



New South Wales

# Electronic Conveyancing Enforcement Bill 2022

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to establish mechanisms for the enforcement of the Electronic Conveyancing National Law (ECNL) set out in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012*. The ECNL provides the basis for a national scheme for the electronic lodgment and processing of conveyancing transactions. In particular, the Bill authorises the Registrar-General to take the following action in relation to an Electronic Lodgment Network Operator (*ELNO*) approved to operate an Electronic Lodgment Network under the ECNL—

- (a) to accept an enforceable undertaking given by an ELNO in relation to a contravention of the ECNL, an operating requirement made under the ECNL or a condition of an approval,
- (b) to give a remedial direction or an interim remedial direction to an ELNO in relation to a contravention of a requirement imposed by or under the ECNL,
- (c) to apply to the Supreme Court for an order requiring payment of a monetary amount for a contravention of certain requirements of the ECNL or a remedial direction or interim remedial direction.

## Outline of provisions

### Part 1 Preliminary

**Clause 1** sets out the name, also called the short title, of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

**Clause 3** sets out the object of the proposed Act.

**Clause 4** defines words and expressions used in the proposed Act.

## **Part 2 Enforcement of Electronic Conveyancing National Law (NSW)**

**Part 2** contains provisions for the enforcement of the *Electronic Conveyancing National Law (NSW)*.

**Division 1** (clauses 5–9) allows the Registrar-General to accept a written undertaking (an *enforceable undertaking*) given by an ELNO in relation to a contravention of the ECNL, the operating requirements determined under the ECNL or a condition of the approval of the ELNO under the ECNL. The Division also provides for—

- (a) the content of an enforceable undertaking, and
- (b) when an enforceable undertaking takes effect, and
- (c) the withdrawal or variation of an enforceable undertaking, and
- (d) the enforcement of an enforceable undertaking by order of the Supreme Court.

**Division 2** (clauses 10–15) authorises the Registrar-General to give a direction (a *remedial direction*) to an ELNO if the Registrar-General reasonably believes the ELNO has contravened or is contravening a requirement imposed by or under the ECNL. The Registrar-General must give the ELNO the opportunity to make submissions in relation to the proposed remedial direction. In an emergency situation, the Registrar may give a direction to the ELNO without first giving the ELNO an opportunity to make submissions (an *interim remedial direction*). The Division also provides for—

- (a) the content of a remedial direction or interim remedial direction, and
- (b) the revocation of a remedial direction or interim remedial direction, and
- (c) the effect of an enforceable undertaking or the commencement of proceedings under proposed Division 3 on the power to give a remedial direction or interim remedial direction, and
- (d) the right of an ELNO to appeal against a decision of the Registrar-General to give a remedial direction or interim remedial direction.

**Division 3** (clauses 16–18) authorises the Registrar-General to apply to the Supreme Court for an order (an *enforcement order*) requiring an ELNO to pay to the State a monetary amount not exceeding a specified maximum amount if an ELNO contravenes section 18A or 34 of the ECNL or a requirement of a remedial direction or interim remedial direction. Section 18A of the ECNL requires an ELNO to establish and maintain interoperability between the Electronic Lodgment Network operated by the ELNO and each Electronic Lodgment Network operated by another ELNO. Section 34 of the ECNL requires an ELNO in relation to whom a compliance examination is being conducted to cooperate fully with the person conducting the examination. The Division also provides for—

- (a) the time for commencing proceedings, and
- (b) the effect of enforceable undertakings on proceedings under the Division.

## **Part 3 Miscellaneous**

**Clause 19** provides that the proposed Act binds the Crown.

**Clause 20** limits personal liability for things done or omitted in good faith and for the purpose of exercising a function under the proposed Act.

**Clause 21** provides for the making of regulations for the purposes of the proposed Act.

## **Schedule 1      Savings, transitional and other provisions**

**Schedule 1** contains savings and transitional provisions consequent on the enactment of the proposed Act.



New South Wales

# Electronic Conveyancing Enforcement Bill 2022

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New South Wales

# Electronic Conveyancing Enforcement Bill 2022

No. \_\_\_\_\_, 2022

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## A Bill for

An Act to provide for the enforcement of the *Electronic Conveyancing National Law (NSW)*; and for other purposes.

