

## NSW Portfolio Committee No 4

### ANSWERS TO QUESTIONS ON NOTICE

#### Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022

**Agency:** Australian Competition and Consumer Commission

**Question 1:**

At the hearing of this Committee on 7 March 2022, Minister Dominello indicated the ACCC supported interoperability and the Bill. He said he 'stands on the side of angels with the ACCC'.

Kindly indicate:

- First, what investigations and reports has the ACCC completed that indicate more is needed to be done to enhance competition in the e-Conveyancing market? Has the ACCC quantified the potential losses or impacts that need to be addressed?
- Second, whether the ACCC has undertaken any investigation or published reports into the range of possible models that could be pursued to effectively enhance competition in the ELNO market, and the relative advantages of each available model? What model did they suggest would most likely sustain effective competition? Would any of the other models break the incumbents network effect?

**Answer:**

The ACCC supports competition in electronic conveyancing to provide competitive pricing, consumer choice and innovation and believes that interoperability is critical to competition in the market.

The ACCC has been advocating for the reform of the electronic conveyancing market for an extended period of time, and through multiple forums. As part of this work we have [published a range of materials relating to the reform of the electronic conveyancing market](#), including our [2019 report on e-conveyancing market reform](#), as well as our [recent letter of support for the reforms being progressed via the Bill](#).

The proposed interoperability approach has been developed by ARNECC over an extended period of time and following extensive consultation and development work with industry. The ACCC has engaged with ARNECC as part of these processes, including through its observer status in certain working groups and committees established by ARNECC in relation to the reforms.

**Question 2:**

I understand that ARNECC has already advised that further amendments are needed to complete the regulatory framework for interoperability. We've also heard that the Law society, AIC and PEXA all say there is more to do with the drafting. What is the logic of proceeding with an incomplete bill now – wouldn't it be better to present a bill that shows that the consultation feedback will be listened to and that the law be sufficient to achieve its intended purpose?

**Answer:**

The approach taken in relation to the development and introduction of the Bill is a matter for ARNECC and the responsible Minister and government, rather than the ACCC.

The ACCC understands that the intention of the staged legislative process is to enable the high-level framework needed to support continued reform to be established. As set out in its submission to the Committee, we understand that the reform process is at a critical stage and encourage the Committee to support the timely passage of the Bill, without amendment. The ACCC also understands the further amendments to the ECNL would be brought back before the NSW Parliament for consideration in advance of the implementation of interoperability.

**Question 3:**

Is the ACCC confident that the bill in its current form provides all the provisions needed to establish a sound and sufficient framework for the introduction of interoperability?

**Answer:**

As previously noted, the ACCC understands that the Bill forms part of a staged legislative process which is intended to establish the framework needed to continue the reforms.

As set out in our submission to the Committee, the ACCC considers it important that relevant issues raised by stakeholders during consultation processes are appropriately addressed and a fit-for-purpose national regulatory framework delivered.

While the ACCC has observer status in certain working groups and committees established by ARNECC in relation to the reforms, ARNECC is responsible for implementing and managing the regulatory framework for the national electronic conveyancing market.

The ACCC considers that delays to the Bill will hamper the rollout of not only interoperability, but other related reform processes e.g. the development of an enforcement regime for ELNOs and Subscribers, and the payments and financial settlement industry code being developed by AusPayNet. The ACCC notes that delays to these processes will affect multiple jurisdictions.

**Question 4:**

If very experienced Commonwealth financial regulators including the Treasury, ASIC and the RBA have decided against interoperability for the ASX with Chi-X, why is the ACCC supporting interoperability for ELNOs? If interoperability is thought too risky for shareholders, on what evidence has the ACCC determined that it could be safe for home-owners?

**Answer:**

The ACCC's role is to enforce the *Competition and Consumer Act 2010* and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of consumers, businesses, and the community.

In relation to the electronic conveyancing market the ACCC has advocated for a competitive market-based outcome, noting that a market dominated by an under-regulated near monopolist is undesirable and not in the long-term interests of the industry or consumers. The ACCC also notes that the existing regulatory framework for electronic conveyancing lacks an appropriate enforcement regime.

**Question 5:**

Last week in a hearing of this Committee, the Minister acknowledged that entrenching a duopoly would be a poor outcome for e-conveyancing and that he would welcome the ACCC's views. Has the ACCC assessed the potential impact on future competition within the sector because of this model of interoperability?

