

Summary of discussion Workshop with economic regulators

11 August 2022

1 Overview

We invited regulators from all jurisdictions to attend a workshop on 11 August to discuss key issues in Stage 1 of the review, as required by our Terms of Reference. The workshop was attended by representatives from:

- IPART
- Essential Services Commission of Victoria (ESC)
- Essential Services Commission of South Australia (ESCOSA)
- Australian Competition and Consumer Commission (ACCC)
- Landgate WA (as an ARNECC-nominated technical expert to assist the economic regulators).

Apologies from the Independent Competition and Regulatory Commission (ACT) (ICRC), the Economic Regulation Authority (WA) (ERA), the Office of the Tasmanian Economic Regulator (OTTER), the Queensland Competition Authority (QCA) and the Utilities Commission of the Northern Territory.

This paper presents a summary of the issues discussed at the workshop:

- Forms of regulation that may be appropriate for an interoperability service fee
- Factors impacting the service offerings of ELNOs and consequences for pricing
- Variation in costs and/or transaction numbers across jurisdictions that may affect pricing and cost recovery
- Whose costs should be considered?
- Development of the eConveyancing market.

2 Form of regulation for an interoperability service fee

The economic regulators noted that, at the Public Hearing on 26 July, stakeholders expressed a preference for a regulated price, rather than a negotiate-arbitrate approach to setting an interoperability service fee.

They discussed the following points:

- Negotiate-arbitrate regimes have been successful in some jurisdictions. However, in those industries where negotiate-arbitrate has worked well, substitute services have typically been available. This is unlikely to be the case in jurisdictions where eConveyancing has been mandated.
- Stakeholder preference for a regulated price may reflect concerns about potential delays in achieving a negotiated or arbitrated outcome, and the desire to minimise the risk of further delays to achieving interoperability.
- For a negotiate-arbitrate approach, drafting of the rules and where the rules sit in the legal framework for eConveyancing would be critical for clarity and compliance.
- It is important to minimise the costs of regulation and ensure that the regulatory approach is not overly complex.

3 Factors impacting the service offerings of ELNOs and consequences for pricing

The regulators noted the following factors that impact the service offerings of ELNOs:

- The Model Operating Requirements (MORs) – currently the MORs require all ELNOs to operate in all jurisdictions with eConveyancing and offer all available document types. However, they do not specify a timeframe for this. Without timeframes, ELNOs could prioritise the high volume and more profitable transaction types. There may be an incentive to delay incurring the capital costs required to offer all services.
- Willingness of financial institutions to connect to new ELNOs – for an ELNO to be the Responsible ELNO in an interoperable transaction it will usually require connections to financial institutions. This gives financial institutions an important role in an interoperable transaction. Developing connections to a financial institution is costly and time-consuming and the size of the market for eConveyancing transactions is restricted (because it is dependent on real property transactions). Both of these factors will affect an ELNO's ability to recover its costs.
- Equal access to data standards – each ELNO requires access to the relevant data standards to offer the full range of eConveyancing services. This is being achieved through the agreement to establish the National Electronic Conveyancing Data Standard Co (NECDS Co).

These factors influence the development of an ELNO's services and the level of competition in the eConveyancing market.

The regulators noted that pricing is one way to encourage ELNOs to develop service offerings and to ensure all ELNOs can recover the costs of their investments. However, setting an interoperable transaction fee would not address all these issues and there may be other solutions to consider, including clear mandates with compliance mechanisms for eConveyancing and interoperability.

4 Differences in costs and fees across jurisdictions

The regulators noted that:

- ELNO costs may vary across jurisdictions, particularly for connections to land registries and revenue offices. The more significant factor is greater variation in transaction numbers, which will lead to higher variation in cost per transaction between jurisdictions.
- If prices (fees) were cost-reflective, this would result in different fees in each jurisdiction.
- Consistency could be achieved through national pricing that uses average costs, but this would need to be considered further.

5 Whose costs should be considered when setting fees?

The regulators noted that:

- If each ELNO has paid to build its own infrastructure, it should not be asked to pay again to contribute to another ELNO's infrastructure.
- An incumbent ELNO will have already invested in its infrastructure, while a new entrant's systems may be cheaper and more efficient, due to technology developments or other factors. Should a new ELNO contribute to the costs of an older or less efficient system?

6 Development of the eConveyancing market

The regulators noted that:

- Mandates have played a significant role in developing the eConveyancing market in most jurisdictions.
- The Covid-19 pandemic also contributed to the demand for, and acceptance of, eConveyancing as a replacement for paper conveyancing.
- The incumbent ELNO has received significant advantage from being a "first mover" and it is likely to enjoy these benefits for some time, given interoperability is expected to develop slowly.