



Our Reference: FILE19/00526

Ms Jennifer Vincent
Director, Pricing
Independent Pricing and Regulatory Tribunal

Via electronic submission

Dear Ms Vincent

NSW Government's response to draft report on the *Pricing framework for eConveyancing services in NSW*

We welcome IPART's draft final report on the Pricing Framework for eConveyancing Services in NSW (draft Report).

The NSW Premier commissioned this work to hear independent, expert advice, with in-depth industry consultation. We believe IPART's draft recommendations put forward a practical and immediate pathway that recognises the urgency of the challenge to ensure robust competition and consumer protections are in place.

The first part of this response focuses on those parts of IPART's draft final Report that deal with market structure, competition and interoperability. The second part focuses on Revenue NSW charges to ELNOs.

Competition between ELNOs – consumer and competition safeguards

NSW is committed to promoting the development of a competitive eConveyancing market. Competition can create more downward pressure on prices than regulation will achieve. Competition also creates pressure on competitors to deliver better service quality for customers in order to attract them or keep them.

This draft Report comes at a critical time in the eConveyancing reform. We have an opportunity now to embed competition between infrastructure ELNOs. Currently:

- Sympli is progressively rolling out services as a second infrastructure ELNO nationwide by the end of 2019;
- Purcell Partners is finalising its plans for market entry;
- lawyers and conveyancers are strongly pushing for a choice between competing ELNOs, but also are worried about how they will cope with completing transactions across multiple standalone ELNOs;
- financial institutions, while acknowledging the benefits of competition between ELNOs for themselves and their customers, raise concerns about duplication and lack of standardisation in their connections with multiple ELNOs;
- new ELNOs are facing competition against a powerful incumbent with strong network effects and limited constraints on its market power;
- the current national eConveyancing framework does not adequately address competing ELNOs; and

- in the face of these challenges, the Australian Competition and Consumer Commission (ACCC) is urging action to ensure that an effective ex ante competitive safeguards regime is in place.

To this end:

- We support your recommendation for a market structure with multiple infrastructure ELNOs integrated with the financial sector, land registries and revenue offices, with direct interoperability between ELNOs:
 - in our view, the current market supports the ‘direct connection’ model, with bilateral interoperability (see **Attachment A**), which you outline as option 1 and Figure 4.1 on page 25 of your draft Report; and
 - we consider the market may further evolve into a structure with additional wholesale and retail options, as shown in **Attachment B**. As this is a technology-based industry, it is to be expected that new business models not currently thought of will emerge, and the regulatory and market structure settings should encourage that continuing market evolution.
- We support your recommendation for the potential for new entrant ELNOs having the choice of accessing existing infrastructure through contracts with other ELNOs, and offering ‘retail’ services, or building their own infrastructure and establishing direct connections with other ELNOs.
- We believe this brings:
 - benefits to all users of the land title system, and our economy, given ELNOs are now a critical part of our community;
 - benefits for financial institutions. We believe gains for banks from moving from paper to eConveyancing should not be a one-time exercise; we query how a monopoly can continue to maintain and increase efficiencies over time, compared to the pressure of multiple market participants;
 - scope for a diversity of competing ELNO business models and future entry by service providers with new business models; and
 - a more resilient lodgement and settlement system, so if the incumbent platform is not working, customers have a back-up system.

The benefits of this approach are more important when considering the counterfactuals.

- In monopoly environments, regulators will face the considerable challenge of functioning as a surrogate for competition in order to drive the pricing, service quality and innovation benefits for customers which competition at the wholesale and retail level would otherwise deliver.
- Alternative market structures would also mean substantial disruption to current business models, regulatory uncertainty for investors and significant costs.
 - For example, the potential implications of a single infrastructure ELNO are revoking the incoming ELNO’s approval, significant stranded investment on its part, costs of potential compensation, impacts to the State’s credibility of withdrawing a licence in these circumstances, requiring divestiture and ownership separation of the existing incumbent ELNO’s financial services component, identifying whether that component should be government owned, or a separate private entity, and close regulation of an access regime for retail ELNO providers.

