



**Law Council**  
OF AUSTRALIA

# **Changes to enforcement powers in the Electronic Conveyancing National Law**

**Australian Registrars' National Electronic Conveyancing Council**

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*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the contributions of its National Electronic Conveyancing System Committee, the Law Society of New South Wales and the Queensland Law Society to this submission.

## Introduction

1. The Law Council appreciates the opportunity to provide comments to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) in relation to the Position Paper on Changes to Enforcement Powers in the Electronic Conveyancing National Law (**Position Paper**).
2. In the Law Council's view, the existing enforcement measures under the Electronic Conveyancing National Law (**ECNL**) of suspension or termination are too limited, particularly in mandated eConveyancing jurisdictions. The Law Council considers the enforcement options and proposals outlined in the Position Paper to be broadly appropriate in ensuring compliance with the ECNL, subject to the further detail to be provided in the draft legislation.
3. The Law Council provides three threshold comments:
  - (a) It will be important that ARNECC and the Registrars in each jurisdiction receive increased resources to enable them to utilise their new enforcement powers and enhance confidence in the regulation of electronic conveyancing generally. Unless sufficiently resourced, the reforms may undermine, rather than assist, the objective of improving compliance with the ECNL.
  - (b) Any enforcement powers should be retained and exercised only by the relevant Registrar in each jurisdiction. In those jurisdictions which have privatised or granted concessions or licences for the operation of their registries, enforcement powers of the kind contemplated in the Position Paper should not be delegable to the operator or concessionaire. The enforcement powers should only be exercised by the 'statutory' Registrar.
  - (c) Any enforcement action must not jeopardise any transaction the subject of an agreed settlement time (except in an emergency). In other words, the certainty that a scheduled settlement will proceed as agreed between the parties to the transaction must not be undermined by any actual or threatened enforcement action against any of the Electronic Lodgment Network Operators (**ELNOs**) involved.

## Enforceable undertakings

4. The Law Council supports ARNECC's proposal that enforceable undertakings are introduced as an alternative to other enforcement action. 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 within this scheme. As an enforcement measure, they can play an educative role without being punitive.
5. The proposed amendment gives the Registrar the power to accept or reject an enforceable undertaking by a 'non-compliant party'. The Law Council supports both ELNOs and Subscribers being subject to the proposed powers and suggests that this be made clear in the draft legislation.

## Registrar Directions

6. The Law Council supports ARNECC's proposal to provide Registrars with the power to issue directions, particularly where the Registrar has reason to suspect non-

compliant conduct. However, the above suggestion that 'non-compliant party' includes both ELNOs and Subscribers is also relevant here.

7. The Law Council also supports the proposal to set out the direction power in the ECNL, to allow the Registrar to remedy non-compliance with the ECNL in addition to non-compliance with obligations under the Operating Requirements and the Participation Rules.
8. The proposed regime allows Registrars to issue a direction for 'minor or major non-compliance'. The Position Paper is unclear as to whether the regime will distinguish between 'minor' and 'major' non-compliance, and if so, how. The Law Council queries whether it is ARNECC's intention to propose a tiered approach to Registrar directions, depending on whether the relevant conduct is deemed to be 'minor or major non-compliance', or that any non-compliance, whether minor or major, would be capable of attracting Registrar directions. The Law Council would support the latter approach.

## Civil penalties and infringement notices

9. The Law Council broadly supports ARNECC's proposed civil penalty regime.
10. The proposed civil penalties regime appears appropriate given that it will be administered by the courts and the clear intent, outlined on page 3 of the Position Paper, that the civil penalty regime will:
  - set the maximum penalty that a court may order for a breach of any obligation; and
  - establish criteria to guide the court's discretion in determining the appropriate penalty for a breach.
11. However, the Position Paper then states that:

*Criteria would include factors such as whether the breach was intentional or unintentional; whether there was an impact on third parties; and damage to the reputation of the Registrar or the land titles system.*
12. The Law Council queries the proposed criteria of 'damage to the reputation of the Registrar or the land titles system', which could be a very subjective test. The Law Council suggests instead that the criteria be expressed as 'damage to the integrity or security of the land titles system'.
13. Further consideration will also need to be given to the operation of the regime in practice. In particular, the Law Council makes the following comments in relation to the 'payment of reparations and compensation' as an available court-ordered remedy:
  - Third party civil remedies are likely already available to both ELNOs and Subscribers. Given the largely regulatory nature of the regime, the inclusion of these remedies will represent a considerable expansion of the regulatory regime. Further detail is required to enable appropriate consideration of this aspect of the proposal.
  - The Registrar has no obligation to take enforcement action. This may create difficulties where third parties have an independent right to compensation, but the Registrar has in that instance exercised the discretion not to take enforcement action.

- While the Law Council agrees with ARNECC's general goal of maintaining national consistency in the exercise of enforcement powers, it is uncertain whether the compensation regime would operate on a national or state-based level.
14. The Law Council is also broadly supportive of ARNECC's proposal in relation to infringement notices, which appears to mean the Registrar's power to issue 'on-the-spot' fines in situations where there has been clear or obvious non-compliance with a requirement. It is noted that the infringement notices will relate to contraventions of 'specific legislative and regulatory requirements' (which is appropriate), rather than operate more generally. It may also be appropriate to develop guidelines and training in relation to this new enforcement power.
  15. The Law Council understands that the decision to issue an infringement notice will be reviewable and may potentially be overturned should the recipient challenge it in court. Infringement notice processes are familiar in a variety of regulatory regimes and the Law Council does not object to them in principle.
  16. The Law Council notes the proposal that 'if the non-compliant party pays the amount specified in the infringement notice, the Registrar cannot take further enforcement action'. This is understood to mean the Registrar cannot escalate penalties after the fine for a one-off breach has been paid. Careful drafting is required so that in cases of repeated non-compliance with the same requirement, further action is not restricted.

