



Review of the pricing framework for electronic conveyancing services in NSW

Submission of Sympli to IPART in response to the Issues Paper released March 2019

13 May 2019

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1 Executive Summary

1.1 Introduction

Sympli Australia Pty Ltd (**Sympli**) welcomes the opportunity to respond to the Issues Paper released by IPART in its review of the pricing regulatory framework for electronic conveyancing services in NSW.

IPART has been asked to review the state of the electronic conveyancing market, and to recommend an appropriate pricing regulatory framework, which includes a maximum price or pricing methodology for the provision of services by an electronic lodgment network operator (**ELNO**), as well as by NSW Land Registry Services and Revenue NSW to ELNOs. The context to IPART's review is that there is currently only one ELNO operating in NSW (Property Exchange Australia Ltd or PEXA), and while traditional paper conveyancing may currently provide some competitive constraint, most types of property documents will be mandated to be electronic in NSW from 1 July 2019.

Sympli is an ELNO which is currently planning to commence operations in NSW in 2019. The purpose of this submission is to set out Sympli's view on an appropriate pricing regulatory framework for electronic conveyancing services.

1.2 Overview of Sympli's submission

In summary:

- **Competition in e-Conveyancing:** Sympli agrees that the need for pricing regulation of electronic conveyancing (**e-Conveyancing**) services (and the appropriate form of any such regulation) should be largely determined by the likely future state of competition in e-Conveyancing. Should the entrance of new ELNOs in NSW result in the development of effective competition, pricing regulation of ELNO services would not be necessary or desirable.
- **Purpose of regulation:** to the extent that IPART concludes that a form of pricing regulation is necessary until the emergence of effective competition, the purpose of such regulation should be to promote the welfare of consumers by:
 - minimising the risk of potential monopolistic behaviour by the incumbent;
 - promoting competition between ELNOs;
 - minimising barriers to entry and encouraging new market participants; and
 - promoting innovation in technology and service delivery.
- **A level playing field:** any pricing regulation framework should seek to ensure a level playing field, where market participants facing the same level of risk are subject to the same regulatory treatment. In the e-Conveyancing market, the risks faced by new entrants are substantially higher than the risks faced by the dominant incumbent, which benefits from substantial network effects. For that reason, any regulatory framework should also seek to promote competition by exempting new entrants from restrictive pricing regulation, which might otherwise act as a barrier to new entry and restrict innovation.

To the extent that pricing regulation would, at some point, apply to multiple ELNOs, Sympli submits that such regulation:

- should be flexible to allow for the development of innovative products and pricing structures; and
 - should apply consistently and should not result in differential price caps between established ELNOs.
- **Interoperability:** interoperability between ELNOs will be essential for efficient and effective competition. Effective interoperability would promote competition by reducing the substantial network effects enjoyed by the only ELNO currently operating in NSW, PEXA.

Each ELNO should bear its own costs of interoperability as a cost of doing business in a multi-operator competitive market. However, in an interoperable transaction, the costs of lodging and financial settlement should be incurred directly by the lodging ELNO, and a portion of the fees charged by the non-lodging ELNO should be passed on to the lodging ELNO as a transfer fee.

Sympli submits that as part of its review, IPART should recommend a methodology for calculating that transfer fee, based on clear and transparent assumptions regarding the model of interoperability (and if necessary, by reference to different potential interoperability models). Sympli submits that IPART should also publish example transfer fees using that methodology. By taking these steps, IPART could clarify and illuminate the potential costs of interoperability and enable the current industry discussion regarding interoperability to progress substantively and on an informed basis.

- **Vertical integration:** Sympli considers that the pricing regulatory framework for ELNOs need not address vertical integration in e-Conveyancing, including because the MORs contain separation and equivalence provisions intended to address vertical integration issues. To the extent that any issues arise with the effectiveness or enforceability of those regulations, Sympli considers that those are matters to be addressed by ARNECC, rather being accounted for in the pricing regulatory framework for ELNOs.
- **Pricing of NSW LRS and Revenue NSW services:** Sympli supports IPART's inquiry into whether NSW LRS' existing fees are efficient and emphasises that such fees should be applied consistently to all ELNOs. Any pricing regulatory framework must allow for the fees charged to ELNOs by NSW LRS to be passed through to subscribers, and therefore such fees should be clear and transparent, and be considered as part of an ELNO's efficient costs for the purposes of any ELNO pricing regulation. Sympli agrees that the calculation of NSW LRS' prices for services to ELNOs should exclude NSW LRS' costs relating to its other functions and services.

In respect of Revenue NSW, Sympli submits that it is inappropriate for Revenue NSW to charge ELNOs a fee to assist it in performing its primary function of collecting taxes, duties and levies. To the extent that IPART recommends that Revenue NSW should charge fees to ELNOs, Sympli submits that such fees should apply consistently to all ELNOs and should be considered as part of an ELNO's efficient costs for the purposes of any ELNO pricing regulation.

Sympli agrees with IPART's proposal to account for the cost savings to NSW LRS (and Revenue NSW) arising from the introduction of e-Conveyancing services.

1.3 Structure of this submission

The structure of this submission is as follows:

- **Section 2** sets out background information on Sympli as an ELNO;
- **Section 3** addresses the state of the e-Conveyancing market;
- **Section 4** addresses the application of pricing regulation for ELNO services;
- **Section 5** addresses issues regarding the cost and pricing of interoperability;
- **Section 6** addresses vertical integration in e-Conveyancing;
- **Section 7** addresses the pricing of the services of NSW LRS and Revenue NSW.
- **Schedule 1** sets out a list of defined terms used in this submission.

