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22 January 2021

Secretariat  
Payments System Review  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [PaymentsReview@treasury.gov.au](mailto:PaymentsReview@treasury.gov.au)

Dear Mr Farrell

**Re: Payments system review – issues paper**

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission in response to the Australian Government's Payments system review issues paper.

The ACCC is the national statutory authority responsible for enforcing compliance with the Competition and Consumer Act 2010 (CCA). The overarching objective of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and through consumer protection.

The ACCC notes that the review's terms of reference centre on examining the regulatory architecture of the Australian payments system to ensure it remains fit-for-purpose and is capable of supporting continued innovation for the benefit of both businesses and consumers. Our submission therefore focuses on:

- our role and recent engagement in the payments system
- how we work collaboratively with other regulators of the payments system
- our observations about competition, fair trading and consumer protection issues in the payments system.

The ACCC considers that the current regulatory architecture of the Australian payments system has allowed for competition and innovation, which is in the long term interests of both Australian consumers and businesses. It will be important that any changes coming from this review should ensure that the regulatory architecture continues to allow competition and innovation.

We would welcome the opportunity to discuss our submission further. If you would like to discuss any aspect of the ACCC's submission, please contact Leah Won, General Manager, Financial Services Competition Branch on [REDACTED] or Michael Eady, Executive Director, Market Studies and Advocacy Team on [REDACTED]

Yours sincerely



Rod Sims  
Chair

## The ACCC's role and recent engagement in the payments system

As noted in the issues paper, the ACCC enforces compliance with the competition provisions of the CCA in the payments system, except where the Reserve Bank of Australia (RBA) has designated and imposed a standard or access regime on the industry.<sup>1</sup>

We frequently engage with issues affecting the payments system through a number of our functions, including:

- taking enforcement action
- assessing mergers and authorisation applications
- market studies and inquiries
- consumer protection actions
- the Consumer Data Right regime
- advocating for competitive outcomes.

Examples of the ACCC's recent engagement in the payments system are set out below.

### Enforcement action

- The ACCC has investigated complaints and taken enforcement action relating to excessive payment surcharges, including:
  - In August 2019, the Federal Court ordered CLA Trading Pty Ltd (trading as Europcar) to pay \$350,000 in penalties for charging excessive credit and debit card payment surcharges in breach of the CCA, in proceedings brought by the ACCC.<sup>2</sup>
  - In 2018, Lloyds Auctioneers and Valuers Pty Ltd paid penalties totalling \$37,800 after the ACCC issued three infringement notices for alleged breaches of the excessive payment surcharges law.<sup>3</sup> In the same year, Fitness First Australia Pty Ltd<sup>4</sup> and Cruisin Motorhomes Pty Ltd<sup>5</sup> each paid a penalty of \$12,600 after the ACCC issued each an infringement notice for an alleged breach of the excessive payment surcharge laws in the CCA.
  - In November 2017, Red Balloon Pty Limited paid penalties totalling \$43,200 following issuing of four infringement notices by the ACCC for alleged excessive payment surcharges.<sup>6</sup>

The ACCC also promotes compliance with payment surcharge legislation by publishing guidance for businesses and consumers.

- In September 2015, the Federal Court ordered Visa to pay a pecuniary penalty of \$18 million following a finding that Visa engaged in anti-competitive conduct in

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<sup>1</sup> The Australian Government the Treasury, *Payments system review: issues paper*, November 2020, p. 5.

<sup>2</sup> Keogh M (ACCC Deputy Chair), Europcar to pay \$350,000 penalty for excessive card payment surcharges, ACCC, 14 August 2019.

<sup>3</sup> Keogh M (ACCC Deputy Chair), Lloyds Auctioneers pays penalty for excessive payment surcharges, ACCC, 17 October 2018.

<sup>4</sup> Keogh M (ACCC Deputy Chair), Fitness First pays penalty for excessive surcharging, ACCC, 26 September 2018.

<sup>5</sup> Keogh M (ACCC Deputy Chair), Correction: Crusin Motorhomes pays penalty for excessive payment surcharges, ACCC, 17 July 2018.

