

**Submission
No 11**

**INQUIRY INTO ELECTRONIC CONVEYANCING
(ADOPTION OF NATIONAL LAW) AMENDMENT BILL
2022**

Organisation: Sympli Australia Pty Ltd

Date Received: 11 March 2022



11 March 2022

The Hon. Mark Banasiak MLC

Committee Chair

Portfolio Committee No.4 – Customer Service and Natural Resources

NSW Legislative Council

By email: PortfolioCommittee4@parliament.nsw.gov.au

Dear Chair,

RE: Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022

- 1 Sympli Australia Pty Ltd (**Sympli**) is an Electronic Lodgment Network Operator (**ELNO**) which launched in 2018, with approval to operate in NSW, Queensland, Victoria, South Australia and Western Australia.
- 2 Thank you for the opportunity to provide a submission in support of the *Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022 (ECNL Bill)*. Sympli would like to recognise the hard work and efforts of the members of Australian Registrars' National Electronic Conveyancing Council (**ARNECC**), state and territory governments, land registries, industry peak bodies and stakeholders, and members of parliament in progressing the ECNL Bill to this point. The ECNL Bill is the critical first step of legislative reform to enable competition and interoperability in the market, and we look forward to further reform later in 2022 to address enforcement issues and other relevant matters.
- 3 The ECNL Bill is a key milestone in establishing competition in the eConveyancing industry through establishing the requirement for Electronic Lodgment Network Operators (**ELNOs**) to interoperate. The passage of the ECNL Bill demonstrates a commitment to competition to the eConveyancing industry, in particular, ELNOs, financial institutions, practitioners, land registries and revenue offices. Significantly, it also establishes the legislative certainty to enable stakeholders to progress their implementation of interoperability, in order to deliver competition and choice to the market as soon as possible.
- 4 Sympli strongly supports the passage of the ECNL Bill without amendment. We believe that, in its current form, it achieves its two primary goals, being to:
 - a) provide a legal framework which will enable Registrars to set requirements in respect of interoperability; and

- b) extend the existing 'reliance' regime established under the ECNL appropriately to ensure that electronic documents can be relied on by parties to a conveyancing transaction.
- 5 Any delay to the passage of the ECNL Bill will only serve to entrench the monopoly position, and disincentivise any new entrants into the market. Access to the market is restricted - interoperability will mitigate the impact of PEXA's network effect. Without the appropriate legislation being in place, customers will continue to be left at the will of the monopolistic incumbent, and miss out on the increased innovation, lower pricing, and resiliency and redundancy enabled by the existence of competition.

Executive Summary

- 6 This submission will set out the background to Sympli and interoperability, and speak to four key issues that support the passage of the ECNL Bill:
- a) **The ECNL Bill is fit for purpose.** The ECNL Bill is intended to operate as enabling legislation, to allow Registrars to make requirements for interoperability through the Model Operating Requirements (**MOR**), and ensure that electronic documents can be relied upon. The ECNL Bill achieves this goal.
 - b) **Time is of the essence.** This reform has been over three years in the making. The eConveyancing industry has been calling for competition for years, with independent experts and bodies reiterating since 2019 that the timing of the introduction of interoperability is a key factor in the ability for competitors to enter the eConveyancing market. Industry expected interoperability to be ready in December 2021. Every day that interoperability is delayed further entrenches the monopoly operator's position and weakens the ability for new entrants to effectively enter the market. Without interoperability, customers are unable to access the benefits of a competitive market, such as innovation and lower costs.
 - c) **There has been broad industry consultation.** In addition to the consultation process that has supported the ECNL Bill, there has been broad industry consultation on this issue since 2019. Consultation requirements in the MOR are effective in ensuring industry consultation by ARNECC, and ARNECC's record shows that it carefully considers feedback from industry and sets requirements accordingly.
 - d) **Legislative certainty will drive progress.** The passage of this legislation is a key step to give stakeholders confidence to engage in the development and implementation of interoperability. It will also allow Registrars to impose

requirements on ELNOs regarding the development of interoperability and give confidence to new entrants to join the market. We are experiencing the impact of the Registrars' inability to regulate ELNOs for interoperability, as the absence of legislation has led to the incumbent halting progress by withdrawing from all industry progress since November 2021. The certainty of legislation will restart the implementation process of interoperability.

