address existing or potential market power concerns by way of the enforcement regime or changes to regulation.

Equally, through increased transparency, stakeholders (for example competitors in related markets or their customers) will be able to identify where possible competition concerns may arise or already exist. This may be particularly helpful in the eConveyancing market as it may be less obvious how related markets intersect, for example across and between markets relating to financial services, information technology (including artificial intelligence), property data and legal services. For this reason, it will be important for the review to consider and engage with a broad range of stakeholders, including those not immediately associated with eConveyancing.

Increased transparency and accountability measures will also go some way to address information asymmetries in eConveyancing and related markets. Ongoing reporting, including in relation to any enforcement action will promote confidence in the regime.

Clarity around types of upstream and downstream services

The issues paper highlights that it is not always clear what separation arrangements have been put in place by the ELNOs and whether these arrangements comply with the Model Operating Rules (MORs) or the policy intent of the separation regime. This is despite the issues paper identifying a number of non-core services currently supplied by the ELNOs through various related entities and subsidiaries.

The ACCC considers it would be appropriate to provide the market with greater certainty on what types of services may breach the separation rules. Given the many markets that can and may in the future intersect with eConveyancing it may be appropriate to establish the scope of the regime by using a non-exhaustive list or categories of services. Potentially the application of the regime could be tiered (e.g. the separation requirement may vary subject to relevance of the market), further considered by ARNECC on a case by case basis, or considered by way of a public periodic review – which could provide an opportunity for competitors or potential new entrants to highlight concerns.

When establishing the appropriate framework for the separation regime (including with respect to scope) it will be important to manage any potential regulatory burden for the ELNOs and their legitimate business interests, against the need for improved transparency, clarity and certainty for stakeholders across the eConveyancing and related markets.

Examples of effective ring-fencing arrangements

One example of an effective ring-fencing regime currently operating in Australia is the ring-fencing regime for electricity distribution network service providers (DNSPs). The Australian Energy Regulator has issued [comprehensive guidance](#) on these ring-fencing arrangements. Features of these arrangements that ARNECC may wish to implement include:

- Measures targeted at preventing cross-subsidisation, such as legal separation, separate accounting and cost allocation requirements.
- Measures targeted at discrimination, including restrictions on information disclosure, and specific obligations targeted at office and staff sharing, branding and promotions.
- Specific compliance and enforcement provisions, including the publication of registers and independent annual verification of compliance with the ring-fencing requirements.¹

An effective enforcement regime is critical

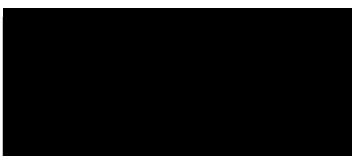
To manage upfront the prospect of competition issues emerging in both upstream and downstream markets the eConveyancing regulatory framework should include appropriate and enforceable separation obligations and transparency measures. As highlighted in the issues paper, the ELNOs are already moving into a range of adjacent and related markets and there are already potential compliance issues with existing separation and disclosure requirements.

Prescriptive and transparent separation arrangement obligations that enable compliance to be measured are more likely to be effective. ELNOs will be better placed to understand their obligations and stakeholders can have greater comfort that the regime will operate as intended.

The separation arrangement compliance obligations must contain a credible threat of enforcement. ARNECC should have a range of enforcement and compliance tools that it can utilise as appropriate in a measured and timely manner. The competition and economic benefits of separation can only be realised if the separation regime is enforced.

A process for reviewing the overall arrangements should also be included, especially given the dynamic nature of the relevant markets.

Yours sincerely



Nicole Ross
Executive General Manager
Infrastructure Division

¹ Source: [AER Ring-Fencing Guideline \(electricity distribution\)](#)