



Interoperability pricing for Electronic
Lodgment Network Operators

Issues Paper 2

October 2022

Tribunal Members

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Invitation for submissions

IPART invites comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

Submissions are due by Friday, 11 November 2022

We prefer to receive them electronically via our [online submission form](#).

You can also send comments by mail to:

Interoperability Pricing for Electronic Lodgment Network Operators
Independent Pricing and Regulatory Tribunal
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Haymarket Post Shop, Sydney NSW 1240

If you require assistance to make a submission (for example, if you would like to make a verbal submission) please contact one of the staff members listed above.

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We may decide not to publish a submission, for example, if we consider it contains offensive or potentially defamatory information. We generally do not publish sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please let us know when you make the submission. However, it could be disclosed under the *Government Information (Public Access) Act 2009* (NSW) or the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's [submission policy](#) is available on our website.

The Independent Pricing and Regulatory Tribunal

IPART's independence is underpinned by an Act of Parliament. Further information on IPART can be obtained from [IPART's website](#).

Acknowledgment of Country

IPART acknowledges the Traditional Custodians of the lands where we work and live. We pay respect to Elders, past, present and emerging.

We recognise the unique cultural and spiritual relationship and celebrate the contributions of First Nations peoples.

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1 Introduction

Conveyancing is the process through which title to real property is transferred from one person to another (e.g. when it is sold or inherited), and other interests in the property are dealt with (e.g. a lessor's or mortgagee's).

Electronic conveyancing (eConveyancing) is a system which provides for the lodgment of electronic instruments with land registries using an Electronic Lodgment Network (ELN). Registrars approve entities to operate ELNs and they are known as ELNOs. The 2 current ELNOs also facilitate the associated financial settlement of conveyancing transactions.

Today, all parties to an eConveyancing transaction must subscribe to the same ELN to complete the transaction. This is because ELNs are not yet interoperable: their systems cannot exchange information, or 'talk' to each other, to complete a transaction. With more than one ELNO now operating, interoperability aims to permit subscribers (conveyancers, lawyers, and financial institutions) to use the ELN(s) they choose, while other parties may use a different ELN.

In June 2022, NSW Parliament enacted changes to the national law (which will ultimately apply in all States and Territories) to support implementation of interoperability.

The Model Operating Requirements (MORs) are being updated to include provisions on interoperability. In particular, the interoperability regime proposes the role of Responsible ELNO (RELNO). The RELNO will orchestrate the transaction, interact with Land Registries and Revenue Offices, and perform the transaction settlement and lodgment. Other ELNOs that are hosting subscribers in the transaction are designated as Participating ELNOs (PELNOs).

The Australian Registrars' National Electronic Conveyancing Council (ARNECC) has proposed that the MORs should include provisions on the fees ELNOs may charge other ELNOs and/or subscribers, in relation to participation in an interoperable transaction. The NSW Minister for Customer Service has asked IPART to investigate and make recommendations on whether those fees should be able to be charged, and if so, how they should be set.

In Issues Paper 1 for this review, we set out the scope of the review and our proposed two-stage approach. We asked questions about the first stage of the review, which entailed deciding on a form of regulation for interoperable transaction fees. We sought submissions on the Issues paper, held a public hearing, and held a workshop with economic regulators from other jurisdictions.

This second Issues Paper outlines what we heard from stakeholders through consultation on Issues Paper 1 and our draft decisions on form of regulation, including that we should proceed to set a regulated price for interoperable transaction fees. It also outlines the issues on which we are seeking comment in the second stage of the review, including:

- when a PELNO should pay interoperable transaction fees
- the relevant cost categories that should be included in those fees
- whether we should recommend a regulated method or price level
- our proposed approach to setting a regulated price
- how to implement such fees.

Through stakeholder feedback and our own research and analysis, we have also identified broader issues with pricing of ELNO services and design of the eConveyancing market. Chapter 4 of this paper outlines these issues. While these are important issues that involve categories of cost that an ELNO should be able to recover, we consider that these costs should not be recovered through interoperable transaction fees.

We have referred these issues to ARNECC and ARNECC is considering them.

1.1 The scope of this review

ARNECC sought this investigation (via the NSW Minister for Customer Service) to support its ongoing reforms to the eConveyancing system to implement interoperability between ELNs from mid-2023.

A consultation draft of the MORs (version 7.1), intended to apply from the introduction of interoperability, defines interoperability service fees as fees that a Responsible ELNO can charge other ELNOs or subscribers in relation to establishing and maintaining interoperability, and carrying out the functions of a Responsible ELNO. Consultation draft 7.1 of the MORs prohibits ELNOs from charging interoperability service fees. However, ARNECC will consider IPART's recommendations in this review on whether and how fees for interoperable transactions should be set.

Our terms of reference outline the matters we should consider in making these recommendations, including:

- supporting and promoting competition through ELNO interoperability pricing
- the costs and risks incurred by different parties during an interoperable transaction
- the current and evolving structure of the interoperable transaction market.

The full terms of reference are at Appendix A.

1.2 Our approach to this review

Our approach to this review considers all matters required by our terms of reference. It comprises the following steps:

1. Determine whether fees should be charged by the Responsible ELNO to Participating ELNOs for participation in an interoperable transaction, and whether and how any such fees should be passed on to subscribers.
2. Determine the form of regulation for any ELNO interoperable transaction fees, that is:
 - whether a negotiate-arbitrate model should apply to setting any such fees, or
 - whether a regulated method or price for 2023-24 should apply, with a method for reviewing and adjusting the price in the future.
3. Based on our recommended form of regulation, determine either:

- the appropriate pricing principles for setting ELNO interoperable transaction fees under a negotiate-arbitrate model and any amendments to the MORs that are required to support these, or
- the regulated method or price for 2023-24 for ELNO interoperable transactions, a method for reviewing and adjusting the price in the future and any required amendments to the MORs.

We released our first Issues Paper to decide on the first 2 points of our terms of reference.

This second Issues Paper discusses what we heard from stakeholders during consultation on our first Issues Paper, and our draft decisions on those issues. It also discusses issues on which we are seeking comment for the second stage of the review, regarding a regulated method or price.

We will consult on this Issues Paper through written submissions, to explore the detailed content of a regulated method or price for ELNO interoperable transactions.

By February 2023, we will publish a Draft Report and submit a Final Report by 30 April 2023.

Table 1.1 shows the project timetable.

Table 1.1 Project timetable

Project milestone	Proposed timetable
Issues Paper 1	15 July 2022
Public hearing - form of regulation	26 July 2022
Workshop with economic regulators – form of regulation	11 August 2022
Submissions on Issues Paper 1 due	12 August 2022
Issues Paper 2 – approach to regulation – this paper	14 October 2022
Submissions on Issues Paper 2 due	11 November 2022
Draft Report	February 2023
Submissions on Draft Report due	March 2023
Final Report	April 2023

Figure 1.1 Project timeline



1.3 How you can be involved

Table 1.2 provides a brief overview of what stakeholders can influence in this stage of the review.

Table 1.2 What stakeholders can influence in this stage of the review

What stakeholders can influence in this stage of the review	Decisions that have already been made
<p>Elements of our proposed approach to determining interoperable transaction fees, including:</p> <ul style="list-style-type: none"> when interoperable transaction fees should apply the categories of cost that should be recovered through interoperable transaction fees the approach to a regulated method or price any changes to the MORs that are necessary to reflect our recommendations. 	<ul style="list-style-type: none"> Interoperability will be required in eConveyancing and the form of interoperability has been decided The process for the review and review timeframe – we must report by April 2023.

This second Issues Paper provides our draft decisions on stage one of the review, following consultation on Issues Paper 1, as follows:

Draft decisions following consultation on Issues Paper 1

1.	The costs of establishing and maintaining interoperability should be recovered from an ELNO's subscribers through ELNO Service Fees.	9
2.	A Responsible ELNO should be able to charge fees to Participating ELNOs in an interoperable transaction.	10
3.	Subscribers who participate in an interoperable transaction should not pay more than subscribers in a single ELNO transaction, so an interoperable transaction fee for performing the role of RELNO should not be passed through to a PELNO's subscribers as a separate charge.	11
4.	Direct price control is the appropriate method for establishing interoperable transaction fees between ELNOs.	12
5.	Apportionment and recovery of the Lodgment Support Service fee should not occur through interoperable transaction fees charged by Responsible ELNO to a Participating ELNO.	13
6.	ELNOs should not be required to pay PEXA a common user charge for participating in an interoperable eConveyancing market.	13

This second Issues Paper also provides an outline of our proposed approach and preliminary views on the second stage of the review, and questions on which we are seeking comment from stakeholders. These questions, as set out below, are aimed at starting the conversation and are not designed to be an exhaustive list.

Questions on which we are seeking comment

1.	Do you agree with prescribing prices rather than prescribing a pricing methodology for interoperable transaction fees? If not, what are the reasons for preferring a pricing methodology?	18
2.	Do you agree that a Responsible ELNO fee should apply to all interoperable transactions?	20
3.	Do you agree that a default Responsible ELNO surcharge should apply when an ELNO cannot fulfil its role as the designated Responsible ELNO?	20
4.	How should we estimate the costs a Responsible ELNO incurs from completing financial settlement on behalf of Participating ELNOs?	23
5.	Which other operating costs are associated with the Responsible ELNO role? How could we estimate these costs and accurately attribute them to the Responsible ELNO role?	23
6.	What are your views on recovering a share of the capital costs of developing financial settlement and lodgment infrastructure via a default Responsible ELNO charge?	24
7.	Do you agree with our approach to categorising the costs of interoperability that should be recovered otherwise than through interoperable transaction fees?	26
8.	Do you agree with reviewing efficient operating and capital costs associated with interoperability for 4 years from 2023-24 to 2026-27? Or, do you think we should review efficient costs for a shorter or longer period than this?	28
9.	Do you agree with our proposed approach for estimating efficient financial settlement costs, other efficient marginal operating costs and efficient capital costs associated with developing financial settlement and lodgment infrastructure? Is there any other information we should consider in estimating these costs?	28
10.	Do you agree with our proposed approach for estimating a margin? Specifically, do you agree with using mortgage banks as proxy companies to estimate equity beta and gearing ratio for ELNOs?	29
11.	What are your views on our proposed approach to forecasting transaction volumes?	30
12.	When setting the default Responsible ELNO surcharge, how should the capital costs of developing financial settlement and lodgment infrastructure be shared across ELNOs in a transaction?	30
13.	Do you agree with recommending charges for 2 years? If not, what time period do you prefer and why?	31
14.	Do you agree with indexing by CPI for the second year of the regulatory period? If not, what approach do you prefer and why?	31
15.	Have we identified the relevant matters that should be implemented through amendments to the Model Operating Requirements?	32
16.	Do you think it is appropriate for the practical arrangements between ELNOs for payment of interoperable transaction fees to be negotiated through Interoperability Agreements?	32

 Have your say

Your input is critical to our review process.

[Submit feedback »](#)

You can get involved by making a submission,
submitting feedback or attending a public hearing.