Is the ACCC aware that there have been warnings, including from discouraged market entrants, that the proposed model of interoperability will result in significant additional cost burdens to future potential entrants - increasing barriers to entry and likely entrenching a duopoly.

Has the ACCC investigated these concerns and published any reports in providing its support to the Bill in its current form?

Can the ACCC guarantee that the reforms will not entrench a duopoly?

**Answer:**

As noted at Question One, the ACCC has [published a range of materials relating to the reform of electronic conveyancing](#), including its [2019 report on e-conveyancing market reform](#), as well as its [recent letter of support for the reforms being progressed via the Bill](#). The ACCC has set out its views on different models for competition in these materials.

The ACCC notes that ARNECC (and before that NSW and South Australia governments via the Interoperability Technical Working Group established in 2020 to identify potential technological approaches to interoperability) has worked extensively with industry to consider how to progress the development of the interoperability model.

**Question 6:**

At the hearing of this Committee on 7 March 2022, the Minister said the ACCC was ‘confident’ all technical challenges, including issues raised by the Australian Institute of Conveyancers, could be overcome to introduce the current model of interoperability. Is that ACCC’s position?

Have you investigated or published any assessment of the technical aspects of implementation?

**Answer:**

The ACCC’s role is to enforce the *Competition and Consumer Act 2010* and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of consumers, businesses, and the community.

The ACCC has observer status in certain working groups and committees established by ARNECC in relation to the reforms, however ARNECC is responsible for implementing and managing the regulatory framework for the national electronic conveyancing market.

**Question 7:**

Does the ACCC have any comment on the timeline to interoperability – specifically that if we stultify the reform process, then we entrench the monopoly. Has the ACCC reviewed a detailed project plan that shows the required steps by all parties required to safely meet the minister’s timeline?

**Answer:**

The ACCC is on the public record stating the view that it is important that competition be introduced into the electronic conveyancing market, and that delay will benefit the incumbent, heighten barriers to entry, and detract from future possible benefits of competition.

As previously noted, the ACCC has observer status in certain working groups and committees established by ARNECC in relation to the reforms. The ACCC has at times received detailed planning documents.

ACCC experience has shown that delay in and of itself can be a key strategy used by dominant incumbents in an effort to stifle market reform and limit the prospect of market entry by competing firms.

**Question 8:**

Are you aware of concerns by the other prospective ELNO LEXTECH which has previously criticised this model of interoperability? That doesn't bode well for competition, does it?

**Answer:**

The ACCC is aware LEXTECH/Purcell Partners has raised concerns in relation to the electronic conveyancing market.

The ACCC notes that the processes for seeking approval to participate in the electronic conveyancing market as an Electronic Lodgement Network Operator are a matter for ARNECC. The ACCC also notes that Purcell Partners is a member of the Interoperability Industry Panel (the ACCC is an observer at this panel).

As previously noted, the ACCC has set out its views on competition in relation to the electronic conveyancing market in a range of public materials.



**Question 9:**

In the ACCC's 2019 market structure reform report, the ACCC itself noted initial concerns with direct connection interoperability including risks of heightening barriers and entrenching a duopoly with vertical integration risks to other markets.

Considering Sympli's owner – InfoTrack - and its related entities are leading suppliers of information broking services and practice management software services (which are much larger markets than e-conveyancing), isn't there a risk that interoperability results in the establishment of additional monopolies in other markets?

**Answer:**

The ACCC has set out its views on competition, including different models for competition, in relation to electronic conveyancing in a range of public materials.

The ACCC notes that since the publication of our 2019 report, stakeholders have engaged with ARNECC across a range of forums to progress the implementation of interoperability and consider a range of related matters. As noted in our submission to the Committee we understand that, should the Bill be passed, ARNECC will continue to work with stakeholders on the further amendments needed to deliver an appropriate regulatory framework.

The ACCC also understands that the current regulatory framework for electronic conveyancing contains provisions which require the separation of ELNOs from related entities operating in upstream or downstream markets. The ACCC understands that these requirements are expected to be strengthened by the introduction of an enforcement regime, which the ACCC understands will form part of the second stage of changes to the ECNL.