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<b>The Legislature of New South Wales enacts—</b>	1
<b>Part 1 Preliminary</b>	2
<b>1 Name of Act</b>	3
This Act is the <i>Electronic Conveyancing Enforcement Act 2022</i> .	4
<b>2 Commencement</b>	5
This Act commences on the date of assent to this Act.	6
<b>3 Object of Act</b>	7
The object of this Act is to promote compliance with the <i>Electronic Conveyancing National Law (NSW)</i> by establishing mechanisms for the enforcement of the Law.	8 9
<b>4 Definitions</b>	10
(1) In this Act—	11
<i>enforceable undertaking</i> —see section 5.	12
<i>enforcement order</i> —see section 16(1).	13
<i>enforcement provision</i> means—	14
(a) the <i>Electronic Conveyancing National Law (NSW)</i> , section 18A, or	15
(b) the <i>Electronic Conveyancing National Law (NSW)</i> , section 34, or	16
(c) a requirement of a remedial direction or an interim remedial direction.	17
<i>interim remedial direction</i> —see section 11(1).	18
<i>remedial direction</i> —see section 10(1).	19
<b>Note</b> — The <i>Interpretation Act 1987</i> contains definitions and other provisions that affect the interpretation and application of this Act.	20 21
(2) Words and expressions used in this Act and also in the <i>Electronic Conveyancing National Law (NSW)</i> have the same meanings as in the Law.	22 23

<b>Part 2</b>	<b>Enforcement of Electronic Conveyancing National Law (NSW)</b>	1
		2
<b>Division 1</b>	<b>Enforceable undertakings</b>	3
<b>5</b>	<b>Registrar may accept undertakings</b>	4
	The Registrar may accept a written undertaking (an <i>enforceable undertaking</i> ) given by an ELNO if the Registrar reasonably believes the ELNO is contravening, has contravened or is about to contravene—	5
		6
		7
	(a) a provision of the <i>Electronic Conveyancing National Law (NSW)</i> , or	8
	(b) a provision of the operating requirements, or	9
	(c) a condition of the approval under the <i>Electronic Conveyancing National Law (NSW)</i> , section 15 to which the ELNO is subject.	10
		11
<b>6</b>	<b>Content of enforceable undertaking</b>	12
(1)	An enforceable undertaking must specify—	13
	(a) the contravention to which the enforceable undertaking relates, and	14
	(b) the measures the ELNO has agreed to implement to remedy or prevent the contravention, and	15
	(c) the period or periods by the end of which the measures must be implemented.	16
(2)	A failure to comply with this section does not affect the validity of an enforceable undertaking.	17
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		19
<b>7</b>	<b>When enforceable undertaking takes effect</b>	20
	An enforceable undertaking takes effect and becomes enforceable—	21
	(a) when written notice of the Registrar’s decision to accept the undertaking is given to the ELNO who gave the undertaking, or	22
		23
	(b) on a later date specified by the Registrar in the notice.	24
<b>8</b>	<b>Withdrawal or variation of enforceable undertaking</b>	25
(1)	An ELNO who has made an enforceable undertaking may, at any time, with the written agreement of the Registrar—	26
		27
	(a) withdraw the undertaking, or	28
	(b) vary the undertaking.	29
(2)	The Registrar may, at any time, with the written agreement of an ELNO who has made an enforceable undertaking, withdraw the Registrar’s acceptance of the undertaking.	30
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		32
(3)	The provisions of an enforceable undertaking must not be varied to provide for a different alleged contravention.	33
		34
(4)	An enforceable undertaking ceases to have effect if—	35
	(a) it is withdrawn by the ELNO who made it, in accordance with this section, or	36
	(b) acceptance of the undertaking is withdrawn by the Registrar.	37
<b>9</b>	<b>Enforcement of enforceable undertaking</b>	38
(1)	The Registrar may apply to the Supreme Court for an order under this section if the Registrar reasonably believes an ELNO has contravened an enforceable undertaking.	39
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- (2) If the Court is satisfied that the ELNO who gave the enforceable undertaking has contravened the undertaking, the Court may make 1 or both of the following orders—
- (a) an order directing the ELNO to comply with the undertaking,
  - (b) an order discharging or varying the undertaking.
- (3) In addition to the orders referred to in subsection (2), the Court may make other orders the Court considers appropriate in the circumstances, including orders directing the ELNO to pay either or both of the following to the State—
- (a) the costs of the proceedings,
  - (b) the reasonable costs of the Registrar in monitoring compliance with the enforceable undertaking in the future.