<sup>6</sup> Schaper M (Deputy ACCC Chair), Red Balloon pays for excessive payment surcharges, ACCC, 17 November 2017.

proceedings brought by the ACCC.<sup>7</sup> During a five-month period in 2010, Visa implemented and maintained a moratorium by making changes to the Visa rules which prohibited the further expansion of the supply of dynamic currency conversion (DCC) services on point-of-sale transactions on the Visa network by rival suppliers of currency conversion services in many parts of the world, including in Australia. DCC is a service which competes with Visa's currency conversion services by giving international cardholders a choice to complete a transaction in their home currency rather than in the local currency of the merchant. The conduct meant that merchants that were not already offering DCC to their customers could not choose to offer DCC. The Court declared that Visa contravened s 47 of the CCA. The ACCC was concerned that Visa's conduct was likely to stop the growth of currency conversion services which competed with its own, and considers that the substantial penalty imposed reflects the serious nature of the conduct.<sup>8</sup>

## Assessing Authorisation Applications

The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition laws but are not harmful to competition and/or are likely to result in overall public benefits.

- Over the past 20 years, the ACCC has approved a number of authorisations relating to co-operation between financial institutions in developing and agreeing on procedures, policies and standards governing payments clearing and settlement for cheque-clearing,<sup>9</sup> direct entry,<sup>10</sup> ATM and card payments,<sup>11</sup> low-value fast transactions<sup>12</sup> and high-value transactions.<sup>13</sup> In each case, the authorisation only relates to the relevant provisions of the system rules that might otherwise risk breaching the CCA and predominantly relate to the certification, suspension, and termination provisions of these system rules.

In these cases we considered that the certification, suspension and termination provisions were likely to result in public benefits through the promotion of the security, efficiency and integrity of the payment systems.

- We have also assessed a number of applications for authorisation of arrangements between members of ATM networks to not charge each other's cardholders for ATM transactions.<sup>14</sup> In these cases, we considered that the arrangements were likely to result in a public benefit by allowing smaller financial institutions to compete more effectively by providing their customers with access to a larger network of fee-free ATMs.<sup>15</sup>
- In March 2017, the ACCC issued a determination denying authorisation to four banks (Commonwealth Bank of Australia, Westpac Banking Corporation, National Australia

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<sup>7</sup> ACCC v Visa Inc [2015] FCA 1020

<sup>8</sup> Sims R (ACCC Chair), Visa ordered to pay \$18 million penalty for anti-competitive conduct following ACCC action, ACCC, 4 September 2015.

<sup>9</sup> Australian Payments Clearing Association Limited, A91464 & A91465, 2015

<sup>10</sup> Australian Payments Clearing Association Limited, A91473 & A91474, 2015.

<sup>11</sup> Australian Payments Network Limited, AA1000495, 2020.

<sup>12</sup> NPP Australia Limited, A91560 - A91562, 2016.

<sup>13</sup> Australian Payments Clearing Association Limited, A91281-A91283, 2012.

<sup>14</sup> Cashcard Australia Limited, A91429, 2014; Cuscal Limited, A91450 – A91452, 2014; Suncorp-Metway Limited A91509-09, 2015; Bendigo and Adelaide Bank Ltd, A91546 & A91547, 2016.

<sup>15</sup> Cashcard Australia Limited, A91429, Final Determination, 2014 at 5-6: "The ACCC considers that the agreement between FeeSmart sub-network members not to directly charge each other's cardholders for ATM transactions will be pro-competitive, providing a public benefit by allowing smaller institutions to develop arrangements that facilitate access to direct charge free ATM transactions for their cardholders at a range of ATMs."

Bank, and Bendigo and Adelaide Bank) to collectively bargain with Apple and collectively boycott Apple Pay.<sup>16</sup> The banks sought authorisation to collectively bargain with Apple for access to the Near-Field Communication (NFC) controller in iPhones, and reasonable access terms to the App Store.

We accepted that Apple providing the banks access to the iPhone NFC controller was likely to lead to increased competition in mobile payment services and that this was a significant public benefit. However, we also considered the likely distortions to and reductions in competition caused by the conduct would be significant. We were not satisfied, on balance, that the likely benefits from the proposed conduct outweighed the likely detriments. We consulted with consumers, financial institutions, retailers and technology companies in reaching our decision.

