

# Removing Barriers to Electronic Land Contracts

**23 February 2018**

**Submission by the NSW Young Lawyers Property Law Committee**

Electronic Contracts Review

Office of the Registrar General

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The NSW Young Lawyers Property Law Committee (Committee) makes the following submission in response to the Removing Barriers to Electronic Land Contracts – Discussion Paper.

## **NSW Young Lawyers**

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Property Law Committee (**Committee**) comprises members interested in all aspects of property law. The Committee coordinates property-related Continuing Professional Development (CPD) Programs and keep property practitioners informed by providing regular information bulletins regarding legislative changes, important judicial decisions and current matters of interest in the property industry. The Committee also provides a networking platform for students and lawyers working across all aspects of property law.

### **Q1 Should the formal requirements for registry instruments, such as mortgages and leases, be reviewed so that they can be created wholly by electronic means?**

Yes. All forms and applications to be lodged with NSW Land Registry Services (LRS) should be reviewed so that the conveyancing process and/or any other property law transactions can be made by purely electronic means, which will be less costly and more efficient for stakeholders, including LRS, vendors, purchasers and mortgagees.

### **Q2 Does the Verification of Identity (Vol) regime replace the need for witnessing for all land registry documents?**

The Committee submits that the Vol regime does not replace the need for witnessing for all land registry documents at this point in time. Vol would need to be conducted specifically in relation to the land registry document being eSigned on behalf of a client.

Practitioners can verify someone's identity under the Vol regime, however that does not mean that the practitioner witnessed that person signing the relevant document. The Committee submits that a witness is still required, even though the transaction can be completed and documents witnessed electronically.

There is also a need to witness documents in more complicated transactions - for example, those involving put and call options and agreements for lease.

Further, Powers of Attorney must be witnessed in order to be registered.

### **Q3 Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?**

Yes. The Committee notes that some conveyancing and law firms are not yet subscribers to PEXA and some mortgagees do not appear to be fully familiar with PEXA at this stage.

The purchaser declaration form should be an extensive and/or combined form with first home owner grant, stamp duty exemption and off-the-plan declaration forms so that clients do not need to complete the same information in multiple forms for multiple purposes.

It would be preferable to facilitate an online collection of information where purchasers can select options that are relevant to their unique transaction to avoid re-keying the same data. Victoria has mandated the electronic collection of stamp duty data, and in the experience of our members, this system is much easier to use.

### **Q4 Should legislation intervene to regulate the use of electronic contracts in conveyancing, or is this a matter best left for conveyancing practice to develop within the current framework?**

The Committee submits that the current legislation is adequate, and recommends that parties should have the flexibility to select their preferred form of contract, as conveyancing is not just the end process for a transaction.

### **Q5 Have you used electronic contracts? What, if any, obstacles did you encounter in the electronic process?**

Yes. Practitioners have found issues arise with getting counterparties to agree to the use of electronic contracts, as well as difficulties in agreeing to settle using the PEXA platform.

We also note that there is a perception among some clients, particularly international clients that it may be 'safer' or more secure to print a contract out and have it externally translated rather than rely on practitioners pressing a button and/or just signing on the screen.

Some clients prefer eSigning eContracts as it eliminates the time-consuming and inconvenient task of sending original documents around the world by courier.

### **Q6 If you have been reluctant to use electronic contracts, what are your concerns?**

The Committee does not have a concern with the use of electronic contracts. However, we note that sometimes it is hard to send the electronic contracts to multiple parties in the negotiation phase. We consider that a technological solution to this issue, such as an electronic negotiation platform, would be appropriate.

There is also a potential for contracts to be misunderstood due to inaccurate translation by translation software, particularly regarding legal terminology. This may be an issue as the potential purchasers rapidly widens to a global market, and the Committee recommends that research and development are undertaken to remedy this.