Terms not defined in this submission have the meaning given to them in either the IPART Issues Paper, the Model Operating Requirements or the General Requirements.

1.4 Sympli contacts

Sympli provides the following details for its representatives, who can be contacted with respect to this submission:

David Wills, CEO: david.wills@sympli.com.au

Joanne Tseng, Head of Legal: joanne.tseng@sympli.com.au

2 Background to Sympli

Sympli has been established as an ELNO to provide services to participants in the electronic property settlement market. As an ELNO, Sympli will provide and operate an Electronic Lodgment Network (**ELN**) – being a platform that allows parties to a conveyancing transaction to settle and lodge such transactions for the purposes of registration with the relevant land registry.

A consumer will generally interact with an ELNO through their solicitor or conveyancer, who will enter into standard-form participation agreements with the ELNO to become a 'subscriber', being persons authorised to enter and exchange data to complete electronic documents and transactions via an ELN, including financial institutions.

Sympli is 50% owned by ASX Limited (**ASX**) and 50% owned by Australian Technology Innovators Pty Limited, the parent company of e-Conveyancing technology and services providers InfoTrack and LEAP. Sympli has been granted approval to operate in Victoria and Queensland as an ELNO and is currently planning to commence operations in NSW in 2019.

3 Assessing the e-Conveyancing market

3.1 Introduction

The Issues Paper notes that:

- the first step IPART will take in its review will be to assess the current state of the e-Conveyancing market, with a view to understanding the current level of competitiveness and the possible development of competition over the next one to five years; and
- the need for price regulation to protect consumers (and the form of any such regulation) is largely determined by the extent to which there is competition which creates incentives for market participants to continually improve their services and maintain efficient prices.

Sympli agrees that this is an appropriate first step in IPART's review, and that the question of whether pricing regulation is necessary and desirable should be informed by the expected level of competition in e-Conveyancing. While several factors will affect the level of competition, Sympli considers that interoperability between ELNOs (as explained below) is the most important of these factors – interoperability is essential for efficient and effective competition, and for ensuring that consumers obtain the benefits of competition. In particular, effective interoperability would promote competition by reducing the network effects enjoyed by the incumbent ELNO, PEXA.

In this context, Sympli notes that IPART has also asked:

- whether the continued availability of paper conveyancing in other jurisdictions constrains prices for e-Conveyancing in NSW;
- how important are barriers to entry in constraining competition in e-Conveyancing, such as the two-sided nature of the e-Conveyancing market, network effects, start-up costs and regulatory requirements;
- what factors influence the effectiveness of interoperability solutions in promoting competition; and
- what are the relative costs of implementing the different models of interoperability.

Sympli addresses these issues below.

3.2 The current state of competition in the e-Conveyancing market in NSW

PEXA as the incumbent monopoly in NSW

As IPART notes, PEXA is currently the only participant operating in the e-Conveyancing market in NSW. PEXA was formed as a private company in 2010 by the Governments of NSW, Queensland and Victoria, with subsequent investments by the WA Government, financial institutions and private investors, before being purchased outright by private investors in mid-January 2019. In the absence of effective interoperability, PEXA (as the incumbent ELNO) will enjoy significant network effects on account of its large subscriber base. Further, as a privately-owned company and as an established and dominant ELNO, PEXA has the ability and incentive to expand into adjacent markets to strengthen its dominant position within the industry.

The prospect of new entrants in NSW

Sympli plans to begin operations in NSW in 2019. Sympli expects that other competing ELNOs may come to operate in NSW and provide a full range of e-Conveyancing services, provided that interoperability is mandated and effective. Such interoperability would lower the barrier to entry posed by the two-sided nature of the e-Conveyancing market and the network effects enjoyed by PEXA as the incumbent. In the absence of effective interoperability, Sympli expects that PEXA will continue to enjoy a dominant position in e-Conveyancing for the foreseeable future.

Constraint imposed by paper conveyancing

The Issues Paper notes that while NSW will partially mandate e-Conveyancing from 1 July 2019, the existence of paper conveyancing in other jurisdictions will continue to impose a constraint in NSW to the extent that PEXA continues to apply uniform national prices (and to the extent that other ELNOs may also choose to apply uniform national prices).

In this respect, Sympli emphasises that PEXA has made a *commercial* decision to adopt uniform national prices and may adopt a different approach in the future as the market develops. In the absence of regulation, Sympli expects that PEXA would move away from uniform national pricing if that approach became commercially unfavourable, including if any benefit arising from applying uniform national pricing was outweighed by the detriment of any continuing constraint imposed by paper conveyancing in other jurisdictions.

Whether pricing regulation is needed given the expected level of competition

As stated above, interoperability between ELNOs is essential for efficient and effective competition. Sympli expects that:

- if there is effective interoperability, effective competition between ELNOs will develop in NSW, ensuring appropriate incentives for ELNOs to continually seek to improve service quality and maintain efficient prices; and
- if there is not effective interoperability, the emergence of competition cannot be effectively achieved given the monopoly status of the incumbent.

In either case, should effective competition develop, Sympli considers that pricing regulation of ELNOs will not be necessary or desirable, and that the cost and risks of pricing regulation should be avoided.

