



THE LAW SOCIETY
OF NEW SOUTH WALES

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16 February 2018

Electronic Contracts Review
Office of the Registrar General
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: ORG-admin@finance.nsw.gov.au

Dear Sir/Madam,

Removing barriers to electronic land contracts ("Discussion Paper")

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper. The Law Society's Property Law and Legal Technology Committees have contributed to this submission.

Our responses to the questions raised in the Discussion Paper are set out in the attached table. We provide some general comments below.

1. Moving to electronic contracts

We support the objective of moving to electronically signed contracts. To date, the growth in the use of electronic signature platforms appears to be steady. We suggest that by taking steps to allay the current level of uncertainty in relation to the electronic signature of land contracts, the use of such platforms is likely to increase.

We expect that some consumers will be more comfortable continuing to sign documentation with wet signatures and the ability to do this must remain. Reforms should facilitate the electronic signing of mainstream conveyancing documentation but must not require it. Additionally we recognise that there will be a time lag for industry to accept and prepare for the greater use of electronically signed contracts.

There is also a need to ensure that any authorised method of electronically signing documents for land transactions is accessible to persons with disabilities, particularly persons who are blind or have low vision or persons with motor disabilities. This will provide an additional benefit of electronic signing and witnessing of documents, namely the removal of discriminatory barriers to persons with disabilities signing and witnessing of documents.

2. Flexibility

In our view, any reforms must allow for a degree of flexibility, allowing the parties some flexibility in tailoring the execution requirements having regard to the nature of the documents. For example, we suggest that in an electronic signature environment, it should be possible to have the execution of a document witnessed but that this need not be mandatory. Like the paper environment, witnessing provides an additional source of evidence of execution. We also note that in addition to allowing for the execution of documents electronically, some platforms also provide encryption of the document, an audit trail of execution, including when and where the document was signed. This provides additional evidence of execution where this functionality is available.

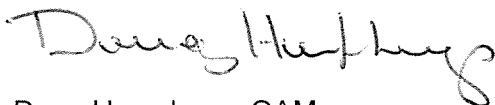
3. Deeds

We support legislative change to allow the signing of deeds electronically, but we suggest the more immediate priority is to better facilitate electronic signing of mainstream conveyancing documentation. Consideration could be given to implementing the reforms in two stages, beginning with mainstream conveyancing documentation.

It is neither possible nor appropriate for the regulatory framework to be software specific. However some guidance could be provided on the minimum characteristics for electronic signing software in order for it to be acceptable in creating a binding electronically signed deed. Such guidance should not be unduly restrictive.

We would be pleased to meet with you to further discuss the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,



Doug Humphreys OAM
President

Encl.

Removing Barriers to Electronic Land Contracts – Discussion Paper

Submission by the Law Society of NSW – February 2018

NO.	QUESTIONS	COMMENTS
1.	BACKGROUND	
2.	LAND TRANSACTIONS AND eCONVEYANCING	
Q.1.	Should the formal requirements for registry instruments, such as mortgages and leases, be reviewed so that they can be created wholly by electronic means?	<ul style="list-style-type: none"> • Yes it would be appropriate to review the formal requirements for registry instruments at this stage of the digital transition. • We understand that it is proposed that the PEXA document hub will play a role in relation to the registration of leases. Further information as to how this will operate would be useful for industry.
Q.2.	Does the Verification of Identity regime replace the need for witnessing for all land registry documents?	<ul style="list-style-type: none"> • No, by itself the Verification of Identity regime does not replace the need for witnessing, it must be considered in conjunction with the Client Authorisation. • In other cases, the verification sought is supplied by the retention by the party affixing an electronic signature, of an appropriately executed paper document (for example the National Mortgage Form).
Q.3.	Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?	<ul style="list-style-type: none"> • Uncertainty or lack of confidence in transacting electronically exists among some practitioners but is decreasing with the increased prevalence of electronic contracts. • Any requirement for a statutory declaration is problematic in a wholly electronic environment. For example, the Revenue NSW Purchaser Declarations in the form of Statutory Declarations.

