



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:EE:1617526

24 April 2019

eConveyancing Review
Independent Pricing and Regulatory Tribunal
PO Box K35
HAYMARKET POST SHOP NSW 1240

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

Dear Sir/Madam,

**Review of pricing framework for electronic conveyancing services in NSW
("Issues Paper")**

The Law Society of NSW appreciates the opportunity to comment on the Issues Paper. The Law Society's Property Law Committee has contributed to this submission.

Our responses to the questions raised in the Issues Paper are set out in the attached table.

We would be pleased to meet with you to further discuss any of the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Elizabeth Espinosa
President

Review of the pricing framework for electronic conveyancing services in NSW

Submission by the Law Society of NSW – April 2019

NO.	QUESTIONS	COMMENTS
Proposed approach		
Q.1.	Do you agree with IPART's proposed approach for this review? Are there any alternative approaches that would better meet the terms of reference, or any other issues we should consider?	<ul style="list-style-type: none">• It appears to be satisfactory and we have no alternative suggestions.• The approach to pricing must ensure that additional charges to ELNs and industry do not erode the benefits of eConveyancing. Competition must not result in increased costs to the industry and clients.
Assessing the eConveyancing market		
Q.2.	What are your views on the current state of the market? For example, does the continued availability of paper conveyancing in other jurisdictions constrain prices for eConveyancing? What scope is there for new entrants to offer the full range of eConveyancing services?	<ul style="list-style-type: none">• For practitioners, the continued availability of paper conveyancing in other jurisdictions is largely irrelevant.• There is scope for new entrants to offer the full range of eConveyancing services and we note the document capability requirements of NSW Operating Requirement 5.2(b).

NO.	QUESTIONS	COMMENTS
Q.3.	How important are barriers to entry in constraining competition in the eConveyancing market? Are there other barriers or factors that will influence competition in the market?	<ul style="list-style-type: none"> • The barriers to entry are important and we agree with the analysis at part 4.2 of the Issues Paper. • From a practitioner's perspective, the factors identified in the last paragraph of part 4.2.1 are significant. Practitioners will need to see tangible benefits to make the investment (including time and effort) in subscribing to new ELNOs. • To date the set-up costs for a new ELN have been prohibitive, but with the mandating of electronic conveyancing it appears that business cases for multiple ELNs can now be justified. • The ability and willingness of the financial institutions to build network connections with each ELN are crucial and any unwillingness on their part to incur further connection costs may operate as a real constraint on the ability of new ELNOs to enter the market.
Q.4.	To what extent would pricing regulation increase barriers to entry? Should new entrants be exempt from pricing regulation and, if so, what would be an appropriate market share benchmark at which pricing regulation would commence?	<ul style="list-style-type: none"> • We do not agree that pricing regulation will increase barriers to entry. • New entrants should not be exempt from pricing regulation. Market forces and competition will play the role of constraining fees.
Q.5.	What factors influence the effectiveness of potential multi-homing or interoperability solutions in promoting competition?	The Law Society prefers an interoperable solution to multi-homing in achieving a more competitive outcome. We see greater potential for anti-competitive behaviour in a multi-homing environment. For example, a financial institution may choose its preferred ELN and mandate that the parties use that ELN for the transaction.

NO.	QUESTIONS	COMMENTS
Q.6.	What are the relative costs of implementing the different potential multi-homing or interoperability solutions between ELNOs?	From our members' perspective, multi-homing will involve greater direct costs to practitioners, but we are unable to comment further.
Q.7.	How will vertical integration or the potential for vertical integration influence competition between ELNOs and the efficiency of the conveyancing process?	<ul style="list-style-type: none"> • We note there are already instances of vertical integration. • To achieve real competition, it will be important to ensure that complementary services are not cross-subsidised. • As the Issues Paper notes, enforcement of the current Model Operating Requirements in relation to vertical integration raises questions as to how requirements will be enforced. Additional regulation in this area would face the same challenges in relation to enforcement. • In our view there is also a need to monitor and regulate, where possible, the effect practices such as the reported integration levy of \$9 being charged by LEAP, a member of the InfoTrack/Sympli group, for clients wanting to push data from their LEAP document system into PEXA.
Q.8.	How should the pricing regulatory framework for ELNOs address vertical integration or the potential for vertical integration in eConveyancing?	We prefer such regulation be achieved through enhancements to the Model Operating Requirements, although we acknowledge the difficulties in enforcement.