As the multi-ELNO market emerges, conveyancers and lawyers want to continue to transact efficiently and securely while only subscribing to the ELNO(s) they choose. Conveyancers and lawyers continue to raise their desire for governments to put in place a solution for interoperability.

NSW supports further immediate work to investigate solutions for an efficient and secure multi-ELNO environment, and to establish interoperability, drawing on models set out in the draft IGA report, Dr Nicholls' report 'Interoperability between ELNOs, 25 July 2019' and this IPART review. We also attach a list of comments on specific sections of the draft Report at Annex 1.

Revenue NSW cost recovery

We outline the following proposed changes to IPART's costing model for Revenue NSW.

1. Subscriber support

- IPART recommends a per inquiry model under which Revenue NSW will charge an ELNO \$15.20 per inquiry received.
 - Revenue NSW proposes a model employing a fixed total cost for all inquiries per year, with each ELNO to pay an amount proportional to their share of all inquiries generated.

2. ELNO product releases

- IPART recommends that Revenue NSW charge \$125,000 per ELNO for each product release that exceeds "base level frequency" (which is considered to be Revenue NSW support activities for two major releases and two minor releases per year, per ELNO).
 - Revenue NSW proposes that:
 - Base level frequency constitute support (excluding any Revenue NSW system changes) for one major release and one minor release, as this better reflects base level activity in a competitive market.
 - For releases beyond base level, \$38,000 would be charged per major release and \$21,000 per minor release, per ELNO.
 - For all Revenue NSW system changes (resulting from base level or non-base level activity), costs would be recovered through contractual arrangements with ELNOs (as with IPART's recommended approach for recovering costs for 'bespoke service changes').

We are of the view that these refinements would make cost recovery arrangements administratively simpler for both Revenue and ELNOs, and would avoid cost burdens on ELNOs that may discourage innovation.

This submission also addresses the issue of an appropriate commencement date for recovery of costs from ELNOs. We attach further information at Annex 2.

Should you wish to discuss this response please contact Jeremy Cox on [REDACTED] or jeremy.cox@customerservice.nsw.gov.au or for the Revenue NSW components, Matthew Nowell, A/Senior Operations Officer, Duties, Customer Service (Taxes and Grants), on [REDACTED] or Matthew.Nowell@revenue.nsw.gov.au.

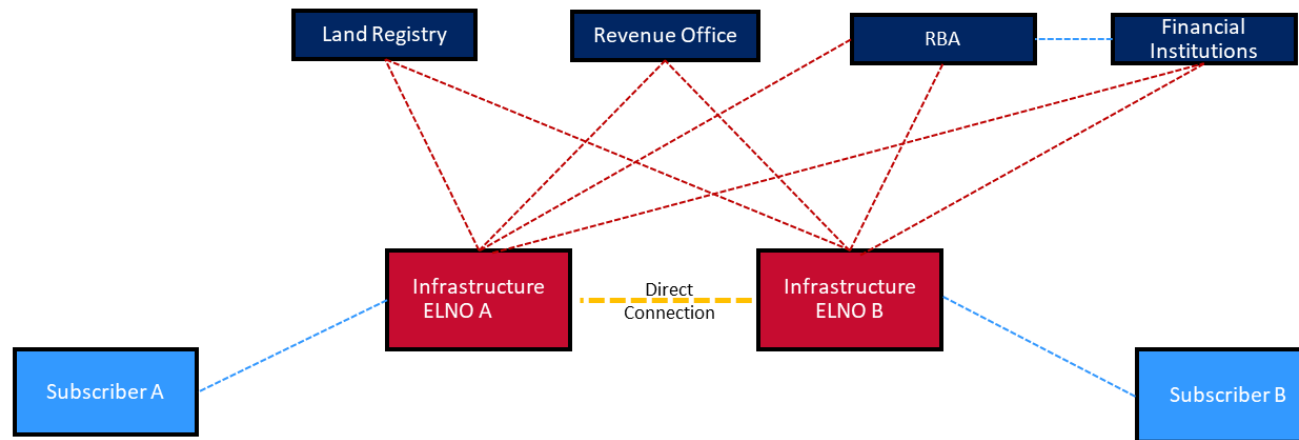
Yours sincerely



Jeremy Cox, Registrar General and Kelly Wood, A/Deputy Secretary, Revenue NSW
8 October 2019