Background – interoperability

The importance of interoperability

- 7 The market is characterised by significant barriers to entry and expansion. In particular, PEXA's monopoly status, the mandating of eConveyancing in almost all jurisdictions and the absence of interoperability has resulted in insurmountable network effects that prevent new entrants from gaining market share.
- 8 The ability for Sympli and other new entrants to compete without interoperability is a fallacy, as customers will ultimately be required to multi-home and bear the cost of subscribing to multiple ELNOs. This position was recognised by the Australian Competition and Consumer Commission (**ACCC**), which stated that "as long as subscribers are required to multi-home, given PEXA's strong network effects the market will remain a near monopoly without appropriate measures in place".¹ The solution to overcome this network effect, and therefore allow effective competition in the market, is interoperability. Without competition, customers miss out on increased innovation, lower pricing, and the resiliency and redundancy of multiple service providers.

The interoperability model

- 9 In essence, interoperability is the ability for customers to work together on an eConveyancing transaction, in the same way that mobile phone users from different carriers can make calls to one another. To achieve this, after substantial review and analysis by a range of experts, ARNECC determined that proceeding with the direct connection model would be appropriate solution for the eConveyancing market. In essence, interoperability in eConveyancing is achieved through:

¹ Australian Competition & Consumer Commission, *E-conveyancing market reform* (2 December 2019) at 12. Available at: <https://www.accc.gov.au/system/files/Letter%20to%20ARNECC%20Chair%20and%20state%20and%20territory%20policy%20agencies%20-%20December%202019.pdf>.

- a) ELNOs being able to communicate with each other, and send transaction information to one another; and
 - b) a set of rules that outlines the roles and responsibilities of each ELNO in an interoperable transaction, with the Responsible ELNO being responsible for performing all lodgment and settlement steps.
- 10 The concept of the Responsible ELNO model is built upon minimising risk to customers, and ensuring that the safety, security and integrity of eConveyancing is preserved. Since there is only one ELNO performing lodgment and settlement, the model does not materially increase risk for any parties to the eConveyancing transaction. Significant work has been done by industry to ensure that customers do not face increased risk as a result of interoperability, and Sympli is confident that the correct controls, standards and requirements are in place from a technical and operational perspective to achieve this.
- 11 Since late 2020, PEXA and Sympli, with ARNECC, have been developing the technical model for interoperability dedicating senior technical and regulatory resources to an ARNECC coordinated Interoperability Operating Committee (**IOC**). These resources include the following:

PEXA	Sympli
Chief Regulatory Officer	Chief Architect
General Manager, Land Registry and OSR Solution Design	Senior Project Manager
General Manager, Quality Engineering and Process Optimisation	Legal Counsel
Program Manager	Product Owner
	2 specialist external consultants

- 12 Subject matter experts from areas such as cybersecurity, testing and financial services also regularly contribute to the IOC.
- 13 The IOC, under its Terms of Reference, is tasked with developing the technical model in a way that is secure, mitigates risk and allows ELNOs to compete effectively. This work

stopped when PEXA withdrew their resources in November 2021 and current sits at a standstill with no clear timeframe of when PEXA will re-engage.

- 14 Whilst the immediate application of the technical model will facilitate interoperability between two ELNOs, it has been designed in a way that will accommodate future entrants into the market. This is supported by the draft MOR 7.1 which requires ELNOs to publish the interoperability agreement between ELNOs, and to engage with other ELNOs on like terms. These measures ensure that interoperability does not guide the market towards an entrenched duopoly, and promotes true competition in the market, and the ECNL Bill delivers the prerequisite for new entrant to have confidence that they are entering a fair and competitive market.

Benefits to customers

- 15 The benefits of interoperability to customers are clear – it allows effective competition in the market which will in turn lead to more innovation, lower costs and a higher quality of service. The ACCC observed in 2019 that “in the absence of competition and with an automatic pathway to increase prices in line with CPI, the impetus for further price reductions, product innovation or service level improvements is foregone.”² Costs incurred by practitioners in an eConveyancing transaction are generally passed on to their clients, meaning that competition will lead to lower costs for buyers and sellers of property. Sympli’s prices are set in accordance with the MOR and published at <https://www.sympli.com.au/pricing/>. In general, Sympli’s prices are between 15% and 50% cheaper than the incumbent. On a typical house purchase, this represents a saving of close to \$100 for customers, which increases with the complexity of the transaction.

