



THE LAW SOCIETY
OF NEW SOUTH WALES

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27 September 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: natalie.cooper@lawcouncil.au

Dear Dr Popple,

Review of the Separation Regime in Operating Requirement 5.6

Thank you for the opportunity to provide feedback on the Issues Paper, *Review of the Separation Regime in Operating Requirement 5.6*, issued by Synergies Economic Consulting, as part of the Review of the Separation Regime in Model Operating Requirement 5.6. The Law Society's Property Law Committee contributed to this submission.

Our feedback on relevant questions in the Issues Paper is provided in the attached table.

We would also be pleased to participate, as appropriate, in any discussions with Synergies Economic Consulting, as part of this consultation.

Please contact Gabrielle Lea, Senior Policy Lawyer, on (02) 9926 0375 or gabrielle.lea@lawsociety.com.au if you have any questions in relation to this letter.

Yours sincerely,

Brett McGrath
President

Encl.



No.	Question	Law Society comments
1.	Do you agree with the list of potential competitive advantages identified in this Issues Paper that could be afforded to an ELNO due to its legislative functions to operate an ELN?	<p>Broadly yes, but we suggest that the potential impact specified as “bundling information and services to potentially provide new products and new services that would not be within the ability of non-ELNO entities”, as specified on page 15 of the Paper, should be classified as a potential competitive advantage.</p> <p>We also suggest the ability to offer end to end conveyancing services (a “one stop shop”) may be a further potential competitive advantage.</p>
2.	Is the list of potential competitive advantages comprehensive? Or are there other advantages that could be relevant?	See our answer to question 1.
3.	Is the existing Separation Regime operating effectively and fulfilling its policy intent?	<p>Page 14 of the Paper notes that the stated purpose of the Separation Regime is to:</p> <p style="padding-left: 40px;">...instil confidence in industry that neither an ELNO, nor its related entity(ies) are providing an upstream or downstream service with a commercial advantage over existing or potential competitors due to it being an ELNO.</p> <p>In our view, there is a lack of awareness and understanding of the Separation Regime, which in part arises from the lack of precision in defining key concepts, such as upstream or downstream services. This makes it difficult to comment on whether the Separation Regime is operating effectively and fulfilling its policy intent.</p> <p>The lack of clarity as to what is required under the Separation Regime is also an obstacle to compliance and enforcement, which limits the effectiveness of the Separation Regime. In our view, the effectiveness of the Separation Regime would benefit from better articulation of the key definitions, concepts and requirements.</p>
4.	Is there vertical integration by existing ELNOs and does this impact competition in any market? How significant is any impact on competition?	Yes. There is vertical integration, in a broad sense, within the related company group of ELNOs, for example, the offerings by related entities of Sympli Pty Ltd (Simpli), such as LEAP Legal Software Pty Ltd (LEAP), Infotrack Pty Ltd (Infotrack), and SettleIT Pty Ltd. Due to Sympli’s current limited market share, we do not regard this vertical integration as having any significant impact on competition at this point in time. It is also interesting to note that LEAP and Infotrack commenced operations well before Sympli.



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5.	Do the services we have identified in this Issues Paper represent the 'core' eConveyancing service offerings provided by ELNOs? Are there other services that should be considered as being core?	Broadly yes, but further expansion of the concept of "settlement" is required in our view, such as clarification that it includes financial settlement.
6.	Are the definitions of upstream and downstream services in the Model Operating Requirements (MOR) sufficiently clear?	No, we suggest that defining these terms with reference to the conveyancing process would be more meaningful to all industry participants. The definitions should also be relatively high level, to accommodate further innovation and regulatory changes.
7.	Is our list of upstream and downstream services identified in this Issues Paper comprehensive? Are there other services that could potentially be delivered by an ELNO and that should be considered as part of this review?	<p>In relation to the list on page 21 of the Paper, we suggest that mortgage broking should be expressly included, perhaps in existing dot-point five.</p> <p>We do not support an exhaustive list of upstream and downstream services, as that will not capture innovative goods and services that may be offered in the future, such as anti-money laundering and counter terrorism financing compliance services. An indicative or inclusive list would be more appropriate in our view.</p>
8.	Should an upstream service require different consideration from a downstream service under the Separation Regime? If so, why?	Our initial view is that an upstream service should not be considered differently from a downstream service, but it is difficult to answer in more detail without further certainty as to the meaning of an upstream or downstream service.
9.	Would more detailed definitions of core eConveyancing services, non-core eConveyancing services and upstream and downstream services improve the Separation Regime? If so, how should this be done?	<p>We support the creation of a definition of core services in the Model Operating Requirements (MOR). Non-core services should be defined as a service that is not a core service.</p> <p>We also support the inclusion of more detailed definitions of upstream and downstream services in the MOR, and, as specified in our answer to question 6, we suggest these services should be defined with reference to the conveyancing process. See also our answer to question 7.</p>
10.	What are the complexities encountered in developing suitable separation policies and provisions for ELNOs?	Complexities include balancing the desirability of innovation with stability in a multi-ELNO system.
11.	Should all non-core services of an ELNO be subject to separation?	<p>No, only those non-core services that are upstream or downstream services. Products or services that have merely a tangential connection to the conveyancing process need not be subject to separation.</p> <p>We also note that MOR 19.3 limits the ability of an ELNO to create certain data products without the approval of the Registrar.</p>



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12.	Is there a need for improved guidance in the Separation Regime around what services should be subject to the separation requirements?	Yes, noting the comments made in the Paper regarding the views of stakeholders, such as at page 26.
13.	If so, how detailed should these service definitions be?	The definitions need to have a degree of detail, but should be non-exhaustive, to allow for innovation and regulatory changes which impact the conveyancing process.
14.	Are the obligations contained in the current Separation Regime difficult to interpret? If so, should the obligations for separation be spelled out in greater detail?	Yes. In our view, the degree of separation required, particularly in relation to financial arrangements, is one area where obligations should be provided in greater detail.
15.	We have heard that the existing Separation Regime is not fit-for-purpose. In what ways could the separation requirements be strengthened?	The existing Separation Regime includes the requirement in MOR 5.6.3(c) for the ELNO to prepare, publish, implement, review, and keep current, a Separation Plan in certain circumstances. However, the annual certification process does not go far enough, in our view, as it does not include examination or audit of an ELNO's compliance with the Separation Plan, but effectively only examines whether the Separation Plan is itself compliant. We suggest consideration could be given to strengthening this requirement.
16.	How common is the practice of related party referrals in the market and does it pose a significant threat to competition?	Given the current eConveyancing market, this practice is uncommon and does not currently pose a threat to competition.
17.	Are the current compliance and enforcement provisions in the Separation Regime adequate or should they be strengthened? If so, in what way?	No, and we suggest compliance and enforcement provisions in the Separation Regime should be examined as part of ARNECC's current review of potential enhancements to enforcement measures under the <i>Electronic Conveyancing National Law</i> .
19.	We have identified a range of issues relating to the current Separation Regime. Are there any issues that we have missed? Which issues are of most concern to stakeholders?	We suggest that consideration of additional regulatory controls should be cognisant of other regulatory controls operating within eConveyancing (eg MOR 19.3) and more generally (eg. the <i>Competition and Consumer Act 2010</i>).