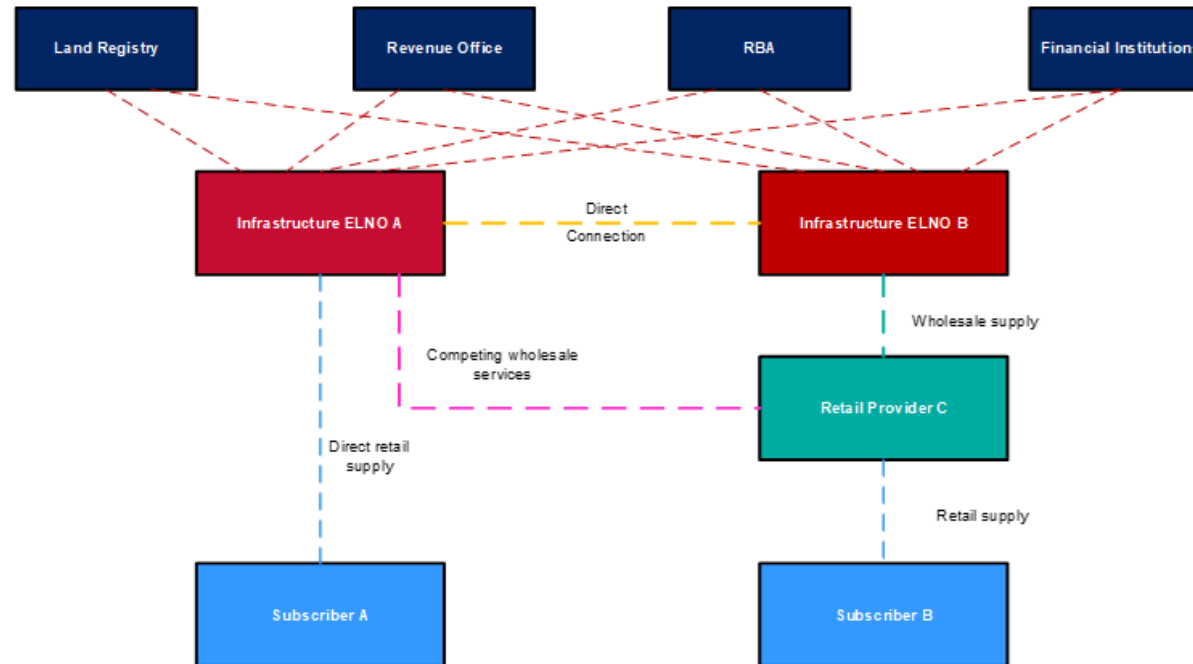
Attachment A

Current emerging two-infrastructure ELNO market



- Direct connection and information sharing between infrastructure ELNOs
- Subscribers can use either infrastructure ELNO
- Infrastructure ELNO also provides retail service
- In each transaction, one of the interconnected ELNOs functions as the lodging ELNO completing financial settlement and titling functions on behalf of subscribers to each ELNO.

Future potential multi-infrastructure ELNO market with access regime to retail providers