**Q7 Should the Sale of Land Regulation provide an alternative, electronic means of providing the prescribed documents? If so, should this be in a particular format?**

The Committee recommends that the regulations provide that vendors who intend to sell their properties should notify the government and if there is any disclosure requirement, the government will automatically notify the Purchaser (after they have signed the contract). The information should also be available online and in a form which can be printed out.

The Committee submits that the State government should bear the burden of consolidating all the information that its departments hold to maintain a central register of information. This will ensure greater transparency over what information is available and allow the update of multiple departments from a single up-to-date source.

**Q8 Electronic contracts may be cheaper and easier for a vendor's solicitor to prepare, but do they provide any form of consumer protection for buyers?**

The Committee submits that electronic contracts provide the same level of protection as paper contracts.

**Q9 Are contracts 'available' at the time a property is marketed, if only in electronic format?**

Yes, a document is not deemed invalid just because it is in a digital format. For example, a tablet computer could be on display at an auction where all parties can view the contract and email a copy to their own devices.

**Q10 Should vendors be permitted to pass on printing and associated costs to a purchaser who cannot receive documents electronically?**

Yes, a vendor should not have to incur the cost of paper, printing or paying an agent to physically exchange when digital means are available. The Committee notes a similar practice exists in that a vendor can charge the purchaser a fee if they elect to settle the purchase outside of the office of the vendor's solicitor.

**Q11 Should there be any further protections for a purchaser if disclosure is made electronically (such as a longer cooling off period to enable the electronic file to be considered by a solicitor or conveyancer)?**

No. Electronic Contracts are easier to read, mark-up (including by bookmarking certain pages), and draft correspondence simultaneously.

**Q12 What methods of electronic signature are appropriate for sale of land contracts?**

There are many eSigning services including Echo Sign, HelloSign, Topaz, Captterra, Adobe, SkySignature, Secured Signing, Right Signature, IdenTrust and DocuSign. Practitioners need to find the right product that suits their needs and budget.

The Committee recommends that any software provider be ISO 27001-certified and SSAE 16-certified (SOC 1 and SOC 2) and internationally tested.

**Q13 Is there a need to clarify the appropriate methods to identify a signatory to an electronic contract, or whether that person had authority to sign?**

The Committee recommends that the same identification steps that apply when signing a paper contract should apply to electronic contracts. The eSigning platforms are a tool to facilitate the execution of a document and do not replace the whole system.

**Q14 Should there be a witnessing requirement for electronically signed contracts? How might this be achieved in an electronic environment?**

Given the concerns over unauthorised signing of electronic contracts, the Committee submits that requiring a witness to attest to the signing provides greater certainty and security in commercial and non-commercial transactions that the person signing is either authorised or consents to be bound by the contract.

Some electronic conveyancing platforms offer witnesses the ability to sign or complete data fields for the same contract at the same time (session) as the vendor and/or purchaser. These platforms also authenticate the witnesses signatures as all electronic conveyancing platforms can track the time and place of each specific action in the signing process through the use of geolocation software, and the IP address of the signatory's computer.<sup>1</sup>

**Q15 Is a formal exchange of contract relevant where contracts are formed electronically? If so, how can exchange be affected?**

A formal process of contract formation is necessary for all electronic contracts.

If the electronic conveyancing platform clearly demonstrates the intention of both parties to be bound by the terms of the electronic contract then formal "eExchange" can take place once the contract is dated and usually once the deposit is paid.

The Committee recommends that there should be a process to replace physical exchange which creates or forms a binding contract.

**Q16 How can the parties' intention be clearly determined without a formal exchange process?**

The Committee recommends that a simple solution that removes some of the uncertainty in the contractual relationship is to have the parties to the contract confirm they have exchanged contracts by ticking a box which appears after they electronically sign the contract.

The text in the box should state that by clicking the box the vendor/purchaser agrees to be bound and recognises formal exchange has taken place. This is commonly referred to as a 'Click-wrap' Contract. It requires the person executing the contract to accept the terms before being able to proceed to eSigning.

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<sup>1</sup> Diccon Loxton, 'Not worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A'. (2017) 91 ALJ 133, 135.