1.4 The structure of this paper

This Issues Paper is structured as follows:

Chapter

- | | |
|----|---|
| 02 | We heard from stakeholders and made draft decisions on a pricing framework for interoperable transaction fees |
| 03 | How we propose to set interoperable transaction fees |
| 04 | Pricing of ELNO services and market design |

Appendix

- | | |
|---|--------------------------------------|
| A | Terms of reference for the review |
| B | Glossary of terms used in this paper |

2 We heard from stakeholders and made draft decisions on a pricing framework for interoperable transaction fees

Our terms of reference direct us to investigate and make recommendations on:

1. Whether fees should be charged by the Responsible ELNO to Participating ELNOs for participation in an interoperable transaction, and whether and how any such fees should be passed on to subscribers.
2. Whether:
 - a. a negotiate-arbitrate model should apply to setting any such ELNO fees, and if so, the pricing principles that should apply under such model; or
 - b. a regulated method or level of price should apply to setting any such ELNO fees, and if so, what that method or level should be for 2023-24 and a method for reviewing and adjusting the price in the future.

In Issues Paper 1, we outlined our preliminary views on whether and how interoperable transaction fees should be charged, and on the benefits and disadvantages of different forms of regulation for such fees. We asked for stakeholder views on these issues. We received feedback in submissions to Issues Paper 1, at our public hearing and at our workshop with economic regulators.

This chapter outlines the feedback we received from stakeholders on the first task in our terms of reference, and on which form of regulation for interoperable transaction fees should apply. It also sets out our draft decisions on 5 issues on which stakeholders broadly agree:

- The costs of establishing and maintaining interoperability should be recovered from all subscribers (and not charged by the RELNO to PELNOs).
- A RELNO should be able to charge fees to PELNOs in an interoperable transaction. These fees should not be passed through to subscribers but will be part of the total costs for an ELNO which they can recover through ELNO Service Fees.
- Subscribers who participate in an interoperable transaction should not pay more than subscribers in a single ELNO transaction.
- Direct price control is the appropriate method for establishing interoperable transaction fees between ELNOs.
- Apportionment and recovery of the Lodgment Support Service fee should not occur through an interoperable transaction fee.

The sections below provide more detail on stakeholder feedback, our analysis, and our draft decisions.

2.1 Overview of stakeholder engagement

In July and August, we sought stakeholder feedback on our first Issues Paper. This paper considered whether fees should be charged by Responsible ELNOs to Participating ELNOs, whether such fees should be passed on to subscribers, and the form of regulation for such fees. We held a public hearing, a workshop with economic regulators and encouraged stakeholders to make submissions on our first Issues Paper. Table 2.1 provides an overview of the timing and level of input to the stakeholder engagements we have undertaken to date.

Table 2.1 Overview of our stakeholder engagement to date

Engagement item	Timing	Level of engagement	More information
Public hearing	26 July 2022	34 participants (excluding IPART staff)	Information and recordings
Workshop with economic regulators	11 August 2022	8 participants (excluding IPART staff)	Summary of issues discussed
Issues Paper, seeking submissions	August 2022	6 submissions	Submissions are publicly available

2.2 We have made 5 draft decisions on issues with broad stakeholder support

In Issues Paper 1 we expressed our preliminary views that:¹

- ELNOs should recover the costs of establishing and maintaining interoperability from all subscribers and not through a separate interoperable transaction fee.
- If the responsibilities of ELNOs in interoperable transactions are asymmetrical and market shares are unequal, it would be appropriate to have an interoperable transaction fee for performing the duties of a RELNO.

Stakeholders generally agree with these positions.

Stakeholders also endorse our preliminary view that customers should pay no more for an interoperable transaction than a single ELNO transaction. This means that the interoperable transaction fee for performing the duties of a RELNO should not be passed through to a PELNO's subscribers as a separate charge. However, it should be considered as part of an ELNO's total costs when an ELNO is setting ELNO Service Fees.

There is strong support for direct price control as the most appropriate form of regulation for interoperable transaction fees.

The following sections set out our analysis in more detail and our draft decisions on the 5 issues on which stakeholders broadly agree.

2.2.1 Stakeholders agree that the costs of establishing and maintaining interoperability should be recovered from all subscribers

In our 2019 review, we considered the costs of establishing and maintaining the direct connections model of interoperability.² These types of costs include development and maintenance of the infrastructure and systems to enable intra-ELNO connections and customer support.

In Issues Paper 1, we outlined our preliminary view that, in the case all ELNOs are required to have the capacity to undertake the RELNO role, any additional costs of establishing and maintaining interoperability should be recovered through ELNO Service Fees and not through a separate interoperable transaction fee. This is because interoperability is a function all ELNOs will need to have. Recovering directly from their own subscribers means there are incentives for ELNOs to be as efficient as possible – these incentives may not be as strong if ELNOs were able to recover from other ELNOs. Ultimately subscribers pay, so greater efficiency should result in lower costs for subscribers overall.

Stakeholders generally agree that the costs of establishing and maintaining interoperability should be recovered from all subscribers.³ The Law Council of Australia states:

...there should be no price discrimination based on whether a transaction is interoperable between ELNOs or completed on an intra-ELNO basis.⁴

Draft decision



1. The costs of establishing and maintaining interoperability should be recovered from an ELNO's subscribers through ELNO Service Fees.

In section 4.1, we outline our view that ELNO Service Fees should be reviewed and updated, including to ensure ELNOs can recover the costs of establishing and maintaining interoperability.

2.2.2 Stakeholders agree that a RELNO should be able to charge a fee for taking that role

In Issues Paper 1, we outlined our preliminary view that if the responsibilities of ELNOs in interoperable transactions are asymmetrical **and** market shares are unequal, it would be appropriate to have an ELNO-to-ELNO fee for performing the duties of a Responsible ELNO, as a way of sharing costs between ELNOs.⁵

PEXA, Sympli and Tasmania's Land Titles Office agree that RELNOs should be able to charge such a fee, although they differ on which costs should be included.⁶

The Law Council of Australia accepts that a RELNO will incur transaction-specific costs and that, in an interim period with a new entrant, it may be reasonable for the new entrant to be charged for using the capability of the RELNO.⁷ However, it states:

...the Law Council does not see that interim theoretical possibility as warranting the implementation of a systemic interoperability fee.⁸

The Law Council's objections are based on its preference for a different model of interoperability, the Enterprise Service Bus (ESB), which would interconnect all ELNOs, land registries, banks and revenue offices.⁹ Under this model, the ESB would perform the lodgment and settlement, and ESB service fees would be an overhead to be recovered through an ELNO's subscriber fees. ARNECC has chosen the direct-connections model for ELNO interoperability and the ESB model preferred by the Law Council of Australia is not being actively pursued. The Law Council of Australia appears to accept that without an ESB model, a RELNO will have transaction-specific (or marginal) costs that it should be able to recover.

The Law Society of NSW submits that it is potentially justifiable that a RELNO charges a fee to PELNOs, however it considers there should be flexibility as the market develops (presumably to remove such a fee if it is no longer justifiable).¹⁰

We recognise that:

- RELNOs have additional costs in an interoperable transaction compared with PELNOs.
- One ELNO (PEXA) is more likely to be the RELNO while later entrants develop their capabilities and connections with financial institutions.
- An interoperable transaction fee would provide an incentive for any party to be a RELNO, which helps to promote competition.

For these reasons, we consider that a RELNO should be able to charge fees to PELNOs in an interoperable transaction.

Draft decision



2. A Responsible ELNO should be able to charge fees to Participating ELNOs in an interoperable transaction.

We also suggest that ARNECC review the need for interoperable transaction fees as the interoperable eConveyancing market matures.

2.2.3 Stakeholders agree that subscribers should pay no more for an interoperable transaction than a single ELNO transaction

We outlined our preliminary view in Issues Paper 1 that subscribers who participate in an interoperable transaction should not pay more than subscribers in a single ELNO transaction.¹¹ While this would mean that these prices are not directly cost-reflective, we consider that this slight distortion is in the longer-term interests of customers and supports competition developing. This means that an interoperable transaction fee for performing the duties of a RELNO should not be passed through to a PELNO's subscribers as a separate charge. However, it should be considered as part of an ELNO's total costs when an ELNO is setting ELNO Service Fees.

Stakeholders, including both ELNOs,¹² broadly agree with our preliminary view from Issues Paper 1.

Tasmania's Land Titles Office notes that it is important to ensure that subscribers are not disincentivised from using interoperable transactions.¹³

The Australian Banking Association argues that increased competition through interoperability should not result in higher fees for subscribers.¹⁴ It submits that we should consider the cost implications of our recommendations on subscribers with little negotiating power.

In contrast, the Law Council of Australia recognises that there will need to be a capital investment to achieve interoperability and that a return on this investment should be recovered from all subscribers through subscriber fees.¹⁵ It argues that, in the longer term, competition from interoperability will lead to innovation and efficiencies that lower (or stabilise) costs and improve the services offered to subscribers.

Draft decision



3. Subscribers who participate in an interoperable transaction should not pay more than subscribers in a single ELNO transaction, so an interoperable transaction fee for performing the role of RELNO should not be passed through to a PELNO's subscribers as a separate charge.

2.2.4 Stakeholders prefer direct price control over negotiate-arbitrate

Setting interoperable transaction fees involves first deciding on a form of regulation to establish fees, and then adjusting fees over time. The form of regulation may have a significant impact on competition in the eConveyancing market. It could affect the ability of ELNOs to interoperate, the incentives for them to interoperate, and/or the choices and information available to consumers.

Stakeholder submissions indicate a preference for direct price control over a negotiate-arbitrate approach for setting interoperable transaction fees between ELNOs.¹⁶ We consulted economic regulators from other jurisdictions on the form of regulation for interoperable transaction fees and they also support a direct price control approach.¹⁷

Most submissions to Issues Paper 1 recognise that the imbalances in bargaining power between PEXA and Sympli would make it difficult for them to achieve a negotiated outcome and, for this reason, the negotiate-arbitrate model is not appropriate for interoperable transaction fees.¹⁸

Sympli argues that the negotiate-arbitrate model is also unsuitable because of:

- PEXA's history of withdrawing from negotiations and development of interoperability
- inherent asymmetry of information, which would make it difficult for Sympli to assess the reasonableness of PEXA's proposal.¹⁹

PEXA notes that, as negotiation on price would be difficult (and even more unlikely with an increased number of ELNOs), the real choice is between whether prices should be set by an arbitrator or an economic regulator.²⁰ It submits that the only appropriate arbitrator would be an economic regulator, like IPART.²¹

Tasmania's Land Titles Office argues that the absence of competition and mandating of eConveyancing in many jurisdictions suggests that a more intrusive regulatory approach is required to protect consumers.²²

Sympli and the Law Council of Australia both suggest that a direct price control approach could be reviewed and phased out as the market matures from a competition perspective.²³ The Law Council of Australia suggests that this review should occur in 2024.²⁴

Our draft decision is that direct price control is the appropriate form of regulation, given:

- the imbalance of bargaining power between the ELNOs
- it provides benefits of certainty and transparency.