Annex 1

Clarifications on the draft Report		
No.	Section	Comments
1.	2.3.1	References to 'X' in the explanation of how the CPI Price Increase operates, should be changed to ' <i>Factor</i> ', as this more closely aligns with the language used in the Conditions of Approval.
2.	3.2	Sympli was granted an 'approval' to operate in NSW in July 2019 – under the ECNL, ELNOs are approved to operate as opposed to being granted a licence.
3.	3.5.3	The draft Report suggests that regulators should provide guidance to prospective entrants. We note that ARNECC provides some guidance as to what is required in an ELNO application in the Model Operating Rules Guidance Notes, as well as the ' <i>Apply to Become an Electronic Lodgment Network Operator (ELNO) Fact Sheet</i> ' (published 13 August 2019).
4.	3.6	The draft Report refers to ORG's intention to replace bilateral agreements with licence conditions; we note that this has already occurred. The Conditions of Approval commenced 1 March 2019. It is also more appropriate to refer to them as Conditions of Approval (see Comment No. 2 above).
5.	3.8.1	<p>The draft Report also uses the PEXA Plus Marketplace as an example of vertical integration. However, this may not constitute vertical integration as the PEXA Plus Marketplace is effectively a distributor for information brokers and so is not directly in competition with information brokers (although as a distributor, it is acknowledged that PEXA is in a position influence this market).</p> <p>As noted in our cover letter, an industry based around a monopoly infrastructure ELNO would require stringent regulatory measures against vertical integration. However, drawing the line of business boundary lines for a non-vertically integrated ELNO is not a straightforward exercise. As the example of the PEXA Plus Marketplace illustrates, there are inherent uncertainties involved in determining whether a function undertaken by an ELNO is part of its regulated ELN scope of business or an upstream or downstream activity.</p>
6.	4.3.2	<p>The draft report makes references to the front-end services that retail ELNOs provide. In the context of market structure discussions, it would be useful for the final report to include more information on what these services might involve.</p> <p>We note that at the final Nicholls working group on interoperability, the suggestion that initially there would at least be two '<i>infrastructure</i>' ELNOs (although there was no recommendation for a formal duopoly, with the possibility of future entry being left open). While the structure is not yet settled, it may counter some of the issues noted in the report, particularly around competition in the provision of infrastructure services. We are unclear as to whether Figure 4.4 contemplates two infrastructure ELNOs, which is this is the current state of the market. We assume that the projected expenditure in Figure 4.5 is based on the existence of one infrastructure ELNO, not two.</p>
7.	5.1	The draft Report states that a maximum price for all ELNOs, set at PEXA's current real prices and indexed by CPI, would be consistent with the existing CPI price cap regulation under the MORs. However, the MORs currently do not set a price cap, they set a cap on price increases. Under the current regime, an ELNO could enter the market with higher starting fees than PEXA, and would comply with the

Clarifications on the draft Report

No.	Section	Comments
		MORs as long as their annual price increases were lower than CPI. Therefore, both the MORs and the Conditions of Approval will need to be amended.
8.	5.7	The draft Report states that ELNOs should not be required to publish national prices, however, ELNOs are not currently required to have national prices. The MORs are implemented in each state and ELNOs are entitled to publish a separate Pricing Table in each state.
9.	7.2.2	Revenue NSW (RNSW) manage data standards and compliance with the Revenue Office Messaging Standards, not the NECDS (see same reference to NECDS at section 7.6)
10.	7.6	The draft Report states that the current governance framework does not ensure that RNSW has oversight over matters such as change control, or that their requirements are considered in the approval process. We note the NSW approval conditions require ELNOs to consult with and obtain the approval of RNSW when ELNOs make system changes that will affect RNSW (see General Conditions, clause 1(c)(iii) and concept of Initial Testing in clause 4.1). Issues of change management in an interoperability context were also addressed in the Nicholls report, with Dr Nicholls expressing the view that, as shown in other industry sectors such as telecommunications, change management can be effectively addressed through industry-based processes endorsed and overseen by the regulator.

Annex 2

Additional comments related to Revenue NSW

Variable costs related to providing ELNO subscriber support

The draft report recommends that Revenue NSW charge a maximum of \$15.20 per inquiry it receives from ELNO subscribers. This price has been determined by dividing annual Revenue NSW staffing costs for addressing ELNO subscriber activities (\$456,000 - derived by IPART/AECOM based on figures provided by Revenue NSW) by the number of support inquiries made to Revenue NSW each year as a result of duties verification errors (estimated by IPART to be 30,000 from July 2019).

In IPART's view, a per subscriber inquiry pricing model would both provide an incentive for ELNOs to reduce the number of inquiries Revenue NSW receives (either through subscriber education or improving the ELNO interface platform), and ensure that Revenue NSW does not over-recover or under-recover costs.