To the extent that IPART concludes that some form of pricing regulation is necessary in the interim period (i.e. until the emergence of effective competition), Sympli emphasises that the purpose of such regulation should be to protect consumers from the potential monopolistic behaviour of the incumbent, and that new entrants should be exempt from such regulation.

3.3 Interoperability is essential for efficient and effective competition

Sympli welcomes IPART's view that interoperability would make it more viable for ELNOs to compete by reducing network effects in the e-Conveyancing market. Sympli considers that interoperability is the single most effective measure that would facilitate a level playing field between ELNOs and is essential for efficient and effective competition. In particular, interoperability would:

- enable market participants to freely choose the ELNO that best suits them, while ensuring a seamless experience when dealing with participants who have chosen a different ELNO. This would increase the incentive of ELNOs to be responsive to the market and to provide the best experience to subscribers, including in relation to user experience, customer service, value for money, risk allocation, reliability and security;
- reduce network effects – that is, reduce the structural bias in the market to gravitate towards the ELNO with the largest subscriber base, regardless of the cost or quality of service of that ELNO. Such network effects would otherwise be a barrier to entry and expansion and would act to entrench the position of the dominant provider;
- improve market resilience – for example, in extreme circumstances where an ELN is unable to perform lodgment or settlement, the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) / the Registrar General could use an interoperability service between ELNs to temporarily redirect transactions to an alternative ELN without additional effort from market participants; and
- encourage innovation and incentivise ELNOs to differentiate themselves from each other.

Interoperability would therefore allow consumers to capture the full financial and operational savings offered by e-Conveyancing.

The level of competition enabled by interoperability could be supported by other readily implemented mechanisms, such as a data standards governance framework and reduced costs for users to switch to another ELN (e.g. registration and security certificates).

3.4 Multi-homing would not deliver the benefits of competition

The Issues Paper notes that an alternative to interoperability is multi-homing (involving market participants subscribing to multiple ELNOs) and asks for information on the factors which would influence the effectiveness of interoperability and multi-homing solutions in promoting competition.

In the absence of interoperability, any market rules which allows a single participant to dictate the ELN used by other participants to a transaction would be inefficient and detrimental to competition. Such rules would effectively require all market participants to be ready to use any ELN and to pay the initial establishment costs of doing so. Further, such rules would result in market participants being forced to use ELNs which are less efficient or more costly for them (and their clients – the end consumer), instead of their preferred ELN. An interoperable market would not face these issues.

Sympli's view, after having conducted an extensive evaluation, is that interoperability is the only viable option to address the desire of market participants for choice between ELNs, without being forced to use a particular ELN. Sympli therefore supports the Government's in-principle position that interoperability between ELNOs should be mandated in NSW.¹ Sympli also understands that there is extensive industry support for interoperability, as well as support from the ACCC and the Law Society.²

As IPART notes, in the absence of interoperability, users would need to agree which ELNO to use for a transaction involving multiple users, meaning that multi-homing would become important

¹ See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, p7.

² In addition, Sympli notes that ARNECC has engaged a consultant to review of the Intergovernmental Agreement for an Electronic Conveyancing National Law, and that the scope of this review asks for advice on the changes needed to support a competitive ELNO market and the interoperability of ELN systems. See: ARNECC, *Scope of Review and Position Statement*.
https://www.arnecc.gov.au/regulation/intergovernmental_agreement

to maintaining a level of competition in the market. Sympli considers that multi-homing would not deliver the benefits of competition, given:

- the existence of network effects in favour of the incumbent ELNO; and
- the potential reluctance of subscribers to use multiple ELNOs – for example, on account of the resulting administrative burden and potential additional costs (such as the cost to lawyers/conveyancers to implement multiple systems and the costs of obtaining separate security certificates for each ELN).

3.5 The effectiveness and relative cost of different interoperability solutions

The IPART Issues Paper also asks for information on the factors which would influence the effectiveness of different models of interoperability, and the relative costs of those models. For that purpose, the Issues Paper describes several potential models of interoperability, being:

- (a) direct connection between ELNOs;
- (b) central infrastructure models, being:
 - (i) an ELNO information sharing hub; or
 - (ii) a central hub connecting directly to the IT systems of ELNOs, financial institutions, the RBA and the relevant land registry and revenue office; and
- (c) an access regime, where one 'infrastructure ELNO' provides lodgment services, settlement services and network infrastructure to the other ELNOs.

The Issues Paper broadly corresponds with the consideration being given to this issue by the industry-wide interoperability working group facilitated by the NSW Registrar General (**Interoperability Working Group**), which is currently examining two types of models to achieve interoperability between ELNs: bilateral interoperability (i.e. direct connection between ELNOs) and hub-based interoperability.³

Sympli will support the view of Registrars, practitioners and financial institutions in the choice of an interoperability implementation model. However, Sympli considers the implementation of the bilateral model would be less costly and simpler to implement under current market conditions.

If a hub model of interoperability is adopted, Sympli will support any of the hub models outlined in the NSW Registrar General's recent Directions Paper, subject to the operational, governance and pricing safeguards outlined in that paper also being implemented. However, Sympli's preference is that the role of the hub be limited to acting simply as messaging hub (i.e. without any central functionality). This is because the 'information hub' model would:

- result in a more secure electronic lodgment and settlement system;
- be simpler in terms of governance and regulation of the hub and the manner in which ELNOs interact with the hub;
- require the least change to product design to allow for interoperability within the e-Conveyancing market; and
- maximise the potential for innovation and better facilitate non-price competition between ELNOs, through investment into the user experience and the portal in which users input information.

