



Australian Banking Association

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Dear Mr Nicholls

Interoperability between ELNOs - Draft Report - 10 June 2019 (Draft Report by the Independent Chair of the Interoperability Working Groups)

The Australian Banking Association (ABA) appreciates the opportunity to provide feedback on the Draft Report, *Interoperability between ELNOs* (Draft Report), which summarises the discussions and outcomes of the two industry working groups on interoperability between ELNs, established by the NSW Government and chaired by yourself.

The ABA welcomes the review of the specific issues around interoperability between ELNOs in a competitive eConveyancing market. The banks who participated in the NSW working groups appreciated the opportunity for discussion and the progress made on the topics to date.

Key Points

This submission makes the following key points:

1. National framework - As we have noted on many previous occasions, any model for interoperability among ELNOs should fit within a nationally consistent framework for eConveyancing.
2. Cost efficiency – The draft report contains a relatively superficial consideration of the costs of interoperability for stakeholders including consumers, the banking sector and other participants, in relation to the facilitation of interoperability and the different models that are under consideration. The final report and suggested next steps would benefit from a more in-depth consideration of the costs to all participants of each model.
3. Risks – Similarly, the draft report does not, in our view, adequately assess the risks of a multi-ELNO interoperable environment for consumers, financial institutions and to the reputation of the eConveyancing system generally.
4. Models and design – Many substantive issues, including the interoperability model need further design discussion, at a use case level. As an example, of the model options canvassed in the draft report for interoperability, the ABA supports further investigation of the ‘infrastructure’ model as it potentially has lower costs, risks and complexity.
5. Next steps - Both costs and risks could be better considered through a continued process of stakeholder meetings in which ABA members would be prepared to participate. From the perspective of ABA members, the industry can, with more time, undertake more in-depth assessment of various options. If the next steps explicitly involve analysis of the



costs, risks and complexity on various choice points in interoperability design, options can be developed which lower those costs, risks and complexity.

6. Timelines – The matters outlined above will take time to properly address. We note that the timeline to implement interoperability is still unclear. We reiterate that a timeframe that provides for implementation of a multi-ELNO environment prior to the end of 2019 is unrealistic.

National consistency

The ABA has taken the opportunity to submit responses to a number of reviews in relation to eConveyancing over the past six months. These included: NSW Office of the Registrar General, *Directions Paper on proposed eConveyancing interoperability regime*, 6 February 2019, and IPART, *Review of the pricing framework for eConveyancing in NSW*, March 2019, and *Review of the IGA for an eConveyancing National Law*, Dench McClean Carlson, 13 February 2019.

Consistent with its previous submissions, the ABA supports a national approach to eConveyancing and this includes a national regime for interoperability.

Most of our members, as with many other financial institutions, operate nationally. Any fragmentation of eConveyancing regulation or procedure across jurisdictions will increase complexity and reduce efficiency. Member banks' operational and technology teams are national, not state-based. Product terms and conditions, including privacy considerations, are predominantly national. ELNO participation agreements are likewise national. All of these – teams, customer terms and conditions and participation agreements – would need to be revamped for interoperability. Where there are differences by state, maintaining varying processes for different jurisdictions increases operational risks and costs, including the likelihood of consumers being impacted negatively. Moving to a new house is a major life event for most people, and the incidence of any failure results in reputational impacts for all industry participants, including banks, practitioners, and land registries.

Currently the eConveyancing system based on PEXA is underpinned to a large extent by a contractual framework involving three sets of bi-lateral agreements: between PEXA and financial institutions; between PEXA and practitioners; and between practitioners and the financial institutions holding practitioners' trust accounts. It is difficult to see how this contractual framework can be scaled up to a multi-ELNO model. We therefore suggest this contractual framework may need to be partially replaced or supplemented by an overall regulatory framework which is more detailed and has a stronger legislative backing than that created by the existing Model Operating Requirements and Model Participation Rules. (We note this concern was also expressed by practitioner Working Group participants – see page 41 of the draft report.) The fact that it would be difficult to implement such an overall regulatory framework in NSW alone while retaining the contractual/MOR/MPR framework in other states illustrates the importance of a national rather than state-based approach to interoperability.

Without national design standards and a national rollout schedule, it is probable the model for interoperability would be different across the states. Every different model introduced would require additional work to design, build and test. Therefore, if interoperability is not designed nationally and concurrently, the costs will scale with each build. State variation, broadly speaking, adds around 10 to 15 per cent to costs.