Deciding on and applying pricing methodology for ELNO services		
Q.9.	What form of regulation for ELNO pricing do you support? Why?	<ul style="list-style-type: none"> We prefer the setting of an initial maximum price with an annual CPI adjustment. This approach has the benefit of simplicity and it is quite a common approach to fee increases. Eg the annual lodgment fee increases of the services provided by NSW Land Registry Services. We suggest an annual increase on 1 July would be appropriate.
Q.10.	If we decide to use an index to adjust the initial regulated prices in the following years of the regulatory period, is CPI an appropriate index? If not, what other index could we use?	Yes, CPI is an appropriate index. It is well understood and transparent.
Q.11.	What measures will our pricing framework require to enable flexibility and innovation for new entrant ELNOs?	We defer to other stakeholders with greater expertise in this area.
Q.12.	Do you consider recommending prices based on the costs of a notional benchmark efficient ELNO is an appropriate way to promote competition in the eConveyancing market? If yes, what is an appropriate set of characteristics for the benchmark efficient ELNO?	The development of a notional benchmark efficient ELNO is problematic in our view. For example, the business models of the emerging ELNOs appear to be very different from the incumbent ELNO.

Q.13.	What firms or industries are comparable to a benchmark ELNO in terms of their exposure to market risk? What percentage of debt rather than equity would an efficient ELNO be able to sustain to finance its assets (ie, the gearing level)?	We defer to other stakeholders with greater expertise in this area.
Q.14.	How should we assess the efficient costs of providing eConveyancing services?	We support the approach of benchmarking ELNO prices to paper conveyancing prices, as set out in part 5.3.1 of the Issue Paper. We note that several consultants have prepared reports in this area, for example the report prepared by KPMG in February 2018, <i>Electronic conveyancing – Analysis of the benefits of electronic conveyancing to conveyancers and lawyers in NSW</i> . ¹
Q.15.	Should ELNO's assets and costs be shared between states according to the proportion of conveyancing transactions or the number of subscribers in each state? Are there other approaches to sharing ELNO's costs and assets across multiple states?	In our view, the fairest approach is to share the costs between states according to the proportion of conveyancing transactions in each state.
Q.16.	Are there benefits to ELNOs having nationally consistent prices?	Yes.
Q.17.	Should eConveyancing customers in states where ELNOs incur lower costs of providing eConveyancing services pay the same price as states that have higher costs?	Yes. In our view the simplicity of this approach lowers administrative costs and is beneficial to all customers on that basis. We acknowledge that others may find this approach objectionable of the basis that the cross subsidisation is unfair, but in our view national consistent prices are preferable.

¹ https://www.registrargeneral.nsw.gov.au/_data/assets/pdf_file/0003/331095/eConveyancing-Final-Report.pdf

Q.18.	Are there any other issues relevant for considering whether our recommended NSW pricing regulatory framework could be an appropriate model for a national regime?	The funding of a future regulatory model and potential new national future regulator may have an impact upon a pricing model for a national regime.
Q.19.	Who should bear the costs of implementing an interoperability solution and how should the costs be recovered?	<ul style="list-style-type: none"> • Each ELNO should bear its own costs and this will ensure a level playing field amongst the ELNOs. • The cost recovery methodology will depend upon the interoperability model adopted.
Q.20.	In an interoperable transaction, should one or multiple ELNO(s) complete lodgment with the land registry and financial settlement with the RBA, and which ELNO(s) should perform these activities?	<ul style="list-style-type: none"> • In our view it should be the one ELNO undertaking both the lodgment and financial settlement functions on behalf of the interconnected ELNOs, as this better ensures that the 'delivery versus payment' principle is followed. • It should not be a matter for agreement between the parties, but rather it should be objectively determined. • In our view the lodging ELNO should be the ELNO being used by the incoming mortgagee or the unencumbered incoming proprietor. • Further consideration will need to be given to the situation where a number of settlements are to occur simultaneously.