³ See: NSW Registrar General, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019.

Sympli also agrees with the Government's proposed key principles to guide decisions about the scope and design of an interoperability regime, being:

- the primary consideration must be to maintain the integrity of the land titles register and the Torrens system more generally.
- the interoperability solution should promote competition and consumer choice, including maximising the opportunities for future innovation in technology, service delivery and business models to the benefit of consumers;
- the least complex and most efficient solution to implement interoperability should be preferred; and
- any interoperability solution adopted in NSW must be adaptive to a nationally agreed interoperability solution.⁴

⁴ See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, p10.

4 Pricing regulation of ELNO services

4.1 Introduction

The Issues Paper asks for views on the appropriate form of ELNO pricing regulation, and whether new entrants should be exempt from such regulation (Questions 4 and 9). Sympli sets out its views on these matters below.

4.2 The purpose of pricing regulation

As stated above, Sympli considers that pricing regulation of ELNOs will not be necessary or desirable upon the emergence of effective competition between ELNOs (which in turn will depend upon effective interoperability).

Further, to the extent that IPART concludes that some form of pricing regulation is necessary in the interim period (i.e. until the emergence of effective competition), Sympli considers that the purpose of such regulation should be to promote the welfare of consumers by:

- minimising the risk of potential monopolistic behaviour by the incumbent ELNO;
- promoting competition between ELNOs;
- minimising barriers to entry and encouraging new market participants; and
- promoting innovation in technology and service delivery.

The risk of potential monopolistic behaviour by the incumbent arises from the state of the e-Conveyancing industry, discussed above. That is, the industry is characterised by the presence of a sole incumbent ELNO (PEXA) providing services which are essential to property dealings. The incumbent is not currently constrained by other ELNOs in NSW and will not be constrained by traditional paper conveyancing once paper conveyancing is phased out in July 2019. Further, the incumbent enjoys significant network effects which act as a barrier to new entrants.

In those circumstances (and in the absence of regulation), the financial performance of the incumbent could be improved by simply increasing prices or reducing service quality. The potential for the incumbent to do so is the 'economic problem' at which any pricing regulation should be targeted. That is, any such regulation should seek to ensure that captive consumers are not exposed to a monopolistic supplier exercising its market power (whether by 'charging more' or 'giving less'), while also ensuring that consumers benefit from cost advantages associated with that supplier's economies of scale. Such regulation should also be a proportional response to that problem, balancing the costs and benefits to industry and the community overall. Sympli notes that pricing regulation has been applied to address similar economic problems in other industries.

Further, to the extent that IPART recommends pricing regulation for ELNO services, such regulation should consider ELNO prices on both sides of the e-Conveyancing market, to minimise the risk of monopolistic behaviour arising from a firm discounting prices in certain market segments, and funding or subsidising such discounts through prices charged to a separate user group.

4.3 The application of pricing regulation to new entrants

New entrants should be exempt from pricing regulation

To achieve the purposes set out above, Sympli considers that any pricing regulation of ELNO services should focus on the existing incumbent and should not apply to new entrants. This is because:

- as IPART notes, a new pricing regulatory framework has the potential to introduce barriers to entry in e-Conveyancing and may restrict innovation. Exempting new entrants from such a framework would therefore promote competition between ELNOs;
- the purpose of such regulation should be to protect consumers from the potential monopolistic behaviour of the incumbent (as discussed above), rather than to limit the flexibility of new entrants bringing competition to a concentrated market; and
- regulation should ensure a level playing field, where market participants facing the same level of risk are subject to the same regulatory treatment. In the e-Conveyancing market, the risks faced by new entrants are substantially higher than the risks faced by the dominant incumbent, which benefits from substantial network effects.

Such an approach would be a proportional regulatory response, targeted at addressing the 'economic problem' at hand.

Such an approach would involve what is sometimes referred to as 'partial industry intervention':

In some situations "partial-industry" regulation may be superior to either all or nothing regulatory policies. In its broadest sense, partial-industry regulation means that government regulates only a part of the industry, leaving another part unregulated. Under partial-industry regulatory schemes, government purposefully treats firms in an industry differently.⁵

This approach may also be referred to as a 'graduated approach' to regulation, designed to facilitate competition and new entry. There is increasing recognition of this approach in other regulatory contexts, and of the need to balance regulation and innovation. This was recently noted by the RBA, as follows:

Most regulators around the world seem to be encouraging innovation while taking a proportionate approach to regulation. This often involves a graduated approach to regulation, depending on the activities of the new participants. For example, many jurisdictions have some type of regulatory 'sandbox' in which new participants can develop their services without the full weight of regulation. Some jurisdictions authorise payment service providers under less onerous conditions than apply to full financial institutions.

In Australia, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) are also taking a graduated approach to new entrants. ASIC has a regulatory sandbox framework that is specifically designed to provide eligible fintech businesses the flexibility to test new products and services without the need for a licence. Similarly APRA has established a framework for licencing 'Restricted ADIs', which allows potential entrants to the banking sector to conduct limited banking business for a period of time under a simpler prudential framework while they develop their capabilities and resources. Importantly though, under both these frameworks, new entrants are expected to eventually meet the same requirements as other financial service providers, ensuring a level playing field.⁶

⁵ Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford Socio-Legal Studies, 1992, p133.

