



ARNECC Members

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

The paper is provided for the information of industry. If you wish to provide views, you should do so by 21 May 2021 to:

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Position Paper: Changes to enforcement powers in the ECNL

The *Electronic Conveyancing National Law 2012 (ECNL)* currently lacks the range of enforcement powers found in many other regulatory regimes. Accordingly, ARNECC has resolved to amend the ECNL to introduce the following four powers for both Electronic Lodgment Network Operators (**ELNOs**) and Subscribers, together comprising a 'toolkit' of provisions for enforcement:

- enforceable undertakings;
- extending the current powers of a Registrar to give binding directions;
- civil penalties and infringement notices;¹ and
- enhancing the current investigative and cooperative powers.

The ECNL will also include powers to publish information about ELNO and Subscriber non-compliance, as well as enforceable undertakings in force, directions, investigations, and any civil proceedings on foot.

Current section 38 of the ECNL, which provides that Registrars need not exercise certain powers, will also be expanded to include all enforcement powers, such that there would be no obligation for a Registrar to take enforcement action, irrespective of the circumstances.

1. Enforceable undertakings

These are legally binding agreements between the Registrar and a non-compliant party, directed principally to ensuring the non-compliant party takes action or refrains from action to comply with the relevant regulatory obligation – both to remedy existing contraventions and to prevent future contraventions.

In practice, the Registrar would find that a breach has occurred and notify the non-compliant party, stating an objective. As an alternative to other enforcement action, the Registrar may accept an enforceable undertaking by the non-compliant party. The undertaking would provide that the non-compliant party will take specified action, or refrain from taking specified action, to ensure compliance or remedy non-compliance with regulatory obligations. The Registrar could accept or reject the undertaking, in their discretion.

Once the Registrar accepts the undertaking, if the non-compliant party subsequently fails to satisfy the relevant terms, the failure would constitute a failure of the non-compliant party to comply with the ECNL, enlivening further enforcement provisions, such as a court ordered civil penalty or payment of compensation (see part 3 below).

2. Registrar Directions

This is a power permitting the Registrar to issue a direction to an ELNO to engage in, or desist from, specific conduct in certain instances. For example, if a Registrar has reason to suspect an ELNO has engaged, is engaging, or will engage, in conduct that constitutes a contravention of a specific regulatory requirement, the Registrar could issue a direction to the ELNO, to address this conduct to prevent ongoing or future contraventions.

The regime will allow Registrars to issue a direction for minor or major non-compliance. A failure to comply with a direction will constitute a breach of the ECNL and attract the other enforcement powers discussed in this paper, for example, a civil penalty or other court-ordered remedies.

While there is an existing power in Operating Requirement (**OR**) 5.3(i) requiring ELNOs to comply with a direction and similarly for Subscribers in Participation Rule (**PR**) 6.8.1, ARNECC is proposing that a remedial direction power be set out in the ECNL because:

¹ Also called 'penalty notices' or 'fines', depending on the jurisdiction.

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- the current directions powers, as they are contained in the ORs and PRs, are limited to enforcing the requirements of the ORs and PRs. By elevating the directions power into the ECNL, it can apply more broadly to allow directions by a Registrar to remedy non-compliance with the ECNL, including non-compliance with conditions attached to an ELNO's approval (**Approval Conditions**) under section 16 of the ECNL; and
- a directions power in the ECNL would sit side-by-side with the ECNL provisions supporting the other enforcement powers. A legislative direction power would make other enforcement powers easier to enforce by creating a 'toolbox' that provides Registrars options for flexibility, negotiation and escalation that are not currently available. For example, where an ELNO does not comply with an undertaking, the Registrar could issue a direction for that ELNO to comply with specific parts of the undertaking.

3. Civil penalties and infringement notices

Civil penalties and other court-ordered remedies

Civil penalties are regimes under which a non-compliant party pays a financial penalty for contravention of a legal requirement.

The legislative context of electronic conveyancing is structured such that most ELNO obligations appear in the ORs and Approval Conditions and for Subscribers, in the PRs. The requirements in these instruments vary widely, from a relatively administrative or process nature, such as the obligations for ELNOs to file documents by a specified date, to others which go to the heart of the public trust in the electronic conveyancing system, such as the requirement for an ELNO to develop and comply with an Information Security Management System.

To accommodate the variation in the nature and importance of ECNL obligations, 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. 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.

The setting of penalties by a court promotes procedural fairness and proportionality, as the court can assess the circumstances of the breach against statutory criteria in determining an appropriate penalty for the breach.

Like with undertakings and directions, there will be an escalation path to penalties in instances where an ELNO or Subscriber fails to comply with other enforcement orders. Under this 'two strike' approach, a failure to comply with an enforceable undertaking or Registrar's direction will give the Registrar a basis to seek a civil penalty in court.

While the essence of a civil penalty is payment of a monetary amount, the regime will also include other court-ordered remedies including injunctions and orders for payment of reparations and compensation. The inclusion of a range of remedies provides flexibility, allowing the court to make orders appropriate to the circumstances of the breach. It also facilitates a process of escalation, as described above.

This approach is consistent with ARNECC's primary objective; to remedy non-compliance, while the non-compliant party continues to operate. Provided that the amount of the penalty is appropriate, it operates as an effective deterrent to non-compliance.

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Infringement notices

Infringement notices are effectively 'on-the-spot' fines issued by the Registrar to a non-compliant party for an **alleged** contravention of a requirement.