### Market studies and inquiries

- On 2 September 2019, we released a final report for our inquiry into foreign currency conversion (FX) services.<sup>17</sup> The report highlights important competition and consumer issues affecting individuals and small businesses who use international money transfers, foreign cash, travel cards, and credit cards or debit cards for transactions in foreign currencies, and makes recommendations to address them. Further discussion of our findings and recommendations are explored below.

### Consumer protection

- While the Australian Securities and Investment Commission (ASIC) has responsibility for consumer protection in relation to financial products and services, the ACCC has a broad mandate to protect the interests and safety of consumers across the remainder of the economy. Many instances of conduct brought to the ACCC's attention involve the use of the payments system to harm consumers. This is particularly acute in the context of scams.
- The ACCC aims to prevent Australians from falling victim to scams by raising awareness, sharing intelligence and working with government and the private sector to reduce opportunities for scams to occur. The payments system is used by scammers to receive funds in many scams. We analyse data collected through our Scamwatch service to identify trends, monitor financial losses and inform our scam prevention strategies.

We have automated systems which share scams data with a number of 'intermediaries' (including financial service providers) on a daily basis and in addition, proactively engage with several private sector organisations about scam trends affecting their platforms or services. In both cases, businesses have reported that this information assists in disrupting scams.

Through independent action and collaboration with other government agencies, more than 30 scam websites were removed by web hosting companies or web domain registrar as a result of requests involving the ACCC in 2020.

### Consumer Data Right regime

- The ACCC also engages with the payment system as part of our roles and functions under the Consumer Data Right regime. This includes engaging with relevant government agencies and industry. We note the recommendations of the Final Report of the *Inquiry into the Future Directions of the Consumer Data Right* relating

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<sup>16</sup> Bendigo and Adelaide Bank & Ors, A91546 & A91547, 2016.

<sup>17</sup> See: ACCC, *Foreign currency conversion services inquiry – final report*, July 2019.

to payment initiation and action initiation. We expect our engagement with payment system stakeholders to increase should the Government decide to accept any or all of those recommendations.

## Advocacy

- The ACCC advocates for the consideration of competition in clearing and settlement of Australian cash equities. In conjunction with the Council of Financial Regulators (CFR), we have completed multiple reviews in recent years concerning the potential for competition in clearing and settlement of Australian cash equities.<sup>18</sup> Further detail on these reviews is provided below.

The ACCC also continues to advocate for the Australian Securities Exchange (ASX) to consider competition issues in its development of the replacement for its Clearing House Electronic Subregister System, the infrastructure used to clear and settle cash equity trades.

- The ACCC has continuing engagement with stakeholders to progress reform measures in electronic conveyancing (e-conveyancing). The ACCC has no formal role in relation to the regulatory framework for the e-conveyancing market. Our advocacy seeks to support decision makers and inform stakeholders to develop the market further and consider the merit of introducing certain regulatory arrangements, including interoperability to promote market-based competition.

In 2019 the ACCC released an e-conveyancing market reform paper, in response to numerous requests by stakeholders to provide guidance on designing a new framework that will allow competition to develop in the market. Further detail on the market reform paper is provided below.

## Working collaboratively with other regulators of the payments system

As outlined in the issues paper, several independent regulators each have legislatively defined roles in relation to the payments system. The ACCC liaises closely with other regulators and government agencies on competition and consumer issues relating to financial services and the payments system.

We recognise the remit and expertise of other regulators in relation to the payments system, including:

- the Australian Prudential Regulation Authority (APRA) in establishing and enforcing prudential standards and practices;
- ASIC in its market conduct and integrity, and consumer protection roles;
- the Australian Transaction Reports and Analysis Centre (AUSTRAC) in preventing, detecting and responding to criminal abuse of the financial system; and
- the RBA in its roles as a regulator, infrastructure provider, provider of banking services to federal government and issuer of Australia's banknotes. The ACCC also recognises the duties of the Payments System Board in controlling risk in the financial system, promoting the efficiency of the payments system and promoting competition in the market for payment service consistent with financial stability.

