



Law Council
OF AUSTRALIA

Office of the President

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Dear Danusia

ELECTRONIC CONVEYANCING NATIONAL LAW NATIONAL ENFORCEMENT FRAMEWORK—DETAILED PROPOSAL CONSULTATION DRAFT

1. The Law Council welcomes the opportunity to respond to the *Electronic Conveyancing National Law National Enforcement Framework—Detailed Proposal Consultation Draft* (the **Paper**) issued by the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**).
2. The Law Council notes that this consultation follows a previous consultation on enforcement measures at a national level in 2021,¹ and the implementation of interim enforcement measures in New South Wales through the *Electronic Conveyancing Enforcement Act 2022* (NSW) (the **NSW Act**).
3. This submission has been prepared with assistance from the Law Council's National Electronic Conveyancing System Committee and the Law Society of New South Wales.

General comments

4. The Law Council broadly supports the new enforcement powers proposed by ARNECC as key to ensuring compliance with the Electronic Conveyancing National Law (**ECNL**), subject to the detail to be provided in the draft legislation, and the concerns outlined below regarding the imposition of criminal penalties.
5. The Law Council shares the view outlined in the Paper that the existing enforcement measures under the ECNL, including suspension or termination, are too limited—particularly in jurisdictions where electronic conveyancing is now mandatory.
6. The introduction of broader enforcement powers under the ECNL will be a significant change for Subscribers and Electronic Lodgement Network Operators (**ELNOs**). It is therefore important that an adequate lead time is provided in the implementation timeframe. Similarly important will be the effective communication and education of the new enforcement measures to Subscribers and ELNOs, particularly noting that

¹ See Law Council of Australia, [Submission](#) to Australian Registrars' National Electronic Conveyancing Council, *Changes to enforcement powers in the Electronic Conveyancing National Law* (19 May 2021).

deterrence of non-compliance is one of the key objectives of the proposed framework, as referred to on page 6 of the Paper.

7. It is critical that the Registrars are provided with additional resources to monitor compliance and implement any new measures that are provided under the ECNL. Without the provision of additional resources, the utility of providing expanded enforcement measures will be significantly diminished.

Interim measures in NSW

8. In NSW, there are currently interim enforcement measures available to the Registrar-General under the NSW Act as follows:
 - to accept enforceable undertakings given by an ELNO in relation to a contravention of the ECNL, an operating requirement made under the ECNL, or a condition of an approval;
 - to give a remedial direction or an interim remedial direction to an ELNO in relation to a contravention of a requirement imposed by or under the ECNL; and
 - to apply to the Supreme Court of NSW for an order requiring payment of a monetary amount for a contravention of certain requirements of the ECNL, or a remedial direction or interim remedial direction.
9. These measures commenced on 14 November 2023 and are intended to operate on an interim basis only, until such time as new enforcement measures are enacted nationally under the ECNL. The Law Council notes that the NSW measures relate only to enforcement powers that may be used in relation to non-compliance by an ELNO, whereas the broader enforcement powers under the ECNL being considered in this consultation relate to non-compliance with the electronic conveyancing legal framework—including the ECNL, Operating Requirements (**ORs**), Model Participation Rules (**PRs**) and any jurisdiction's conditions of approval—by both ELNOs and Subscribers.

Enforceable undertakings

10. The Law Council supports the inclusion of enforceable undertakings as an additional enforcement measure. It is appropriate that an undertaking may be offered by either an ELNO or Subscriber, with the terms to be negotiated and agreed with the Registrar. Enforceable undertakings are commonplace across many regulatory regimes and are desirable as a first-instance measure, or as a negotiated alternative to other enforcement options. As an enforcement measure, they can play an important educative role without being punitive, and they align with a key objective of the compliance program as stated at section 3 of *Model Participation Rules Guidance Note 6 on Compliance Examinations*:

... to ensure the program assists Subscribers in meeting their obligations and responsibilities under the Model Participation Rules and to build trust and confidence in the Electronic Lodgement Network.

