



Australian Banking
Association



**ELECTRONIC CONVEYANCING NATIONAL LAW
ENFORCEMENT FRAMEWORK**
Australian Registrars National Electronic Conveyancing Council

9 February 2024

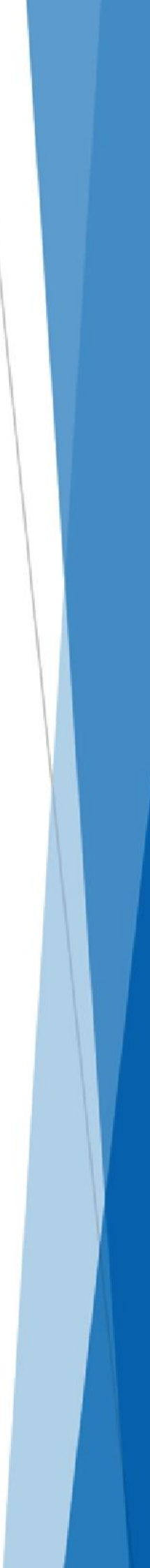




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Key recommendations

The ABA supports in principle the inclusion of compliance powers in the Electronic Conveyancing National Law (**ECNL**). However, the ABA considers it critical that the Australian Registrars National Electronic Conveyancing Council (**ARNECC**) is constituted with the appropriate understanding of the technical and operational details of interoperability, including financial settlement, to enforce its proposed new powers under the ECNL.

It is fundamental that ARNECC or another appropriate body be equipped with the required expertise to oversee the compliance scheme beyond the scope of the registration and lodgement of title documents, and for the benefit of all participants in eConveyancing. Failure to do so has the potential to significantly impact on subscribers' ability to confidently undertake eConveyancing transactions.

In respect of the proposed amendments to the ECNL, the ABA strongly recommends the following:

1. The time in which a subscriber subject to a remedial direction can make written submissions in respect of the direction is amended to 21 business days after notice is first issued, rather than ten business days.
2. The penalty regime of the ECNL be limited to civil penalties, rather than civil and criminal penalties.
3. The power to publish information about non-compliance and enforcement should be complemented with safeguards that support procedural fairness, including the requirement for ARNECC to seek and consider written submissions from an impacted subscriber prior to publication of information.
4. The ECNL contain an obligation on Registrars to take all reasonable steps to work together and coordinate their actions with other Registrars concerned, to ensure that stakeholders do not receive conflicting directions from various jurisdictions.
5. The ECNL include a mechanism to permit the reviews of decisions of multiple Registrars being consolidated into proceedings before a single tribunal or court with the determination of that tribunal or court being bind on all relevant Registrars.

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About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

ABA submission to the Electronic Conveyancing National Law National Enforcement Framework consultation

Overview

The Australian Banking Association (**ABA**) welcomes the opportunity to comment on the consultation draft of the Electronic Conveyancing National Law (**ECNL**) National Enforcement Framework developed by the Australian Registrars National Electronic Conveyancing Council (**ARNECC**).

As we stated in our submission to the draft Model Operating Requirements version 7 consultation, the ABA continues to support the intention of interoperability on the basis that eConveyancing transactions under interoperability are functionally equivalent to those under a non-interoperable framework.

However, the ABA has significant concerns that the interoperability program will be impacted by the failure to resolve ongoing issues relating to the scope, functionality, innovation and payment and settlement flows of the program, including in relation to the enforcement powers of ARNECC to uphold requirements.

In this regard, the ABA supports in principle the introduction of additional enforcement powers to ensure that Electronic Lodgement Network Operators (**ELNOs**) are accountable in the event of non-compliance with the ECNL and the Model Operating Requirements, and to ensure the interoperability program and customer experience is not impacted.

However, ARNECC must be constituted with appropriate understanding of the technical and operational details of interoperability, including financial settlement, to enforce these powers appropriately. ARNECC's limited focus on registration of land title documents in respect of the interoperability program continues to be an ongoing concern of the ABA.

The ABA notes that while we have raised these issues with ARNECC in the past, the issues are yet to be resolved. In our view, it is important that ARNECC has the required expertise and jurisdiction to oversight the delivery and implementation of the interoperability program. We note in its recent consultation on the Model Operating Requirements version 7, majority of feedback provided by stakeholders, including banks, was not actioned or adopted.

Comments on the draft National Enforcement Framework

The ABA makes the following comments in relation to the draft National Enforcement Framework.

Enforceable undertakings

The discussion paper on the ECNL (**discussion paper**) states that 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 or other conditions of approval. The ABA is supportive of the inclusion of enforceable undertakings under the ECNL. The ABA seeks it be made clear in the ECNL that an undertaking can be entered into by an organisation and an individual who has the delegated authority to provide the undertaking on behalf of the organisation.