Draft decision



4. Direct price control is the appropriate method for establishing interoperable transaction fees between ELNOs.

We also asked which form of direct price control would be appropriate for fees for performing the functions of a Responsible ELNO in an interoperable transaction i.e. a regulated price or a pricing methodology.

Sympli would prefer a pricing methodology, rather than a regulated price because:

- a methodology removes the burden on regulators to set the price – ELNOs would be responsible for calculating the price according to transaction costs
- it allows for flexibility when costs change, without having to engage regulators to review a price
- it rewards investment in infrastructure and provides incentives for ELNOs to drive down costs, which can be reflected in lower costs to subscribers.²⁵

The Law Council of Australia, however, considers that a regulated price would be preferable in the short term, for consistency and transparency, and that a pricing methodology may be preferable in the longer term.²⁶

PEXA argues that the form of direct price control is less relevant than the factors it takes into consideration and the impact and incentives the fee creates.²⁷

2.2.5 The Lodgment Support Service fee should be apportioned outside an interoperable transaction fee

The Lodgment Support Service (LSS) fee is incurred by the ELNO opening the digital workspace (which is not necessarily the RELNO). Stakeholders agree that it is appropriate for this fee to be apportioned equally between participants in a transaction.²⁸

Sympli, the Law Society of NSW and the Law Council of Australia suggest that this apportionment and recovery can be resolved in the negotiation framework for the interoperability agreement between ELNOs that is set out in draft version 7.1 of the MORs.²⁹

PEXA suggests that the formula for apportionment of LSS fees may form part of IPART's further analysis.³⁰

Apportionment of the LSS fee is an issue that arises because of interoperability, but it is not related to the costs of performing the role of a Responsible ELNO. We therefore consider that it should not form part of interoperable transaction fees charged by a Responsible ELNO to a Participating ELNO.

Draft decision



5. Apportionment and recovery of the Lodgment Support Service fee should not occur through interoperable transaction fees charged by a Responsible ELNO to a Participating ELNO.

2.3 We have made a draft decision not to recommend a founding ELNO charge

PEXA argues that it must be able to recover the cost to create the existing eConveyancing system on which interoperability is built.³¹ PEXA states that these costs include the one-off costs of building the processes and relationships that transformed the market from paper to electronic conveyancing.

PEXA submits that interoperability jeopardises its ability to recover those costs and earn a return on that investment, and that interoperability creates a situation analogous to an infrastructure access regime, in which PEXA is the access provider to other ELNOs.

It suggests that there could be a common user charge that all ELNOs (except PEXA) would pay to PEXA as the founding ELNO for each transaction, whether or not that ELNO was the Responsible ELNO.³² PEXA proposes that this charge would be deducted from retail fees (ELNO Service Fees) and that it should not result in any increase in charges to subscribers.

Sympli disagrees with PEXA's proposed founding ELNO fee. It notes that PEXA has enjoyed a monopoly since its inception, benefiting greatly from being the first mover and from the mandating of eConveyancing in most jurisdictions prior to Sympli being in the market.³³ Sympli considers that if PEXA were also paid a premium for being the "founding ELNO", it would punish new entrant ELNOs and make competition unviable.³⁴

IPART does not consider that other ELNOs should pay PEXA a fee for "creating eConveyancing".

Draft decision



6. ELNOs should not be required to pay PEXA a common user charge for participating in an interoperable eConveyancing market.

The sections below set out our analysis that led to this draft decision.

PEXA says interoperability puts its ability to earn a return on its investment at risk

PEXA submits that, without interoperability, it would have more opportunity to recover the additional onetime costs it incurred compared to other market participants - for instance, by relying on its first mover advantage and the strength of its network with financial institutions and practitioners.³⁵ With interoperability, however, recovery of PEXA's invested costs is at greater risk 'by enabling new entrant ELNOs to piggy-back off the network and ecosystem created by PEXA'.³⁶

PEXA acknowledges that IPART's 2019 review of the pricing framework for eConveyancing services in NSW found that PEXA's 2019 prices allowed for a return on invested capital. However, PEXA submits that IPART did not consider whether PEXA would earn an appropriate return on capital with current ELNO Service Fees if the system is interoperable. In particular:

- PEXA's market share is likely to fall more quickly than IPART assumed because of the chosen model of interoperability.
- IPART predicted very strong transaction volumes that have now declined.
- IPART did not consider the implications of a vertically integrated ATI Global/Sympli.³⁷

We consider that subscriber prices (ELNO Service Fees) should again be reviewed to ascertain the impact of any changed market conditions, including any changes in efficient costs and transaction volumes. We discuss this further in section 4.1. However, some of the impacts that PEXA outlines in its submission relate to the eConveyancing market more generally, to the impact of competition rather than interoperability per se, and to a specific competitor. In our view, none of these issues, whatever their merit, should be addressed through interoperable transaction fees. That is because the role of an interoperable transaction fee is to recover only those costs which relate to an ELNO acting as a RELNO in an interoperable transaction.

PEXA considers that its role in the eConveyancing market is analogous to that of an access provider

PEXA submits that when new entrants make their systems interoperable with PEXA's network, they benefit from PEXA's:

- work to set the relevant IT standards
- example of how to build the IT platform
- creation of new business processes
- work to individually convince paper-based practitioners to change their business systems, learn how to use a new e-conveyancing system, and adopt a new way of working.³⁸

PEXA argues that these benefits result in materially lower fixed costs for new entrants,³⁹ and that when new entrants benefit from connection to this network, they should pay for PEXA's costs to create it. As such, PEXA considers that a fee to PEXA for this benefit should not be construed as a new entrant paying twice for fixed costs (for their own build and PEXA's).⁴⁰

PEXA argues that this is analogous to being an access provider to infrastructure. It considers, therefore, that pricing principles that are commonly adopted in statutory access regimes or network-based industries should be considered by IPART.

Sympli notes in its submission that "PEXA has enjoyed a monopoly since its inception, benefiting greatly from being the first mover and from the mandating of eConveyancing in most jurisdictions prior to Sympli being in market".⁴¹ Sympli also notes that:

there is a common misconception that the development of interoperability allows new entrant ELNOs to "piggy-back" off existing ELNO infrastructure. This is not the case... ELNOs are required to develop their own capability to meet eligibility requirements under the MOR. Pathways exist for new entrants to utilise existing ELNO infrastructure, however, this is separate to interoperability.⁴²

We have considered whether an interoperable transaction fee has the characteristics of an access fee and taken the view that it does not. Participation in an interoperable transaction is not the same as providing access to monopoly infrastructure. PEXA's argument is based on an analogy that it is providing access to its intangible roles as "industry reform facilitator and network enabler". However, we note that these roles also gave PEXA a significant first mover advantage and PEXA was also the beneficiary of mandates in several jurisdictions that allowed it to obtain a monopoly position as paper conveyancing was phased out.

PEXA also makes a case for its platform effectively facilitating a 2-sided market, where entry by another ELNO allows the new entrant to access PEXA's existing customers. PEXA says this:

...is analogous to other digital network-based industries, where common user charges enable the first mover to recover costs. For example, various digital platforms charge participants not only for the services they provide, but for access to the intangible value of the ecosystem they have created, and in which they continue to invest... Google's Play Store, Apple's App Store and the Microsoft Store, as digital storefronts for mobile apps, charge a 10-30% commission on sales of apps distributed through their respective stores. The charge recognises that these platforms have invested in the creation of a network that allows developers to not only optimise and distribute their apps, but to reach millions of users around the world.⁴³

As noted previously, an interoperable transaction is not the same as access to monopoly infrastructure, and each ELNO retains its own customers throughout an interoperable transaction. Any "access" benefits to the other ELNO are reciprocated to PEXA.

PEXA considers that a common user charge will benefit competition

PEXA also argues that Sympli and its related entities are likely to use vertical integration to increase their share of the eConveyancing market. If this occurs, PEXA submits that it will have to re-prioritise investments to compete. PEXA says this would risk expansion of the network, notably to smaller jurisdictions.

PEXA argues that a common user charge would ensure both ELNOs can operate profitably, particularly as PEXA has higher fixed costs than a new entrant who can benefit from technological improvements and efficiencies that PEXA has created.

It submits that:

A common user charge will result in a new entrant's costs increasing, however, this would be tied to their market share and can be set at a level that ensures their viability. It may also have the added benefit of giving a new entrant incentives to take share of both Responsible and Participating ELNO roles, as larger market shares would be required to recover a new entrant's fixed costs. This is consistent with the need to create financial incentives for new entrants to build back-end capabilities, rather than just relying on a vague, and largely unenforceable regulatory requirement.⁴⁴

PEXA also raises this issue in connection with the universal service obligation, which we discuss further in section 4.2.

Sympli disagrees with PEXA's proposed founding ELNO fee. Sympli considers that if PEXA were also paid a premium for being the "founding ELNO", it would punish new entrant ELNOs and make competition unviable.⁴⁵

We consider that a founding ELNO fee would constitute a barrier to entry and inhibit rather than encourage competition. Achieving effective competition in the market for eConveyancing services has been an explicit objective of Australian state and territory governments and ARNECC for many years. There are no guaranteed returns for any participant in a competitive market, and second and subsequent entrants will inevitably have a different experience (both in terms of advantages and disadvantages) in a developing market compared to first movers.

3 How we propose to set interoperable transaction fees

In Chapter 2 we set out our draft decisions, following consultation on Issues Paper 1, that a RELNO should be able to charge fees to PELNOs in an interoperable transaction, and that direct price control is the appropriate method to set those fees. In this second stage of the review we will develop draft recommendations to implement direct price control. We will consider:

- whether price control should be as a methodology or level of fees
- when fees should be charged
- which costs should be included in calculating those fees.

This chapter sets out our proposed approach to this second stage of the review.

We propose to recommend a maximum level of fees rather than a methodology. Our preliminary view is that there should be two types of interoperable transaction fees:

- A RELNO fee, payable by PELNOs to the RELNO in every interoperable transaction, set at a level to allow the RELNO to recover a share of the marginal costs of performing the RELNO role.
- A default RELNO surcharge, payable by the initially designated RELNO to the redesignated RELNO where the initially designated RELNO is unable to complete the transaction as RELNO. This fee represents the avoided cost of the infrastructure or facility that the initially designated RELNO does not have at the time of the transaction.

We consider that most other costs associated with interoperability should be recovered from ELNO service fees.

We propose to use a cost build-up approach to set prices for interoperable transaction fees.

The sections below set out our proposed approach, preliminary views, and matters on which we seek feedback in more detail.

3.1 We propose to recommend a level of interoperable transaction fees for 2023-24

As discussed in Chapter 2, our draft decision is to adopt direct price control as the form of regulation for interoperable transaction fees. To apply direct price control, we need to decide whether to prescribe a pricing methodology that ELNOs must use to set their own interoperable transaction fees or whether to prescribe the maximum fees that ELNOs can charge.