ARNECC is responsible for implementing and managing the regulatory framework for the national electronic conveyancing market. However, the ACCC also notes its role in enforcing the *Competition and Consumer Act 2010* and a range of additional legislation, promoting competition, fair trading and regulating national infrastructure for the benefit of consumers, businesses, and the community.

**Question 10:**

Considering the concerns that many parties identified regarding the viability of interoperability in the cash equities settlement and clearing market, coupled with concerns raised by stakeholders as to the interoperability model for e-conveyancing, do you think further consultation is required to ensure there are no unintended or unforeseen consequences from this Bill?

**Answer:**

The ACCC understands that the Bill forms part of a staged legislative process and is intended to establish the high-level framework needed to support the continued progress of the reforms.

As set out in our submission to the Committee, the ACCC considers it important that relevant issues raised by stakeholders during consultation processes are appropriately addressed and a fit-for-purpose national regulatory framework delivered.

Delaying the passage of the Bill will hinder ARNECC's capacity to carry out that consultation and risks further delays to the reform timetable.

ARNECC is responsible for implementing and managing the regulatory framework for the national electronic conveyancing market. The ACCC notes that the proposed interoperability approach has been developed by ARNECC over an extended period of time and following extensive work with industry.

**Question 11:**

Do you hold any concerns over the Minister's comments about a digital marketplace requiring less regulation, and the fact this bill does not include a regulatory regime?

**Answer:**

The ACCC has not directly considered, and does not hold a view in relation to, these statements. The ACCC notes ARNECC is responsible for implementing and managing the regulatory framework for the national electronic conveyancing market. In practice Electronic Lodgement Network Operators are required to comply with Operating Requirements, while Subscribers must comply with Participation Rules.

As previously noted, the ACCC understands that the Bill forms part of a staged legislative process and is intended to establish the high-level framework needed to support the continued progress of the reforms. We understand that, in addition to progressing the further legislative amendments needed to support the implementation of the interoperability reforms, ARNECC will also further develop other related materials, including the participation rules and operating requirements, guidance material and commercial agreements. The ACCC understands these materials will be finalised before the implementation of interoperability.

**Question 12:**

Do you hold concerns that even with interoperability we will only trade a monopoly for a duopoly?

**Answer:**

The ACCC has set out its views on competition in relation to electronic conveyancing in a range of public materials.

The ACCC notes there is a risk that reform may not deliver the intended competitive outcome however it is critical that, at a minimum, existing regulatory gaps are addressed and an appropriate regulatory framework is in place for the electronic conveyancing market.

The ACCC also notes a key barrier to entry to the market relates to payment infrastructure. This is a separate matter to interoperability, which will be considered by AusPayNet who is working on an industry code relating to payments and financial settlement in electronic conveyancing.

**Question 13:**

Do you believe an independent regulator appointed by the registrar to assess the readiness of participants and the interoperable system as a whole, would help address industry and consumer concerns about cybersecurity and risk?

**Answer:**

The ACCC does not hold a specific view in relation to the appointment of an independent regulator (or other party) in such a role.

ARNECC is responsible for implementing and managing the regulatory framework for the national electronic conveyancing market. The ACCC notes a series of existing legislative and regulatory tools already exist. In addition, and in consultation with stakeholders, ARNECC is developing a series of further agreements, rules and processes in consultation with industry in order to implement interoperability.

**Question 14:**

Regarding the ACCC's investigation into Dye and Durham Corporations proposed acquisition of Link Administration Holdings, could you detail the ACC's concerns with this proposed acquisition?

**Answer:**

The ACCC commenced its review of Dye and Durham Corporation's proposed acquisition of Link Administration Holdings on 1 March 2022 and its provisional decision date is 26 May. The ACCC's review therefore is ongoing, so the ACCC is not yet in a position to confirm whether it has any concerns with the proposed acquisition.

The topics being considered by the ACCC are detailed in its market inquiries letter which can be accessed on the ACCC's mergers public register [here](#).

In its market inquiries letter, the ACCC is seeking views on:

- competition to supply information search and broking services, conveyancing software, practice management software, and lodgement and settlement services — and combinations or bundles of these
- the ability and incentive for D&D, Link and/or PEXA to discriminate against or 'foreclose' other businesses (such as other information search and broking providers, software providers or Electronic Lodgement Network Operators) or otherwise frustrate their ability to compete.