⁶ Michele Bullock, Assistant Governor, Financial System, RBA, *Keynote speech at the 5th Bund Summit on Fintech*, 8 July 2018. See: <https://www.rba.gov.au/speeches/2018/pdf/sp-aq-2018-07-08.pdf>

An appropriate point for pricing regulation to apply to new entrants

The Issues Paper also asks for comment on the appropriate point at which new entrants should become subject to pricing regulation, should they be initially exempt from such regulation. In particular, the Issues Paper suggests that new entrants could become subject to pricing regulation upon reaching a set level of market share.

Sympli does not propose to comment on a particular market share at which point new entrants should be subject to pricing regulation. However, Sympli submits that:

- in assessing the market share threshold, it will be important to account for the existence of network effects in the market, which may limit the ability of new entrants to gain and maintain market share; and
- whether new entrants meet the relevant market share threshold for pricing regulation should be assessed over an appropriate period of time and across different metrics. For example, it would not be appropriate to assess whether a particular new entrant meets the market share thresholds based on volume of one type of transaction over a one-month period.

Further, Sympli submits that if new entrants are meeting the relevant market share threshold in order for pricing regulation to apply, this may be indicative of effective competition in the market. If that were the case, the need for pricing regulation altogether would fall away.

4.4 Form of ELNO pricing regulation

IPART view on form of ELNO pricing regulation

In the Issues Paper, IPART seeks views on an appropriate regulatory framework for the pricing of ELNO services, and sets out four broad forms of price regulation, from most to least prescriptive, as follows:

- (a) setting maximum prices for the individual regulated services ELNOs provide for each year of the regulatory period;
- (b) setting maximum prices for the individual regulated services for the initial year of the regulatory period, and adjusting these prices by the change in an index (such as CPI or an industry-specific index) in each of the following years of the period;
- (c) setting maximum prices for the individual regulated services ELNOs provide for the initial year of the regulatory period, and allowing ELNOs to adjust these prices within the limits of a weighted average price cap in each of the following years of the period; and
- (d) setting the total revenue each ELNO is permitted to generate from all the regulated services it provides in each year of the regulatory period and allowing the ELNOs to set its prices for individual services within the limits of this revenue cap each year.

IPART goes on to note that:

- IPART prefers a form of regulation which allows for pricing flexibility, as this would allow for competition through innovative pricing structures;
- of those options listed above, only (c) and (d) allow some flexibility for ELNOs to vary the structure and levels of individual product prices over the regulatory period, subject to broader constraints on price or revenue increases; and
- IPART is likely to recommend a form of regulation which sets maximum prices.

Sympli view on the form of ELNO pricing regulation

Sympli strongly supports IPART's view that any framework for regulating ELNO pricing should allow for pricing flexibility and promote competition. Regulation which is more prescriptive and less flexible may harm the industry by raising barriers to entry and limiting innovation.

For example, while current pricing models attach a price per product or service (which appear to be fixed regardless of quantity), it is plausible that new pricing models may emerge, such as subscription-based services. Such innovation should not be stifled by inflexible pricing regulation.

4.5 The concept of a 'benchmark efficient ELNO'

The Issues Paper notes that the costs of the incumbent ELNO may differ from those of future ELNOs, and that IPART therefore proposes to set prices to recover the costs of a 'benchmark efficient ELNO'. Sympli understands that, to the extent that pricing regulation applies to multiple ELNOs in NSW (rather than just the dominant incumbent), using the concept of a 'benchmark efficient ELNO' would ensure that pricing regulation:

- does not discriminate between ELNOs; and
- is less likely to inhibit competition from smaller ELNOs which may have different cost structures to the incumbent.

Sympli considers that these outcomes are important to any form of pricing regulation and therefore supports the use of the 'benchmark efficient ELNO' concept to the extent that it would achieve those outcomes.

4.6 Method of estimating the costs of a benchmark efficient ELNO

The Issues Paper considers three methods of estimating the costs of a benchmark efficient ELNO, being:

- (a) a building block approach;
- (b) a cost build-up approach; and
- (c) benchmarking ELNO prices to the prices of paper conveyancing.

Relevantly, IPART states that its "*standard regulatory approach to estimating the costs of an asset-heavy business uses the 'building block' method to determine a 'notional revenue requirement'*".⁷

Sympli considers that a building block approach may be a viable method of estimating the costs of a benchmark efficient ELNO, if that approach involves examining the financial and business information of the incumbent ELNO (PEXA) and making adjustments to reflect IPART's expectations of efficiency and the characteristics of a benchmark efficient ELNO. However, such an approach may be difficult to apply in practice if it involved estimating the costs of a benchmark efficient ELNO by examining the anticipated costs of Sympli or other potential new entrants, given that e-Conveyancing is in its infancy and that Sympli (and other ELNOs) have not yet commenced operations in NSW.

Further, Sympli submits that in considering the costs of a notional 'benchmark efficient ELNO', IPART should acknowledge that:

- to the extent that PEXA invested capital and developed intellectual property as the incumbent ELNO, that investment has given PEXA a 'first-mover advantage' – that is, the

⁷ IPART, *Review of the pricing framework for electronic conveyancing services in NSW: Issues Paper*, 2019, p35.

competitive advantage of an incumbent position in an industry with barriers to entry and network effects;

- during this time, PEXA has experienced a degree of regulatory certainty, with the introduction of e-Conveyancing in certain states from 2013. This is in contrast with the developing regulatory environment facing new entrants today, which has yet to effectively deal with issues of competition, including interoperability. In that context, new entrants face a high degree of uncertainty and risk;
- PEXA is likely to increase its investment in customer retention to maintain its position as new firms seek to enter the market; and
- as the prospective second entrant, Sympli has incurred costs related to promoting competition – including costs related to accessing the National Electronic Conveyancing Data Standard (NECDS) and advocating for interoperability. Further, Sympli will incur higher ongoing costs in attracting new customers, including extensive marketing costs; and
- new entrants will benefit from the investment that Sympli and PEXA have made into the design and development of interoperability (including the development of data standards, business rules and governance framework).