Our preliminary view is that we will prescribe maximum fees. The eConveyancing market has few participants, and only a single service (performing the role of RELNO) is being priced. As outlined below, we consider there should be a single standard price for that service and an additional surcharge in a specific circumstance. The need to provide certainty about interoperable transaction fees outweighs the need to provide flexibility to accommodate multiple different circumstances. The sections below set out our analysis in more detail.

3.1.1 A pricing methodology would be preferred where circumstances vary

To develop a pricing methodology, we would determine a formula for interoperable transaction fees and ELNOs would then set their own interoperable transaction fees based on the specified methodology.

This approach allows more flexibility to accommodate different circumstances. For example, IPART's developer charges determinations prescribe a net present value (NPV) methodology that water utilities must use to calculate their developer charges.⁴⁶ This enables the water utilities to establish new development servicing plans, which includes calculating location-based developer charges, as they are required.⁴⁷ The efficient costs of supplying water utility infrastructure vary by location, and there are multiple development areas which vary over time.

We have also used weighted average price caps for situations where a regulated business has multiple different services or different prices, such as electricity retailers or public transport with distance- and mode-based fares. A weighted average price cap allows a business flexibility over individual prices within an overall cap.

Sympli supports a pricing methodology approach, submitting that a pricing methodology would allow ELNOs to update interoperable transaction fees if underlying costs change.⁴⁸ Sympli submitted that setting a pricing methodology rewards investment in infrastructure and provides incentives for ELNOs to drive down costs.⁴⁹

However, we consider that, with only 2 firms in the market, and the prescribed nature of the service which is being priced, the benefits of a pricing methodology for interoperable transaction fees are minimal. A pricing methodology may necessitate greater regulatory involvement in monitoring compliance with the specified methodology.

3.1.2 A prescribed price is preferred if there is less variation in circumstances

Like a pricing methodology, prescribing a price also requires analysing efficient costs associated with interoperable transactions. However, instead of a formula, we would be setting a specific price (or prices) to apply from 2023-24.

This approach generally provides greater certainty for participants by setting specific and enforceable maximum prices, particularly where services are similar and generic, as for performing the role of RELNO.

The **Law Council of Australia** submits that a regulated price would be preferable in the short term for consistency and transparency and that a pricing methodology may be preferable in the long term.⁵⁰

Seek comment



1. Do you agree with prescribing prices rather than prescribing a pricing methodology for interoperable transaction fees? If not, what are the reasons for preferring a pricing methodology?

3.2 We consider there should be 2 types of interoperable transaction fees

Stakeholders had different views on when a PELNO should pay interoperable transaction fees.

PEXA submits that an interoperable transaction fee for performing the role of RELNO should be charged in every interoperable transaction.⁵¹

Sympli submits that PELNOs should not pay an interoperable transaction fee for every interoperable transaction because this would mean new entrant ELNOs pay twice for infrastructure, establishing additional barriers to entry.⁵² Sympli considers that:

- an interoperable transaction fee for performing the role of RELNO should only be charged when the party designated the RELNO by the business rules cannot perform this role.⁵³ This may be, for example, because it does not have back-end connections to all financial institutions in the transaction, or for a temporary system downtime. In this case, the RELNO role would be re-designated to the next ELNO in the business rule hierarchy.
- the fee charged by the default RELNO should recover the marginal costs the initially designated RELNO has avoided when they have been unable to perform the RELNO role as this approach aligns ELNO incentives by rewarding capital investment.⁵⁴ Once ELNOs have completed payment connections to all financial institutions, they would rarely, if ever, need to pay this fee.⁵⁵ It assumes that an ELNO is as likely to be the RELNO as it is to be a PELNO in any interoperable transaction it is involved in, so costs net out over time and there is no need for a fee to be paid.

The **Law Council of Australia** submits that:

"Each ELNO in an interoperable transaction will be required to be capable of performing the role of 'Responsible ELNO' if called upon. As such, apart from out-of-pocket transaction-specific costs, which should be charged to the participants in the transaction, the Responsible ELNO and each Participating ELNO would have much the same costs and the need for a fee would be negligible (...) [However] in the current setting where Sympli is building its capability and connections, it would not yet be able to operate as a Responsible ELNO in every instance. Where it utilises any of PEXA's infrastructure to complete a transaction some charge for that use might be justified."⁵⁶

In our view, an ELNO is not as likely to be the RELNO as it is to be a PELNO in any interoperable transaction, because:

- under the business rules, the designated RELNO is determined by the incoming mortgagee
- Sympli and any new entrant are likely to have fewer financial institution subscribers than PEXA, at least in the short term.

Where there are costs that are specific to performing the role of the RELNO, we consider that the RELNO should be able to recover a share of these costs from PELNOs through interoperable transaction fees.

Our preliminary view is that there should be 2 regulated interoperable transaction fees:

1. **RELNO fee** – paid by all PELNOs to the RELNO in every interoperable transaction. This fee would reflect a share of the marginal costs an ELNO incurs from fulfilling its role as the RELNO that are avoided by the PELNOs. It would be based on the marginal costs of performing the RELNO role only, as each ELNO has invested in its own infrastructure (which can be recovered from ELNO Service Fees).
2. **Default RELNO surcharge** - where an ELNO is not able to perform the designated (by business rules) RELNO role and the role is redesignated to another ELNO, we consider it would be reasonable for an additional fee to be charged which reflects a capital costs component. This capital costs component would represent the avoided cost of the infrastructure or facility that the initially designated RELNO does not have at the time of the transaction. This would ensure that ELNOs have an incentive to invest in their infrastructure to develop the capability to perform the RELNO role.

In both situations the PELNO/s would pay these fees to the RELNO, reflecting a share of each PELNO's avoided costs in an interoperable transaction.

Seek comment



2. Do you agree that a Responsible ELNO fee should apply to all interoperable transactions?



3. Do you agree that a default Responsible ELNO surcharge should apply when an ELNO cannot fulfil its role as the designated Responsible ELNO?

3.3 We will consider which costs should be recovered through the 2 types of interoperable transaction fees

We have considered the costs associated with interoperable transactions and the actions that each ELNO will undertake. Our preliminary view is that only some of these costs should be included in interoperable transaction fees.

Our preliminary view is that a share of the marginal costs of performing the RELNO role should be recovered via the RELNO fee and a share of avoided capital costs should be recovered via the default RELNO surcharge. This section looks at the components of these costs in more detail, drawing on feedback from stakeholders on the costs and risks incurred in an interoperable transaction, and which parties would incur these costs.

3.3.1 Stakeholders had differing views on the costs incurred during an interoperable transaction

In Issues Paper 1, we set out the categories of cost we understood that ELNOs incur and sought feedback on whether we had correctly identified the cost categories, which party incurs the costs, and whether they vary between jurisdictions.

Stakeholders have different views on what the costs of performing the RELNO role are likely to be.

PEXA submits that:

"As with other technology platform businesses, the marginal cost of any single additional transaction is low (but not zero). However, a step change increase in transaction volume can materially increase costs. Higher transaction volumes increase the load on support functions and technology. (...) Adding interoperability functionality is likely to increase these marginal costs further, because interoperability creates additional possibilities for issues to arise during a transaction".⁵⁷

Other stakeholders identify jurisdictional differences in process (such as no duty verification required in the ACT) and requirements (such as a vendor guarantee against fraud), some of which may affect a RELNO's marginal costs.⁵⁸

As discussed in Issues Paper 1, a RELNO is likely to have more responsibilities and incur more costs than PELNOs in an interoperable transaction. PEXA submitted that the RELNO sets up the workspace, liaises with stakeholders, and orchestrates and executes lodgment and financial settlement. It also manages post lodgment and settlement communications.⁵⁹

Table 3.1 outlines our understanding of the actions RELNOs and PELNOs will perform in an interoperable transaction, noting that these are under discussion and subject to change.^a The interoperability APIs are used to provide two-way updates between ELNOs when subscriber and system actions are performed.⁶⁰ We understand that most of the interactions between ELNOs will be automated by each ELNO using the interoperability data standard (NECIDS). However, there are some actions that will require manual intervention at least in the short-term.

Throughout a transaction ELNOs will be either the RELNO or a PELNO, according to a business rule hierarchy. However, it is expected that the RELNO and PELNO roles may change multiple times in a transaction, as documents and parties are added to the workspace.

The sections below explain how we consider these actions may create costs for ELNOs and our preliminary views on how these costs should be recovered.

^a The Interoperability Operational Committee (IOC) has been tasked with the co-creation of a common set of artefacts including data standards, APIs, technical architecture and associated documentation to facilitate the technical Interoperability of ELNOs in accordance with the agreed industry principles, requirements and standards.

Table 3.1 Actions performed by ELNOs in an interoperable transaction

Actions performed by RELNO	Actions performed by PELNO/s
<ul style="list-style-type: none"> • Manage exchange of transaction Objects such that all ELNOs receive changes. • Manage subscriber interactions for their subscribers. • Ensure the NECDS and SDV schema versions for a transaction are acceptable to the authorities in the jurisdiction and other participating ELNOs. • Perform all calls to Land Registries and Revenue Offices (authority calls), either as requested by a participant ELNO, and/or as required by its own business rules. • Distribute any responses from authorities in relation to authority calls. • Determine the appropriate NECDS Schema version for the lodgment case. • Prepare documents for viewing and signing on all ELNs. This will involve creating the XML in the relevant NECDS schema and rendering the document using the appropriate XSLT stylesheet. (For discussion and clarification). • Ensure duty is accounted for and – create the Duty line item in the Financial Settlement Schedule. • Perform any pre-locking integrity checks. • Lock the workspace. • Perform financial settlement. • Lodge documents with Land Registry. • Manage post-settlement communications with participant ELNOs, Banks and Land Registries. • Collect and remit Lodgment Fees to the Land Registry (For discussion and clarification). • Pay LSS fees and any fees associated with financial settlement (For discussion and clarification). • Ensure they (continue to) have the capability to conduct the conveyancing transaction and request another ELNO (determined by role hierarchy) to take over as Responsible ELNO if they cease to have the capability. • Manage "lodgment case level" errors. 	<ul style="list-style-type: none"> • Respond in a timely manner to all requests and/or notices sent by the Responsible ELNO. • Manage subscriber interactions for their subscribers. • Supporting digital signing of documents generated by the Responsible ELNO. • If they are now the ELNO for the responsible subscriber and have the capability to be the lodging ELNO and all other rules regarding changing the responsible ELNO have been met, initiate a request to become the responsible ELNO. • Allow owner/creator of a document to manage "document level" errors including considering whether to un-sign.

Note: These actions are under discussion and are subject to change.

Source: Email received from Interoperability Operational Committee.

3.3.2 Marginal operating costs should be recovered via the RELNO fee

Our preliminary view is that the marginal operating costs of performing the RELNO role will comprise 2 components:

Financial settlement costs

The RELNO will incur costs from performing financial settlement in a transaction via the Reserve Bank of Australia on behalf of all ELNOs. These costs may vary depending on which ELNO performs the RELNO role and what arrangements they have for financial settlement. For example, Sympli notes that costs for financial settlement are likely to substantially differ between incumbent and new entrant ELNOs, given economies of scale and efficiencies that PEXA has developed.⁶¹ We will need to consider how to estimate benchmark efficient costs of financial settlement.

