



Removing the barriers to electronic land contracts Submission

February 2018

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

Email: ORG-admin@finance.nsw.gov.au

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Estate Agents Co-operative or EAC was established by a group of seven real estate agents in 1960 to help agencies meet the challenges of the time. While our purpose hasn't changed, today we are a network of more than 300 member agencies representing over 6,000 real estate professionals from independent and franchise agencies, based in Australia, bringing like-minded agents together, providing the support you need.

We enable and inspire real estate agents to work together to build strong, prosperous and sustainable businesses that are well-equipped to cope with the modern era. We provide end to end support to independent and franchise organisations via a comprehensive suite of real estate support services, including:

- Agency Practice Support and Advice
- Business Consulting and Coaching
- Professional Development and Training
- Insurance Services in conjunction with Aon
- Real Estate Forms & Merchandise
- Real Estate Publications
- Property Data and Mapping
- Listing Services and a property portal
- Digital Marketing including video, 360 virtual tours, website design and hosting.

EAC as an industry body represents its members by working with government and other bodies to ensure the views of our members and the greater industry are heard, as well as ensuring that consumers' interests are protected. We are part of the NSW Fair Trading Real Estate Reference Group and sit on NCAT and other industry forums.

Our submission includes feedback from our members, Jemmeson & Fisher Solicitors and Accountants who provide legal support to EAC and its members, Rosy Sullivan from the Australian College of Professionals who are the preferred training provider for EAC Members.

EAC would like to note its appreciation for the opportunity to provide feedback on the discussion paper and are happy to meet with those government agencies involved to clarify any points within our submission.

Yours sincerely



David Crombie
Chief Executive Officer

1. Background

No Questions.

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?

Yes. At the moment there are three (3) primary issues in relation to the requirement of original documents being registered. The first and most important issue is the delay in registering the dealing on title. As seen in cases such as *Black v Garnock* [2007] HCA 31 registering interests on title promptly is vital to protecting proprietary interests.

Delay in registering original instruments with NSW Land Registry Services may be caused by a number of factors including but not limited to the following:

1. Postal delay due to original signatures being required;
2. Potential delay caused by lost post; and
3. Requirement to attend the NSW Land Registry Services personally.

The second issue is that documents the parties have agreed to are complete and identical. That is, that no pages are omitted and no terms have been added or amended without the other party's consent. By submitting documents electronically and approval (execution) being undertaken by electronic means, it would further provide protection against fraudulent dealings.

The third issue is costs. Submission of documents electronically would reduce the end processing time and costs to clients by limiting the required correspondence, postage and agency costs in attending to registering the original instruments personally at NSW Land Registry Services.

Q.2 Does the Verification of Identity regime replace the need for witnessing for all land registry documents?

The Verification of Identity regime *only* replaces the need for witnessing on registry documents that are being lodged in *electronic form* by means of an *Electronic Lodgement Network*. Pursuant to section 117 of the Real Property Act 1900 (RPA) dealings that are lodged in paper form must be lodged in accordance with the Conveyancing rules. Part 6.1.2(b) of the Conveyancing rules replicates the certification requirements that were previously set out in section 117 of the Real Property Act 1900 and Clause 22 of the Real Property Regulation 2014 to require primary applications, dealings or caveats lodged in paper forms to bear a certificate signed by an eligible witness to the execution of the application, dealing or caveat.

Section 117(1)(a) requires electronic forms to be lodged in accordance with the participation rules made under the *Electronic Conveyancing National Law (NSW)*. Part 6.5 of the NSW Participation Rules for Electronic Conveyancing (the Rules) places the onus on the “Subscriber” to take reasonable steps to verify the identity of their clients. The Verification of Identity is to be undertaken in accordance with the Verification of Identity Standard or by undertaking reasonable steps to identify the person. These are the identity verification standards that were set in section 117 of the RPA. The identity verification requirements required in accordance with the Electronic Conveyancing National Law (NSW) will negate the requirement for land registry documents to be witnessed.

Q.3 Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?

Schedule 4 of the Rules is a Client Authorisation Form which when executed, provides that the client authorises the Representative to act for the Client in a Conveyancing Transaction in accordance with the either specified or standing authority. The Form further provides that the Representative has taken reasonable steps to ensure that this Client Authorisation was signed by each of the Persons named above as client or Client Agent.

It is our opinion that further clarification is required to identify what “reasonable steps” means for the purpose of ensuring the client has signed the form, particularly if the form is completed electronically. For example, if the Australian Consular Office Witness signs below the client’s signature, is their witnessing of the client signature sufficient to satisfy “reasonable steps” as their obligation would be to satisfy themselves with the client’s identity in accordance with identity verification standards. This certainty is to further affect the purpose of the electronic conveyancing scheme to ensure transactions can be completed by electronic means and to ensure Representatives and Subscribers are not subjected to unnecessary liability.

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?

Yes, it is imperative legislation regulates the use of electronic contracts in conveyancing for the purpose of certainty as opposed to the trial and error of a new system in conveyancing practice.