The ECNL Bill is fit for purpose

- 16 As identified in the Regulatory Impact Statement (**RIS**), the ECNL Bill does not seek to set out substantive obligations for eConveyancing, but instead enables Registrars to create obligations through the MOR and Model Participation Rules (**MPR**). This is not a new concept for interoperability; this is consistent with the operation and regulation of the eConveyancing industry to date. Similarly, the ECNL Bill does not limit interoperability to any specific technical model; if ARNECC considers that a different model of interoperability is appropriate than the one currently being developed, they can make changes to the MOR and the relevant data standards to facilitate this change without any further legislative action being required.

² Australian Competition & Consumer Commission, *E-conveyancing market reform* (2 December 2019) at 9.

- 17 Symplicon considers that it is appropriate for the ECNL Bill to operate in this way, similar to other enabling legislation in other industries. For example, the ACCC is empowered to make a code relating to access to telecommunications facilities under subclause 37(1) of Schedule 1 to the *Telecommunications Act 1997* (Cth). Similarly, section 51AE of the Competition and Consumer Act 2010 (Cth) allows the regulations to prescribe certain industry codes. One such code is the Electricity Retail Code, which applies to all electricity retailers that supply small customers in certain distribution regions. Notably, it sets a cap on standing offer prices and how prices and discounts must be advertised and offered. As such, the ECNL Bill is not unique in its role as enabling legislation.
- 18 Symplicon supports the powers granted to Registrars in the ECNL Bill. It provides the necessary scope for Registrars to establish the necessary regulations to enable interoperability, and to govern ELNOs activities between each other and their subscribers with respect to interoperable conveyancing transactions. The publication of the draft version 7.1 of the MOR by ARNECC demonstrates how these powers can be used to effectively implement interoperability in a way that promotes competition and brings benefits to customers as soon as possible. This draft MOR update, which has been subject to date to multiple consultation phases, contains proposed updates to the MOR which would be implemented following the passage of the ECNL Bill.
- 19 Symplicon understands that there will be additional changes to the ECNL to be considered later this year, which among other items, will deal with enforcement powers for Registrars. Symplicon supports this approach to the legislative reform, noting the cost of delaying the ECNL Bill will only delay competition in this market, which is already long overdue. The ECNL Bill in its current form does not preclude further changes to address other issues within eConveyancing.

Time is of the essence

- 20 Interoperability, and therefore competition, in the eConveyancing market is long overdue. The original Ministerial direction on interoperability on 7 September 2020 set out a timeline that included legislation being introduced in NSW in February 2021, with interoperability to be live no later than the end of 2021.³ In 2019, the ACCC identified that “further delays in progressing the development of an appropriate market structure will fragment the national

³ ARNECC, *Ministerial direction on a competitive market structure in the eConveyancing market* (7 September 2020). Available at: <https://www.arnecc.gov.au/wp-content/uploads/2021/08/ministerial-direction-econveyancing-market-structure.pdf>.

market and/or entrench a monopoly service provider model.”⁴ Since then, significant time has passed, and the need for urgent action has grown. In a recent letter to ARNECC, the ACCC stated that “further delay will heighten barriers to entry to the market and detract from future possible benefits of competition. Absent this development PEXA’s position in the market will likely present ongoing challenges for industry and government alike. Further delay will also test the capacity of industry (especially practitioners) to participate in the reform process.”⁵ The Ministerial deadline for interoperability of mid-2023 again highlights the broad support for a timely implementation for interoperability.

- 21 Any delay to the ECNL Bill will only further delay interoperability and deny NSW customers the benefits of competition. The NSW Productivity Commission estimates that interoperability will deliver a net benefit of more than \$83 million for NSW over 10 years, and recommended that “the NSW Government should urgently require interoperability in e-conveyancing”.⁶ This benefit could be realised by over 35,000 lawyers and conveyancers, and buyers and sellers participating in almost 200,000 property sales annually.⁷ The effects of these benefits will also be enjoyed nationally with the application of this national legislation.
- 22 Financially, the real cost of the lack of competition in the market is primarily borne by mums and dads purchasing and selling property each year. As mentioned above, ELNO fees are generally passed through from practitioners to their clients, meaning that buyers and sellers ultimately wear the costs of a monopolistic market. The current pricing regime allows ELNOs to raise already-monopolistic prices by CPI each year, and without effective competition, there is no downward pressure on prices. The introduction of interoperability, and therefore competition, has the ability to provide this downward pressure and alleviate the fees incurred by buyers and sellers when transacting property.
- 23 Delays to competition will prolong the lack of innovation within the eConveyancing market. The Report by the Independent Pricing and Regulatory Tribunal of NSW (**IPART Report**) found that “implementing an interoperability solution has significant potential to promote the

⁴ Australian Competition & Consumer Commission, *E-conveyancing market reform* (2 December 2019) at 1.