Other operating costs

Other operating costs may include the costs of responding to queries, managing errors and post-settlement issues and providing hosting. While the RELNO may incur some costs associated with these activities, it is likely that PELNOs will also incur at least some of these costs, particularly since the RELNO and PELNO roles may change multiple times in a transaction. The net level of other operating costs attributable to performing the RELNO role is unclear. Table 3.2 describes other operating costs PEXA raised in its submission and our preliminary thinking on each cost item.

To determine how to include these costs in an interoperable transaction fee, we will consider stakeholder views and cost information provided by both PEXA and Sympli. We will also engage a consultant to provide expert advice on these costs.

Table 3.2 Operating costs that may be associated with the RELNO role

Cost category	Recovered through interoperable transaction fee?	Recovered through other charges?	Considerations
Respond to support queries (e.g. incident management, providing guidance)	Unclear	Possibly through ELNO Service Fees	All ELNOs will likely need to respond to support queries. Each ELNO will be responsible for responding to its own subscribers.
Manage lodgment case errors or document errors	Unclear	Possibly through ELNO Service Fees	All ELNOs will likely need to contribute to resolving errors.
Manage post-settlement issues (e.g. mistaken payments)	Unclear	Possibly through ELNO Service Fees	All ELNOs will likely contribute to managing post-settlement issues.
Provide hosting (e.g. server and bandwidth load)	Unclear	Possibly through ELNO Service Fees	It could be difficult to determine the materiality of this cost and how to attribute it to the role of the RELNO.

Source: PEXA [submission to IPART Issues Paper 1](#), August 2022, p 22.

Seek comment

4. How should we estimate the costs a Responsible ELNO incurs from completing financial settlement on behalf of Participating ELNOs?
5. Which other operating costs are associated with the Responsible ELNO role? How could we estimate these costs and accurately attribute them to the Responsible ELNO role?

3.3.3 A share of capital costs of lodgment and financial settlement infrastructure should be recovered via the default RELNO surcharge

As discussed above, an additional default RELNO surcharge should apply where the ELNO which was initially designated as the RELNO cannot perform the role. This surcharge compensates the default RELNO for its capital investment and provides an incentive for all ELNOs to invest in developing the capability required to perform the RELNO role. The default RELNO surcharge would reflect a portion of capital costs of investing in financial settlement and lodgment infrastructure.

For our 2019 review we engaged a cost consultant, AECOM, to estimate the capital costs that a benchmark efficient new entrant ELNO would incur in NSW from 2018-19 to 2022-23. AECOM estimated that a benchmark efficient ELNO would incur capital costs of around \$4 million to develop financial settlement and lodgment infrastructure,^b which included the following costs:

- the core ELNO service of financial settlement and lodgment. That is, the software development effort required (including activities such as project management, quality assurance and process design)
- IT hardware (e.g. PCs and local network equipment)
- building connections to around 10 financial institutions.

We will update this estimate to calculate a default RELNO surcharge for this review. Any estimates for capital costs should be based on benchmark efficient costs and not actual costs incurred by an ELNO.

Seek comment



6. What are your views on recovering a share of the capital costs of developing financial settlement and lodgment infrastructure via a default Responsible ELNO charge?

3.4 Most other costs associated with interoperability should be recovered through ELNO Service Fees

Interoperability may create additional costs for ELNOs at least in the short term, which may include higher:

- capital costs from developing the APIs required to enable two-way updates between ELNOs
- operating costs, such as additional staff costs to provide subscriber support while subscribers adjust to an interoperable eConveyancing market.

^b AECOM estimated that an ELNO would incur capital costs of around \$3.7 million (in \$2018-19) to provide lodgment and financial settlement infrastructure. After adjusting for inflation (using the RBA inflation calculator) this would be around \$4 million in \$2021-22. See, IPART, [Review of the pricing framework for electronic conveyancing services in NSW](#), November 2019, p 34.

However, we consider that these costs are likely to be incurred by all ELNOs, as all ELNOs will need to invest in establishing and maintaining interoperability. Therefore, it is more appropriate for these costs to be recovered through ELNO Service Fees. While interoperability may increase costs for ELNOs in the short term, there may be other offsetting cost reductions for ELNOs due to other factors. As discussed in Chapter 4, ELNO Service Fees should be reviewed to ensure that they remain cost-reflective.

There are several other cost categories raised in Issues Paper 1 and in stakeholder submissions that we do not consider should be recovered through interoperable transaction fees. Table 3.3 summarises these costs and our preliminary views on whether there is merit in recovering these costs through other charges.

We are seeking your views on these costs and whether you agree with our preliminary views on which costs should be included in interoperable transaction fees.

Table 3.3 IPART's preliminary views on other cost categories

Cost category	Recovered through interoperable transaction fee?	Recovered through other charges?	Reason
Costs of establishing and maintaining interoperability (PEXA)	No	Yes, through ELNO Service Fees	All ELNOs will need to invest in establishing and maintaining interoperability
Costs of providing a Universal Service (PEXA)	No	Unclear	There are several options for addressing this issue, which should be explored further
Cost of the founding ELNO creating the existing system (PEXA)	No	No	PEXA has had first mover advantages. Private businesses in a competitive market are not guaranteed a return on their investment.
Interoperability insurance	No	Yes, through ELNO Service Fees	This product has not yet been developed. If this product is developed, it is likely that all ELNOs will need to purchase interoperability insurance.
Lodgment Gap Insurance (Law Society NSW)	No	Yes, through ELNO Service Fees	Lodgment gap insurance protects only the purchaser in an eConveyancing transaction. Both ELNOs will likely treat it as part of their broader cost base and recover it from all subscribers. We do not consider it a RELNO-related marginal cost.
LSS fees (Law Council of Australia, Law Society NSW, PEXA)	No	Recovery can be negotiated through ELNO interoperability agreements	We understand that recovery can be resolved in the negotiation framework for the interoperability agreement between ELNOs.
Lodgment fees	No	Paid by parties to the transaction	We understand that lodgment fees are typically paid using settlement funds and so these costs are not incurred by ELNOs

Note: Both the Law Council of Australia, Law Society NSW and PEXA suggest that sharing of LSS fees may be implemented through ELNO interoperability agreements.

Source: PEXA [submission to IPART Issues Paper 1](#), August 2022, pp 21-39; Law Society of NSW [submission to IPART Issues Paper 1](#), August 2022, pp 2-3; Law Council of Australia [submission to IPART Issues Paper 1](#), August 2022, p 3.

Seek comment



7. Do you agree with our approach to categorising the costs of interoperability that should be recovered through other charges and not through interoperable transaction fees?

3.5 We propose to use a cost build-up approach to set prices for interoperable transaction fees

Once we decide whether a regulated methodology or level of price should apply to setting interoperable transaction fees, the terms of reference require us to make recommendations on what pricing method or price level should be set for 2023-24 and a method for reviewing and adjusting the price in the future.

Setting regulated prices for interoperable transaction fees requires establishing an efficient cost base. We propose to use a cost build-up approach to estimate total efficient costs.

In many industries where we regulate prices, we use a 'building block' method: we estimate how much revenue the business needs to generate from prices over the determination period to recover the efficient costs of providing the regulated services to the required standard, and divide the revenue requirement by the forecast demand for the services. We typically use this method for capital intensive industries such as water or transport.

In the 2019 eConveyancing review, we used the building block approach to calculate indicative maximum prices for ELNO services. This involved estimating the initial asset base and efficient operating and capital expenditure for a benchmark efficient ELNO, and using a range of transaction volume scenarios.

In this review, we are only considering interoperable transaction fees for performing the RELNO role. Therefore, we will focus only on the costs associated with the RELNO role and so we propose to use a cost build-up approach instead.

The cost build-up method involves the following:

- estimating the efficient relevant operating and capital costs
- allowing for an efficient margin
- estimating transaction volumes
- applying the margin to the relevant costs to calculate prices
- deciding on a regulatory period
- setting arrangements for adjusting prices from year to year.

The following sections set out these steps in more detail.

3.5.1 We will estimate efficient relevant operating and capital costs for 4 years from 2023-24 to 2026-27

While the terms of reference specifically ask us to set a price (or develop a pricing methodology) for 2023-24, we propose to review and estimate efficient costs for 4 years from 2023-24 to 2026-27. While a longer period may increase risks of forecasting error, it would help us form a longer-term view of costs associated with interoperability, which is at an early stage of development. It would also help us develop a method for reviewing and adjusting the price beyond 2023-24 as required by the terms of reference.

In our last review, we estimated the costs that a benchmark efficient ELNO would incur in providing eConveyancing services for 4 years from 2020-21 to 2023-24.

RELNO fee to be paid by all PELNOs to the RELNO in every interoperable transaction

As discussed in Section 3.3, our preliminary view is that only the marginal operating costs of performing the RELNO role should be included in the RELNO fee that applies to all transactions. Specifically, we proposed that the marginal operating costs of performing the RELNO role would consist of a share of financial settlement costs and possibly other operating costs such as those associated with providing client support, managing lodgment case errors or document errors, managing post-settlement issues, or providing hosting.

To estimate efficient financial settlement costs and any other marginal operating costs associated with the RELNO fee:

- We will seek information from PEXA and Sympli on their historical and forecast financial settlement costs and operating costs including those associated with the RELNO role in an interoperable transaction.
- We will engage an external consultant to assess the efficiency of cost information provided by PEXA and Sympli, estimate the efficient financial settlement cost and any additional operating costs associated with interoperable transactions for the period from 2023-24 to 2026-27 and provide advice on an appropriate share of the cost between the RELNO and PELNOs.

Default RELNO surcharge where an ELNO is not able to perform the designated RELNO role

Where an ELNO is not able to perform the designated RELNO role, we propose that an additional interoperable transaction fee would apply to reflect the avoided cost of the infrastructure or facility that the initially designated RELNO lacks at the time of the transaction.

We previously estimated that a benchmark efficient ELNO would incur capital costs of around \$4 million to develop financial settlement and lodgment infrastructure.^{c62} This was based on the actual and forecast costs provided by PEXA and Sympli and our consultant's analysis for the period from 2018-19 to 2022-23.

For this review we will update that estimate:

- We will seek updated information on actual and forecast capital costs associated with financial settlement and lodgment.
- We will engage an external consultant to assess the efficiency of cost information provided by PEXA and Sympli, estimate the efficient capital costs for the period from 2023-24 to 2026-27 and provide advice on an appropriate share of the cost between the default RELNO and PELNO.

Seek comment



8. Do you agree with reviewing efficient operating and capital costs associated with interoperability for 4 years from 2023-24 to 2026-27? Or do you think we should review efficient costs for a shorter or longer period than this?