Q.21.	What are the likely cost drivers of an interoperable transaction?	<p>The cost drivers will depend upon the interoperability model chosen but potentially relevant factors include:</p> <ul style="list-style-type: none"> • the extent to which there is a single data supply which is shared between ELNOs, or whether multiple data supplies will be required; • the extent of multi-homing; • if a limited interoperability model is operating, the cost of disagreements regarding the ELN in which the transaction will be conducted; and • the solution for risk, liability and insurance that is adopted. <p>The pricing methodology will need to differentiate between an ELN doing the whole lodgment case, an ELN contributing to the lodgment case and an ELN contributing and managing lodgment and settlement.</p>
Recommending prices for the services provided by NSW Land Registry Services and Revenue NSW		
Q.22.	What is the most appropriate pricing methodology for NSW LRS's services to ELNOs? Are there other alternative approaches we should consider?	Please see our response to question 25.
Q.23.	What firms or industries are comparable to NSW LRS in terms of their exposure to market risk? What percentage of debt rather than equity would NSW LRS be able to sustain to finance its assets (ie, the gearing level)?	<ul style="list-style-type: none"> • We have no suggestions. • In relation to the appropriate gearing level, we defer to other stakeholders with greater expertise in this area.
Q.24.	Do you agree with our proposed approach to allocating shared assets and costs? Are there other approaches or issues we should consider?	We don't agree that there should be cross-subsidisation through eConveyancing service fees for the maintenance of other systems that NSW LRS is obliged to maintain, such as the cadastre system, and for which fees are separately collected by NSW LRS.

Q.25.	Do you agree with our proposed approach to accounting for any cost savings to NSW LRS arising from the introduction of electronic lodgment services?	If the projected savings flowing from the growth of electronic lodgment identified in a number of published studies have been (and continue to be) realised, these should offset any costs NSW LRS may otherwise have sought to charge participants, so as to reduce the costs of implementing an interoperable solution.
Q.26.	Should Revenue NSW charge ELNOs for its electronic system?	No, Revenue NSW benefits significantly by having duty paid up front and from reduced labour costs. Revenue NSW also benefits in terms of information and processes within the eConveyancing system which facilitate better payment reconciliation and compliance management.
Q.27.	If Revenue NSW were to charge for services to ELNOs, on what bases should the fees be set?	We do not support Revenue NSW charging for services to ELNOs – see our response to question 26.
Timeframes and transition		
Q.28	When could businesses implement prices recommended by this review? What factors affect that timing and any transitional measures required?	<p>The answer depends upon the business being referred to, but relevant factors include:</p> <ul style="list-style-type: none"> • existing contractual arrangements, such as the ELNOs Participation Agreement; • solicitors, conveyancing and financial institutions have statutory cost disclosure requirements which will require sufficient lead times to implement; and • industry expectations of annual fee increases only. <p>We also note that clause 3 of the NSW General Conditions for ELNO approval limits an ELNO's ability to increase its fee to once annually, with limited exceptions.</p>

Q.29.	What is the appropriate determination period for ELNO, NSW LRS and Revenue NSW prices? What factors should we take into account when deciding on a determination period?	It is difficult to say but with the current state of flux in the market we agree that a shorter determination period appears to be more appropriate.
Q.30.	Should the scope of future reviews be similar to the current review, or focus on particular aspects of pricing?	We agree it should be similar but should also take into account the market conditions at the time of the review.