The notice stipulates an amount that the non-compliant party pays for the alleged contravention, which is significantly less than the amount a Court may order following civil penalty proceedings. If the non-compliant party pays the amount specified in the infringement notice, the Registrar cannot take further enforcement action.

The infringement notice regime will include a power for Registrars to issue infringement notices to non-compliant parties (ELNOs and Subscribers) for alleged contraventions of specific legislative and regulatory obligations.

The legislative regime will be facilitative, empowering each Registrar make regulations to implement an infringement notice regime in accordance with specific legislative requirements and policy considerations in their jurisdiction. As a result of these jurisdictional differences, it is likely that there will be a level of inconsistency in the application of infringement notices across different jurisdictions.

4. Investigative and Cooperative Powers

As noted above, sections 33 and 34 of the ECNL currently allow Registrars to require an ELNO or Subscriber to furnish information, produce documents or take specified action for the purposes of a compliance examination. These examinations relate only to compliance with the OR, PR and suspected or alleged misconduct with respect to the ELN. The threshold for initiating an investigation will be expanded, such that a Registrar can investigate non-compliance with an undertaking or direction as well.

The investigative and cooperative powers will be expanded as follows:

- Investigatory powers will be amended to more closely align with the technology-based systems which the Registrar is regulating – including a power to specify data to be extracted from an ELN and a power to require an ELNO to provide access to its ELN, so that the Registrar can observe the ELN in operation; and
- Cooperative powers will be amended to apply to ELNOs and Subscribers more broadly, rather than only to those under investigation. The power to require production of information or to provide assistance to the Registrar should extend to any ELNO or Subscriber where the Registrar considers this would assist in the investigation of actual or potential non-compliance. For example, in an interoperable transaction, the Registrar may need information not only from the ELNO which is being investigated. In this example, the other ELNO or Subscriber is not under investigation *per se*, and so the Registrar couldn't rely on sections 33 and 34 of the ECNL to investigate or require the cooperation of that other ELNO/Subscriber.

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

The ECNL does not currently include an express power for the Registrar to publish information about ELNO or Subscriber non-compliance and subsequent enforcement action.

The information publishing framework will be expanded to include powers for the Registrar to publish information that will supplement other enforcement powers, including the power to publish information about:

- suspected or alleged ELNO or Subscriber non-compliance;
- any enforceable undertakings in force;
- any directions issued by a Registrar and actions or outcomes following such directions;
- any investigations underway and the outcomes of those investigations; and
- any civil proceedings on foot as well as the outcome of those proceedings.

Publishing information in relation to enforcement action will incentivise ELNO and Subscriber compliance – particularly for ELNOs operating in a competitive market. Any publication under these provisions would be done in accordance with, and subject to, relevant privacy legislation.

6. Reviewable decisions will form part of the regime

The final ‘limb’ of this approach would be to allow an ELNO or Subscriber to apply for a review of any of the above enforcement decisions according to the process stipulated for appeals in each jurisdiction. This will be by way of amendment to current section 28 of the ECNL, which deals with ‘appealable decisions’ by the ‘responsible tribunal’. Each jurisdiction determines the ‘responsible tribunal’.

A National Enforcement Process

While the regulatory requirements of the electronic conveyancing scheme are developed on a national basis through ARNECC, the legal powers to enforce those rules are in the hands of each individual Registrar. The additional powers and remedies outlined above would be powers of the individual Registrars.

ARNECC considers that it is important to achieve a level of national consistency in the approach to enforcement.

There are three broad scenarios in which non-compliance could arise:

- the non-compliant party has breached the same regulatory requirement on a national basis (or at least in more than one jurisdiction). As ELNOs and some Subscribers operate on a national basis, a systemic error is likely to produce breaches of the same provision across all participating jurisdictions;
- the non-compliant party has breached a nationally applied rule in one jurisdiction. While the PRs apply nationally,² financial institutions and large law firms tend to operate nationally while smaller practitioners mostly operate in one jurisdiction; and
- the non-compliant party has breached a rule which is specific to an individual jurisdiction.

In the case of breaches of nationally applied rules across multiple jurisdictions, it would be in the interests of the party alleged to have breached the rules, those impacted by the breach and the Registrars not to have multiple parallel investigations and different outcomes in terms of the remedies or penalties applied. Where a breach of a nationally applied rule has occurred in one jurisdiction only,

² As in, Registrars have determined the same PRs in their respective jurisdictions.

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stakeholders will benefit from a consistency in approach by individual Registrars to how non-compliance is investigated and remedied.

ARNECC's approach, to achieve consistency, would be to establish a committee of representatives from each State and Territory, who will work together to ensure a nationally coordinated approach to enforcement. The committee will operate under joint guidelines which will stipulate (amongst other things):

- a mandate to avoid unnecessary duplication of effort;
- an agreed process to investigate non-compliance and determine appropriate enforcement action to remedy non-compliance;
- circumstances in which it is appropriate to issue warnings and/or cautions, prior to enforcement action..

Through the committee, Registrars may agree that one Registrar will take the lead on investigating a particular complaint, and where there is an impact on consumers nationwide, all jurisdictions participating in the investigation and decision process. There can also be discussion of appropriate remedies to be applied on a national basis.

The committee process will facilitate co-ordination and information sharing between Registrars, promoting consistent and efficient decision-making while preserving each Registrar's independence in the exercise of enforcement powers.