Law Council
OF AUSTRALIA

Office of the President

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Emeritus Professor John Mangan and Mr Euan Morton
Principals
Synergies Economic Consulting
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By email: submissions@synergies.com.au

Dear Professor Mangan and Mr Morton

Review of the Separation Regime in Operating Requirement 5.6: Issues Paper

1. The Law Council of Australia is pleased to make a submission to **Synergies** Economic Consulting in response to its Issues Paper, *Review of the Separation Regime in Operating Requirement 5.6*. We apologise for the delayed response and hope that you will nevertheless find it useful.

2. We note that Synergies was engaged by the Australian Registrars National Electronic Conveyancing Council (**ARNECC**) to review the separation (or ring-fencing) mechanism(s) that apply to Electronic Lodgment Network Operators (**ELNOs**). We commend Synergies on its comprehensive Issues Paper.

3. This submission responds to each question in the Issues Paper. I acknowledge the contributions of the Law Society of New South Wales (**LS NSW**) and the Law Society of Western Australia (**LS WA**) in the preparation of this submission.

Question 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 Electronic Lodgment Network (ELN)?

Question 2: Is the list of potential competitive advantages comprehensive? Or are there other advantages that could be relevant?

4. We broadly agree with the list and consider that the competitive advantages that are listed in the Issues Paper could be afforded to an ELNO, due to its legislative functions to operate an ELN.

5. We consider that the list of potential competitive advantages is, largely, comprehensive. However, we suggest that:

   - the potential impact specified in the Issues Paper as "bundling information and services to potentially provide new products and new services that would not be

within the ability of non-ALNO entitles"[1] should be classified as a potential competitive advantage; and

- the ability to offer end-to-end conveyancing services (a "one-stop shop") may be an additional competitive advantage.

Question 3: Is the existing Separation Regime operating effectively and fulfilling its policy intent?

6. The Issues Paper notes that the purpose of the Separation Regime, as stated by ARNECC, is to:

> *… 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.*[2]

7. We consider that there is a lack of awareness and understanding of the Separation Regime. This arises, in part, from the lack of precision in defining key concepts, such as upstream or downstream services. As a result, it is difficult to comment on whether the Separation Regime is operating effectively and, by extension, fulfilling its policy intent.

8. The lack of clarity as to what is required under the Separation Regime is also an obstacle to compliance and enforcement, thereby limiting the overall effectiveness of the Separation Regime.

9. We suggest that the effectiveness of the Separation Regime would benefit from better articulation of the key definitions, concepts, and requirements.

Question 4: Is there vertical integration by existing ELNOs and does this impact competition in any market? How significant is any impact on competition?

10. The LS WA considers that there is vertical integration, and that it impacts competition. The LS WA expects that this impact will be exacerbated as eConveyancing becomes mandatory in all Australian States and Territories.

11. The LS NSW observes that 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, including LEAP Legal Software Pty Ltd, Infotrack Pty Ltd, and SettleIT Pty Ltd. However, the LS NSW does not regard this vertical integration as having any significant impact on competition at this point in time, noting Sympli's limited market share.

Question 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?

12. We broadly agree that the services identified in the Issues Paper represent the 'core' eConveyancing service offerings provided by ELNOs. Nonetheless, we suggest that further expansion of the concept of "settlement" is required, so that it is clear that this term includes financial settlement.

[1] Issues Paper, 15.
[2] Ibid 14.

Question 6: Are the definitions of upstream and downstream services in the Model Operating Requirements (MOR) sufficiently clear?

13. We do not consider that the definitions of upstream and downstream services in the Model Operating Requirements (**MOR**) are sufficiently clear.

14. We suggest that defining these terms by reference to the conveyancing process would be more meaningful to all industry participants. While these definitions require more detail, they should also be designed to be sufficiently high-level, in order to accommodate further innovation and regulatory changes.

Question 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?

15. We suggest that mortgage broking should be expressly included in the list of upstream and downstream services in the Issues Paper (perhaps as part of dot point five—"Financial services for buyer/seller, financial institutions").[3]

16. We do not support an exhaustive list of upstream and downstream services. Any such list would not capture innovative goods and services that may be offered in the future (e.g., anti-money laundering and counter-terrorism financing compliance services). A non-exhaustive list would be more appropriate to ensure its ongoing relevance.