Having a nationally consistent model agreed upfront provides greater certainty for industry participants around committing to the necessary investments to support the changes. Investments may relate to capital investments in systems and processes, but also relate to investment in the time of key resources (e.g. payments experts) in working with other industry participants to define and agree workable industry solutions. If this effort and investment is likely to be duplicated for every jurisdiction, a commitment to make the necessary investment may be difficult to secure.

We note that the draft report recognises, in Chapter 13, the need for a national framework: “This Chapter sets out my recommendations as Independent Chair on the next steps to move the discussion from both a framework for interoperability to how to implement interoperability, and from a New South Wales context to a national one”. (p. 101)

We agree that this is a critical consideration. ABA members consider that a more seamless rollout of interoperability across ARNECC jurisdictions is more likely to be achieved if ARNECC jurisdictions are fully engaged in the process of development of any model adopted for NSW.

The objective is to establish a process whereby consensus could be achieved on a national model (including a revised national regulatory framework, if needed) prior to its rollout in NSW. That would increase the likelihood of national consistency being maintained as interoperability was adopted in other jurisdictions and lessen the likelihood of significant differences emerging in systems as they are rolled out. We note that this view is shared by ARNECC¹.

Similarly, the ACCC noted, in its letter of 13 February 2019, that:

“The ACCC considers that in the long term it may be preferable for there to be consistency in the application of interoperability mechanisms across the industry nationally, for greater efficiency and to avoid duplication of processes.”²

ABA members maintain that the issue of national consistency can’t be separated from the other themes – cost, security, and liability – because a lack of national consistency could adversely affect some or all of these areas.

Again, our members are of the view the process of developing solutions for ELNO competition and interoperability should involve all ARNECC jurisdictions to increase the probability that ultimately, a nationally consistent model can be adopted.

Cost efficiency

It is not clear if the proposed environment will definitively result in reduced costs and complexity for consumers. If a multi-ELNO market results in duplication of existing infrastructure, or a complex new environment in a central hub (e.g. a “new payments” environment), it is possible that the total cost of the system would increase, with the subsequent likelihood that consumers end up bearing the impact of these increased costs of complexity.

Transitioning to a multi-ELNO framework could be costly for ABA members. For example, a solution requiring new business rules and controls and, most importantly, new payment gateways or pipes, is costly.

E-settlement payment gateways are bespoke and not standardised, as are other payment gateways. One major bank reported spending more than \$10 million to build their eConveyancing payment solution. The new framework and at least 2 models discussed in the working groups would require financial institutions to build and maintain payment pipes to all operating ELNOs, regardless of whether the financial institution utilises that ELNO for eConveyancing. There are potential interoperable models which may not result in incremental payment infrastructure. Discussion of these models in future working groups should involve payment architects with the intention of reducing costs and risks in the payment environment.

Without national design standards and “use case” details, it is probable that the system design would be different for NSW than for other states. Each instance would need design, build, testing and maintenance phases. Therefore, an interoperability system, which is not designed nationally and concurrently, will result in costs, complexity and risks increasing with each build. And, known issues for one design may not receive enough time and resources. Once an interoperable model is active, there needs to be maintenance and testing of the system controls as well as change

¹ ARNECC letter to the Hon. Victor Dominello, 11 February 2019, p. 2

² ACCC letter to Jeremy Cox, 13 February 2019

management for operational teams. So, a state-based model means that maintenance and change management is also a significant impost of time and costs for each release.

The ABA members are therefore of the opinion that the impact of any interoperability regime on the financial institutions needs to be assessed in depth. The current working group discussions have been at a high level and based on the ELNO and practitioner (conveyancers, lawyers) viewpoint and have not as yet addressed the costs for the financial institutions.

There is significant engagement and discussions still required with financial institutions to ensure that all stakeholder views are considered in the development of the interoperability model. There are many issues that need to be resolved with experts. For instance, not only are the ELNO models unresolved, but business rules on which ELNO is responsible for TACs, the operation of linked settlements and the selection of the Lodging ELNO need more design work at the use case level.

It will be important to clearly outline estimated costs for the different interoperability models, for instance in the form of an industry analysis. It is proposed that further working group discussions with financial institutions take place to enable in-depth and technical conversations. This would also allow for leveraging the work completed on payments and other industry-wide programs (e.g. National Payments Platform (NPP)).