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<sup>18</sup> See: Council of Financial Regulators, *Competition in the clearing and settlement of the Australian cash equity market – Discussion Paper*, June 2012; Council of Financial Regulators, *Review of Competition in Clearing Australian Cash Equities – A Consultation Paper by the Council of Financial Regulators*, February 2015; and Council of Financial Regulators, *Safe and Effective Competition in Cash Equity Settlement in Australia – A Consultation Paper by the Council of Financial Regulators*, March 2017.

We have Memoranda of Understanding (MoUs) with each of the aforementioned regulators.

The commitments agreed to in these MoUs aim to coordinate and complement each regulator's respective role. They generally include commitments to share information on relevant matters, collaborate on joint tasks, and to regularly schedule meetings between the heads of each agency. This includes more specific requirements, including:

- the ACCC and APRA MoU includes commitments for proactive engagement and information sharing where relevant to each respective agency's role;
- the ACCC and ASIC MoU includes arrangements for cost sharing where there are substantial costs associated with sharing information;
- the ACCC and AUSTRAC MoU allows the ACCC access to AUSTRAC information under strict records compliance and accountability measures, and includes consultation commitments for media relations which may be of mutual interest;
- the ACCC and the RBA MoU has specific consultation commitments when the RBA is considering designating a payment system as being subject to the RBA's powers.

Examples of recent collaboration with other regulators of the payment system include:

- From October 2018 to June 2019 the ACCC provided input and assistance to the RBA in carrying out a consultation process regarding *New Payments Platform Functionality and Access*.<sup>19</sup>
- As noted previously, the ACCC works closely with the CFR in advocating for the consideration of competition in clearing and settlement in cash equities, and was involved in reviews of the potential for competition in clearing and settlement. Following those reviews, the ACCC and CFR published policy documents setting out expectations and guidance where the provision of clearing and settlement services were provided by a single (monopoly) provider or multiple providers, respectively.<sup>20</sup>

The most recent reviews have a number of recommendations and conclusions, including legislative reforms to:

- provide the ACCC with powers to arbitrate disputes relating to price and non-price terms and conditions of access to the ASX's monopoly clearing and settlement services for cash equities in Australia, and
- provide ASIC with powers to make rules that impose specific obligations on cash equity clearing and/or settlement facilities to act in accordance with the principles enshrined in the abovementioned policy documents.

In response to these reviews, the Government endorsed the recommendations and conclusions; and stated a policy stance of openness to competition in the provision of both clearing and settlement services for cash equities in Australia.<sup>21</sup>

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<sup>19</sup> RBA, *NPP Functionality and Access Consultation: Conclusions Paper*, June 2019.

<sup>20</sup> See: Council of Financial Regulators, *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia*, September 2017; Council of Financial Regulators, *Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia*, September 2017; and Council of Financial Regulators, *Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia*, September 2017.

<sup>21</sup> See: Morrison S (Treasurer), Turnbull Government to open competition in share clearance, The Treasury, 30 March 2016; Morrison S (Treasurer), Turnbull Government continues policy of open competition in clearing and settlement of shares, The Treasury, 12 October 2016; Morrison S (Treasurer), Open competition in clearing and settlement of shares, 7 September 2017.

Since finalising the reviews, the ACCC has been working closely with the CFR and the Government on the development of legislation that will provide ASIC and the ACCC with their respective rule-making and arbitration powers.

- In addition to the ACCC's e-conveyancing market reform paper (discussed previously and in more detail below), last year the ACCC began working with both state regulators and the CFR to review elements of the regulatory framework for e-conveyancing systems. The aim of reviewing elements of the framework is to promote financial stability, resilience and competition.

## **Competition, fair trading and consumer protection issues in the payments system**

The following discussion illustrates issues and potential areas for reform that the ACCC has identified relating to the payments system, through its work in relation to FX services, NPP, scams, and e-conveyancing. We consider sharing our observations will assist in the considerations of this review and demonstrates the broad range of ways in which the ACCC's expertise in relation to competition, fair trading and consumer protection issues are relevant to the efficient regulation of the payments system.

The ACCC does not have any views on the appropriate regulator(s) to address each of these issues. However, the ACCC considers that the current regulatory architecture has allowed for competition and innovation in the Australian payments system, which is in the long term interest of both Australian consumers and businesses. Therefore, it is important that any changes should ensure that the regulatory architecture continues to allow for competition and innovation in the Australian payments system.