**Question 15:**

Is the ACCC is concerned about Link Administration Holdings offering information search and broking services Australia-wide, and jurisdiction specific conveyancing software solutions and lodgement services?

Given that the NSW market would be dominated by PEXA and Sympli who both offer such services, does this concern you?

**Answer:**

The ACCC does not have any comments in response to this question.

**Question 16:**

Do you believe a more stringent regulatory regime is required to ensure a duopoly that squeezes out smaller conveyancing firms does not develop?

**Answer:**

As previously noted, the ACCC has set out its views on competition in relation to electronic conveyancing in a range of published materials. The ACCC notes the existing situation where the market is dominated by an under regulated near monopolist is not desirable and presents a series of pressing challenges for stakeholders.

The ACCC also notes that the current regulatory framework for electronic conveying contains provisions which require the separation of ELNOs from related entities operating in upstream or downstream markets. The ACCC understands that these requirements are expected to be strengthened by the introduction of an enforcement regime, which the ACCC understands will form part of the second stage of changes to the ECNL.

ARNECC has indicated it will engage closely with stakeholders on the next stage of reform. It will be important that final documentation supporting interoperability include appropriate measures to support transparency, accountability and review.



**Question 17:**

In your view, would the savings brought about by interoperability would go directly to the subscribers of an ELNO such as lawyers and conveyancers, not 'mum and dad' purchasers?

**Answer:**

The ACCC considers that the pass through of savings from subscribers (such as lawyers and conveyancers) to their customers would be a matter for those businesses. That said, such businesses typically operate in relatively competitive markets and competitive markets can be expected to deliver benefits in terms of price and/or service to end consumers.

More broadly the ACCC has noted the poor outcomes for markets when key assets are privatised without implementing appropriate regulatory settings and safeguards upfront. The consequences of not addressing the necessary reform of the electronic conveyancing market at this point in time is likely to have far reaching effects across the sector.

**Question 18:**

Can the ACCC comment if it is formally investigating PEXA's current conduct under section 46 of the Competition and Consumer Act? If you cannot comment specifically, can you provide some indication of your concerns about PEXA's conduct potentially lessening competition in the market?

**Answer:**

The ACCC is unable to comment on whether an investigation is being undertaken or not.

Actions by a business to hinder or prevent future competition in a market, including from new entrants, have the potential to raise concerns under section 46 of the Competition and Consumer Act. Section 46 of the Competition and Consumer Act prohibits a business with market power from engaging in conduct with the purpose, effect or likely effect of substantially lessening competition in a market.

**Question 19:**

Based on your participation in the National Industry Panel, has it allowed all industry participants to raise concerns, and these be addressed by the appropriate expert working groups? For example, has PEXA had opportunities in the past three years to put forward models and comment on other models via the National Industry Panel?

**Answer:**

As previously noted, the ACCC has had observer status in some (though not all) working groups and committees established by ARNECC in relation to the reform process (as well as making submission to a range of consultation processes). Based on our involvement to date, the arrangements appear to have provided stakeholders, including parties such as the ELNOs, with significant opportunities to engage with the reform process over an extended period of time.

**Question 20:**

Has the ACCC participated in (or as observers) any associated National Industry Panel working groups? Could the ACCC share material with the Committee it has provided ARNECC (or the National Industry Panel) to help inform the regulatory regime.

**Answer:**

As previously noted, the ACCC has been advocating for the reform of the electronic conveyancing market for an extended period of time, including through both public and targeted forums.

The ACCC has routinely engaged with ARNECC in the course of this work, including as an observer in certain working groups and committees established by ARNECC in relation to the reforms. For example, the ACCC (as well as other stakeholders) provided ARNECC with views on the proposed changes to the Model Operating Rules intended to support the introduction of interoperability. ARNECC has [published the feedback from stakeholders](#) on the operating rules.

**Question 21:**

The way PEXA operates now, what sort of challenges are there for competitors trying to enter this market?

**Answer:**

Current and future entrants to the electronic conveyancing (or any other near monopoly) market are likely to face significant disadvantages.