Remedial directions

The discussion paper states 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. The ABA is broadly comfortable with this proposal given it is proposed that Registrar's decisions in relation to remedial directions would be appealable under section 28 and 29 of the ECNL. However, the ABA seeks confirmation that while application for appeal was on foot, the relevant timeframes of the direction would be postponed pending the outcome of the appeal.

The discussion paper also states that the Registrar must provide ten business days written notice to the recipient of the proposed direction, during which the recipient may make submissions. The ABA considers

the timeframe for response should be extended to ensure that organisations have adequate time to respond to issues, which are likely to be complex in nature. For example, a submission that requires detailed technical, legal and operational input relating to a complex matter would likely take longer than ten business days to appropriately respond to. In this regard, the ABA requests the timeframe be revised from ten business days to 21 business days to afford stakeholders sufficient time to consult within their organisations. The ABA also requests that a direction be sent to multiple contacts to ensure that, in the absence of a team member (due to leave, for example), the subscriber is otherwise appropriately notified.

Financial penalty regime

The discussion paper states that the ECNL will include a financial penalty regime, comprising civil penalty provisions, and criminal penalty provisions consisting of offences for which infringement notices may be issued.

Civil penalty provisions

The ABA supports civil penalty provisions for ELNOs to interoperate and for ELNOs and subscribers to comply with a remedial direction. The ABA notes that the discussion paper states that the civil penalty regime will establish criteria to guide the court's discretion in determining the appropriate penalty for a breach. Criteria will 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. However, the ABA would expect to see much greater detail on the relevant penalties that would apply for breaches, as well as detailed factors that must be considered in determining the appropriate penalty before further feedback can be provided on a maximum civil penalty amount of \$50,000 civil for subscribers. The ABA requests further guidance information is published in this regard before changes to the ECNL commence.

Criminal penalty provisions

The ABA opposes the inclusion of criminal penalties and does not consider criminal penalties are an appropriate regime to be implemented in the electronic conveyancing process. In particular, the types of obligations outlined at Attachment B do not appear to be offences that would warrant criminal sanctions. The ABA considers the proposed civil penalty regime would sufficiently achieve deterrence and compliance with the requirements of the ECNL.

Power to publish information about non-compliance and enforcement

The ABA broadly supports the ability for ARNECC to publish information about non-compliance and enforcement to provide transparency and accountability of enforcement action and to incentivise compliance with the regulatory framework. The ABA requests the power be complemented with safeguards that support procedural fairness. This includes a requirement for ARNECC to seek and consider written submissions from an impacted subscriber prior to publication of information.

Other issues

Level of expertise and nature of remedial action

It is critical that ARNECC and each Registrar consults with, and has the required understanding and expertise, of an issue prior to issuing a remedial action. ABA members have been the subject of several issues in which Land Titles Offices have sought to reform or modify existing rules and requirements without a thorough understanding of how this may impact customers or banks' regulatory obligations. The practical effect of this is that all participants in the ecosystem experience greater regulatory burden and operational complexity while these issues are being mitigated, together with a reduction in efficiency, which ultimately impacts customers. It is imperative that Land Titles Offices, Registrars and industry, including banks, work together collaboratively prior to the imposition of any remedial actions and further changes to the framework to avoid these issues into the future.

National coordination and enforcement

When a significant issue arises in the context of the eConveyancing framework, it is likely that it will affect more than a single eConveyancing jurisdiction and require involvement by multiple Registrars, and compliance actions by each Registrar at one time. The discussion paper suggests that responsible tribunals and courts of competent jurisdiction be given the power to review various types of decisions made by Registrars, such as the making of remedial directions. This raises the prospect of multiple tribunals and courts being asked to review decisions made by multiple Registrars and possibly reaching different conclusions.

One of ARNECC's principal functions is to ensure that, as far as is practicable, business practices with respect to electronic conveyancing are consistent when implemented by the Registrars in each jurisdiction. The discussion paper suggests that responsible tribunals and courts of competent jurisdiction be given the power to review various types of decisions made by Registrars, such as the making of remedial directions.

The ABA therefore recommends that the ECNL contain an obligation on Registrars to take all reasonable steps to work together and coordinate their actions and, where practices differ with other jurisdictions, agree on a plan to align with practices with other Registrars concerned to ensure that stakeholders do not receive multiple or conflicting directions from various jurisdictions. The ABA also recommends there be a mechanism to permit the reviews of decisions of multiple Registrars being consolidated into proceedings before a single tribunal or court with the determination of that tribunal or court being bound on all relevant Registrars.