### **FX services**

The ACCC's final report into Australia's FX services found that it can be challenging for consumers to shop around and make informed decisions about FX services. As a result, many consumers continue to use the big four banks for FX services despite the availability of much cheaper alternatives. The ACCC also found that multiple factors led to Australians facing high costs when remitting money abroad, including a lack of price transparency, consumer inertia and a lack of strong competitive forces in the industry.

The ACCC published a best practice guidance for suppliers of FX services. This guidance outlines that the ACCC expect suppliers to clearly and prominently disclose the total price of FX services to consumers up-front. In addition to outlining what constitutes best practice for suppliers of FX services, the guidance outlined that the ACCC will monitor its uptake and consider enforcement action where appropriate.

In early 2020 the ACCC began to review the uptake of our best practice guidance by suppliers of FX services. The COVID-19 pandemic has led to significant disruption to the FX industry, however we intend to complete this review and take any further necessary action once the industry has resumed normal operation.

The ACCC also identified concerns about International Money Transfer (IMT) suppliers being able to get and maintain access to banking services required for providing IMT services, and the effect this had on competition in the supply of IMTs. To address these concerns, the ACCC recommended the development of a scheme to assist IMT suppliers to address due diligence requirements of the banks, including in relation to Anti-Money Laundering and Counter-Terrorism (AML/CTF) requirements. As with the review of the uptake of best practice guidance, the ACCC intends to seek the development of this scheme once the industry has resumed normal operation.



## New Payments Platform

The issues paper notes that Treasury's review will include an assessment of:

*'How to create more productivity-enhancing innovation and competition in the payments system, including in relation to the pace and manner in which the New Payments Platform is being rolled out and enhanced by industry'.<sup>22</sup>*

In June 2019 the RBA released a Conclusions Paper which highlighted that 'the slow and uneven roll-out of NPP services by the major banks had been disappointing and that this had likely slowed the development of new functionality'.<sup>23</sup> The ACCC provided input and assistance into this process.

The Conclusions Paper contained a number of recommendations, supported by the ACCC, that were intended to encourage wider spread access to NPP services and greater certainty and transparency over the timeframes for additional NPP functionality. These included recommendations that:

- NPP participants should prioritise the roll-out of NPP services to their entire customer base and address any functionality gaps in existing customer offerings
- New Payments Platform Australia (NPPA) should periodically publish a roadmap of the additional NPP functionality it has agreed to develop and the expected time period over which it will be delivered
- NPPA should introduce a power for the NPPA Board to mandate that specified NPP core capabilities must be supported by NPP participants within a specific period of time, with an enforceable sanctions regime to apply if participants do not comply.

At the time the Conclusions Paper was released in 2019, the RBA indicated it would conduct (with ACCC assistance) a further review commencing no later than July 2021.<sup>24</sup> The review will consider progress made in addressing the Conclusion Paper's 13 recommendations, which also included recommendations intended to address concerns regarding access to the NPP.

Since the release of the Conclusions Paper, NPPA, eftpos and BPAY announced their intention to amalgamate, with the parties proposing to submit a formal application to the ACCC in March 2021 for its assessment.<sup>25</sup> Even in light of this proposed merger, the ACCC considers it important that the proposed further review examine the effectiveness of the recommendations in addressing stakeholder concerns (including those relating to the pace that functionality is being rolled out and enhanced by industry). In view of this information the case (or need) for regulation via standards mandating functionality or an access regime imposed on the NPP and its participants will be revisited.

## Scams

The ACCC is involved with ensuring the safety of the payments system by identifying laws and regulations that could be improved to ensure Australians are better protected against scams. In 2020, over 216 000 scams were reported to Scamwatch with total reported losses exceeding \$176m.

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<sup>22</sup> The Treasury, *Payments System Review – Issues paper*, November 2020, p.2.

<sup>23</sup> RBA, *NPP Functionality and Access Consultation: Conclusions Paper*, June 2019, p.34.

<sup>24</sup> Ibid, p.4.

<sup>25</sup> eftpos, BPAY Group and NPPA, *eftpos, BPAY Group and NPPA propose to amalgamate for the benefit of Australian consumers and businesses*, 15 December 2020, p.3.

