



ELECTRONIC CONVEYANCING ENFORCEMENT BILL 2022

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

The Electronic Conveyancing National Law (**ECNL**) governs the provisioning and operation of electronic conveyancing in Australia. It is implemented by separate application or corresponding legislation in each state and territory. The ECNL was first implemented in NSW as an Appendix to its *Electronic Conveyancing (Adoption of National Law) Act 2012* (**Adoption Act**), which is administered by the NSW Office of the Registrar General (**NSW ORG**), a business unit within the Department of Customer Service.

This Bill establishes a standalone NSW electronic conveyancing enforcement regime. It relates to, but is separate to, the ECNL, and therefore does not apply to other states and territories.

The introduction of a more robust compliance and enforcement framework was a key recommendation of the 2019 Dench McClean Carlson final report on the 'Intergovernmental Agreement for an Electronic Conveyancing National Law' and the 2019 ACCC report on the eConveyancing market reform; the ACCC recommending this as a matter of urgency.

The current Registrar powers are limited to revocation or suspension of an Electronic Lodgment Network Operator (**ELNO**)'s approval to operate, or a narrow directions power that only applies to one aspect of the electronic conveyancing legal framework (the Operating Requirements). While it is important for the Registrar to retain powers of suspension and revocation, these powers are only effective for the most serious non-compliance and as a last resort. Further, in the event of failure to comply with a direction, the Registrar's only option for escalation is suspension or revocation/termination.

The proposal in this Bill is a targeted and pared-down version of an electronic conveyancing enforcement regime being developed by the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) under the ECNL, that will apply to ELNOs and Subscribers (users of Electronic Lodgment Networks such as law firms and conveyancing practices). However, it could be some time before this national enforcement regime commences. Considering that all land dealings in NSW must now be lodged with the land registry via an ELNO, compliance with the ECNL by ELNOs is essential to maintain the security and integrity of the NSW electronic conveyancing system.

Subscribers are not addressed in this Bill as NSW is utilising its existing Subscriber compliance program. Informal mechanisms, including Subscriber guidelines and education, are currently adequate to support Subscriber compliance. For sufficiently serious non-compliance, a Subscriber's access to an Electronic Lodgment Network can be suspended or terminated, and if appropriate, re-instated, without significant disruption to the electronic conveyancing system.

Conversely, existing enforcement mechanisms for ELNOs are not fit-for-purpose. There is currently only one incumbent ELNO that enjoys a majority of the market share, and an emerging second ELNO.

The proposed NSW regime allows the Registrar General to ensure compliance with the ECNL and related framework, without the significant disruption that would be caused by suspending or terminating an ELNO's approval to operate.

Objectives: What is the policy's objective couched in terms of the public interest?

This Bill aims to promote compliance by ELNOs with the electronic conveyancing legal framework and minimise adverse impacts on other parties involved in or affected by electronic conveyancing transactions, by conferring on the Registrar enforcement powers additional to the Registrar's currently limited powers under the ECNL. This aligns with the objectives of the developing national electronic conveyancing enforcement regime.

The Bill also anticipates effective regulation of eConveyancing transactions in the future with the aims:

- to uphold the security and integrity of the NSW eConveyancing system for the public,
- to increase stakeholder confidence in the regime, and
- to provide a strong regulatory foundation for interoperable transactions.

Options: What alternative policies and mechanisms were considered in advance of the bill?

If NSW did not introduce a standalone Bill to address the current regulatory gap in respect of ELNO enforcement, the only alternative would be for NSW to wait for ARNECC to address the same regulatory gap, as part of its anticipated amendments to the ECNL.

Non-legislative enforcement options already exist and are not alone sufficient to ensure compliance with the ECNL. The 2019 ACCC report on the eConveyancing market reform expressed particular concern about how the current Model Operating Requirements require self-monitoring by ELNOs and do not contain a credible threat of enforcement by way of any specific response or sanction for non-compliance regime.

Analysis: What were the pros/cons and benefits/costs of each option considered?

NSW supports the ARNECC proposal and continues to contribute to developing a national enforcement regime. However, the national regime is still being developed, and there is a risk of delay due to the need for national agreement and approval by each state and territory. Given that all land dealings must be lodged electronically in NSW, there is an immediate need for effective enforcement powers to ensure robust regulation of the essential infrastructure that enables electronic conveyancing. Accordingly, NSW intends to proceed with standalone enforcement legislation, in advance of the national enforcement regime under the ECNL.

The standalone NSW regime could be incorporated into the NSW Adoption Act. As this would not involve amending the ECNL, the regime would apply to NSW only. However, due to concerns of some jurisdictions that amending the Adoption Act could derogate from national consistency (considering that other states and territories have similar application or corresponding legislation), this is not the preferred option. A standalone NSW regime achieves the same regulatory outcomes as amending the Adoption Act without giving rise to concerns about risking national consistency.

Introducing the standalone NSW regime in a NSW principal bill is the preferred option. This will also not involve any amendment to the ECNL and will be separate from the Adoption Act.

Pathway: What are the timetable and steps for the policy’s rollout and who will administer it?

Following passage through Parliament, the Bill will commence on the date of assent.

Some provisions will not be utilised until assurance reviews are conducted and amendments are made to the ECNL regulatory framework. For example, civil penalties for a breach of the enforcement provision relating to the requirement to interoperate (under section 18A of the ECNL) would not be sought until the scope of interoperability and implementation timetable for interoperability is settled by the relevant state and territory Ministers (in the ECNL and/or Model Operating Requirements).

It is intended that the standalone NSW legislation will operate only until an agreed national enforcement regime commences under the ECNL, at which point, it is intended that the NSW legislation would be repealed.

The NSW Office of the Registrar General will administer the NSW legislation.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

As mentioned, the proposal is a targeted and pared-down version of an electronic conveyancing enforcement regime being developed by ARNECC.

In April 2021, ARNECC published a position paper on ‘Changes to enforcement powers in the Electronic Conveyancing National Law’. A majority of key stakeholders, including the ELNOs (Property Exchange Australia Ltd and Sympli Australia Pty Ltd), the ACCC, Law Council of Australia, Australian Institute of Conveyancing, and the Australian Banking Association, all expressed in principle support for that proposal.

In April and May 2022, the NSW Office of the Registrar General (NSW ORG) consulted with the Department of Communities and Justice and NSW Supreme Court on matters such as proposed maximum penalty amounts and framework of the proposal.

In July 2022, the NSW ORG issued a position statement outlining the proposal to the same key stakeholders. NSW ORG incorporated stakeholder feedback into the draft Bill, including suggestions to introduce more limitations and safeguards in the proposed directions power provisions.

Before being introduced to Parliament, the draft Bill was shared with the Department of Communities and Justice, and the NSW Supreme Court, for comment.