As set out in our 2019 report, PEXA is a well-established service provider that has benefited from the network effects and economies of scale associated with its first mover advantage (and the mandating of electronic conveyancing in certain jurisdictions). By virtue of its dominant incumbent position in the market, it is likely PEXA would be able to exercise market power through its interaction at the front facing retail environment (i.e. as customers potentially contemplate switching ELNOs) or via back end connections and associated relationships with other parties (including revenue offices and financial institutions).

The ACCC notes that ARNECC is in the process of developing an enforcement regime for the electronic conveyancing regulatory framework more broadly (as part of the next stage of amendments to follow this Bill). As acknowledged by ARNECC, the current regulatory framework is lacking in this respect. The ACCC considers it critical that the development and implementation of the enforcement regime is not further delayed.

Finally, we note that delay is a mechanism frequently employed by incumbent firms whose market share or control of the market is at risk due to reform. In addition to frustrating new or potential entry into a market, the ACCC has observed that delayed or drawn-out reform process can also lead to significant stakeholder fatigue, diminishing the level and effectiveness of interaction with interested parties over time. We understand that the current reform process commenced due to practitioner concerns regarding PEXA's market dominance. The industry as a whole has engaged in extensive consultation processes in the interests of implementing interoperability over an extended period of time. It is in the long-term interest of the industry and consumers that a competitive market is established and sustained.

**Question 22:**

Has the ACCC written to PEXA since a viable competitor emerged in 2018 requiring it cooperate with government and industry, for example, to release the National Electronic Data Standards needed for the competitor so it could commence building its platform, or because of PEXA's delays in contributing to developing viable models via the National Industry Panel consultation framework. Could the ACCC please provide copies of relevant correspondence and public media seeking PEXA to cooperate?

**Answer:**

As previously noted, the ACCC has been advocating for the reform of the electronic conveyancing market for an extended period of time. This includes through public and targeted forums, as well as direct interactions, and the participation of ACCC Commissioners in a number of Ministerial Forums.

The ACCC has engaged with ARNECC and a range of industry participants (including ELNOs) in the course of this work and has consistently emphasized the importance of taking the necessary steps to ensure the reforms are able to be progressed in a timely manner. The ACCC notes that, in the interests of transparency, it has sought to publish relevant materials where appropriate (including its [2019 report on reform of the electronic conveyancing market](#)).

In August 2018 the ACCC acknowledged that it was engaged with PEXA and State Governments about electronic conveyancing, and held concerns that might lead to an enforcement investigation under the *Competition and Consumer Act 2010*. As the ACCC does not normally comment on enforcement investigations, it is unable to comment further on these matters.

**Question 23:**

What would the ACCC expect if the market fails due to further delays in interoperability?

**Answer:**

As set out in the various materials we have published in relation to the reform of the electronic conveyancing market, the ACCC considers that the electronic conveyancing market is at a turning point and it is essential that decision makers support the transition to competition. Absent a timely and effective transition it appears unlikely that new entrants would be able to sustain a presence in the market. The result could reasonably be expected to be an entrenched monopoly that will require complex and costly regulation, in addition to the forgone opportunities for innovation, lower costs and improved quality of service associated with competition.

**Question 24:**

Is the ACCC concerned about PEXA's current market dominance and its intentions to delay competition to maintain its current monopoly? Is the ACCC concerned that delays with this Bill could potentially result in the new entrant leaving the market?

**Answer:**

The ACCC considers that the electronic conveyancing market is at a turning point. Absent a timely and effective transition, it appears unlikely that new entrants would be able to sustain a presence in the market. The result could reasonably be expected to entrench the incumbent as a monopoly.



**Question 25:**

Can the ACCC comment on whether PEXA's tactics are similar to other monopolies such as Telstra to delay new entrants and preserve market dominance?

**Answer:**

The ACCC generally considers that any incumbent in a monopoly (or near monopoly) position faces strong incentives to delay the entry of competitors into the relevant market and to preserve its dominant position. As previously noted, in addition to frustrating new or potential entry into a market, delayed or drawn-out reform process can also lead to significant stakeholder fatigue. The ACCC therefore considers it critical that the development and implementation of an appropriate enforcement regime for the electronic conveyancing market is not further delayed.

Separately, the ACCC notes that the proposed interoperability approach has been developed by ARNECC following extensive work with industry and that a range of processes (such as committees and working groups) have been established to enable industry to work through the technical implementation of interoperability.