5 Pricing of interoperability

5.1 Introduction

Sympli sets out below its views on the appropriate market conventions to support an interoperability pricing framework and the treatment of the costs of interoperability.

5.2 Market conventions to support interoperability pricing framework

The Issues Paper notes that market conventions will be required to delegate each ELNO's role in an interoperable transaction, and asks:

- should one or multiple ELNO(s) complete lodgment within the land registry and financial settlement with the RBA; and
- which ELNO(s) should perform those activities.

Sympli notes that these issues are being considered by the Interoperability Working Group.⁸ In that context, Sympli has submitted that:

- in an interoperable transaction, lodgment and financial settlement should both be undertaken by a single ELNO on behalf of the interconnected ELNOs; and
- Sympli will support the view of Registrars, practitioners and financial institutions in choosing a rule or market convention to identify the single lodging ELNO in an interoperable transaction and supports the intention for the lodging ELNO to be selected by the Responsible Subscriber;
- Sympli supports the Interoperability Working Group criteria for addressing this question, being that:
 - the lodging ELNO should be designated at the earliest practicable point in the conveyancing transaction;
 - the designation of the lodging ELNO should be subject to minimum change during the course of the conveyancing transaction; and
 - as between two ELNOs, there should be broad symmetry in the transactions where they are acting as lodging ELNOs and where they are not.⁹

5.3 The cost of implementing an interoperability solution

The Issues Paper asks which parties should bear the costs of implementing an interoperability solution, and how those costs should be recovered.

Each ELNO should bear its own costs of interoperability

Sympli agrees with the Government's preliminary view that each ELNO should bear its own costs of interoperability as a cost of doing business in a multi-operator competitive market.¹⁰ In particular, Sympli considers that:

- if a bilateral interoperability model is adopted, the costs of interoperability should be absorbed by each ELNO; and

⁸ See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019.

⁹ See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, p20.

¹⁰ See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, p27.

- if a hub-based interoperability model is adopted, ELNOs should be charged for use of the hub. The fees for use of the hub should be determined with reference to cost and regulated.

Sharing the costs of lodgment and financial settlement

ELNO pricing generally includes an allowance for the costs of lodgment and financial settlement. Sympli supports the Government's view that interoperable transactions should not involve a special subscriber charge or loading. Rather, in an interoperable transaction, the costs of lodging and financial settlement should be incurred directly by the lodging ELNO, and a portion of the fees charged by the non-lodging ELNO should be passed on to the lodging ELNO as a transfer fee. Sympli submits that these transfer fees should be determined with reference to cost and set consistently across ELNOs, and that IPART should recommend a methodology to calculate that transfer fee as part of its review, as discussed below.

5.4 IPART's proposed approach to examining interoperability pricing

The Issues Paper states that:

- IPART cannot accurately estimate the costs of interoperability and recommend how those costs should be recovered, given the uncertainty regarding whether interoperability will be implemented and what form that interoperability will take; and
- IPART therefore proposes to recommend a set of economic and pricing principles for recovering the potential costs of interoperability, to be revisited once a solution has been defined and costs are known.

Sympli strongly implores IPART to go further than recommending principles for interoperability pricing. In particular, Sympli submits that IPART should also recommend a methodology (or methodologies) to calculate interoperability pricing (i.e. the 'transfer fees' referred to above), and publish example transfer fees using that methodology as an example for the benefit of the industry.

Sympli considers that this would be an eminently achievable exercise. The process would involve IPART examining different potential scenarios and making assumptions for each scenario. In particular, the process would involve making assumptions regarding:

- the model of interoperability to be adopted (or examining multiple potential models of interoperability and recommending pricing methodologies for the models more likely to be adopted)
- the number of ELNOs in an interoperable transaction;
- the volume of interoperable transactions, and
- the costs of lodgment and financial settlement to be shared between ELNOs in an interoperable transaction.

Naturally, IPART's recommendations for such methodologies and calculation of example transfer fees would need to be revisited upon the adoption of a particular model for interoperability. However, by publishing such recommendations and example calculations now, IPART could clarify and illuminate the potential costs of interoperability and enable the current industry discussion regarding interoperability to progress substantively and on an informed basis. In that context, Sympli notes that the Interoperability Working Group's recent Directions Paper defers to IPART on these issues:

As IPART is currently reviewing electronic conveyancing fees in the lead up to mandatory eConveyancing, it would be well placed to advise on the appropriate allocation of the fees between the lodging and non-lodging ELNOs.¹¹

Taking these steps would also be consistent with the NSW Government's terms of reference for IPART's review, which direct IPART to consider how the costs and effectiveness of interoperability should be reflected in an appropriate pricing regulatory framework for ELNO services.

¹¹ See: Registrar General NSW, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, p28.

