

**Electronic Conveyancing National Law  
National Enforcement Framework  
Detailed Proposal Consultation Draft  
November 2023**

## Summary

ARNECC is seeking feedback on the proposed framework for broader enforcement powers under the Electronic Conveyancing National Law (**ECNL**). The ECNL currently lacks the range of enforcement powers found in many other regulatory regimes. This means that Registrars have limited powers to enforce compliance and to take appropriate action in the event of non-compliance by Electronic Lodgment Network Operators (**ELNOs**) and Subscribers.

This detailed proposal builds on the ARNECC position paper previously circulated to industry in April 2021 (**Attachment A**) and is intended to provide greater clarity on the framework and highlight key changes.

### 1. Why does ARNECC need broader enforcement powers?

The current principal enforcement powers in the ECNL are:

- a Registrar may suspend or revoke the approval of an ELNO if there is a Suspension Event or Termination Event as set out in the Operating Requirements (**ORs**);
- a Registrar may, or may direct an ELNO to, restrict, suspend or terminate a Subscriber's use of or access to an ELN if there is a Suspension Event or Termination Event as set out in the Participation Rules (**PRs**);
- an ELNO must comply with any reasonable direction given by the Registrar for the purpose of the ORs; and
- Subscribers must also comply with reasonable directions of the Registrar under the PRs.

It is important for Registrars to retain powers of suspension and revocation/termination for serious breaches. However:

- for ELNOs, suspension or revocation of an approval to operate is likely to be not viable given the limited number of ELNOs.
- for many Subscribers, suspension or termination will impact business viability.

While the requirement to comply with a Registrar's reasonable directions provides flexibility, it only applies to ORs and PRs as opposed to the entire legal framework, and its effectiveness is limited by the lack of supplementary enforcement powers. For example, where a party fails to comply with a direction, the Registrar's only option for enforcement is suspension or revocation/termination.

For these reasons, Registrars need access to a wider range of enforcement options.

In April 2021, ARNECC published a position paper for industry on proposed changes to enforcement powers in the ECNL. Key stakeholders were generally supportive of the proposal. Since the publication of that paper ARNECC has been developing a detailed framework and now seeks further feedback from stakeholders.

The broad objectives of ARNECC's proposed framework for enhanced enforcement remain:

- giving Registrars the flexibility to take enforcement action that is appropriate and proportionate to the event of non-compliance.
- bringing the contravening party into compliance with their obligations.
- encouraging compliance by ELNOs and Subscribers, in other words deterring non-compliance.

- minimising adverse impacts on other parties involved in or affected by conveyancing transactions.

While ARNECC will look to coordinate enforcement approaches, differing circumstances and policies may mean that enforcement activity may vary across jurisdictions.

## 2. Overview of proposed framework

The proposed enforcement framework involves four key elements:

1. Enforceable undertakings
2. Remedial directions
3. Financial penalty regime, comprising:
  - a. civil penalty provisions for ELNOs and Subscribers
  - b. offences for which an infringement notice may be issued for Subscribers
4. Power to publish information about non-compliance and enforcement

The framework is set out in more detail below.

### 2.1 Enforceable undertakings

#### Overview

The ECNL will be amended to permit the Registrar to accept a written undertaking (enforceable undertaking) by a person who has breached, is breaching or is at risk of breaching any provision of the ECNL, ORs, PRs or conditions of approval (collectively the **Legal Framework**). The undertaking will specify the action that the person will take to remedy the contravention or prevent occurrence (or re-occurrence) of the contravention, or mitigate the risk of future contravention, as appropriate.

#### Process

An undertaking may be offered by either an ELNO or Subscriber, with terms to be negotiated and agreed with the Registrar.

Acceptance of an undertaking will be at the absolute discretion of the Registrar.

The Registrar must give the person seeking to provide an enforceable undertaking (the offeror) written notice of the Registrar's decision to accept or reject the undertaking, and the reasons for any decision to reject.

An undertaking will take effect and become enforceable when the Registrar's written decision to accept the undertaking is given to the offeror, or at any other date specified by the Registrar.

The Registrar and the offeror may agree to withdraw or vary the enforceable undertaking at any time.