9. Do you agree with our proposed approach for estimating efficient financial settlement costs, other efficient marginal operating costs and efficient capital costs associated with developing financial settlement and lodgment infrastructure? Is there any other information we should consider in estimating these costs?

^c AECOM estimated that an ELNO would incur capital costs of around \$3.7 million (in \$2018-19) to provide lodgment and financial settlement infrastructure. After adjusting for inflation this would be around \$4 million in \$2021-22.

3.5.2 We will estimate a profit margin using benchmarking methodology

Under our cost build-up approach, we will identify a per unit cost for efficient operating, and capital costs. We will then add a profit margin to these costs which adds the return on assets and tax allowance components of the total efficient cost.

We propose to use IPART's standard WACC methodology to calculate an appropriate profit margin for performing the RELNO role. In the 2019 review, we determined the WACC for an efficient established ELNO based on an equity beta of one and gearing ratio of 60%.⁶³

The equity beta and gearing ratio was based on our proxy company analysis of mortgage banks. Conveyancing activity is the core business of an ELNO, and the number of transactions in the real estate market has a direct impact on the revenues of an ELNO. We found that based on ORG's statistics regarding conveyancing transactions, transfers, mortgages and discharge of mortgages involving financial settlement would have accounted for around 70% to 80% of an ELNO's total transactions. Since ELNOs' revenues were likely to be driven by the number of property transactions, we considered mortgage banks, whose returns would be highly correlated with the number of property transactions, would best match the systematic risk profile of a benchmark ELNO.

Our preliminary view is that mortgage banks are still the best proxy companies to estimate the equity beta and gearing ratio for ELNOs. Hence, we propose to update the equity beta and gearing ratio based on the latest information available for mortgage banks, and apply IPART's WACC methodology to estimate the margin for interoperable transactions.

We note that since our 2019 eConveyancing review, we have developed a new method for estimating equity beta for WACC, where we decided that we would:

- Use the broadest possible selection of proxy companies to estimate equity beta, but exclude thinly traded stocks.
- Adopt a proxy selection process that includes:
 - publishing our criteria for proxy selection, and our list of comparator companies that meet our criteria at the start of the relevant review
 - giving stakeholders the opportunity to propose additional comparable industries that meet our criteria.
- Determine the appropriate equity beta having regard to equity betas calculated using the Ordinary Least Squares (OLS) method with the Vasicek adjustment.⁶⁴

We will follow the new method to update the equity beta and gearing ratio for mortgage banks.

Seek comment



10. Do you agree with our proposed approach for estimating a margin? Specifically, do you agree with using mortgage banks as proxy companies to estimate the equity beta and gearing ratio for ELNOs?

3.5.3 We will estimate eConveyancing transaction volumes

For our 2019 eConveyancing review, we obtained data from NSW Land Registry Services about past conveyancing activity (both paper and electronic) in NSW. To forecast future eConveyancing transaction volumes, we will obtain data from land registry offices, and seek information from ELNOs.



11. What are your views on our proposed approach to forecasting transaction volumes?

3.5.4 We will calculate prices using efficient cost estimates and the efficient margin

The RELNO fee would be calculated as the sum of a share of efficient financial settlement costs and any other marginal operating costs associated with performing the RELNO role. We will then add an efficient profit margin (discussed in the previous section) to arrive at the total efficient cost from which we will derive a RELNO fee per transaction.

The default RELNO surcharge would be calculated as a share of the efficient capital cost associated with developing financial settlement and lodgment infrastructure. We will then add an efficient profit margin to arrive at the total efficient cost from which we will derive a default RELNO surcharge per transaction. We will also need to decide on how these capital costs should be apportioned across ELNOs. For example, a default RELNO surcharge could be calculated by dividing the capital costs by the total number of expected eConveyancing transactions over the life of the asset. We are interested in your views on a method for sharing these capital costs fairly between the RELNO and PELNOs in a transaction, that reflects the appropriate incentives for all ELNOs to develop and maintain their infrastructure.



12. When setting the default Responsible ELNO surcharge, how should the capital costs of developing financial settlement and lodgment infrastructure be shared across ELNOs in a transaction?

3.5.5 We propose to recommend charges for 2 years

Once we decide on the form of regulation, we need to establish the period for which we will be recommending charges. We propose to recommend charges for 2 years, between 2023-24 and 2024-25.

There are advantages and disadvantages of recommending charges for a longer period. For example, it would provide greater stability and predictability in fees and charges. However, it would also increase risk associated with inaccuracies in the forecast data we used to recommend these charges, and the risk that changes in the industry, if any, will impact the effectiveness of our recommendations.

In our review of ELNO Service Fees in 2019, we recommended a regulatory period of 2 years on the basis that the market was still in the early stages of development. Given that interoperability has not commenced yet, the market for interoperable transactions is at an even earlier stage of development. In our view, recommending charges for 2 years is appropriate to manage the risks of change.

Seek comment



13. Do you agree with recommending charges for 2 years? If not, what time period do you prefer and why?

3.5.6 We will recommend arrangements for adjusting or reviewing interoperable transaction fees

We have considered 2 forms of annual adjustment for interoperable transaction fees during the 2-year regulatory period:

- **Recommending charges for each year of the regulatory period**
- **Recommending charges for the initial year and indexing for the second** – That is, recommending charges for the individual services for the first year, and updating these charges by the change in an index (such as the Consumer Price Index (CPI) or an industry-specific index) in the year thereafter.

At this stage, we do not consider it is necessary to recommend charges for each year. Instead, we propose to recommend charges for the first year and index them for the second. This is in line with the current pricing regulatory framework for ELNO Service Fees.

Using an indexation approach implies an expectation that the costs of performing the RELNO role are likely to vary in line with the proposed index.



14. Do you agree with indexing by CPI for the second year of the regulatory period? If not, what approach do you prefer and why?

3.6 Implementation, compliance and enforcement for interoperable transaction fees

The terms of reference require us to investigate and make recommendations on any amendments to the MORs that are required to support our proposed interoperability pricing arrangements.

At this stage of the review, we have made a number of draft decisions that would need to be reflected in amendments to the MORs, including:

- The costs of establishing and maintaining interoperability should be recovered from an ELNO's subscribers through ELNO Service Fees (see Draft Decision 1 at section 2.2).

This draft decision would mean that the regulated method or level of price to be applied in the MORs for setting fees charged by a RELNO to PELNOs for participation in an interoperable transaction would not include the costs of establishing and maintaining interoperability.

Consideration could also be given to any necessary amendments to the definition of "interoperability service fees" in the current Draft Version 7.1 of the MORs which refers to the costs of "establishing and maintaining interoperability".⁶⁵

- Subscribers who participate in an interoperable transaction should not pay more than subscribers in a single ELNO transaction (see Draft Decision 3 at section 2.2).

That is, we do not consider that the MORs should provide for any pass through to subscribers of the fees that a RELNO will be able to charge PELNOs for participation in an interoperable transaction.

In Stage 2 of the review, we will make further recommendations about:

- when interoperable transaction fees should be charged
- the methodology for determining interoperable transaction fees or the level of prices
- arrangements for adjusting or reviewing interoperable transaction fees.

Each of these matters would be implemented through amendments to the MORs. Compliance with and enforcement of these requirements would therefore be subject to the regime that is being established by ARNECC.

Seek comment



15. Have we identified the relevant matters that should be implemented through amendments to the Model Operating Requirements?

On a practical level, ELNOs will need to establish arrangements for payment of interoperable transaction fees to each other, including for matters such as frequency and method of payment. Our preliminary view is that ELNOs should negotiate the payment arrangements for interoperable transaction fees between themselves as part of the interoperability service agreement.

Consultation Draft Version 7.1 of the MORs provides that an Interoperability Agreement must include terms that deal with the Interoperability Agreement Matters, as outlined in Schedule 8 of that instrument.⁶⁶ We suggest that it may be appropriate for the Interoperability Agreement Matters to include the practical arrangements for payment of interoperable transaction fees.

Seek comment



16. Do you think it is appropriate for the practical arrangements between ELNOs for payment of interoperable transaction fees to be negotiated through Interoperability Agreements?

4 Pricing of ELNO services and market design

Through stakeholder feedback and our own research and analysis, we have identified broader issues with pricing of ELNO services and design of the eConveyancing market. This chapter outlines these issues. It also explains our view that, while they are important issues that involve categories of cost that an ELNO should be able to recover, these costs should not be recovered through interoperable transaction fees.

4.1 ELNO Service Fees should be reviewed and updated

Even without competition or interoperability, ELNO Service Fees should be regularly reviewed. In 2019, we recommended a review of these fees within 2 years. Pricing regulators undertake periodic pricing reviews to take account of changing operating conditions and costs. In more mature, stable industries, with minimal changes in operating conditions, a pricing period is usually no longer than 5 years. However, more frequent review is required in industries undergoing rapid change.

We know there have been changes to the operating conditions and costs of ELNOs since ELNO Service Fees were first regulated, including additional costs associated with establishing and maintaining interoperability.

In Issues Paper 1, we observed that implementing interoperability may increase overall costs for ELNOs in the short term, implying that ELNO Service Fees may need to increase.⁶⁷ However, the impact of implementing interoperability on ELNO Service Fees is uncertain, as other inputs to the price calculation may have changed. For example, innovation and efficiency may have lowered the costs of eConveyancing.

Further, interoperability has exposed (but not caused) the cross-subsidies in ELNO Service Fees between different classes of subscriber and/or transaction type that mean these fees are not individually cost-reflective.

A review and update of ELNO Service Fees is needed to ensure these fees allow ELNOs to recover their efficient costs within current operating conditions. While the MORs provide a mechanism for ELNOs to individually propose changes to their pricing schedules to jurisdictional Registrars,⁶⁸ we consider that it would be better for ARNECC to review ELNO Service Fees more generally.

ARNECC should also consider a formal review mechanism for ELNO Service Fees to allow it to assess the effectiveness of competition in the eConveyancing market and the need for ongoing pricing regulation. As stakeholders have noted, competition from interoperability in eConveyancing services may lead to further innovation from ELNOs and efficiencies that result in lower costs and improved services for subscribers.⁶⁹ A formal review mechanism would allow ARNECC to assess the impact of competition on ELNO pricing.

4.1.1 Regulated prices should be reviewed regularly

Even in mature, stable industries without any obvious changes in operating conditions, pricing regulators do not generally set prices for a period that is any longer than 5 years. This is to ensure that any changes to inputs to a pricing calculation – for example, costs of production, demand for the product or service, the cost of debt and equity funding for any capital inputs – can be reflected in prices. Often, regulators will permit annual adjustments to allow for inflation, or may allow for specific “pass-through” costs to simply be added to existing prices during the pricing period. Both of these adjustments are allowed for in the current pricing regulatory framework for ELNO Service Fees, which has been set for 4 years, from 1 July 2019 to 30 June 2023.⁷⁰

4.1.2 Conditions have changed since ELNO Service Fees were first set

Since February 2019, the MORs have allowed PEXA and Sympli to raise the prices outlined in their pricing schedules once a year on 1 July, up to the year-on-year CPI growth to the previous March quarter.⁷¹ This price regulation is based on the price schedule each ELNO had at the time of coming into the eConveyancing market, and not on the efficient costs of a benchmark ELNO.