Remedial directions

11. The Law Council supports amendment of the ECNL to permit a Registrar to issue a remedial direction to an ELNO or Subscriber if the Registrar reasonably believes they are contravening or have contravened the ECNL, the ORs or the PRs.

12. However, in some instances, the period of 10 Business Days for a recipient of a remedial direction to make submissions may be insufficient. The Law Council suggests that consideration be given to amending the period to '10 Business Days, or such longer time as may be agreed between the parties' to accommodate a mutually agreed extension of time.
13. The Law Council supports the provision of new appeal rights to the 'responsible tribunal' in relation to the remedial directions issued by the Registrar under sections 28 and 29 of the ECNL. The 'responsible tribunal', and therefore the remedies available, will differ across jurisdictions. For instance, pursuant to section 6 of the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW) the 'responsible tribunal' in NSW is the Supreme Court, while for other jurisdictions, it is the respective administrative decisions tribunal. Therefore, the Law Council suggests that consideration be given to whether the legislation regulating each 'responsible tribunal' may require amendment to ensure it has the same powers as the Registrar.

Financial penalties

14. In prior submissions, the Law Council has broadly supported ARNECC's proposed civil penalty regime and the utilisation of infringement notices as enforcement measures available to the Registrar. However, the current Paper contains proposals for both a civil and a criminal penalty regime.
15. The justification for a criminal penalty regime appears to be set out on page 6 of the Paper as follows:

A criminal penalty regime reflects the critical role that Subscribers play in the electronic conveyancing process—a robust enforcement regime is essential to promote Subscriber compliance with key obligations which protect consumers, the security and integrity of the electronic conveyancing process, ELNs and land titles systems in each State and Territory. This is because Subscribers play a critical role in the electronic conveyancing process.

16. The Law Council agrees that Subscribers play a critical role in the electronic conveyancing process, and that a robust enforcement regime is essential to promoting Subscriber compliance with the ECNL and legal framework. We also agree that Subscriber compliance is essential to protecting consumers and ensuring the security and integrity of the electronic conveyancing process, ELNs and land titles systems in each State and Territory. However, a robust enforcement regime, can be achieved through a civil penalty regime.
17. Criminal offences are the ultimate sanction for breaching the law and generally reflect a significant degree of malfeasance or wrongdoing.² Conviction for criminal offences can have significant and wide-ranging consequences for individuals. Therefore, it is imperative that lawmakers consider the range of alternative options and select the most appropriate penalty or sanction.³ As noted in the Commonwealth Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, in many instances, other mechanisms

² Attorney-General's Department (Cth), [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) 12.

³ *Ibid.*

such as infringement notices, civil penalties and enforceable undertakings can 'be as effective, or more effective, in deterring and punishing breaches of legislation'.⁴

18. The Law Council cannot see the justification for a criminal penalty regime directed solely at legal practitioners and conveyancers in the absence of any demonstrated need for such punishment and given the limited operation of the regime. Criminal offences tend to be directed towards behaviour that represents an offence against a person, public order, or property.⁵ The conduct described in the Consultation Draft is regulatory contravention, falling well below the threshold of what is appropriate to be proscribed as criminal behaviour.
19. On the other hand, ELNOs, for whom suspension is not a suitable remedy given the consequential impact on eConveyancing systems and participants, may need the prospect of criminal prosecution/conviction and director accessorial liability to better secure compliance.
20. The availability of a statutory right to compensation suffered by a person from ELNO conduct in contravention of the ECNL or ORs should also be considered as a significant deterrent to non-compliance. This is in line, for example, with the availability of private action for breach of mandatory industry codes in force under section 51AE of the *Competition and Consumer Act 2010* (Cth).