#### Limitations and safeguards

To prevent the offeror being subject to the burden of multiple enforcement actions, and to create an incentive to address non-compliance through an undertaking, the ECNL will provide that no proceedings or other enforcement action for a contravention or alleged contravention of the Legal Framework will be brought against a person if:

- there is an enforceable undertaking in effect in relation to that specific contravention, or

- the person has completely discharged an undertaking as it applies to that specific contravention.

If the Registrar accepts an undertaking while civil penalty proceedings are on foot in respect of the contravention, the Registrar will be required to take all reasonable steps to have the proceedings discontinued as soon as reasonably practicable. However, if the undertaking is withdrawn the Registrar may reinstate the proceedings.

### **Enforcement of undertakings**

If the Registrar considers that a person has breached the terms of an undertaking, they may apply to the Responsible Tribunal for orders to enforce the undertaking, including:

- directing the person to comply with the undertaking,
- financial orders, such as payments to the State, and
- other orders that the Responsible Tribunal considers appropriate.

The Responsible Tribunal would decide whether the person has breached the undertaking and, if so, make orders as appropriate in the circumstances.

### **Appeal of decisions**

It is not proposed to include a right of appeal of any decision by the Registrar in relation to an enforceable undertaking. The proposal is to not include any specific right to appeal for:

- internal review by the Registrar;
- merits review by a Responsible Tribunal; or
- judicial review by a Court of competent jurisdiction.

This is because:

- undertakings are voluntarily given by the offeror;
- acceptance of an undertaking is a matter for the discretion of the Registrar; and
- variation or withdrawal of an undertaking must be agreed by both the Registrar and the offeror.

## **2.2 Remedial directions**

### **Overview**

The ECNL will be amended to permit the Registrar to issue a remedial direction (referred to in the Position Paper as 'Registrar Directions') to an ELNO or Subscriber if the Registrar reasonably believes that they are contravening, or have contravened, the Legal Framework.

Remedial directions will be imposed unilaterally by the Registrar rather than negotiated. Some Registrars may choose to give the recipient the opportunity to offer an enforceable undertaking before the Registrar proceeds to issue a remedial direction. This may not be appropriate for example, in an emergency situation where there is a threat to the security or integrity of an ELN, the land titles register or one or more electronic conveyancing transactions.

### **Content of remedial directions**

The Registrar will be permitted to issue a remedial direction to a person where the Registrar is satisfied on reasonable grounds that a breach has occurred or is occurring. The direction must set out:

- the reasons for issuing the direction, including the relevant provision(s) the Registrar believes are in breach, and how the provision(s) is being or has been breached;
- the action the recipient is required to take, which the Registrar reasonably considers necessary to remedy the non-compliance and/or prevent re-occurrence of further non-compliance;
- the period within which the recipient is required to remedy the breach, which must be reasonable in all the circumstances.

The Registrar will be permitted to vary or revoke a remedial direction at any time by giving written notice to the recipient, noting that the Registrar must provide the recipient with a reasonable period to comply with any varied terms of the remedial direction.

### **Limitations and safeguards**

Noting that remedial directions will be issued unilaterally and have the potential to impose a financial and/or operational burden on the recipient, it is proposed that the power will be subject to the following limitations and safeguards:

- The Registrar may only issue a direction if they are satisfied on reasonable grounds that the recipient has breached or is breaching the Legal Framework. This ensures that the power is limited to circumstances of breach and cannot be used as a general power to control ELNO and Subscriber conduct.
- The Registrar must provide 10 Business Days' written notice to the recipient of the proposed direction, during which the recipient may make submissions. Where submissions are made, the Registrar must consider all submissions, advise the recipient of any outcome and where applicable specify a date on which the remedial direction will take effect. For the avoidance of doubt, where no submissions are received in response to the written notice, the remedial direction will take effect at the end of the 10 Business Day notice period.
- The notice period would not apply where the Registrar considered the direction needed to be issued in response to an emergency situation. For the purposes of this provision an emergency situation exists if the Registrar considers that the breach jeopardises or is likely to jeopardise the operation, security, integrity or stability of an ELN, the land titles register or one or more electronic conveyancing transactions.
- The terms of a remedial direction must be specifically directed to remedying the breach and/or preventing recurrence of the non-complying conduct. This ensures that the direction is appropriately targeted and minimises the impact of the direction on the recipient.
- The Registrar may not issue a remedial direction if:
  - there is an enforceable undertaking in effect in relation to that specific contravention;
  - the Registrar has given the person an infringement notice in respect of the specific contravention and the person has paid the amount specified in, and in accordance with, the terms of the infringement notice; or
  - a Responsible Tribunal has issued an order or direction to the person in respect of the same specific contravention.