⁵ Letter from Anna Brakey (ACCC Commissioner) to Bruce Roberts (ARNECC Chair) regarding ECNL Bill (18 February 2022). Available at: <https://www.accc.gov.au/system/files/ACCC%20letter%20to%20ARNECC%20regarding%20ECNL%20bill%2018%20February%202022.pdf>.

⁶ NSW Productivity Commission paper considers regulation as a major productivity lever. The Productivity Commission recommends interoperability as the solution to a lack of competition in the e-conveyancing market. *Rebooting the Economy – White Paper* (2021) at 172. Available at: <https://www.productivity.nsw.gov.au/sites/default/files/2021-06/Productivity%20Commission%20White%20Paper%202021.pdf>.

⁷ CoreLogic, *Housing turnover reaches highest level in nearly 12 years* (16 September 2021). Available at <https://www.corelogic.com.au/news/housing-turnover-reaches-highest-level-nearly-12-years>.

benefits of competition, including innovation and dynamic efficiency.”⁸ Innovation in eConveyancing will drive efficiency for practitioners. Ultimately, this will result in better outcomes for buyers and sellers of property.

- 24 The ECNL Bill is a national uniform law and a large degree of co-ordination between the various states and territories was required to bring the legislation to this point. Sympli is concerned that substantive changes or additions to the ECNL Bill will require more time to align the relevant jurisdictions. This will ultimately have the impact of delaying the introduction of meaningful competition in the eConveyancing market. As discussed in detail below, the ECNL Bill is fit for purpose in its current form.
- 25 In addition to the broader eConveyancing market, delays to the implementation of interoperability pose a serious risk to new entrants such as Sympli. The ACCC has identified interoperability as the key to overcoming the network effect in the market, which currently acts as a significant barrier not only to new entrants seeking to establish themselves in the market, but to customers who wish to switch to an ELNO of their choice. The mandating of eConveyancing, both in NSW and in most jurisdictions nationally, means that virtually all practitioners are PEXA customers. Without interoperability, practitioners wanting to use Sympli would need to either multi-home and continue to use both ELNOs, or accept that they cannot participate in all transactions. Neither of these are realistic choices for most practitioners, who will therefore remain with the incumbent. Any further delay to the ECNL Bill will prevent effective competition being achieved in the market, and the monopoly provider will continue to reap rewards at the expense of practitioners and buyers and sellers of property.

There has been broad industry consultation

- 26 The foundations for interoperability and the ECNL Bill have been on foot since the IGA Review⁹ in 2018, which led to a number of ARNECC and NSW driven interoperability reviews including the:

⁸ IPART conducted an independent review of the eConveyancing market and recommended an appropriate pricing regulatory framework. *Review of the Pricing Framework for Electronic Conveyancing Services in NSW – Final Report* (November 2019) at 2. Available at: <https://www.ipart.nsw.gov.au/sites/default/files/documents/final-report-review-of-pricing-framework-for-electronic-conveyancing-services-in-nsw-november-2019.pdf>.

⁹ Dench McClean Carlson, *Final Report: Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law* (18 December 2019). Available at: <https://www.arnecc.gov.au/wp-content/uploads/2021/08/iga-review-final-report-1.pdf>.

- a) Directions Paper by NSW Office of the Registrar General in 2019;¹⁰
- b) Independent Report on Interoperability between ELNOs (including the Kinetic IT Report on cybersecurity) in 2019;¹¹
- c) IPART Report in 2019;¹²
- d) 2020 Cost-benefit Analysis;¹³ and
- e) 2020 Independent Technical Expert Report.¹⁴

27 These reviews have been undertaken through broad industry consultation across regulators, financial institutions, peak industry bodies, lawyers, conveyancers and ELNOs.

28 Our discussions with key industry stakeholders indicate that they are satisfied with the ECNL Bill in its current form, and recognise that it is vital for this legislation to be implemented in a timely manner.