Draft offences—Attachment B

21. Noting the above general comments against the proposed introduction of a criminal penalty regime directed only at legal practitioners and conveyancers, the Law Council does not support the use of 'offences' terminology. However, the Law Council does broadly support the list of breaches outlined in Attachment B as appropriate for *civil* penalties, with two qualifications.
22. First, the Law Council has concerns with the 'draft offence' in respect of PR 7.2.1(b):

A Subscriber whose Users have not received cyber security awareness training as required under the Participation Rules shall be guilty of an offence and liable to a penalty.
23. The Law Council strongly supports the provision of cyber security awareness training to members of the legal profession and related employees and notes its importance in electronic conveyancing and legal practice generally. However, this 'draft offence' lacks sufficient precision, and may be difficult to enforce, as it appears to involve a subjective decision or a determination as to the appropriate level and content of training received by a User. Non-compliance, in such circumstances is not an appropriate basis for a criminal penalty.
24. A breach of this 'draft offence' is not of the usual type of non-compliance that would form the basis for an infringement notice—which are generally in the nature of an 'on the spot fine' in situations where there has been clear non-compliance.⁶ The Law Council therefore considers that non-compliance with this obligation may more appropriately be the subject of a Remedial Direction by the Registrar.
25. Further, non-compliance by an ELNO with the corresponding requirement in relation to cyber security awareness training pursuant to OR 7.1(b)(ii)(D) is not the subject of a criminal penalty. The Law Council sees no basis for this distinction when compliance

⁴ Ibid.

⁵ Ibid.

⁶ See, eg, Attorney-General's Department (Cth), [Introduction to infringement notices](#) (Web Page).

by Subscribers is just as important as compliance by ELNOs, in mitigating cyber security risks in respect of the electronic conveyancing system.

26. Second, the Law Council is also concerned with the ‘draft offence’ in respect of PR 7.8.1:

A Subscriber that fails to (a) Promptly revoke a User’s access to and use of an ELN when they no longer intend that person to be a User of that ELN; or (b) Promptly revoke a User’s signing rights within that ELN when they no longer intend that person to be a Signer of that ELN and, where appropriate, request the Certification Authority to revoke the Signer’s Digital Certificate; or (c) Promptly revoke the User’s administrative rights within an ELN when they no longer intend that person to be a Subscriber Administrator of that ELN, when required to do so shall be guilty of an offence and liable to a penalty.

27. The term ‘Promptly’ is a defined term under the PRs and means ‘without delay in light of the facts and circumstances’.⁷ The Law Council suggests that it is not appropriate for a criminal penalty to be determined based on a subjective decision as to whether the Subscriber acted without delay considering the facts and circumstances. Again, this is also not consistent with the nature of an infringement notice given ‘on the spot’ for clear non-compliance. The Law Council therefore suggests that this non-compliance should not form the basis of either a criminal or civil penalty but may more appropriately be the subject of a Remedial Direction by the Registrar.

Infringement notices

28. The third dot point on page 7 of the Paper states that the ECNL:

... may provide that where an infringement notice amount is paid in accordance with the notice, the person is not liable to any proceedings for the offence if this aspect is not dealt with under State and Territory legislation.

29. The Law Council is unsure what the final phrase ‘if this aspect is not dealt with under State and Territory legislation’ is intended to mean and would appreciate clarification of the point. If what is intended are words to the effect of ‘whether or not the same act or omission attracts a penalty under the law of a State or Territory’, then the Law Council suggests the use of that language instead. Alternatively, if the words are intended to have some other meaning, clarification would be welcome as to that intended meaning.

Existing referral powers of the Registrar

30. Further consideration should be given to utilising existing section 35 of the ECNL, which allows the Registrar to refer a matter to an appropriate authority. Under paragraph 35(1)(b)(ii), an appropriate authority includes ‘a regulatory or disciplinary body for persons engaged in any profession, occupation, calling or business’.
31. Instead of superimposing a new criminal penalty regime, the Law Council considers that a more appropriate approach would be a civil penalty regime, coupled with greater exercise by the Registrars of their existing powers under section 35 of the ECNL to refer matters to a disciplinary body with jurisdiction to censure the conduct of a

⁷ Australian Registrars’ National Electronic Conveyancing Council, *Model Participation Rules*, (Version 7, January 2024) r 2.1 (definition of ‘Promptly’).