## Division 2 Remedial directions

### 10 Registrar may give remedial direction

- (1) The Registrar may give a written direction to an ELNO (a *remedial direction*) if the Registrar reasonably believes the ELNO has contravened or is contravening a requirement imposed by or under the *Electronic Conveyancing National Law (NSW)*.
- (2) The Registrar must not give a remedial direction to an ELNO unless—
- (a) the Registrar has given written notice to the ELNO of the Registrar’s intention to give the direction, and
  - (b) the notice states the ELNO may make submissions to the Registrar within 14 days after the date of the notice, and
  - (c) the Registrar has considered submissions made by the ELNO within that period.

### 11 Interim remedial directions

- (1) The Registrar may give a written direction to an ELNO (an *interim remedial direction*) if the Registrar—
- (a) reasonably believes the ELNO has contravened or is contravening a requirement imposed by or under the *Electronic Conveyancing National Law (NSW)*, and
  - (b) is satisfied the direction needs to be given urgently because an emergency situation exists.
- (2) For subsection (1), an emergency situation exists if the Registrar considers that, because of the occurrence of an event or the existence of particular circumstances, the operation, security, integrity or stability of an ELN, the titles register or the land titles system is being, or is likely to be, jeopardised.
- (3) An interim remedial direction given to an ELNO constitutes notice for section 10(2) of the Registrar’s intention to give a remedial direction on the same terms as the interim remedial direction.
- (4) Subsection (3) does not prevent the Registrar specifying in a remedial direction a period or periods for implementation under section 12(1)(c) that is different from the period or periods for implementation specified in the interim direction.
- (5) Unless sooner revoked, an interim remedial direction for a contravention ceases to have effect on the earliest of the following—
- (a) the end of the period of 21 days after the date of the interim remedial direction,
  - (b) when the Registrar gives a remedial direction to the ELNO in relation to the contravention.

(6)	Sections 12–15 apply to an interim remedial direction in the same way as they apply to a remedial direction.	1 2
<b>12</b>	<b>Content of remedial direction</b>	3
(1)	A remedial direction must specify—	4
(a)	the contravention to which the remedial direction relates, and	5
(b)	the measures the ELNO must implement to remedy the contravention or to prevent the contravention occurring again, and	6 7
(c)	the period or periods by the end of which the measures must be implemented.	8
(2)	The period or periods specified under subsection (1)(c) must be reasonable in the circumstances.	9 10
<b>13</b>	<b>Revocation of remedial direction</b>	11
	The Registrar may, by written notice given to an ELNO, revoke a remedial direction relating to the ELNO.	12 13
<b>14</b>	<b>Registrar not to give remedial direction in certain circumstances</b>	14
	The Registrar must not give a remedial direction to an ELNO in relation to a contravention if—	15 16
(a)	the ELNO has given an enforceable undertaking in relation to the contravention and the enforceable undertaking is in effect, or	17 18
(b)	proceedings for an enforcement order in relation to the contravention have been commenced but not determined.	19 20
<b>15</b>	<b>Appeal against decision to give remedial direction</b>	21
	The <i>Electronic Conveyancing National Law (NSW)</i> , Part 3, Division 4 applies to a decision by the Registrar to give a remedial direction as if the decision were an appellable decision within the meaning of section 28 of the Law.	22 23 24
<b>Division 3</b>	<b>Enforcement orders</b>	25
<b>16</b>	<b>Registrar may apply for enforcement order</b>	26
(1)	The Registrar may apply to the Supreme Court for an order under this section (an <b>enforcement order</b> ) if the Registrar reasonably believes an ELNO has contravened an enforcement provision.	27 28 29
(2)	If the Court is satisfied the ELNO has contravened the enforcement provision, the Court may make an order that the ELNO pay to the State an amount not exceeding the maximum amount.	30 31 32
(3)	In addition to the order under subsection (2), the Court may make other orders the Court considers appropriate in the circumstances, including orders directing the ELNO to pay either or both of the following to the State—	33 34 35
(a)	the costs of the proceedings,	36
(b)	the reasonable costs of the Registrar in monitoring compliance with the enforcement provision in the future.	37 38
(4)	The Court must have regard to the following in determining the amount required to be paid under an enforcement order—	39 40
(a)	the nature and extent of the contravention,	41
(b)	the nature and extent of loss or damage suffered as a result of the contravention, including by third parties,	42 43