6 Vertical integration

6.1 Introduction

The Issues Paper notes the potential for vertical integration of ELNOs with upstream and downstream services, and asks for comment on:

- how vertical integration will influence competition between ELNOs and the efficiency of the conveyancing process; and
- how any pricing regulatory framework for ELNOs should address vertical integration in e-Conveyancing.

Sympli sets out its view on these issues below. In summary, Sympli considers that the pricing regulatory framework for ELNOs need not address vertical integration in e-Conveyancing, including because the MORs contain separation and equivalence provisions intended to address vertical integration issues.

6.2 Relevance of separation and equivalence requirements in the MORs

The MORs require that an ELNO (or a related entity) which supplies upstream or downstream services must separate those services from its services as an ELNO, either structurally or functionally, and operate those separate businesses at arm's length and in a manner which does not give an unfair commercial advantage to the related entity. The purpose of this requirement is to ensure the related supplier of the upstream or downstream service does not receive an advantage over its competitors by virtue of its relationship to the ELNO.¹²

Further, the MORs also set out equivalence obligations on ELNOs providing services to persons wishing to integrate their system technologically with an ELN. Those provisions require that:

- ELNOs prepare and publish a set of Integration terms and conditions which set out the requirements for a person wishing to integrate; and
- ELNOs treat persons wishing to integrate and who have integrated on an 'equivalent basis', subject only to differences which are attributable to the type, level or class of integration with the ELN, provided that each person has an equivalent opportunity to choose between those options.¹³

Relevantly, the term 'equivalent basis' is defined as meaning equivalence:

- (a) by using the same terms and conditions relating to price or the same method of ascertaining price;
- (b) by using the same application programming interfaces, other interfaces and technologies;
- (c) by using the same processes and systems in providing access to, or use of, the ELN;
- (d) in relation to the development of new application programming interfaces, other interfaces and technologies of the ELN or enhancing the ELN's functionality and capabilities; and
- (e) in relation to other terms and conditions for supplying access to, or use of, the ELN.

6.3 An ELNO pricing regulatory framework need not address vertical integration

Sympli intends to integrate its platform with the platforms of upstream businesses such as information brokers and practice management system providers. Such integration allows those

¹² See MORs 5.6 and related Guidance Notes. Examples of upstream services include practice management software and information broking, while downstream services include conveyancing and legal services.

¹³ See MORs 5.5.

providers to offer end-to-end conveyancing systems, reduces the risk of error in the e-Conveyancing process and saves user time which would otherwise be spent on re-keying data across platforms. For comparison, Sympli understands that PEXA is also integrated with such providers, such as InfoTrack, SAI Global and Global X.

Relevantly, Sympli is 50% owned by Australian Technology Innovators Pty Limited, the parent company of conveyancing software providers InfoTrack and LEAP. However, these relationships will not influence competition between ELNOs or the efficiency of the conveyancing process. That is, Sympli will not obtain a competitive advantage on account of its relationships with InfoTrack or LEAP. Sympli does not share systems or personnel with InfoTrack or LEAP, and in any case, the MORs require that Sympli:

- engage with InfoTrack and LEAP on an arms' length basis and in a manner which does not give an unfair commercial advantage to InfoTrack and LEAP; and
- engage with other conveyancing software providers on an equivalent basis.

To the extent that any issues arise with the effectiveness or enforceability of those regulations, Sympli considers that those would be matters to be addressed by ARNECC, including in any future version of the MORs. In that context, Sympli notes that:

- ARNECC has stated that it will consider specific issues and suggestions on the equivalence provisions in the MORs as they arise;¹⁴ and
- there is regulatory precedent to guide any necessary amendment to the MORs – for example, the equivalence provisions in the MORs are not dissimilar to the non-discrimination obligations which have applied to superfast telecommunication networks for several years, and to the ACCC's guidelines in respect of those obligations.¹⁵

For these reasons, Sympli considers that the pricing regulatory framework for ELNOs need not address vertical integration in e-Conveyancing.

¹⁴ ARNECC, *Model Operating Requirements Version 5 Consultation Draft 5.1 Feedback Table*, 21 December 2018: <https://www.arnecc.gov.au/resources/feedback>

¹⁵ See: Part XIC of the *Competition and Consumer Act 2010* (Cth); ACCC, *Part XIC non-discrimination guidelines*, April 2012: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/non-discrimination-under-part-xic/guideline>

7 Regulation of pricing of LRS and Revenue NSW

7.1 Introduction

In respect of services provided to ELNOs by NSW LRS, IPART proposes to:

- consider whether current lodgment support service (**LSS**) fees reflect the efficient costs of providing those services; and
- recommend appropriate fees and a fee structure that NSW LRS can charge for building a system of connection and ongoing maintenance (recovered separately from LSS fees).

In that context, IPART has asked for views on the appropriate pricing methodology for NSW LRS's services to ELNOs. Sympli sets out its view on these issues below.

7.2 Sympli view on current pricing regulation of NSW LRS

Sympli supports the existing regulation of NSW LRS pricing which requires that the:

- prices set by regulation at the time NSW LRS moved to a concession model cannot increase by more than CPI each year; and
- the prices of new services introduced by NSW LRS must be approved by the Registrar General.