Clarifying Revenue NSW Business Support Team Costs

As recently discussed with IPART, we would like to clarify the costs incurred from providing ELNO subscriber support. It is important these costs are correctly understood for the purposes of determining efficient costs required for Revenue NSW to support ELNO subscriber enquiries. The business support team referred to in our supporting information comprises a total of 22 FTE (total establishment), spread across multiple office locations. This team is responsible for a wide range of Electronic Duties functions, including support for both Electronic Duties Return (EDR) and eConveyancing. Of these 22 FTE, 6 positions are dedicated to the management of eConveyancing enquiries and associated activities. \$608,000 is required to fund these positions.

Per inquiry pricing vs fixed total cost apportioned between ELNOs

The arguments in favour of a per inquiry cost model are recognised. However, we do not believe this model is optimal in the context of a competitive ELNO market where participants in eConveyancing are still in a transitional, learning phase.

We propose an alternative model under which:

- The total amount recovered by Revenue NSW for all ELNO subscriber support would be a fixed amount based on the revised costs specified above.
- Each ELNO would pay an amount proportional to their share of the total number of subscriber inquiries received by Revenue NSW.
- The fixed amount recovered by Revenue NSW would be subject to reassessment every two years.

For example, based on a support cost of \$608,000 for the year, if 70% of inquiries were attributable to 'ELNO A' and the remaining 30% to 'ELNO B', 'ELNO A' would be charged \$425,600 and 'ELNO B' \$182,400.

Against various criteria, overall this model offers some advantages compared with a per inquiry model, such as cost certainty and simplicity of administration, whilst also still encouraging ELNOs to reduce the number of unnecessary inquiries made to Revenue NSW through improved education and other measures. A comparison of the two models is contained in table 1 below.

Table 1

	Fixed cost apportioned between ELNOs	Per inquiry
Cost certainty/stability	High	Moderate. In the short to medium term there may be some volatility in numbers of inquiries as new players enter the market, subscribers are on-boarded, and new ELNO products and services are developed.
Cost recovery	Moderate - high <ul style="list-style-type: none"> Fixed cost based on historical Revenue NSW costs incurred in providing subscriber support. Fixed cost would be apportioned between ELNOs based on their respective shares of total inquiries generated. Minimal risk of over-recovery. Some risk of under-recovery, given potential volatility in inquiry numbers in short to medium term. 	Moderate – high <ul style="list-style-type: none"> Per inquiry charge based on historical Revenue NSW costs incurred in providing subscriber support, and numbers of inquiries. Minimal risk of under-recovery. Some risk of over-recovery, given potential volatility in inquiry numbers in short to medium term.
Customer experience	Moderate - high <ul style="list-style-type: none"> Incentive for ELNOs to minimise unnecessary inquiries made to Revenue NSW is not as strong as a per inquiry model. However, because an ELNO's contribution to costs is based on share of subscriber inquiries, there is still some incentive. Minimises any incentive for ELNOs to discourage subscribers from contacting Revenue NSW. Encourages Revenue NSW to ensure that its subscriber support services are efficient and tailored to needs of customers. Ability to adjust fixed costs at 2-year review point would help to ensure that ELNOs have ongoing incentives to improve support services and encourages long term, strategic collaboration between the organisations. Ensures dedicated level of Revenue NSW support services for eConveyancing. Provides ELNO and ELNO subscribers an uncapped level of support services. 	High <ul style="list-style-type: none"> Incentivises ELNOs to make their support services efficient, accessible and informative, and minimise any unnecessary reliance on Revenue NSW. However, in the context of an immature competitive ELNO market, there is some risk of poor customer experience (such as potential delays to settlements) if subscribers are discouraged from contacting Revenue NSW in order to minimise ELNO costs. May not provide optimum incentive for Revenue NSW to ensure that its subscriber support services are efficient and tailored to customer needs.
Administration	Simple	More complex <ul style="list-style-type: none"> Expanded datasets may be required to substantiate invoices. Potential for disputation.

