THE LAW SOCIETY
OF NEW SOUTH WALES

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10 August 2022

Interoperability pricing for Electronic Lodgment Network Operators
Independent Pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop
Sydney NSW 1240

By submission portal

Dear Sir/Madam,

Interoperability pricing for Electronic Lodgment Network Operators – Issues Paper

The Law Society of NSW appreciates the opportunity to comment on the Interoperability pricing for Electronic Lodgment Network Operators Issues Paper. The Law Society's Property Law Committee has contributed to this submission.

Our responses to the discussion points raised in the paper are provided in the **attached** comments table.

If you have any further questions in relation to this submission, please contact Gabrielle Lea, Acting Principal Policy Lawyer by email: [redacted]

Yours faithfully,

[redacted]

Joanne van der Plaat
President

Encl

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IPART – Interoperability pricing for Electronic Lodgment Network Operators – Issues Paper July 2022
Law Society of NSW Comments

NO.	Question	Law Society comments
3 ELNO costs and fees		
3.4 Interoperable transactions change the way costs are incurred		
1.	Have we identified all relevant categories of costs and risks associated with interoperable transactions?	Yes, broadly the Paper identifies the main costs and risks associated with interoperable transactions. We note that additional detail might be obtained by reviewing the draft National Electronic Conveyancing Interoperability Data Standard ("NECIDS") which we understand sets out in detail the responsibilities of the Responsible and Participating Electronic Lodgment Network Operators ("ELNOs"). Page 14 mentions lodgment gap insurance. We understand that this is currently provided by the incumbent ELNO on a voluntary basis and are unsure whether it will be provided by other ELNOs. We note with interest the statement in the Paper, at the end of page 14, that interoperability insurance is being developed, and we would welcome further information in that regard.
2.	Have we accurately identified the party incurring the costs and risks associated with interoperable transactions?	In our view the Paper does not sufficiently recognise that the identity of the Responsible ELNO may change while the workspace is on foot during the life of the transaction. To the extent that an ELNO has the technical capacity to be the Responsible ELNO, each ELNO needs to make preparations in the workspace on the basis that they could be the Responsible ELNO.
3.	Do these costs and risks vary across jurisdictions? If so, what are the reasons for the variation?	Broadly the costs and risks are similar across jurisdictions except that: • while not a major cost in the transaction, Lodgment Support Service fees vary across jurisdictions; • some jurisdictions, such as the ACT, do not require transfer duty verification in the workspace; and • in NSW, provision of a Vendor Guarantee against fraud is a requirement of the licence conditions of an ELNO in NSW.[1]

[1] Clause 9.1 of the general conditions of the ELNO Conditions of approval, accessed on 25 July 2022 at: https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0006/829824/General-Conditions_V2.pdf

NO.	Question	Law Society comments
3.5 There are different ways to recover the costs of interoperability		
4.	Should a Responsible ELNO be able to charge a fee to Participating ELNOs for performing the functions of a Responsible ELNO in an interoperable transaction?	In our view, given the current eConveyancing market, it is potentially justifiable that a Responsible ELNO is able to charge a fee to a Participating ELNO. However, there will need to be flexibility, as the fee may not be appropriate as the market develops, and may need to be adjusted should a third or subsequent ELNO enter the market.
5.	We have proposed that the costs of interoperability should be recovered from all subscribers. This may result in prices for subscribers that are not directly cost reflective, however, we consider this is worthwhile to achieve the long-term benefits of competition. Are there any alternative approaches that we should consider?	We support the statement on page 17 of the Paper that "Subscribers who participate in an interoperable transaction should not pay more than subscribers in a single ELNO transaction." In our view, this must be a fundamental premise for the consideration of any interoperability fee.
6.	We have identified that the Lodgment Support Service fee, paid to a land registry to open a digital workspace, is not necessarily paid by the Responsible ELNO. This means it cannot be recovered through a fee for performing the functions of a Responsible ELNO. What are your views on the best mechanism for sharing this cost between all ELNOs in an interoperable transaction?	We agree that the Lodgment Support Service fee is unable to be recovered from the Responsible ELNO, due to the way in which such fees are currently incurred and billed. We understand that recovery of the Lodgment Support Service fee may be able to be directly addressed in the interoperability agreements between ELNOs, such agreements contemplated by clause 5.7.2 of draft version 7.1 of the Model Operating Requirements. In our view this would be an appropriate approach.
4 What form of regulation should apply for ELNO interoperable transaction fees?		
4.2 Negotiate-arbitrate as a form of regulation		
7.	What are your views on negotiate-arbitrate as a form of regulation for fees for performing the functions of a Responsible ELNO in an interoperable transaction?	The limitations in Table 4.1 of the Paper suggest that it is not appropriate to pursue a negotiate-arbitrate model given perceived imbalances in bargaining power.
8.	What characteristics of the eConveyancing market influence whether a negotiate-arbitrate form of regulation is appropriate?	The relative market shares of existing ELNOs would appear to be the most relevant consideration to the suitability of a negotiate-arbitrate form of regulation.

NO.	Question	Law Society comments
4.3 Direct price control as a form of regulation		
9.	What are your views on direct price control (regulated price or a pricing methodology) for fees for performing the functions of a Responsible ELNO in an interoperable transaction?	Direct price controls may have a role to play, and we note the existing price controls in place for ELNO service fees under clause 5.4 of the NSW Operating Requirements. Currently, ELNO service fees are effectively capped to an annual increase in accordance with the relevant increase in the Consumer Price Index, unless approval for a higher increase is obtained from the Registrar General. We note that this provision will expire 30 June 2023, but we would support its extension until at least 30 June 2024 and preferably until the ELNO market matures and competition may be able to replace this control.