The process needs to be done in a manner providing reasonable prior notice to those entering the contract before the formation of the contract.<sup>2</sup>

### **Q17 What protections can be implemented to ensure preliminary negotiations do not constitute a legally binding agreement?**

The Committee recommends that the same process should be followed as occurs during the wet-ink process. Upon eSigning of and electronic copy of the contract, exchange or formation should not be deemed to have occurred until:

1. all parties have signed,
2. the 10% deposit (or as otherwise agreed) has been paid, and
3. the contract has been dated.

### **Q18 Should the law be clarified to enable a deed to be formed by electronic means? If so, should this relate to all deeds or limited only to those specifically relating to land transactions (such as options deeds)?**

The Committee recommends that the provisions of the *Electronic Transaction Act 2000* (Cth) should be amended to clarify that all documents that must be witnessed, including deeds and option deeds can be formed electronically. Any such amendment to the legislation should also address the current technical formalities that deeds must satisfy under law (sign, sealed and delivered and be made of paper, parchment or vellum).

These common law formalities are addressed by the effect of s 38 of the *Conveyancing Act 1919* (NSW), which provides for deemed sealing and eliminates the need for indenting and subsection 127(3) of the *Corporations Act 2001* (Cth), which provides that a corporation may execute a document as a deed if the document is expressed to be a deed and signed in accordance with s 127.

### **Q19 If the deed is to be executed electronically, what form of electronic signature is appropriate?**

The Committee recommends that if a deed is to be executed electronically then any electronic platform that allows for a party to sign in a specific place within the electronic instrument is an appropriate form of electronic signature for a deed.<sup>3</sup>

### **Q20 Should electronic signatures on deeds be witnessed?**

The Committee submits that all electronic signatures on deeds should be witnessed given the potential for technology-assisted identity theft. The Committee is concerned that without a witnessing requirement, these

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<sup>2</sup> *Thornton v Shoe Lane Parking* [1971] 2 QB 163.

<sup>3</sup> Diccon Loxton, 'Not Worth the Paper They're not written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part B'; (2017) 91 ALJ 205, 215.

risks are only exacerbated by systems such as PEXA that centralise the conveyancing process in one place.<sup>4</sup>

### **Q20 A If so, how can a witness attest to a signature in an electronic environment?**

Any electronic conveyancing platform that allows:

- (1) a witness to see the act of execution, and
- (2) attest she has done so by signing the document with the appropriate attestation.<sup>5</sup>

The Committee recommends that further requirements for witness attestation should be necessary, such as having the witness present when the signatory is signing with full sight of the signatory screen keyboard, mouse, and pad.<sup>6</sup> Following this the witness would then add her attestation to the same electronic version as the signatory, by signing through the same platform.<sup>7</sup>

Some electronic conveyancing platforms allow for the above attestation process. Moreover, the majority of online eConveyancing platforms are structured in such a way so that each signature is entered in a specific order with each witness's signature being recorded to correspond with the appropriate attestation.

### **Q20 B Should the witness be physically present when the signer signs, or can this be performed through video link? (such as Skype or Facetime) or other means?**

The Committee submits that the use of online video streaming technology such as Skype or Facetime is not an acceptable substitute or a replacement for the physical presence of a witness. The technology does not have the necessary controls to assist in proving the authenticity of the signatures made. Moreover, the Committee recommends that all technology should comply with ISO27001 Certification for storing data.

### **Q21 Should the signatory be present when the witness signs?**

The Committee submits that good practice would dictate that the signatory be present when the witness signs the deed. As a matter of general principle, a signatory should always be present when the witness signs, whether a document is being executed in paper or electronically.

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<sup>4</sup> Lynden Griggs, 'Consumer issues: It's a new day, it's a new dawn, it's a new life ... PEXA, electronic conveyancing, and consumers' (2016) 6 Prop L Rev 117, 120.

<sup>5</sup> Diccon Loxton, 'Not worth the Paper they're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A' (2017) 91 ALJ 133, 135.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

## Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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