The regulation setting those prices includes:

- the *Real Property Regulation 2014* (NSW), which sets out the fees that can be charged for: advertisements, LSS, lodgment of caveats, dealings, and priority notices, reports and official searches;
- the *Conveyancing (General) Regulation 2013* (NSW), which sets out the fees that can be charged for: registration of instruments, supplying or lodging digital images, official searches and dealing with plans; and
- the *Strata Schemes Development Regulation 2016* (NSW), which sets out the fees that can be charged for: lodgment of plans and associated instruments, supplying or lodging digital images and dealings, applications and requests.

7.3 IPART review of NSW LRS pricing

Sympli supports IPART's inquiry into whether NSW LRS' existing fees are efficient, and into the appropriate fees that NSW LRS should charge for building a system of connection with ELNOs and ongoing maintenance of that system. Sympli is currently in the process of connecting its systems to those of NSW LRS pursuant to a commercial arrangement with NSW LRS.

Further, Sympli submits that:

- it is appropriate that the fees of NSW LRS apply consistently to all ELNOs. PEXA should not be advantaged in respect of such fees on account of being the first ELNO operating in NSW;
- it is important that there is no double recovery of NSW LRS costs through LSS fees and the separate fees to be charged for building and maintaining connections to ELNOs;
- any pricing regulatory framework must allow for the fees charged to ELNOs by NSW LRS to be passed through to subscribers, and therefore such fees:
 - should be clear and transparent; and

- should be considered as part of an ELNO's efficient costs for the purposes of any ELNO pricing regulation to be recommended by IPART;
- Sympli agrees with IPART's view that any cost savings to NSW LRS as a result of e-Conveyancing should be taken into account when setting prices for the services provided to ELNOs by NSW LRS. This is the logical counterpoint to NSW LRS being able to charge ELNOs for building and maintaining connections to ELNOs.

7.4 Allocation of NSW LRS' shared assets and costs to services for ELNOs

The Issues Paper:

- notes that NSW LRS provides a range of services including accepting documents for lodgment, managing the Torrens Title Register, plan examination and plan registration;
- states that IPART is only required to review the efficient costs of NSW LRS providing lodgment services to ELNOs, as opposed to NSW LRS' other services; and
- sets out IPART's proposed approach to accounting for NSW LRS assets and costs which are used both for providing services to ELNOs and for other functions and services of NSW LRS. Broadly, that approach involves IPART identifying an appropriate cost driver for each shared asset and cost (such as time or the volume of transactions or subscribers), estimating the proportion of the cost driver which relates to providing lodgment services to ELNOs (and not to NSW LRS' other functions and services), then allocating an appropriate proportion of the shared asset into the cost base.

Sympli agrees with IPART's proposed approach and the principle that the calculation NSW LRS' prices for services to ELNOs should exclude NSW LRS' costs relating to its other functions and services. For example, that calculation should exclude NSW LRS' costs of plan examination and maintaining the Torrens Title Register, which NSW LRS recovers separately through other charges. Amounts paid by ELNOs to NSW LRS should not subsidise NSW LRS' other functions and services.

7.5 IPART review of Revenue NSW pricing

The Issues Paper notes that the current Revenue NSW system was set up for a single ELNO and asks whether Revenue NSW should charge ELNOs for the cost of updating its system to accommodate new ELNOs, and if so, on what basis. Sympli is currently in the process of connecting its systems to those of Revenue NSW and has entered into commercial arrangements with Revenue NSW to offset Revenue NSW's cost of connection.

Sympli submits that it is inappropriate for Revenue NSW to charge ELNOs a fee to assist Revenue NSW in performing its primary function of collecting taxes, duties and levies. This is not the approach taken for taxation generally, or in respect of regulatory regimes applying in other industries. Any fees charged by Revenue NSW to ELNOs would be passed through to subscribers (and ultimately consumers), meaning that consumers would be paying Revenue NSW's costs to process their mandatory tax, duty or levy. In contrast, consumers using paper conveyancing are not charged for Revenue NSW's costs in collecting taxes, duties and levies. It is not appropriate that Revenue NSW charge some groups but not others for performing its primary function, based on the technology used by those different groups.

To the extent that IPART takes a different view and recommends that Revenue NSW should charge fees to ELNOs, Sympli submits that:

- such fees should apply consistently to all ELNOs. PEXA should not be advantaged in respect of such fees on account of being the first ELNO operating in NSW;
- any pricing regulatory framework must allow for the fees charged to ELNOs by Revenue NSW to be passed through to subscribers, and therefore such fees:
 - should be clear and transparent; and
 - should be considered as part of an ELNO's efficient costs for the purposes of any ELNO pricing regulation to be recommended by IPART; and
- when assessing any fees charged by Revenue NSW, IPART should take into account the cost savings to Revenue NSW as a result of e-Conveyancing (as IPART proposes to do in relation to the services of NSW LRS). This is the logical counterpoint to Revenue NSW being able to charge ELNOs for building and maintaining connections to ELNOs.

Schedule 1 – Definitions

ARNECC	Australian Registrars' National Electronic Conveyancing Council
ASX	ASX Limited
e-Conveyancing	electronic conveyancing
ELN	Electronic Lodgment Network
ELNO	Electronic Lodgment Network Operator
IPART	Independent Pricing and Regulatory Tribunal
Interoperability Working Group	The industry-wide working group examining issues related to interoperability, facilitated by the NSW Registrar General.
MOR	Model Operating Requirements Version 5 effective 25 February 2019
PEXA	Property Exchange Australia Ltd
Subscribers	Customers who are authorised to use the ELNO platform such as conveyancers, solicitors or financial institutions
Sympli	Sympli Australia Pty Ltd