Q.5 Have you used electronic contracts? What, if any, obstacles did you encounter in the electronic process?

Our solicitors Jemmeson and Fisher have prepared electronic contracts however, we have not acted in the exchange of an electronic contract.

Q.6 If you have been reluctant to use electronic contracts, what are your concerns?

Our solicitors Jemmeson and Fisher have not acted in a conveyance whereby both purchaser and vendor (and their solicitors/conveyancers) have agreed to complete the conveyance by e-conveyancing.

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?

In our opinion, an alternative, electronic means of providing prescribed documents is unnecessary. The review of a Contract by a Solicitor or Conveyancer will inevitably be conducted with a paper copy of the full Contract. Key elements of the Contract including the first pages, the special conditions, the Title Search and the dealings need to be compared to ensure accuracy of the Contract and to ensure the Contract is reviewed thoroughly.

As a matter of professional courtesy, it is normal practice for the Sale of Land Contracts to be prepared in a particular order. That order being:

1. First & Second Page of the Contract
2. Standard Condition
3. Special Conditions
4. Requisitions on Title (if attaching)
5. Title Search
6. Plan of the property
7. Dealings listed on the title search in order they are listed
8. Sewer diagrams
9. Pool compliance certificates
10. Leases (if required)
11. Zoning Certificate
12. Section 47 Certificate
13. Foreign Resident Capital Gains Withholding Certificate

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?

Electronic contracts provide no less consumer protections for buyers than a printed contract.

Q.9 Are contracts ‘available’ at the time a property is marketed, if only in electronic format?

Section 63 of the Property, Stock and Business Agents Act 2002 provides that a “*real estate agent must not offer residential property for sale unless the required documents are all available for inspection at the real estate Agent’s registered office...*”. The Act does not specify the format the Contract must be in for the inspection purposes, however for practical purposes, it is usual practice for the Agent to have a printed version of the Contract available.

Q.10 Should vendors be permitted to pass on printing and associated costs to a purchaser who cannot receive documents electronically?

If a Contract is unusually large, a Vendor should be permitted to add a special condition into the Contract that provides the purchaser must make an adjustment at settlement for printing costs of the Contract.

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)?

It is common practice to receive Sale of Land Contracts in electronic format. In our opinion, further protection for a purchaser who receives an electronic contract is not required as the process of receiving an electronic file will not affect the current common practice.

Q.12 What methods of electronic signature are appropriate for sale of land contracts?

The two methods of electronic signatures that are appropriate for sale of land contracts are

1. electronic signing on a mobile device with a stylus which would be appropriate in matters where exchange is being conducted by an agent; or
2. electronic signing in accordance with participation rules made under the *Electronic Conveyancing National Law (NSW)*.

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?

The Verification of Identity standards provide sufficient clarity on appropriate methods to identify a signatory to an electronic Contract.

Q.14 Should there be a witnessing requirement for electronically signed contracts? How might this be achieved in an electronic environment?

Yes. There should be a requirement that signature of the parties' signatures (electronic or otherwise) should be witnessed by an authorised witness who has verified the parties' identify.

Q.15 Is a formal exchange of contracts relevant where contracts are formed electronically? If so, how can exchange be affected?

Formal exchange of contracts is not required for contracts formed electronically. The mere creation of electronic Contracts does not currently prevent contemporary exchange methods such as exchange by telephone, fax, post or document exchange (SDX) from occurring.

Q.16 How can the parties' intention be clearly determined without a formal exchange process?

In the case of *Eccles v Bryant and Pollock* [1948] Ch 93 the Court laid down that the "[manner] in which the contract is to be created so as to bind them must be gathered from the intentions of the parties, express or implied". If the intention of the parties is that exchange take place by electronic exchange of Contracts, for the purpose of certainty of the parties intentions, the Contract should express that intention.

Q.17 What protections can be implemented to ensure preliminary negotiations do not constitute a legally binding agreement?

Preliminary negotiations may constitute a legally binding agreement if the essential terms of the agreement have been reached and agreed and the parties' intentions to be immediately bound can be determined. Section 54A of the Conveyancing Act 1919 further provides the requirement for Contracts for the Sale of Land to be made in writing. The requirement of writing is now met by most electronic communications pursuant to the *Electronic Transaction Act 2000*.

Whether electronic communications in preliminary negotiations amounted to a legally binding agreement was tested in the of *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd* [2015] QSC 119. It was found in that case that the electronic communication and signing of an email satisfied the requirements of the *Electronic Transactions (Queensland) Act 2001*. It is a commercial reality that email correspondence is one of the primary uses of commercial communication. As such, where the majority of preliminary negotiations have been undertaken by email correspondence, there is sufficient evidence that the parties are aware of the identity of the person they are corresponding with and should be able to equally rely on that communication to provide evidence of an agreement that has been reached.

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)?

No comment.

Q.19 If a Deed is to be executed electronically, what form of electronic signature is appropriate?

No comment.

Q.20 Should electronic signatures on deeds be witnessed?

If so: 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?

No comment.

Q.21 Should the signatory be present when the witness signs?

No comment.