PEXA developed its initial pricing schedule at a time when paper conveyancing was still the dominant conveyancing mode, and therefore it set its prices by comparison to the market at that time. Sympli set its prices at a discount to PEXA's prices.⁷²

In 2019, the NSW Government asked IPART to undertake a review of eConveyancing pricing.⁷³ We developed a pricing model to assess whether prices being charged by ELNOs were reasonable, based on efficient costs. We engaged a cost consultant, AECOM, to estimate the capital and operating costs that a benchmark efficient new entrant ELNO would incur in NSW from 2018-19 to 2022-23. At the time, interoperability had been foreshadowed but a model had not been chosen.

We concluded that PEXA and Sympli's ELNO Services Fees were reasonable and sufficient to cover the costs identified by AECOM. However, we did not assess whether each transaction price was individually cost-reflective. We also recommended a fresh review after 2 years to take account of market development and any changes to costs.

We consider that ELNO Service Fees should be reviewed and updated for the following reasons:

- Some of the inputs we used to assess ELNO's prices in 2019 have changed. For example, we know that:
 - transaction volumes have proven to be higher than forecast in 2019, suggesting lower costs per transaction than we allowed for
 - the Weighted Average Cost of Capital (WACC) has changed.

There may also have been other changes to pricing inputs that should be assessed.

- ELNOs have incurred, and will continue to incur, costs in establishing and maintaining interoperability that they should be able to recover from subscribers (see section 4.1.3).
- Individual transaction prices are capped by ARNECC's price regulation and they may not be individually cost-reflective.

- ELNO Service Fees for different classes of subscriber may involve cross-subsidy but they cannot be rebalanced because individual fees are capped. For example, in a typical 4-party transaction, involving a vendor, purchaser and financial institutions for both parties, under PEXA's current pricing schedule:⁷⁴
 - subscribers for the vendor and purchaser would each pay \$123.97
 - the incoming mortgagee would pay \$62.04
 - the outgoing mortgagee would pay \$45.76.

These prices are unlikely to represent an ELNO's costs for each subscriber in an interoperable transaction.

- ARNECC's price regulation is based on the price schedules each ELNO had at the time of coming into the market, and not on the efficient costs of a benchmark ELNO.

Stakeholders have acknowledged some of these issues. For example, Sympli submits that:⁷⁵

...the MOR Guidance Notes set out that ELNO pricing should be cost reflective, and that cross-subsidies should be minimised and would need to be justified as being in the public interest. ...this may mean ELNOs should take the opportunity of shifting market structures and interoperability to review their pricing and ensure it remains appropriate in the present market environment. Competition in eConveyancing presents an opportunity not only for innovation in service and functionality, but also on pricing. ELNOs should ensure that pricing is competitive and cost-reflective, in accordance with their obligations under the MOR.

4.1.3 Costs of establishing and maintaining interoperability

In Chapter 2, we outlined our draft decision that the costs of establishing and maintaining interoperability should be recovered from an ELNO's subscribers through ELNO Service Fees.

Current ELNO Service Fees were set before the costs of establishing and maintaining interoperability were incurred. These costs will include additional capital and operating expenditure for development and maintenance of the infrastructure and systems to enable an ELNO to connect to other ELNOs. Other operating expenses, such as customer support, could increase with the introduction of interoperability. However, the costs and number of staff required to maintain IT assets used for lodgment and settlement may not be affected by interoperability.

PEXA submits that the task of establishing and maintaining interoperability has been more complex and involved more significant financial investment than anticipated at the time of IPART's 2019 review.

It notes that, at this stage, the anticipated interoperability build costs involve only the technical build required for interoperability. However, there may be significant additional costs to accommodate changes to the existing governance, change and release management, contractual, regulatory, legal, risk and liability allocation and insurance framework. There will also be significant training and education costs for all industry participants.⁷⁶

PEXA considers that:

- there is an inherent uncertainty about the costs of establishing and maintaining interoperability - there may be costs to establish and maintain interoperability that are currently unknown
- future reviews that consider pricing for eConveyancing services will likely need to consider the scope of costs involved with establishing and maintaining interoperability.⁷⁷

It submits that:

...these additional costs imposed by government regulation should be reflected by an appropriate increase in overall subscriber fees in the short-term.⁷⁸

Other subscribers, including Sympli, the Law Council of Australia and Tasmania's Land Titles Office, agree that the costs of establishing and maintaining interoperability should be recovered from all subscribers.⁷⁹ Sympli submits that this should occur through ELNO Service Fees.

4.2 ARNECC should consider the cost of providing universal eConveyancing services

ELNOs are required by the MORs to provide complete coverage of all lodgment instruments in all jurisdictions to ensure eConveyancing is accessible to all Australians. This is a type of universal service obligation (USO). There is currently no mechanism to enforce how and when ELNOs provide full coverage and no requirement for ELNOs to provide comprehensive financial settlement functionality.

After more than 10 years, PEXA does not have full coverage of lodgment instruments in jurisdictions with eConveyancing, and there are 2 jurisdictions (Northern Territory and Tasmania) with no eConveyancing yet.

PEXA and Sympli currently have nationally consistent pricing for eConveyancing transactions. These prices provide cross-subsidies that ensure that subscribers in less populous jurisdictions do not pay higher prices than subscribers in more populous jurisdictions. Otherwise, subscribers in less populous jurisdictions could potentially be paying much higher prices as fixed costs are recovered from fewer customers.

PEXA explains that "the rationale for this cross-subsidy is that all entities in conveyancing benefit if the number of [paper] transactions is minimised." PEXA adds that "the cross-subsidy may also reflect the preference of ARNECC, as an intergovernmental body made up of States and Territories, for fiscal equalisation principles that so far as possible deliver an equivalent level of government services to residents of different states".⁸⁰

PEXA further adds:⁸¹

Expanding into new jurisdictions is a largely fixed cost, irrespective of the size of the jurisdiction. It is also a lengthy and costly exercise, taking years, significant financial investment, and organisational focus. Expanding coverage of transaction types has similar dynamics. 85% of transactions occur through one of five instruments, and 95% of transactions occur through one of seven. The remaining 5% of transactions involve 200-300 instruments. ...the likely e-conveyancing revenue is likely to be much lower in jurisdictions that have not yet become part of the e-conveyancing network, and consequently building e-conveyancing capability for them is likely to be less economically attractive than in larger jurisdictions.

PEXA notes that it is likely that new ELNOs will not reach PEXA's level of coverage for many years, meaning they will have substantially different fixed costs. PEXA argues that IPART should consider these fixed costs in setting interoperable transaction fees. Failing to do so may result in new entrants being incentivised to cherry pick the highest volume transactions in the largest jurisdictions, while potentially offering prices that do not include the fixed costs of building back-end settlement and lodgment functionality for other transactions.

PEXA submits that:⁸²

This would likely to lead to ELNOs investing less in creating and maintaining small-volume transaction types, so that the conveyancing industry (and therefore the public) misses out on the potential savings from using an electronic platform for these transactions

Sympli disagrees with this position. It argues that there is nothing specific to PEXA that requires it to provide a universal level of service. The requirement to develop a level of infrastructure and capability to support eConveyancing transactions in each jurisdiction applies to all ELNOs. It notes that this contrasts with the concept of a USO in the telecommunications industry, where Telstra is specifically required, to the exclusion of other telecommunications operators, to provide a universal level of service nationally, with an acknowledgement that this is below cost.⁸³

Sympli notes that there are several enforcement regimes being contemplated at State and ARNECC levels to ensure ELNOs comply with MORs.⁸⁴ It also notes that while there is no regulatory mandate to establish payment connections with all financial institutions, there are market incentives to do so:

Payment connections with financial institutions are critical for ELNOs to ensure that they are able to participate in all transactions, both interoperable and single-ELN. Without these payment connections, ELNOs are unable to offer a comparable and compelling ELN offering. This incentive drives ELNOs to complete payment connections...

Sympli advises that it has completed payment connections to the 4 major banks, with further connections to follow.⁸⁵

The Law Council of Australia does not comment specifically on the USO; however, like Sympli, it notes that every ELNO is required to provide the infrastructure and facilities to perform the RELNO role.⁸⁶

PEXA has proposed some options for addressing the costs associated with the USO:⁸⁷

- Changing subscriber fees to be more cost-reflective (which potentially implies large price increases for small jurisdictions or low volume transactions).
- A specific USO payment to one or more ELNOs in return for building/maintaining functionality that is not otherwise economic.
- Inter-ELNO fees that allow recovery of some or all the fixed costs of building the functionality.

PEXA requested that IPART be clear as to whether the costs associated with a USO are beyond the scope of this review.

We agree that the USO combined with national pricing sets up incentives for ELNOs to delay full roll-out in order to cherry-pick the most profitable jurisdictions and transactions. Imposing and enforcing a USO on all ELNOs may not be the most economically optimal approach to development of the eConveyancing market. This is a market design issue that needs to be resolved but it goes well beyond interoperability pricing.

We consider that it would not be appropriate to recover costs associated with a USO through an interoperable transaction fee charged by a RELNO to a PELNO, as USO costs are driven by market design and not by the model of competition (interoperability) chosen.

Appendices



TERMS OF REFERENCE

Interoperability pricing for Electronic Lodgment Network Operators

I, Victor Dominello, Minister for Digital, Minister for Customer Service, under section 12A of the *Independent Pricing and Regulatory Tribunal Act 1992* (the Act), request the Independent Pricing and Regulatory Tribunal (Tribunal) to investigate and report on a pricing regulatory framework for interoperable transactions between Electronic Lodgment Network Operators (ELNOs) in accordance with this Terms of Reference.

Context

Electronic conveyancing is a system which provides for the lodgment of electronic instruments with Land Registries using an Electronic Lodgment Network (ELN). Registrars approve entities to operate ELNs and they are known as ELNOs. The two current ELNOs also facilitate the associated financial settlement of conveyancing transactions.

Today, all parties to a conveyancing transaction must subscribe to the same ELN to complete the transaction. This is because ELNs are not yet interoperable: they cannot exchange information, or 'talk' to each other, to complete a transaction. With more than one ELNO now operating, interoperability aims to permit subscribers (conveyancers, lawyers and financial institutions) to use the ELN(s) they choose, while other parties may use a different ELN.

All states and territories support the principle of requiring interoperability between ELNs in the Electronic Conveyancing National Law (ECNL).

To support implementation of interoperability, with the approval of all States and Territories, the NSW Parliament enacted proposed changes to the national law on 6 June 2022 (to apply in all States and Territories).