NO.	QUESTIONS	COMMENTS
		<ul style="list-style-type: none"> • Another gap or obstacle preventing fully electronic transactions are the processes that should be integrated with the electronic settlement process but are not yet available, for example: <ul style="list-style-type: none"> ○ the clearance of a land tax certificate at settlement, currently only possible in the paper channel; and ○ better functionality for payments to third parties, such as payment to Councils and water authorities. • We note that due to limitations on the operation of the <i>Electronic Transactions Act 1999</i> (Cth), when a company executes a contract electronically, the other party to the contract is unable to rely on s 129 of the <i>Corporations Act 2001</i> (Cth) to assume that the company execution is valid if it appears to be executed in accordance with s 127 of that Act.¹ This is a gap that should be resolved, but we note that this requires changes to Commonwealth legislation. • We also note that the launch of the New Payments Platform (http://www.nppa.com.au/) represents another step towards paperless conveyancing.
3.	ELECTRONIC CONTRACTS FOR THE SALE OF LAND	
Q.4.	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?	<ul style="list-style-type: none"> • In our view legislation should be introduced to provide certainty. While technically this appears to be unnecessary for mainstream conveyancing documentation, it would be a very useful way to allay uncertainty and assist industry to be comfortable in the electronic environment. • We suggest this need only be done by way of “light touch” legislation, and in the nature of a “for the avoidance of doubt provision.” Any changes should

¹ This limitation is referred to on page 15 of the Discussion Paper.

NO.	QUESTIONS	COMMENTS
		<p>focus on removing any doubt that s 23C of the <i>Conveyancing Act 1919</i> prevents the parties from entering into the contract by whatever means they choose.</p> <ul style="list-style-type: none"> We note that when drafted, the <i>Conveyancing (Sale of Land) Regulation 2017</i> assumed that the contract would issue in paper format. Provisions regarding requirements such as prescribed warnings and font size should be reviewed to ensure they operate appropriately in both paper and electronic environments.
Q.5.	Have you used electronic contracts? What, if any, obstacles did you encounter in the electronic process?	<ul style="list-style-type: none"> Among the members of the Property Law Committee there is a range of experience. Some members use electronic contracts and electronic signature, particularly those members that act for developers. The most common obstacle is uncertainty and a lack of confidence to proceed electronically.
Q.6.	If you have been reluctant to use electronic contracts, what are your concerns?	Reluctance is due to a level of uncertainty in the industry.
4.	ISSUES AFFECTING ELECTRONIC CONTRACTS	
Q.7.	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?	<ul style="list-style-type: none"> Yes, this is something that our members would welcome. As to format we suggest the electronic contract (including its attachments) must be: <ul style="list-style-type: none"> printable if required; and in a single file, not piecemeal. Any alternative means should also consider the requirements for residential properties of the <i>Property, Stock and Business Agents Act 2002</i> and Regulations made under that Act.

NO.	QUESTIONS	COMMENTS
Q.8.	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 contracts will provide the same level of protection as a paper contract. The relevant issues are more in relation to access to technology and comfort using technology.
Q.9.	Are contracts 'available' at the time a property is marketed, if only in electronic format?	In our view this is an area where legislative clarity should be provided. A core principle of the <i>Electronic Transactions Act 2000</i> is that the relevant party expressly consents to communicating/operating electronically. In the context of the <i>Property, Stock and Business Agents Act 2002</i> and availability of a contract, the basis of that consent may be questionable as the contract is made available unilaterally.
Q.10.	Should vendors be permitted to pass on printing and associated costs to a purchaser who cannot receive documents electronically?	We note that at present a vendor could attempt to pass on such costs. Whether the vendor would try to do so, and whether the purchaser would accept this, is best left to the parties.
Q.11.	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 further protections are necessary in our view.
Q.12.	What methods of electronic signature are appropriate for sale of land contracts?	<ul style="list-style-type: none"> • Depending on the nature and significance of the transaction, the electronic signature must be sufficiently: <ul style="list-style-type: none"> ○ reliable; ○ supported by appropriate retention and storage facilities; ○ secure; and ○ able to be authenticated in the future if required. • We suggest than any guidance should not be too prescriptive. Changes and improvements are constantly being made to existing products. New products and providers will continue to enter the market and any guidance