Release activities by Revenue NSW to support ELNO system changes where Revenue NSW system does not change

The draft report recommends that Revenue NSW charge a maximum price of \$125,000 per ELNO for each product release that exceeds “base level frequency”. Base level frequency is considered to be Revenue NSW support activities for two major releases and two minor releases per year, per ELNO. As a technology platform requires system releases and upgrades, IPART considered that a base level of testing is unavoidable for an efficient ELNO and therefore government should bear any costs resulting from this base level testing.

Revenue NSW accepts that a certain level of testing within the ELNO market is unavoidable, but would like to propose two refinements to IPART’s recommendation which we believe will provide for a more transparent and fair cost recovery arrangement between Revenue NSW and ELNOs.

1. Revised definition of base level support - frequency

The proposed frequency of four ELNO releases per year appears to be based on the current state of the ELNO market and the practices of its sole participant, PEXA. However, we do not believe that this is necessarily a reliable indicator of the extent of base level activity that will be undertaken per ELNO as the market evolves. In its report, *Estimating costs of electronic conveyancing services in NSW*, AECOM was of the view that, in a competitive market, the number of releases would reduce from four releases every year to four every two years, per ELNO. We agree with this analysis.

Further, we would like to stress that the Duties Verification service is critical to the effective operation of the NSW eConveyancing process, and when an ELNO release occurs, Revenue NSW support is essential. Given that Revenue NSW has limited influence on the timing and scope of ELNO releases, it would seem unreasonable that Revenue NSW should have to bear the costs of supporting at least eight releases per year (based on two operational ELNOs).

On this basis, Revenue NSW considers that the base level frequency should be free release support for one major release and one minor release, per ELNO, per year.

2. Maximum price per ELNO, per release

The recommended maximum price of \$125,000 per ELNO for each product release is based on previous advice from Revenue NSW concerning costs normally incurred when such releases are made. Thus, under IPART’s proposed charging model, if an ELNO wanted to follow a monthly release schedule, Revenue NSW would provide free support activities for the first four releases. However, it would invoice the ELNO \$1,000,000 total for the following eight releases.

Such a cost burden could discourage ELNOs from operating in an innovative and agile way, and Revenue NSW would like to propose a revised cost structure for the reasons set out below.

The types of activities undertaken by Revenue NSW when releases are made are standard and, accordingly, the associated costs are generally stable and predictable from one release to another, thereby allowing for a maximum price to be set. However, the costing advice originally provided by Revenue NSW to IPART also included costs associated with Revenue NSW system changes. Having further considered those costs, we are of the view that they should be decoupled from the other release related costs, as such costs may vary significantly depending upon the changes required. Charges associated with Revenue NSW system changes would therefore be more appropriately negotiated through contractual arrangements between Revenue NSW and ELNOs (as with bespoke service changes), rather than be subject to a fixed amount that may not accurately reflect the costs.

Consequently, it is proposed that –

- a) For base level releases (one major, one minor), costs incurred by Revenue NSW for release support activities (as outlined in the draft report at page 65), would be absorbed except for any Revenue NSW system changes and delivery costs, which would be negotiated separately.
- b) For releases above and beyond base level, the following amounts would be charged per release, per ELNO, to cover release support activity costs (except Revenue NSW system change and delivery costs).
 - i. Major release - \$38,000
 - ii. Minor release - \$21,000
- c) For all Revenue NSW system changes, costs would be recovered through contractual arrangements with ELNOs.

Revenue NSW considers that the above refinements to the cost recovery model for ELNO releases:

- Better reflect likely release trends as the market matures and becomes more competitive.
- Ensure that costs incurred over and above base level releases are accurately and transparently defined for purposes of recovery.
- Ensure that prices do not discourage ELNOs from continuously improving their platforms through agile delivery methodologies.

Commencement date for cost recovery

The draft IPART report recommends that prices take effect from 1 July 2020. As ELNOs are required to enter into an operating agreement with Revenue NSW (which will govern pricing arrangements), prices should take effect from the point at which such arrangements are settled through an agreement.