### **Enforcement of remedial directions**

Once issued by the Registrar, the remedial direction becomes binding on the recipient. The ECNL will include an express obligation for a person to comply with a remedial direction, within the specified period.

The requirement to comply with a remedial direction will be a civil penalty provision. If a person fails to comply with a remedial direction, the Registrar will be permitted to commence proceedings to recover a civil penalty for failure to comply with the remedial direction (discussed further at 2.3)

### **Appeal of decisions**

It is proposed that several Registrar's decisions in relation to remedial directions would be appealable under sections 28 and 29 of the ECNL, including a decision to:

- issue a remedial direction
- vary a remedial direction

Under sections 28 and 29, the Responsible Tribunal may confirm, amend or substitute the Registrar's decision and in doing so, may exercise the same powers as the Registrar in making the original decision.

In considering an application for appeal, the Responsible Tribunal would be permitted to make a determination as to whether the underlying breach actually occurred, before resolving to confirm, amend or substitute the Registrar's decision.

## **2.3 Financial penalties**

### **Overview**

It is proposed to include a financial penalty regime, comprising civil penalty provisions, and criminal penalty provisions consisting of offences for which infringement notices may be issued.

### **Civil penalties**

The ECNL will be amended to define the meaning of a civil penalty provision and designate the following as civil penalty provisions (and outline the maximum penalty for a contravention):

1. the requirement for ELNOs to interoperate (section 18A)
2. the requirement for ELNOs and Subscribers to comply with a remedial direction (new provision).

The ECNL will also outline:

1. maximum civil penalty amounts for breaches of civil penalty provisions which are:
  - a. yet to be determined for ELNOs
  - b. proposed to be \$50,000 for Subscribers
2. that a breach of a civil penalty provision is not an offence
3. factors that the Responsible Tribunal must consider in determining the appropriate civil penalty for a contravention of a civil penalty provision.

### **Criminal penalties**

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.

A criminal penalty regime will consist of offences and will facilitate the issue of infringement notices, as a lower cost and less disruptive approach to enforcement.

The ECNL will be amended to create offences for certain conduct, as set out in the table at **Attachment B**. Offences will attract financial penalties only, and the maximum penalty will be \$50,000, aligning with the civil penalty regime.

Infringement notices are commonly used in jurisdictions and cover matters such as conveyancer professional conduct breaches, speeding fines, parking offences, not holding a valid ticket on public transport and littering.

### **Infringement notices**

The ECNL will be amended to apply infringement notice schemes to the offences. The ECNL:

- will specify offences as infringement notice provisions
- will specify that the infringement notice amount will be \$3,096
- 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.

### **Process – civil penalties**

Where the Registrar reasonably believes that an ELNO or a Subscriber has contravened a civil penalty provision designated in the ECNL, the Registrar may commence proceedings in the Responsible Tribunal seeking recovery of a penalty up to the specified maximum for the civil penalty provision.

The Responsible Tribunal will determine whether the contravention has occurred and, if so, make orders for payment of a civil penalty. Orders will be in accordance with the factors set out in the legislation, together with such other factors as the Responsible Tribunal considers appropriate.

The ECNL will specify that when determining a civil penalty, the Responsible Tribunal (in addition to all other relevant considerations) must have regard to the following:

1. the nature and extent of the contravention; and
2. the nature and extent of any loss or damage suffered as a result of the contravention; and the circumstances in which the contravention took place; and whether a Responsible Tribunal of a participating jurisdiction has previously found the person to have engaged in any similar conduct in proceedings under the ECNL as applied in the participating jurisdiction.

### **Process - offences**

Where the Registrar believes that a Subscriber has committed an offence (that is, has satisfied the elements of the offence as outlined in the ECNL):

- an infringement notice may be issued for the alleged contravention; or
- proceedings may be commenced in the appropriate court for prosecution of the offence.

Offences will be heard in the court with the appropriate jurisdiction within each State or Territory – this could depend on a number of factors, including any State or Territory based legislation or any monetary limits on a court's jurisdiction.

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

### Overview

The ECNL will be amended to permit the Registrar, at their discretion to publish information in relation to the following:

- enforceable undertakings accepted by the Registrar (including enforceable undertakings that are no longer in force)
- remedial directions given by the Registrar
- the outcome of any civil penalty proceedings or proceedings for an offence, subject to any relevant court non-publication orders.