In the absence of these specific costings, upon initial consideration the infrastructure model looks favourable to ABA members. The infrastructure model will be more efficient to implement, requiring less industry effort and, because payment pipelines don't have to be replicated, it will require less time and lower cost to build. The whole idea of competition in the eConveyancing market is to achieve better and more cost effective outcomes for consumers. A complex, costly and untested model would obviously be antithetical to this goal.

Risks

The Draft Report focuses for a large part on the circumstances of ELNOs and practitioners. We have already stated that the cost analysis for the financial sector has not been part of the working group discussion to the extent necessary to form a detailed view of the costs related to support eConveyancing and interoperability between ELNOs. A detailed view on the technical, IT architecture issues is for the same reason insufficiently explored.

Key considerations around security and payments will need to be addressed to ensure a robust multi-ELNO environment. IT security for PEXA is currently addressed through the Participation Agreements it enters into with financial institutions. These agreements require periodic audits of PEXA's security arrangements by independent experts. IT security governance framework and controls required to maintain the integrity of the system are not currently addressed in the draft report. An overall regulatory framework in place of the current largely contractual arrangements may be required.

Whilst NSW carries a very large portion of the eConveyancing transactions carried out in Australia, the security of the NSW system will ultimately depend upon how it is interconnected with other state systems. For the security of the NSW system, it will be ultimately preferable for a national, robust and well thought through regime, agreed by all states so that risk is minimised, well managed and spread fairly

In a multi-ELNO environment, it is even more important that we – as an industry – develop payment standards for eConveyancing, as was originally started with the existing system. Financial settlement risks are significant to the Australian property owner and in magnitude significant to the Australian economy. Consequently, these risks need far more attention. Currently, banks accept payment instructions as accurate in the eConveyancing ecosystem and process them. In a multi-ELNO environment, particularly with interoperability, there may be use cases where payment instructions should be validated before processing them. Catering for

different platforms does not necessarily mean reducing them to the lowest common denominator. It means working through individual use cases to ensure appropriate processing of payments.

Banks may synchronise their software release cycle to ensure security protocols and functionality match an ELNO's release cycle. In a multi-ELNO, interoperable world, synchronisation of releases should be coordinated across all market participants. Otherwise, banks will need to synchronise their releases with multiple ELNOs or, alternatively, risk security breaches. Where a security release is not synchronised across ELNOs and the entire ecosystem of banking and conveyancer practice management software, the risk of an end-customer's funds being appropriated increases. In a multi-ELNO interoperable market, the supervisory body/regulator has responsibility for security audits as no single participant can see the entire ecosystem. While in a single ELNO market, security could be audited by ELNO participants, in a multi-ELNO environment an audit of the ecosystem would be insufficient if undertaken by the ELNO participants only.

In conclusion, the ABA members are of the opinion that further risk and cost analysis needs to be done over the coming period and we agree with an earlier view expressed in our submission to the IGA Issues Paper:

“We do not believe that any decision to adopt an interoperability model should be made until the risks, liabilities and costs are properly identified and agreed upon between the ELNOs and the governments.”

Timeline

The timeline to implement a national, competitive eConveyancing framework and interoperability model is still unclear.

The timeline set by the NSW Government for establishing a regulatory framework for mandating ELN interoperability leaves insufficient time for:

- a. Stakeholders to properly consider proposals and participate meaningfully in the development of the framework;
- b. If necessary, for ABA members to implement systems and controls to ensure a secure multi-ELNO environment; and
- c. The involvement of other jurisdictions and the ARNECC in the development of an appropriate model for interoperability between ELNs.

We have already stated in a previous submission that the reasons behind the urgency with which the NSW Government is proceeding are based on perceptions of potential poor outcomes for consumers and entrenchment of the existing monopoly (i.e. PEXA).

The approach is not, however, weighed against the risks to consumers of a rushed approach. These risks are at least twofold:

1. The risk that the regulatory approach will not be secure, cost effective, and underpinned by an appropriate system for allocation of liability.

Failure here would undermine confidence in the system and would likely have significant reputational and actual impacts for all industry participants, including the NSW Government. If a major problem would occur in the areas of risk we have mentioned, it could have potential catastrophic consequences for the system as a whole, especially with NSW being by far the largest market for property transactions in Australia.

2. The risk that major participants, such as ABA members, will not have enough time to put systems in place to facilitate the new regime.

