Law Council
OF AUSTRALIA

Office of the President

12 August 2022

Ms Carmel Donnelly PSM
Chair
Independent Pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop
SYDNEY NSW 1240

By email: ipart@ipart.nsw.gov.au

Dear Ms Donnelly

Interoperability pricing for Electronic Lodgment Network Operators – Issues Paper

The Law Council is pleased to provide this submission to the Independent Pricing and Regulatory Tribunal (**IPART**) Issues Paper titled 'Interoperability pricing for Electronic Lodgment Network Operators' (**Issues Paper**).

The Law Council acknowledges the contributions of its National Electronic Conveyancing System Committee, the Law Society of the Australian Capital Territory and the Law Society of South Australia to this submission. The Law Council notes that the Law Society of New South Wales has also provided a separate submission in response to the Issues Paper.

The Law Council's responses to each of the questions posed in the Issues Paper are provided in the **attached** table.

Please contact Mr John Farrell, Senior Policy Lawyer, on [redacted] or at [redacted] in the first instance, if you require further information or clarification.

Yours sincerely

[redacted]

Mr Tass Liveris
President

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Attachment – Law Council responses to the questions raised in the 'Interoperability pricing for Electronic Lodgment Network Operators' Issues Paper

Question	Law Council Response
1. Have we identified all relevant categories of costs and risks associated with interoperable transactions?	The Law Council considers that the Independent Pricing and Regulatory Tribunal (**IPART**) has sufficiently identified the categories of cost and risk associated with interoperable transactions. As a general comment, the Law Council notes the importance of the design of the framework for interoperable transactions adequately protecting practitioners in respect of their trust account obligations.
2. Have we accurately identified the party incurring the costs and risks associated with interoperable transactions?	The Law Council understands that in any interoperable transaction the Participating Electronic Lodgment Network Operator (**ELNO**) will need to be able to become the Responsible ELNO if, for any reason, the originally designated Responsible ELNO cannot perform the role. Therefore every ELNO has to provide the capital infrastructure and other facilities necessary for it to be able to perform that role, whether it is required to do so in any particular instance or not. In the Law Council's view this is not adequately recognised in the Issues Paper. Otherwise, the Law Council considers that IPART has correctly identified the parties incurring the costs and risks associated with interoperable transactions.
3. Do these costs and risks vary across jurisdictions? If so, what are the reasons for the variation?	The Law Council considers that the costs and risks are largely similar across jurisdictions (noting, for example, that Lodgment Support Service (**LSS**) fees differ slightly in each jurisdiction). There may also be some costs which are specific to certain jurisdictions (for example, the 'Vendor Guarantee against fraud' required in New South Wales).

4. Should a Responsible ELNO be able to charge a fee to Participating ELNOs for performing the functions of a Responsible ELNO in an interoperable transaction?	The IPART correctly notes at page 17 of the Issues Paper that '[i]f the responsibilities of ELNOs in interoperable transaction are symmetrical, each ELNO would have the same set of costs and there would be no need for an ELNO-to-ELNO fee'. The IPART then states that '[g]iven that only one party can be the Responsible ELNO, interoperable transactions will always be asymmetrical'. The Law Council queries the validity of this statement. As noted above in response to Question 2, 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, the Law Council recognises that an interoperability charge may be appropriate where one ELNO is wholesaling capability to another, which might be the case for an interim period with a new entrant. For example, in the current setting where Sympli is building its capability and connections, it would not yet be able 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. However, the Law Council does not see that interim theoretical possibility as warranting the implementation of a systemic interoperability fee. The Law Council would prefer to see the accelerated implementation of the proposed Enterprise Service Bus (**ESB**) which would be responsible for interconnecting all ELNOs with all Land Registries as well as all banks and revenue offices – complete interconnectivity between all participants via the ESB will mean that any ELNO needs only connect to the ESB to participate in a full interoperable environment. The ESB service fees will be an overhead to be recouped in the fees ELNOs charge their Subscribers.

Question	Law Council Response
5. We have proposed that the costs of interoperability should be recovered from all subscribers. This may result in prices for subscribers that are not directly cost-reflective, however, we consider this is worthwhile to achieve the long-term benefits of competition. Are there any alternative approaches that we should consider?	The Law Council recognises that the return on capital investment for interoperability should be recovered in the standard fees charged by ELNOs to their Subscribers for all transactions. The Law Council is confident that in the longer term the competition enabled by the introduction of interoperability will lead to innovation and efficiencies that lower (or stabilise) costs and improve the services offered to Subscribers. However, the key principle which should underpin the IPART's consideration of these issues is that there should be no financial penalty imposed on a lawyer's (or conveyancer's) client just because that lawyer preferred one ELNO over another in an interoperable transaction. In other words, there should be no price discrimination based on whether a transaction is interoperable between ELNOs or completed on an intra-ELNO basis. Additionally, pricing measures should not be a barrier to competition and fees passed onto Subscribers (and their clients) should be minimal and as transparent and explicable as possible.
6. We have identified that the Lodgment Support Service fee, paid to a land registry to open a digital workspace, is not necessarily paid by the Responsible ELNO. This means it cannot be recovered through a fee for performing the functions of a Responsible ELNO. What are your views on the best mechanism for sharing this cost between all ELNOs in an interoperable transaction?	In the Law Council's view, recovery of the LSS fee may be able to be directly addressed between the ELNOs in the negotiation of the proposed interoperability agreements.

Question	Law Council Response
7. What are your views on negotiate-arbitrate as a form of regulation for fees for performing the functions of a Responsible ELNO in an interoperable transaction?	As discussed further below, the Law Council considers direct price control to be the more appropriate form of fee regulation for performing the functions of a Responsible ELNO if IPART determines such a fee to be appropriate, but the Law Council's primary view remains that it is not.
8. What characteristics of the eConveyancing market influence whether a negotiate-arbitrate form of regulation is appropriate?	The IPART has identified at Table 4.1 of the Issues Paper, a number of the limitations of negotiate-arbitrate regulation in the context of the eConveyancing market. In particular, the relative market shares and bargaining power of the existing ELNOs and the ongoing costs of negotiation/arbitration (compared to the potential fee income) suggest that a negotiate-arbitrate form of regulation is not appropriate.
9. What are your views on direct price control (regulated price or a pricing methodology) for fees for performing the functions of a Responsible ELNO in an interoperable transaction?	The Law Council considers that direct price control either by way of a regulated price or a pricing methodology, should be adopted in calculating any fee for performing the functions of a responsible ELNO in an interoperable transaction - at least until 2024, when a review of the regulation of fees should then occur. The Law Council notes that a form of direct price control is already in place in relation to eConveyancing as ELNO service fees are capped to an annual increase in accordance with the Consumer Price Index (unless approval for a larger increase is obtained).
10. Which form of direct price control would be appropriate for fees for performing the functions of a Responsible ELNO in an interoperable transaction?	The Law Council considers that in the short term a regulated price would be preferable for consistency and transparency, but a pricing methodology may be preferable in the longer term.

Question	Law Council Response
Other comments	As noted above in response to Question 4, the role of the ESB should be considered in the potential charging of a fee by a Responsible ELNO to Participating ELNOs for performing the functions of a Responsible ELNO. To the extent to which ultimately all land titles offices, revenue offices and financial institutions will be interconnected via the ESB, no ELNO should need to rely on another ELNO for connectivity and therefore no inter-ELNO fee should be required.