Question 8: Should an upstream service require different consideration from a downstream service under the Separation Regime? If so, why?

17. Our preliminary view is that an upstream service should not be considered differently from a downstream service. However, this question is difficult to answer in more detail without further certainty as to the meanings of upstream and downstream services.

Question 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?

18. We support the creation of a definition of 'core services' in the MOR.

19. 'Non-core services' should be defined as a service that is not a core service.

20. We also support the inclusion of more detailed definitions of upstream and downstream services in the MOR (see response to Question 6 above).

Question 10: What are the complexities encountered in developing suitable separation policies and provisions for ELNOs?

21. We consider that the complexities encountered in developing suitable separation policies and provisions for ELNOs include balancing the desirability of innovation with stability in a multi-ELNO system.

[3] Ibid 21.

<u>Question 11:</u> Should all non-core services of an ELNO be subject to separation?

22. We do not have a settled view on this question, noting that:

    - the LS WA considers that all non-core services of an ELNO should be subject to separation; and

    - the LS NSW does not consider that all non-core services of an ELNO should be subject to separation—only those non-core services that are upstream or downstream services. The LS NSW suggests that products or services that have merely a tangential connection to the conveyancing process need not be subject to separation.

23. We note that MOR 19.3 limits the ability of an ELNO to create certain data products without the approval of the Registrar.

<u>Question 12:</u> Is there a need for improved guidance in the Separation Regime around what services should be subject to the separation requirements?

<u>Question 13:</u> If so, how detailed should these service definitions be?

24. We agree that there is a need for improved guidance in the Separation Regime about what services should be subject to the separation requirements, especially noting the comments made in the Issues Paper regarding the views of stakeholders.[4]

25. The definitions should have some degree of detail, but should be non-exhaustive, to allow for innovation and regulatory changes that will impact the conveyancing process.

<u>Question 14:</u> 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?

26. We consider that the obligations contained in the current Separation Regime are difficult to interpret. The degree of separation required, particularly in relation to financial arrangements, is one area where obligations should be specified in greater detail.

<u>Question 15:</u> We have heard that the existing Separation Regime is not fit-for-purpose. In what ways could the separation requirements be strengthened?

27. 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, we consider that the annual certification process does not go far enough, because it effectively only examines whether the Separation Plan is itself compliant, and does not include an examination or audit of an ELNO's compliance with the Separation Plan. We recommend that consideration be given to strengthening this requirement.

28. More broadly, we suggest that the current compliance and enforcement provisions could be strengthened and made more consistent (see response to Question 17 below).

[4] Ibid 26.

Question 16: How common is the practice of related party referrals in the market and dose it pose a significant threat to competition?

29. Given the current eConveyancing market, we understand that this practice is uncommon, and does not presently pose a threat to competition.

Question 17: Are the current compliance and enforcement provisions in the Separation Regime adequate or should they be strengthened? If so, in what way?

30. We do not consider that the current compliance and enforcement provisions in the Separation Regime are adequate.

31. We recommend that these provisions should be examined as part of the ARNECC's current review of potential enhancements to enforcement measures under the *Electronic Conveyancing National Law*.

32. We note that the LS WA recommends that greater compliance and enforcement could achieved by making the legislative requirements stricter, and by providing the Australian Competition and Consumer Commission and the ARNECC with enforcement powers.

Question 18: There are benefits and costs associated with various levels of ring-fencing prescription. Would the benefits of a more robust ring-fencing regime outweigh the costs? Would the benefits of separation outweigh the costs?

33. We suggest that the benefits of a more robust ring-fencing regime, and the benefits of separation, outweigh the costs.

Question 19: We have identified a range of issues relating to the current Separation Regime. Are there any issues that we have missed? Which issues re of most concern to stakeholders?

34. We submit that consideration of additional regulatory controls should be cognisant of other regulatory controls operating within eConveyancing (for example, MOR 19.3) and more generally (for example, the *Competition and Consumer Act 2010* (Cth)).

Contact

35. Thank you again for the opportunity to contribute to this consultation. If the Law Council can be of any further assistance to Synergies in the course of its review, please contact Ms Natalie Cooper, Senior Policy Lawyer [redacted]

Yours sincerely



Greg McIntyre SC
President