The power to publish information about compliance and enforcement incentivises compliance with the regulatory framework, by exposing a person to risk of reputational damage for non-compliance. Publication also provides transparency and accountability of enforcement action.

### Limitations and safeguards

Before publishing any information about a person, the Registrar must consider any public interest concerns in publishing the information.

## 3. Safeguarding against multiple enforcement actions

It is proposed that the ECNL should include provisions which prevent an individual or organisation being subject to multiple enforcement actions for the same specific non-compliance.

## 4. Collaborative approach to national enforcement

Where possible ARNECC will provide high-level guidance to ELNOs and Subscribers around how the enforcement framework will work. It is important to note that while this is a national framework, it will need to accommodate jurisdictional differences. For example, jurisdictions may seek to set different enforcement priorities in response to specific circumstances in their State or Territory.

To promote a collaborative approach to enforcement of ELNO and Subscriber obligations under the Legal Framework, ARNECC will consider the establishment of an enforcement committee. The focus of this committee would be to provide high-level guidance to ELNOs and Subscribers to facilitate national consistency and to provide a forum for discussion and information sharing between jurisdictions.



**Position Paper: Changes to enforcement powers in the ECNL****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:

Christina Garas  
NSW Office of the Registrar General  
Phone: +61 2 9372 9009  
Email: [christina.garas@customerservice.nsw.gov.au](mailto:christina.garas@customerservice.nsw.gov.au)  
Copy to: [chair@arnecc.gov.au](mailto:chair@arnecc.gov.au), [ORG-Admin@customerservice.nsw.gov.au](mailto:ORG-Admin@customerservice.nsw.gov.au)

## 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;<sup>1</sup> 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:

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<sup>1</sup> Also called 'penalty notices' or 'fines', depending on the jurisdiction.

## Position Paper: Changes to enforcement powers in the ECNL

- 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.

## Position Paper: Changes to enforcement powers in the ECNL

### *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.

## Position Paper: Changes to enforcement powers in the ECNL

### 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,<sup>2</sup> 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,

<sup>2</sup> 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.

## Criminal offences relating to breaches of Participation Rule obligations by Subscribers

### Participation Rules

Any reference to a Participation Rule in this document is a reference to the rule as it appears in **Model Participation Rules Version 7 Consultation Draft 7** (available here: <https://www.arnec.gov.au/wp-content/uploads/2021/08/Model-Participation-Rules-Consultation-Draft-7-clean.pdf>)

Capitalised terms have the meaning set out at Participation Rule 2.1.2

Rule	Obligation	Comments	Draft Offence
6.3	If the Subscriber is a Representative, the Subscriber must: (b) except for Caveats, Priority Notices, extensions of Priority Notices and withdrawals of Priority Notices, for which a Client Authorisation is optional, enter into a Client Authorisation with its Client before the Subscriber Digitally Signs any electronic Registry Instrument or other electronic Document in an ELN;	Attach a criminal offence and infringement notice to this obligation only when no Client Authorisation was obtained.	A Subscriber that does not obtain a Client Authorisation as required under the Participation Rules shall be guilty of an offence and liable to a penalty.
6.4	A Subscriber must comply with the requirements in relation to right to deal.	Attach a criminal offence and infringement notice to this obligation only where no steps taken to verify Client has the right to enter into the Conveyancing Transaction.	A Subscriber that takes no steps to verify that a person is a legal Person and has the right to enter into a Conveyancing Transaction when verification is required under the Participation Rules shall be guilty of an offence and liable to a penalty.
6.5	A Subscriber must comply with the requirements in relation to verification of identity.	Attach a criminal offence and infringement notice to this obligation only where no steps taken to verify identity.	A Subscriber that takes no steps to verify the identity of a person when verification is required under the Participation Rules shall be guilty of an offence and liable to a penalty.