NO.	QUESTIONS	COMMENTS
		should be broad enough to account for this fluidity.
Q.13.	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?	No, the same steps apply in the paper environment.
Q.14.	Should there be a witnessing requirement for electronically signed contracts?	<ul style="list-style-type: none"> • No, it should not be required. We note that when the contract for the sale of land and purchase of land is executed in paper, where the vendor or purchaser is a natural person, it is customary for their signature to be witnessed. However this is not a requirement but a matter of good practice in the event that the execution of the contract is disputed. The same considerations are relevant in the electronic environment. • Parties should be able to have a witness electronically sign a contract. We suggest that guidance should be provided in relation to the manner in which a witness should sign a document electronically, given the <i>Electronic Transactions Regulation 2017</i> does not provide for digital signature by witnesses. We note that witnessing in an electronic environment, whether of a deed or an agreement under hand, is an area with complexities which will need to be addressed.
Q.15.	Is a formal exchange of contracts relevant where contracts are formed electronically? If so, how can exchange be effected?	Any change to the law to facilitate the electronic formation of contracts should not preclude that formation taking place through the exchange of counterparts by whatever means the parties choose to adopt. This is particularly important bearing in mind that many electronic signature platforms are predicated on a model that allows for the joint electronic signing of the one contract. It is ultimately a matter for the parties to determine the manner in which they become bound.
Q.16.	How can the parties' intention be clearly	Whether in a paper or electronic environment, the critical issue is the parties'

NO.	QUESTIONS	COMMENTS
	determined without a formal exchange process?	intention to be bound. In paper, that intention is commonly evidenced by a physical exchange of counterparts, but sometimes other methods are used such as telephone or email. We suggest that no single process should be prescribed for determining the parties' intention to be bound. It is a matter for evidence in each case and depends upon the process adopted by the parties.
Q.17.	What protections can be implemented to ensure preliminary negotiations do not constitute a legally binding agreement?	<ul style="list-style-type: none"> • Generally the parties should take the same precautions as they currently take in negotiations, specifying that negotiations are subject to contract and that there is no binding agreement prior. In a transaction where electronic signatures may be used, it may be especially prudent to specify that negotiations are subject to contract. • When using electronic signature platforms it is important that all users understand the critical steps and points in time that the contract will be regarded as having been formed. These critical steps are usually specified in the communications requesting signature as generated by the particular platform used.
5.	DEEDS	
Q.18.	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 option deeds)?	<ul style="list-style-type: none"> • Yes, the law should be clarified to enable a deed to be formed by electronic means. • There is merit in enabling all deeds to be formed by electronic means though this would be a more significant change. • Although we support making changes to enable a deed to be formed by electronic means, we suggest that the more immediate priority is the changes to be made to better facilitate electronic contracts in mainstream conveyancing documentation.
Q.19.	If a Deed is to be executed electronically,	Please see our response to question 12.

NO.	QUESTIONS	COMMENTS
	what form of electronic signature is appropriate?	
Q.20.	<p>Should electronic signatures on deeds be witnessed? If so:</p> <ul style="list-style-type: none"> ▪ How can a witness attest to a signature in an electronic environment? ▪ 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? 	<ul style="list-style-type: none"> • Traditionally, witnessing is a key requirement of a deed. We suggest that electronic signatures on deeds need not be witnessed, but the parties can if they wish include witnessing of signatures. • Witnessing in an electronic environment is easily achieved in many of the electronic signature platforms. • We prefer that the witness be physically present and note this is consistent with the VOI regime which does not currently permit the use of Skype etc.
Q.21.	Should the signatory be present when the witness signs?	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.