(c)	the circumstances in which the contravention took place,	1
(d)	whether the contravention was intentional or unintentional,	2
(e)	whether the ELNO has previously contravened the enforcement provision to which the order relates,	3 4
(f)	the amount necessary to deter the ELNO from engaging in the contravening conduct in the future,	5 6
(g)	the damage the contravention has caused to the security or integrity of the land titles system.	7 8
(5)	An amount payable under an order made under this section is recoverable by the State as a debt from the ELNO.	9 10
(6)	In this section—	11
	<i>maximum amount</i> means—	12
(a)	for a contravention of the <i>Electronic Conveyancing National Law (NSW)</i> , section 18A—	13 14
(i)	\$1,650,000, and	15
(ii)	for a continuing contravention—a further \$44,000 for each day the contravention continues, or	16 17
(b)	for a contravention of the <i>Electronic Conveyancing National Law (NSW)</i> , section 34—\$110,000, or	18 19
(c)	for a contravention of a requirement of a remedial direction or an interim remedial direction—\$1,650,000.	20 21
<b>17</b>	<b>Time for commencing proceedings</b>	22
	The Registrar may not apply for an enforcement order against an ELNO in relation to a contravention of an enforcement provision more than 2 years after the Registrar becomes aware of the contravention.	23 24 25
<b>18</b>	<b>Effect of enforceable undertaking</b>	26
(1)	No proceedings may be brought under this Division in relation to a contravention of an enforcement provision if—	27 28
(a)	there is an enforceable undertaking in effect in relation to the contravention, or	29
(b)	an enforceable undertaking given by the ELNO in relation to the contravention has been completely discharged.	30 31
(2)	If the Registrar accepts an enforceable undertaking in relation to a contravention of an enforcement provision after proceedings under this Division in relation to the contravention have been commenced, the Registrar must take all reasonable steps to have the proceedings discontinued as soon as practicable.	32 33 34 35

<b>Part 3</b>	<b>Miscellaneous</b>	1
<b>19</b>	<b>Act to bind Crown</b>	2
	This Act binds the Crown.	3
<b>20</b>	<b>Personal liability</b>	4
(1)	A protected person is not personally subject to liability for anything done—	5
(a)	in good faith, and	6
(b)	for the purpose of exercising a function under this Act.	7
(2)	The liability instead attaches to the Crown.	8
(3)	In this section—	9
	<i>done</i> includes omitted to be done.	10
	<i>liability</i> means civil liability and includes action, claim or demand.	11
	<i>protected person</i> means—	12
(a)	the Registrar, or	13
(b)	a person acting under the direction of the Registrar.	14
<b>21</b>	<b>Regulations</b>	15
	The Governor may make regulations, not inconsistent with this Act, about any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	16 17 18

<b>Schedule 1</b>	<b>Savings, transitional and other provisions</b>	1
<b>1</b>	<b>Regulations</b>	2
(1)	The regulations may contain provisions of a savings or transitional nature consequent on the commencement of—	3
	(a) a provision of this Act, or	4
	(b) a provision amending this Act.	5
(2)	A savings or transitional provision consequent on the commencement of a provision must not be made more than 2 years after the commencement.	6
(3)	A savings or transitional provision made consequent on the commencement of a provision is repealed 2 years after the commencement.	7
(4)	A savings or transitional provision made consequent on the commencement of a provision may take effect before the commencement but not before—	8
	(a) for a provision of this Act—the date of assent to this Act, or	9
	(b) for a provision amending this Act—the date of assent to the amending Act.	10
(5)	A savings or transitional provision taking effect before its publication on the NSW legislation website does not—	11
	(a) affect the rights of a person existing before the publication in a way prejudicial to the person, or	12
	(b) impose liabilities on a person for anything done or omitted to be done before the publication.	13
(6)	In this section—	14
	<i>person</i> does not include the State or an authority of the State.	15
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