## Investigative and Cooperative Powers

17. The Law Council is broadly supportive of ARNECC's proposal to expand the Registrar's investigative and cooperative powers to facilitate ease of investigating non-compliance. However, additional information about how any data or information provided under these new powers would be protected is required. In addition to the requirement to comply with any relevant privacy laws in relation to the use of such information, consideration should be given to establishing clear requirements in relation to the limitations on the collection, use and disclosure of such information; as well as in relation to the handling, storage and destruction of that information.
18. Additional resources should be provided to allow the Registrars to utilise these increased powers. Advocacy to the respective state/territory governments to either reallocate, or increase, resources available in this area is likely to be required.

## Power to publish information about non-compliance and enforcement

19. The Law Council appreciates that the purpose of publishing information about non-compliance and enforcement options is to 'incentivise ELNO and Subscriber compliance.' However, the Law Council is concerned that the proposal includes an intention to confer power to publish information about:
  - suspected or alleged ELNO or Subscriber non-compliance; and
  - any investigations underway about non-compliance.
20. In the Law Council's view, the publication of information about suspected or alleged non-compliance, or investigations and civil proceedings currently underway, is not appropriate.

21. As a general principle, only concluded matters of ELNO and Subscriber non-compliance and the final outcomes of completed investigations and concluded civil proceedings should be published. However, consideration could be given to developing a 'two-tier' system of alleged non-compliance. If there is a serious allegation of non-compliance (and/or associated investigation) which gives rise to a systemic risk to participants in the industry, such as a risk to upcoming transactions (for example, the safe transfer of settlement funds) or a risk to the safety and integrity of the titling system, this tier could involve the relevant Registrar delivering a 'show cause' notice to the party. On the issuing of a show cause notice, the Registrar could also publish sufficient details of the allegation to enable other participants in the system to take steps to protect their transactions from those risks. If the alleged non-compliance or the investigation does not identify any such significant risks (the second tier), then there should not be any publication of the matter until the investigation is completed and the allegation substantiated.
22. The Law Council otherwise supports ARNECC's proposal to give Registrars the power to publish information about non-compliance and enforcement, subject to relevant privacy laws. The Law Council supports the statement in the Position Paper that '[a]ny publication under these provisions would be done in accordance with, and subject to, relevant privacy legislation'. However, there is no further detail given as to how these 'privacy' parameters would be applied. The Law Council would welcome the opportunity to comment on this in due course.
23. In relation to publishing 'enforceable undertakings', the Law Council acknowledges the approach of the Australian Competition and Consumer Commission (**ACCC**) in publishing section 87B enforceable undertakings on a public register.<sup>1</sup> The ACCC considers that such undertakings should be 'a matter of public record and open to public scrutiny'.<sup>2</sup> However, the ACCC also indicates in its guidance material that it 'may be possible to grant confidentiality to some aspects of a s 87B undertaking involving genuinely commercially sensitive information'.<sup>3</sup> The Law Council recommends that a similar measure be included in the proposed ARNECC approach to publishing undertakings, to provide an option to protect sensitive information in appropriate matters.
24. The publication of information should be done on each individual Registrar's website as this is where Subscribers in the particular jurisdiction would be most likely to access the information. Where an ELNO 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. Registrars may decide to publish a link to a notice published by another Registrar for the sake of consistency. Should Registrars each publish details of a completed non-compliance action, care will need to be taken to ensure consistency.

## Reviewable decisions will form part of the regime

25. The Law Council supports ARNECC's proposal to make enforcement decisions reviewable by the 'responsible tribunal' in each jurisdiction. However, the 'responsible tribunal', and therefore the remedies available, will differ across jurisdictions. For instance, pursuant to section 6 of the *Electronic Conveyancing*

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<sup>1</sup> See *Competition and Consumer Act 2010* (Cth) s 87B.

<sup>2</sup> Australian Competition and Consumer Commission, *Section 87B of the Competition and Consumer Act: Guidelines on the use of enforceable undertakings by the Australian Competition and Consumer Commission* (April 2014) 7 <<https://www.accc.gov.au/system/files/Guide%20to%20Section%2087B.pdf>>.

<sup>3</sup> *Ibid.*



*(Adoption of National Law) Act 2012* (NSW) the 'responsible tribunal' in New South Wales is the Supreme Court, while for many other jurisdictions, it is the respective administrative decisions tribunal. The Law Council suggests that each 'responsible tribunal' is expressly given the same powers as the Registrar. To that end, the legislation regulating each tribunal may need to be amended.

## A National Enforcement Process

26. The Law Council broadly supports ARNECC's proposal in relation to the National Enforcement Process. However, there are likely to be several challenges in developing a national enforcement process in the context of electronic conveyancing, given the regulatory overlap between state and federal jurisdictions in this space. The Position Paper has highlighted those challenges at page 5.
27. The Law Council supports the 'committee' approach proposed as a relatively practical solution. However, there are likely to be some challenges with the proposed committee system, given that there will be no strict legal structure or basis to limit the decisions of the committee when developing joint guidelines and allocating responsibilities to one Registrar to investigate a cross-jurisdictional matter.
28. It is not possible to impose a legally binding structure on the committee because, as noted in the Position Paper, each Registrar must maintain independence in the exercise of their enforcement powers within each state.
29. If the committee structure is introduced, the Law Council suggests that ARNECC commit to a review of the efficacy of the committee process after 12 months of operation. This review should be conducted by an independent consultant and seek input from all stakeholders about their experiences with the enforcement process.
30. It is also important that any National Enforcement Process, and the committee of representatives from each state and territory be sufficiently well-resourced.