29 Given the role of the ECNL Bill as enabling legislation, it is also crucial to consider the consultation that has taken place through ARNECC in establishing the next versions of the MORs. For each version of the MOR which has been implemented to date (currently on version 6), ARNECC has engaged in substantial consultation in accordance with the consultation requirements set out in Schedule 6 of the MOR, and have published documentation demonstrating how they have considered stakeholder feedback and implemented this into the MOR.

30 Symply is satisfied that the consultation by ARNECC to date on interoperability, in addition to its history with considering stakeholder feedback on both the ECNL Bill and the MOR, has been appropriately considered, and that the industry is broadly satisfied with the regulatory

¹⁰ NSW Office of the Registrar General, *Directions Paper on proposed eConveyancing interoperability regime* (6 February 2019). Available at: https://www.registrargeneral.nsw.gov.au/_data/assets/pdf_file/0019/571240/Directions-Paper-on-proposed-eConveyancing-interoperability-regime.pdf.

¹¹ Dr Rob Nicholls, Independent Chair of the Interoperability Working Groups, *Interoperability Between ELNOs* (25 July 2019).

¹² The IPART Report cites and supports the conclusion reached by the IGA Review that national consistency of regulation is beneficial. Independent Pricing and Regulatory Tribunal NSW, *Pricing regulation of electronic conveyancing services in NSW* (29 November 2019) at 18. Available at: <https://www.ipart.nsw.gov.au/sites/default/files/documents/final-report-review-of-pricing-framework-for-electronic-conveyancing-services-in-nsw-november-2019.pdf>.

¹³ The Centre for International Economics, *Addressing market power in electronic lodgment services* (1 September 2020). Available at: <https://www.thecie.com.au/s/CIE-Final-report-Addressing-market-power-in-electronic-lodgment-services-CBA-01092020.pdf>.

¹⁴ Glenn Archer, *Identifying a Preferred Technology Model to Support a National Interoperable eConveyancing Marketplace* (28 August 2020).

framework. We trust that this consultation will continue for future amendments to the ECNL and the MOR in the future.

Legislative certainty will drive progress

- 31 The ongoing delay of legislation setting out the framework for interoperability, which was originally planned to be enacted in 2021, has caused several issues in the development and implementation of interoperability. Stakeholders have been hesitant to invest resources into progressing interoperability without a clear legislative mandate. Some stakeholders have refused to fully engage with interoperability without legislation in place. The passage of the ECNL Bill will provide stakeholders with confidence to make these investments and motivate stakeholders to engage with the industry processes.
- 32 A present issue is that the implementation of interoperability requires the wilful participation by stakeholders, most notably the incumbent who has refused to participate in industry interoperability streams since November 2021, despite representing to industry that interoperability remains a priority for them. Several streams of work in interoperability are currently impacted by the lack of engagement by the incumbent. In summary, these are the:
 - a) Interoperability Operating Committee;
 - b) Interoperability Implementation Committee;
 - c) Interoperability Agreement;
 - d) Interoperability Testing Working Group; and
 - e) development of the AusPayNet eConveyancing Payments Industry Code.
- 33 The ECNL Bill will oblige the ELNOs to interoperate, and provide clarity for the decision makers at the incumbent (their board and key executives) that re-engagement at these forums is necessary, and will allow interoperability to be achieved by mid-2023 in accordance with the Ministerial deadline. Any further delay to the ECNL Bill will embolden the incumbent to continue to hold the progress of interoperability to ransom, and continue their non-participation in the technical design work necessary to ensure a safe and secure model for interoperability.
- 34 The ECNL Bill is also a hard dependency for Registrars to be able to update the MOR for ELNOs with respect to interoperability. The ability for Registrars to be able to make these regulations is key to meeting the Ministerial deadline of mid-2023 for interoperability. Without immediate action to achieve legislative certainty, and progress in all streams of

interoperability work, the timeline for full interoperability will not be able to be met, impacting the ability for effective competition to exist within the eConveyancing market.

Next Steps

35 Sympli appreciates the efforts of the committee in considering our submission, and we again reiterate our strong support for the passage of the ECNL Bill without amendment. We look forward to providing further evidence at the public hearing on 17 March 2022. With that in mind, please do not hesitate to reach out to Sympli if there is additional information we can provide to assist you in your inquiry.

Yours sincerely

Philip Joyce

Chief Executive Officer