Typically, design, build and testing time of a system like this is more than twelve months. Experience shows that, without enough time for these processes, functionality often

fails. Failure would undermine confidence in the system, result in more settlements on paper and potentially mean increases in fraud and delayed settlements for consumers.

The next steps, as listed in the Draft report in Chapter 13, are all valid pieces of work that need to be undertaken. The estimation that the design work can be finalised by the last quarter of this calendar year is ambitious, in particular if an industry analysis is going to be considered as additional work, as deemed necessary by the ABA members.

As context, the banking industry took more than 2 years to be functional on PEXA for both settlement and payments. The rollout approach by many banks was a stepped approach, focusing on standalone and refinances. Similar large projects like NPP have also been multi-year, with standards, testing and phased rollouts coordinated across the industry.

The ABA submits that the final report should endorse the view that a national model should be agreed upon through ARNECC, with analysis of risks, costs and complexity and a view on a national rollout approach prior to rollout of the model in NSW. The industry should continue to work towards more market resilience, furthering interoperability and other design elements of the system at a national level.

Other issues

In addition to the above we offer the following detailed comments on the draft report:

1. Interchange fees – The “interchange fee” payable to the Lodging ELNO (for handling the lodgement of dealing and the financial settlement) probably needs to be the same whichever is the Lodging ELNO as it is important that financial institution participants know the applicable fees in advance. In other words, the fees payable by them should not depend on the identity of the Lodging ELNO. (We note the precontractual disclosure requirements of section 16 and 17 of the National Credit Code. Also, to the extent that FIs wish to recover from borrowers fees paid to a third party (like an ELNO), section 32 of the NCC limits the amount which can be recovered to the amount paid to the third party.)
2. TACs – The report does not deal with responsibility for TACs. The solution may be making all ELNOs involved in the transaction(s) responsible for TACs in relation to titles in which their subscribers have an interest (e.g., purchaser’s and incoming mortgagee’s ELNOs to be responsible for TACs in relation to the property being purchased/mortgaged). Will the fact that this could in some cases double the number of TACs throw up any technical or cost issues?
3. Page 31, first bullet point – The alternative set out in this bullet point potentially raises AML/CFT Act issues for financial institutions. Importantly, the current PEXA trust account registration process allows the financial institution to check and confirm that they have previously identified the persons who are being given the ability to authorise financial transactions using PEXA.
4. Page 32 – We suggest a business rule that if any of the ELNOs involved in the transaction go offline, the transaction cannot proceed. Thought needs to be given to what happens where there is a chain of linked settlements. In what circumstances should settlements earlier in the chain proceed despite the chain being “broken” as a result of an ELNO involved in a transaction further down the chain going offline?
5. Pages 35 and 36, “Changes in the Lodging ELNO” – The possibility of there being multiple or last-minute changes in the Lodging ELNO appears to be understated. A third bullet point should be added to deal with the possibility of two or more settlements being linked. Linkages between settlements could be broken due to a number of reasons including delays with funds required for settlements in the chain.



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6. Page 39, “Authorisation for the Lodging ELNO” – This section does not deal with the fact that financial institution participation agreements currently appoint PEXA as their agent for the limited purpose of receiving, generating and transmitting to the financial institution instructions regarding funds going into or coming out of the financial settlement. This agency model needs modification for a situation in which instructions regarding an account with a financial institution will be transmitted through or generated by an ELNO with which the financial institution has no contractual relationship. “Generated by” is a reference to the fact that settlements are done on a net basis, so the Lodging ELNO has a role in netting off transactions and generating the instructions required for the net financial flows.
7. Page 42, “Trust Account Registration Form”, second bullet point – The description of the options facing practitioners is incorrect. Given the mandated use of electronic lodgement for an increasing range of dealings, practitioners have no practical alternative agreeing to whatever is set out in the Trust Account Registration Form. If they do not accept what is in the Trust Account Registration Form they would cease to be practitioners capable of handling conveyancing work. We suggest there should be a standardised Trust Account Registration Form for all ELNOs. Modifying the Operating Requirements or Participation Rules to mandate a standardised form requires the involvement of ARNECC.

With the active participation of its members, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry’s contribution to the economy and community, and to ensure Australia’s banking customers continue to benefit from a stable, competitive and accessible banking industry.

Thank you again for the opportunity to provide comments on this report and the progress achieved through the working groups.

Yours sincerely

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