



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref:PLC:JWgl120521

12 May 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Michael,

Position Paper on Changes to Enforcement Powers in the *Electronic Conveyancing National Law*

The Law Society of NSW appreciates the opportunity to provide comments for a Law Council submission 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* ("Paper"). The Law Society's Property Law Committee has contributed to this submission.

The Law Society broadly supports the new enforcement powers proposed by ARNECC as key to ensuring compliance with the Electronic Conveyancing National Law ("ECNL"), subject to the further detail to be provided in the draft legislation. In our view, in a mandated eConveyancing environment, such as currently exists in NSW, the existing enforcement measures under the ECNL of suspension or termination are too limited.

As a general comment, it will be important that the Registrars in each jurisdiction and ARNECC receive increased resources to enable them to utilise their new enforcement powers and enhance confidence in the regulation of electronic conveyancing generally, but particularly in jurisdictions where its use is mandated. Unless sufficiently resourced, the reforms may undermine rather than assist the objective of improving compliance with the ECNL.

We set out our further comments below.

1. Enforceable undertakings

We support 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. As an enforcement measure, they can play an educative role without being punitive.

We note that the proposed amendment gives the Registrar the power to accept or reject an enforceable undertaking by a "non-compliant party". We support both ELNOs and Subscribers being subject to the proposed powers, and suggest this be made clear in the draft legislation.

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2. Registrar Directions

We support ARNECC's proposal to provide Registrars with the power to issue directions, particularly where the Registrar has reason to suspect non-compliant conduct. Our suggestion above to clarify that "non-compliant party" includes both ELNOs and Subscribers is also relevant here. We agree with 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.

We note that the proposed regime allows Registrars to issue a direction for "minor or major non-compliance". The Paper is unclear as to whether the regime will distinguish between "minor" and "major" non-compliance, and if so, how. We query 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 rather that any non-compliance, whether minor or major, would be capable of attracting Registrar directions. We would support the latter.

3. Civil penalties and infringement notices

We broadly support ARNECC's proposed civil penalty regime. However, further consideration will need to be given to the operation of the regime in practice. In particular, we make 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.
- We agree with ARNECC's general goal of maintaining national consistency in the exercise of enforcement powers. In light of this goal, it is uncertain whether the compensation regime would operate on a national or state-based level.

We support ARNECC's proposal in relation to infringement notices, which we understand 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. We note 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.

We understand 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 we do not object to them in principle.

We note 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. We suggest careful drafting is required so that in cases of repeated non-compliance with the same requirement, further action is not restricted.

4. Investigative and Cooperative Powers

We broadly support ARNECC's proposal to expand the Registrar's investigative and cooperative powers to facilitate ease of investigating non-compliance. However, we would welcome additional information about how any data or information provided under these new powers would be protected. In addition to the requirement to comply with any relevant privacy laws in relation to the use of such information, we suggest consideration 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.

Additional resources should be provided to allow the Registrars to utilise these increased powers. We note that advocacy to respective State Governments to either reallocate, or increase, resources available in this area is likely to be required.

5. Power to publish information about non-compliance and enforcement

In our view, the publication of information about suspected or alleged non-compliance, or investigations and civil proceedings currently underway, is not appropriate. We suggest that only *concluded* matters of ELNO and Subscriber non-compliance and the final outcomes of *completed* investigations and *concluded* civil proceedings should be published. We otherwise support ARNECC's proposal to give Registrars the power to publish information about non-compliance and enforcement, subject to relevant privacy laws.

We suggest that the publication of such information should be done on each individual Registrar's website as this is where Subscribers in the particular jurisdiction would be more likely to access the information. Where an ELNO operates in more than one jurisdiction across Australia, we suggest that 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.

6. Reviewable decisions will form part of the regime

We support ARNECC's proposal to make enforcement decisions reviewable by the "responsible tribunal" in each jurisdiction. However, we note that the "responsible tribunal" and thus the remedies available will differ across jurisdictions. For instance, pursuant to s 6 of the *Electronic Conveyancing (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. We suggest 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.

7. National Enforcement Process

We broadly support ARNECC's proposal in relation to the National Enforcement Process. However, any National Enforcement Process, and the committee of representatives from each State and Territory, will need to be sufficiently well-resourced.

If you have any further questions in relation to this submission, please contact Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JW', followed by a horizontal line extending to the right.

Juliana Warner
President