While Scamwatch is the primary government website used by Australians to report scams, we know only around 13 per cent of victims make a report via this platform so the actual number of scams and associated losses suffered by Australians each year is much higher. Scams are essentially crimes of deception. Some scams if tested in court may be breaches of the Australian Consumer Law. However due to the 'fly by night' nature of many scammers, it is difficult for law enforcement agencies to track them down and take action against them. This is further complicated by the fact that most scammers are based overseas.

The ACCC considers that name matching on bank transfers, the protection and management of identity information and better protections for scam victims will help protect consumers from scams in the payments system sector.

### ***Name matching on bank transfers***

The primary type of fraud this would prevent is 'business email compromise' also known as 'invoice fraud'. The most damaging form of this scam involves fraudsters altering the payment account (either directly through a compromised IT system, or through deception by requesting the payer use a different account) of a legitimate business expense to an account created by them. In 2019, Australians lost more than \$132 million to this type of fraud.

Name matching would also provide limited protection for consumers from other types of fraud such as romance scams or online shopping scams where scammers are impersonating a specific individual such as a puppy breeder.

The ACCC is aware that 'Name matching' or 'confirmation of payee' has been successfully implemented in the United Kingdom and the Netherlands through their respective equivalents of the 'PayID' system. However, in order for 'name matching on bank transfers' to be effectively implemented in Australia there would need to be an 'overlay' of the name checking functionality onto the traditional banking system.

### ***The protection and management of identity information***

Reports to Scamwatch indicate that many scammers are seeking to obtain personal information so that it can be used to access a person's finances directly or indirectly through access to other services. Our data highlights several areas of concern for Australian consumers in relation to the loss and misuse of identity information.

In 2018, the ACCC made a submission to the Department of Home Affairs' review of national arrangements for the protection and management of identity information.<sup>26</sup> In this submission, we made a number of recommendations, aimed at further reducing identification information loss and misuse for consumers. In particular, we recommended that:

- larger financial penalties be created to ensure organisations comply with secure storage of data
- existing phone porting regulations are examined
- better protection against personal information mail theft is provided
- identity verification by biographical information is discouraged, resourcing for victim care providers is improved, and

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<sup>26</sup> See: ACCC, *ACCC Submission to the Review of national arrangements for the protection and management of identity information*, November 2018.

- consumer education about personal information protection is provided greater support.

### **Better protections for scam victims**

The ACCC's experience in administering Scamwatch highlights the need for better protections for scam victims in Australia. The ACCC recommended that the following two current initiatives in the UK to be considered in Australia:

- the *Contingent Reimbursement Model Code for Authorised Push Payment Scams*, which provides greater protections for scam victims when they 'authorise' a transfer in circumstances where they have been tricked and provides them reimbursement (subject to particular criteria) from a pool of money funded by the banking sector.
- the compulsory *Confirmation of Payee*, which assists consumers and businesses to check they have the correct name for the person or business they are paying, give better protection against certain types of fraud, and help to stop mistakes.

### **E-conveyancing**

In 2019 the ACCC released an e-conveyancing market reform paper to assist the Australian Registrars' National Electronic Conveyancing Council and the relevant state and territory policy-makers in their consideration of e-conveyancing and the design of this emerging market.<sup>27</sup>

Overall, the ACCC observed that:

- the existing regulatory framework for e-conveyancing is no longer fit for purpose
- unless policy-makers urgently move to implement a regulatory framework that facilitates competition and provides certainty, it is likely that new entrants will be unable to sustain their presence in the market, to the detriment of end users
- in the event that competition is not facilitated, the monopoly provider of e-conveyancing services will need to be subject to robust regulatory requirements to protect the interests of stakeholders and end users. This regulation could be complex, costly and time consuming, and would be a suboptimal result compared to effective competition.

The ACCC concluded that, while it has a strong preference for a nationally consistent approach to e-conveyancing, if this cannot be achieved soon then individual state and territory governments should progress their own approaches, as it is preferable that some markets benefit from competition rather than none.

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<sup>27</sup> See: ACCC, *ACCC report on e-conveyancing market reform*, December 2019.