Rule	Obligation	Comments	Draft Offence
6.6	A Subscriber must comply with the requirements in relation to supporting evidence.	Attach a criminal offence and infringement notice to this obligation only where no supporting evidence retained.	A Subscriber that does not retain evidence supporting an electronic Registry Instrument or other electronic Document as required under the Participation Rules shall be guilty of an offence and liable to a penalty.
6.13.1	Where a mortgagor (in its capacity as mortgagor) is not a Subscriber or represented by a Subscriber, the mortgagee, or the mortgagee's Representative, must comply with PR 6.13.1	Attach a criminal offence and infringement notice to PR 6.13.1: (b) - when the mortgage granted by the mortgagor is not held, <del>(c) - only where certifications not validly given, and</del> (d) – for a transfer of mortgage, when the mortgage granted by the mortgagor is not held	Where a mortgagor (in its capacity as mortgagor) is not a Subscriber or represented by a Subscriber, a Subscriber (being either the mortgagee or the Representative of the mortgagee) that does not ensure that they hold a mortgage granted by the mortgagor on the same terms as the mortgage signed by, or on behalf of, the mortgagee, shall be guilty of an offence and liable to a penalty.  For a transfer of mortgage for which the mortgagor (in its capacity as mortgagor) is not a Subscriber or represented by a Subscriber, a Subscriber (being either the transferee mortgagee or the Representative of the transferee mortgagee) that does not ensure they hold the mortgage granted by the mortgagor on the same terms as the mortgage signed by, or on behalf of, the mortgagee, shall be guilty of an offence and liable to a penalty.
7.2.1(b)	A Subscriber must ensure that each of its Users has received training appropriate to their use of an ELN, including cyber security awareness training covering as a minimum secure use of the ELN, secure use of the Subscriber's Systems and secure use of email and other electronic	Attach a criminal offence and infringement notice to this obligation if no steps taken	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.



Rule	Obligation	Comments	Draft Offence
	communication		
7.2.3(b)	A Subscriber must ensure that prior to the initial allocation of a Digital Certificate to a Signer or prior to the appointment of a Subscriber Administrator, a police background check is conducted for that Signer or Subscriber Administrator to ensure the Signer or Subscriber Administrator is not or has not been subject to a conviction of fraud or an indictable offence which may impact on the conduct of a Conveyancing Transaction or a conviction for any offence for dishonesty against any law in connection with business, professional or commercial activities	Attach a criminal offence and infringement notice to this obligation if no steps taken.	A Subscriber that does not ensure a police background check is conducted for their Users as and when required under the Participation Rules shall be guilty of an offence and liable to a penalty.
7.5.5	The Subscriber must take reasonable steps to ensure that only Signers Digitally Sign electronic Registry Instruments or other electronic Documents.	<p>Attach a criminal offence and infringement notice to this obligation if evidence that any of the sub-paragraphs breached ie:</p> <ul style="list-style-type: none"> <li>(a) Digital Certificate used by someone other than the Signer</li> <li><del>(b) Signer shares their Access Credentials and Digital Certificates</del></li> <li><del>(c) Signer does not keep their Digital Certificates safe and secure</del></li> <li><del>(d) Digital Certificate used by someone other than the User</del></li> <li>(e) Access Credentials used by someone other than the User</li> </ul>	<p>A Subscriber that takes no steps to prevent its Signer's Digital Certificate being used by someone other than the Signer to whom it was allocated, shall be guilty of an offence and liable to a penalty.</p> <p>A Subscriber that takes no steps to prevent its User's Access Credentials being used by someone other than the User to whom they were allocated, shall be guilty of an offence and liable to a penalty.</p>

Rule	Obligation	Comments	Draft Offence
7.8.1	If a Subscriber no longer intends: (a) a Person to be a User of an ELN, the Subscriber must Promptly revoke the User's access to and use of that ELN; or (b) a Person to be a Signer of an ELN, the Subscriber must Promptly revoke the User's signing rights within that ELN and, where appropriate, request the Certification Authority to revoke the Signer's Digital Certificate; or (c) a Person to be a Subscriber Administrator of an ELN, the Subscriber must Promptly revoke the User's administrative rights within that ELN.	Attach a criminal offence and infringement notice to this obligation if Prompt action not taken	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.
7.10	A Subscriber must provide those of the certifications set out in the Certification Rules as are required when Digitally Signing an electronic Registry Instrument or other electronic Document.	Attach a criminal offence and infringement notice to this obligation only where certifications not validly given	A Subscriber that provides a certification as set out in the Certification Rules in relation to a (duplicate) certificate(s) of title when the Subscriber has not retrieved and either securely destroyed or made invalid the (duplicate) certificate(s) of title prior to making the certification shall be guilty of an offence and liable to a penalty.