The Model Operating Requirements (MORs) are being updated to include provisions on interoperability. In particular, the interoperability regime proposes the role of Responsible ELNO, which will interact with Land Registries and Revenue Offices, and perform the transaction Settlement and Lodgement. Other ELNOs hosting subscribers in the transaction are designated as Participating ELNOs. More information is available here:

<https://www.arnecc.gov.au/wp-content/uploads/2021/08/interoperability-model-overview.pdf>

It is proposed that the MORs include provisions on Interoperability Service Fees, being fees charged by an ELNO to another ELNO or to a Subscriber in relation to: (a) establishing and maintaining Interoperability with the other ELNO; and (b) carrying out the functions of the Responsible ELNO.

The task

The Tribunal should investigate and make recommendations on:

- 1) Whether fees should be charged by the Responsible ELNO to Participating ELNOs for participation in an interoperable transaction, and whether and how any such fees should be passed on to subscribers.

- 2) Whether:
 - a) a negotiate-arbitrate model should apply to setting any such ELNO fees, and if so, the pricing principles that should apply under such model; or
 - b) a regulated method or level of price should apply to setting any such ELNO fees, and if so, what that method or level should be for 2023-24 and a method for reviewing and adjusting the price in the future.
- 3) Any amendments to the MORs required to support the most appropriate way to apply the principles or formula, as applicable.

In investigating and making recommendations regarding the fees, the Tribunal should consider:

- a) Supporting and promoting competition through ELNO interoperability pricing
- b) Promoting ongoing investment by ELNOs
- c) Costs (including operating and relevant capital costs) and risks incurred by different participants in an interoperable transaction and who should bear these costs
- d) The current and evolving structure of the interoperable transaction market, with additional ELNOs potentially entering the market over the next 1-5 years
- e) Avoiding unnecessary regulatory or administrative burdens on ELNOs or other participants in an interoperable transaction
- f) Any other matter the Tribunal considers relevant.

Process and timeframe

The Tribunal will provide progress briefings to the Australian Registrars' National Electronic Conveyancing Council (ARNECC) at key timetable milestones, as well as upon request by ARNECC.

The Tribunal will also consult with the public, including the key stakeholders listed below, in undertaking its review, including through releasing a draft report, and provide a final report to the Minister by 30 April 2023.

The Tribunal will consult with these key stakeholders:

- ▣ Economic regulators from other Australian jurisdictions
- ▣ Treasuries from other Australian jurisdictions
- ▣ ARNECC nominees/Registrars
- ▣ ELNOs
- ▣ ELNO subscriber representatives
- ▣ Australian Competition and Consumer Commission

The final report will be made publicly available on the Tribunal's website.

B Glossary

Term	Meaning
API	Application Programming Interface - ELNOs interact with land registries, revenue offices, financial institutions and the Reserve Bank of Australia through secure APIs. The backbone of interoperability is a set of purpose-built APIs, governed by a data standard which will determine how ELNOs exchange data to complete interoperable transactions.
ARNECC	Australian Registrars' National Electronic Conveyancing Council – formed in 2011 under the Intergovernmental Agreement for an Electronic Conveyancing National Law (ECNL) to coordinate a national approach among States and Territories to regulation of an electronic environment for completing conveyancing transactions.
Default RELNO	The ELNO that performs the role of Responsible ELNO following redesignation of this role during a transaction, arising from the determination of the originally designated RELNO that it does not have the RELNO capability for that transaction.
ECNL	Electronic Conveyancing National Law
ELNO Service Fees	Fees charged by the ELNO to a Subscriber for access to, and use of, the ELN. Also known as subscriber prices or transaction service fees.
ELN	Electronic Lodgment Network, an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purposes of the land titles legislation.
ELNO	Electronic Lodgement Network Operator, the party approved to provide and operate an ELN. There are 2 ELNOs approved across most Australian jurisdictions - PEXA and Sympli.
Interoperable Transaction Fees	Fees charged by an ELNO to another ELNO for carrying out the functions of the Responsible ELNO. Consultation Draft 7.1 of the MORs uses the term "interoperability service fees" to describe this and other categories of fees that can be charged for interoperability.
MORs	Model Operating Requirements – the requirements relating to the operation of an ELNO and the provision and operation, by an ELNO, of an ELN. These are the requirements on which the Operating Requirements in each jurisdiction are based.
MPR	Model Participation Rules – the rules, relating to the use of an ELN, with which subscribers (participants in the system such as lawyers) must comply. These are the rules on which the Participation Rules in each jurisdiction are based. ARNECC publishes Guidance Notes on the Operating Requirements and Guidance Notes on the Participation Rules to explain what is expected in complying with the requirements and rules in each jurisdiction.
NECDS	National Electronic Conveyancing Data Standard – ELNOs are required to use the NECDS to send data to or receive data from Land Registries
NECDIS	National Electronic Conveyancing Interoperability Data Standard
PELNO	Participating ELNO - means an ELNO involved in an Interoperable Electronic Workspace that is not the Responsible ELNO.
RELNO	Responsible ELNO - means the ELNO involved in an Interoperable Electronic Workspace that is responsible for Lodgment of the Interoperable Lodgment Case and completion of any Associated Financial Transaction.
Subscriber	A person or entity authorised to conduct electronic conveyancing transactions using the ELNO on behalf of a client, such as lawyers or conveyancers, or on their own behalf, such as financial institutions and government agencies.

- ¹ IPART, [Interoperability pricing for ELNOs Issues Paper 1](#), July 2022, p 17.
- ² IPART, [Review of the pricing framework for electronic conveyancing services in NSW](#), Final Report, November 2019.
- ³ Law Council of Australia submission to IPART Issues Paper 1, p 4; Law Society of NSW submission to IPART Issues Paper 1, p 3; PEXA submission to IPART Issues Paper 1, pp 27-30, 55; Sympli submission to IPART Issues Paper 1, p 7; Tasmania Land Titles Office submission to IPART Issues Paper 1, p 1.
- ⁴ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 4.
- ⁵ IPART, [Interoperability pricing for ELNOs Issues Paper 1](#), July 2022, p 17.
- ⁶ PEXA submission to IPART Issues Paper 1, p 21; Sympli submission to IPART Issues Paper 1, p 5; Tasmania Land Titles Office submission to IPART Issues Paper 1, p 1.
- ⁷ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 3.
- ⁸ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 3.
- ⁹ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 3.
- ¹⁰ Law Society of NSW submission to IPART Issues Paper 1, August 2022, p 3.
- ¹¹ IPART, [Interoperability pricing for ELNOs Issues Paper 1](#), July 2022, p 17.
- ¹² PEXA submission to IPART Issues Paper 1, pp 25-28; Sympli submission to IPART Issues Paper 1, p 7.
- ¹³ Tasmania Land Titles Office submission to IPART Issues Paper 1, August 2022, p 1.
- ¹⁴ Australian Banking Association, submission to IPART Issues Paper 1, August 2022, p 1.
- ¹⁵ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 4.
- ¹⁶ Law Council of Australia submission to IPART Issues Paper 1, p 5; Law Society of NSW submission to IPART Issues Paper 1, p 4; PEXA submission to IPART Issues Paper 1, pp 40, 58; Tasmania Land Titles Office submission to IPART Issues Paper 1, p 1; Sympli submission to IPART Issues Paper 1, August 2022, p 8.
- ¹⁷ IPART, [Summary of discussion – workshop with economic regulators](#), September 2022, p 2.
- ¹⁸ Law Society of NSW submission to IPART Issues Paper 1, p 3; Law Council of Australia submission to IPART Issues Paper 1, p 5; PEXA submission to IPART Issues Paper 1, p 40; Sympli submission to IPART Issues Paper 1, p 8.
- ¹⁹ Sympli submission to IPART Issues Paper 1, August 2022, p 8.
- ²⁰ PEXA submission to IPART Issues Paper 1, August 2022, p 40.
- ²¹ PEXA submission to IPART Issues Paper 1, August 2022, p 40.
- ²² Tasmania Land Titles Office submission to IPART Issues Paper 1, August 2022, p 1.
- ²³ Sympli submission to IPART Issues Paper 1, pp 8-9; Law Council of Australia submission to IPART Issues Paper 1, p 5.
- ²⁴ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 5.
- ²⁵ Sympli submission to IPART Issues Paper 1, August 2022, pp 8-9.
- ²⁶ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 5.
- ²⁷ PEXA submission to IPART Issues Paper 1, August 2022, p 40.
- ²⁸ Law Society of NSW submission to IPART Issues Paper 1, p 3; Sympli submission to IPART Issues Paper 1, pp 7-8; Law Council of Australia submission to IPART Issues Paper 1, p 4.
- ²⁹ Law Society of NSW submission to IPART Issues Paper 1, p 3; Sympli submission to IPART Issues Paper 1, pp 7-8; Law Council of Australia submission to IPART Issues Paper 1, p 4.
- ³⁰ PEXA submission to IPART Issues Paper 1, August 2022, p 24.
- ³¹ PEXA submission to IPART Issues Paper 1, August 2022, pp 21, 32-39.
- ³² PEXA submission to IPART Issues Paper 1, August 2022, p 36.
- ³³ Sympli submission to IPART Issues Paper 1, August 2022, p 6.
- ³⁴ Sympli submission to IPART Issues Paper 1, August 2022, p 7.
- ³⁵ PEXA submission to IPART Issues Paper 1, August 2022, p 33.
- ³⁶ PEXA submission to IPART Issues Paper 1, August 2022, p 33.
- ³⁷ PEXA submission to IPART Issues Paper 1, August 2022, p 33.
- ³⁸ PEXA submission to IPART Issues Paper 1, August 2022, p 36.
- ³⁹ PEXA submission to IPART Issues Paper 1, August 2022, p 31.
- ⁴⁰ PEXA submission to IPART Issues Paper 1, August 2022, pp 31, 36.
- ⁴¹ Sympli submission to IPART Issues Paper 1, August 2022, p 6.
- ⁴² Sympli submission to IPART Issues Paper 1, August 2022, p 2.
- ⁴³ PEXA submission to IPART Issues Paper 1, August 2022, p 37.
- ⁴⁴ PEXA submission to IPART Issues Paper 1, August 2022, pp 38-39.
- ⁴⁵ Sympli submission to IPART Issues Paper 1, August 2022, p 7.
- ⁴⁶ IPART, [Maximum prices to connect, extend or upgrade a service for metropolitan water agencies](#), Final Report, 2018, p 2.
- ⁴⁷ IPART, [Maximum prices to connect, extend or upgrade a service for metropolitan water agencies](#), Final Report, 2018, pp 2-3.
- ⁴⁸ Sympli submission to IPART Issues Paper 1, August 2022, p 8.
- ⁴⁹ Sympli submission to IPART Issues Paper 1, August 2022, p 8.
- ⁵⁰ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 5.
- ⁵¹ PEXA submission to IPART Issues Paper 1, August 2022, p 21.
- ⁵² Sympli submission to IPART Issues Paper 1, August 2022, p 5.
- ⁵³ Sympli submission to IPART Issues Paper 1, August 2022, p 5.
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- ⁵⁵ Sympli submission to IPART Issues Paper 1, August 2022, p 6.
- ⁵⁶ Law Council of Australia submission to IPART Issues Paper 1, August 2022, p 3.
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