Subscriber. A proposal to expand existing referral powers under section 35 should be discussed with the relevant disciplinary bodies of Subscribers in participating jurisdictions, to ensure it is a workable solution for both the Registrars and the disciplinary bodies. Section 35 may need to be expanded to specifically allow a Registrar to refer a matter instead of, or in addition to, conducting a compliance examination or imposing a penalty under the new regime.

Power to publish information about non-compliance and enforcement

32. The Law Council generally supports ARNECC's proposal to give Registrars the power to publish information about non-compliance and enforcement (subject to relevant privacy laws) if there is a civil penalty proceeding where a finding of non-compliance is made. However, the Law Council does not support the publication of the outcome of civil penalty proceedings or proceedings for an offence where no penalty was issued—that is proceedings where there was no finding of non-compliance.
33. The Law Council suggests that information should be published on each individual Registrar's website, as this is where Subscribers in the relevant jurisdiction would be more likely to access the information. Where an ELNO or Subscriber operates in more than one jurisdiction across Australia, the Registrar seeking to publish information should be given the power to inform all other relevant Registrars, with each Registrar ultimately retaining discretion as to whether the information should be published in their jurisdiction. Should Registrars each publish details of a completed non-compliance action, care will need to be taken to ensure consistency.
34. Section 43 of the ECNL provides existing authorisations to a Registrar to disclose certain information to ARNECC, another Registrar or a body with responsibilities under the ECNL or land titles legislation. This provision is likely to require amendment in relation to the proposed new powers of publication. Despite the breadth of the enabling paragraph 43(1)(d), it would be preferable if section 43 was amended to specifically include the types of information able to be disclosed by a Registrar to another Registrar, ARNECC or other relevant body—particularly in light of subsection 43(2), which provides that the 'Registrar may disclose the information despite any law of this jurisdiction relating to privacy or confidentiality'.

Public warning notices and adverse publicity orders

35. Consideration could be given to authorising the Registrar, in appropriate circumstances, to issue a public warning notice regarding a contravention of the regulatory framework. Alternatively, the legislation could provide that the Registrar may apply for a court issued adverse publicity order. The rationale of consumer protection that underpins the use of public warning notices and adverse publicity orders under the *Australian Consumer Law* is equally relevant to the protection of consumers and Subscribers in the context of the ECNL.

Safeguarding against multiple enforcement actions

36. The Law Council supports the inclusion of provisions in the ECNL that prevent an individual or organisation being subject to multiple enforcement actions for the same specific non-compliance under the ECNL. Careful drafting will be required so that, in cases of repeated non-compliance with the same requirement, further action is not restricted.

37. We also note that such provisions could reference that they do not preclude the jurisdiction of other relevant regulators in respect of the matter, nor would they affect any third party civil or other remedies that may be available to ELNOs, Subscribers and other parties in respect of the matter.

Collaborative approach to national enforcement

38. The Law Council supports a collaborative approach by the Registrars to enforcement, and the establishment of an 'enforcement committee', as proposed. ELNOs, and many Subscribers, operate in multiple jurisdictions, and would therefore benefit from such an approach, in addition to the benefits of information sharing amongst the Registrars as referenced in the Paper. Additional resources should be provided to ARNECC for this work.
39. The ARNECC enforcement committee should also be specifically empowered to engage with other relevant regulators. This would align with the suggested expansion of section 35 which enables a Registrar to refer a matter to a regulatory body, as referred to above.

Contact

40. Please contact John Farrell, Executive Policy Lawyer, [REDACTED] [REDACTED] if you would like to discuss the matters raised in this submission.
41. The Law Council looks forward to reviewing the draft legislation in due course.

Yours sincerely



Greg McIntyre SC
President