Removing barriers to electronic land contracts — Walrus Committee submission

Introduction

We are a committee of senior lawyers drawn from five large law firms — Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fulbright. Each firm has a large commercial practice which involves significant property and other transactions, in Australia and internationally.

We write in response to the Discussion Paper of the Office of the Registrar-General entitled 'Removing barriers to electronic land contracts' and dated December 2017.

We welcome the Discussion Paper and the opportunity to make this submission.

The Discussion Paper is very timely and an exciting development. The advantages of moving transactions to an electronic basis are manifest, and are confirmed by our experience and that of our clients in many sectors. The cost savings, and the gains in efficiency and in the speed of transactions, are considerable. There can be a significant benefit for the New South Wales economy.

Technology in general, and e-commerce in particular, are developing very rapidly. As discussed below (in [4.2.2]), there are already many mechanisms by which documents can be 'signed' electronically. And there are many ways disclosures can be made electronically. It is impossible to predict the solutions of the future, beyond the obvious point that rapid change will continue indefinitely. It is key that the law should apply technological neutrality. That is, that the law should not prescribe particular technological solutions. Rather, it should be able to embrace any current or future technology that achieves the relevant policy goals. Overall, we strongly urge the government not to be prescriptive as to the form of technology adopted by parties. Doing so would not remove barriers but create them.

As part of this approach, it is important that the law should not impose higher thresholds or standards on electronic signatures, in terms of authenticity and authorisation, than it has traditionally accepted, and continues to accept, for paper transactions.

We also think it would be counterproductive to use this review as an occasion to engage in a reconsideration of broader questions concerning the formation of contracts — a number of the issues raised in the Discussion Paper appear to fall into this category, rather than focussing on the specific issues that arise where contracts are formed electronically rather than by paper.

There is little gain in having the new e-conveyancing system if paper is still required.

In this submission, we use the Discussion Paper's own numbering and headings.

1 Background

The *Electronic Transactions Act 2000* (NSW) (together with its equivalents in other jurisdictions the ***ETA***) is significant legislation facilitating electronic commerce.

It is a combined Commonwealth, State and Territory initiative (which follows international model legislation put forward by UNCITRAL and adopted by many countries across the globe) and demonstrates a clear policy intention to facilitate electronic transactions. We should not be frustrating that policy intention by making electronic execution harder for land contracts in NSW.

Two fundamental aspects of the legislation are:

- that it is technologically neutral: consequently, it is drafted very broadly and non-specifically; and
- that it is facilitative: the relevant provisions validate transactions and activities within their compass but do not invalidate transactions or activities which are outside their compass.

These two features are critical and should be preserved.

It is important to note that compliance with the legislation is not a mandatory requirement for electronic execution. Under current law, electronic transactions can still be effective without relying on the legislation. Courts have often held that electronic transactions satisfy statutory and general law requirements for documents to be in writing and signed, without relying on the ETA.[1] Nevertheless, it is clearly preferable that electronic transactions are supported where possible by legislative backing, to remove doubt and minimise litigation, particularly as most questions concerning the effectiveness of contracts formed electronically relate to whether such contracts satisfy formalities prescribed by legislation.

2 Land Transactions and eConveyancing

The current move to an electronic land titles register and electronic lodgement of documents is a considerable advance. But many of the advantages would be defeated if statutes, statutory instruments, procedures, or policies require, or are interpreted to require, paper documents. While the format of actual electronic lodgement is necessarily circumscribed by the requirements of the particular system, there should be full technological neutrality in surrounding steps.

In particular, electronic lodgement of transactions cannot be truly transformative if there is an underlying assumption that the document effecting the transaction must be executed, verified or retained in paper or other physical materials.

The electronic land titles register is just one example of a trend throughout government and the business sector, and the community generally, to move to the electronic storage of documents. Creating or storing documents electronically does not necessarily mean any loss of authenticity or integrity. Some technologies involved and the fact that documents can be stored in multiple locations can enhance it.

Issues for Discussion

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. Most of the major banks now mandate electronic lodgement and registration of mortgages, consents and caveats, so this is the next logical step.

Where the Participation Rules and any other requirement or guidance (including those issued by ARNECC) require a document or copy to be made or held, it should be made clear the document or copy can be electronic.

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

Yes. Verification of Identity gives significantly greater assurance than witnessing. The protection afforded by witnessing has always been limited. Further, while witnessing and attestation by a witness are possible for electronic documents, they can create practical complications (see Q.20 below). Where a document has been the subject of VOI, witnessing is largely redundant.

Nor is there a gap for unrepresented mortgagors (as the Discussion Paper suggests). VOI applies to all electronically registered mortgages.

VOI is designed to, and does, provide a high degree of assurance that the parties purporting to enter into transactions which are registered on a public register – and therefore have the benefits of indefeasibility and are effectively irreversible – are who they purport to be. The premise behind the requirements when they were introduced must have been that witnessing was not adequate to achieve that purpose.

[1] See the cases listed in Diccon Loxton, 'Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part A' (2017) 91 *Australian Law Journal* 133 [4].

As a general matter, witnessing in our experience has its limitations as a mechanism for ensuring proper execution of contracts and protecting against fraud or forgery. Witnesses' signatures can be forged or faked, just as easily as signatories'. A purported witness may not in fact have been actually present to see the execution. (Though this may not affect registrable documents where the witness gives a certificate) more generally, often the witness' signature is indecipherable, or the witness is difficult or impossible to track down when it is necessary to prove execution. Witnesses do not usually identify or read the document — they are merely shown the signature page. The best that can be said about attestation by a witness is that it can have a deterrent effect, discouraging parties who actually have signed a document in front of a witness from denying that they so signed it.

Of course if witnessing is removed as a standard requirement, parties can always choose to continue to have documents witnessed. The law only sets the minimum.

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

The Verification of Identity Standard (contained in Schedule 8 of the Participation Rules) could be clarified to allow for face to face meetings to occur by Skype, FaceTime, video conference or some other effective remote method. It should be clear that it is sufficient merely that the relevant identifier saw the person in question and was able to see his or her features. The Rules and ideally the Standard should also accommodate remote verification of identity documents. There may be a number of ways this might be achieved. The system used for Australian passport holders on re-entry into Australia is one example.

The relevant rules could make clear that an identifier can retain evidence and documents electronically.

Stamping procedures could follow Victoria in having documents lodged by email, so there is no need to lodge a paper document..

Currently the National Mortgage Form mandated for use by ARNECC with regards to electronic mortgages, requires a subscriber to an electronic lodgement network to certify that it “holds a mortgage granted by the mortgagor on the same terms as this Registry Instrument'. It is not made clear that this can be an electronic copy. This should be made clear. See Q.1 above.

3 Electronic Contracts for the Sale of Land

As the Discussion Paper suggests, there is a very clear distinction between:

- the finality of settlement, which for Torrens Title land brings into play the indefeasibility rules in the *Real Property Act 1900* (NSW), making the transactions (with a few limited exceptions) irreversible. Registration makes the transactions public, involves the use of a public resource (the register), and has public effects; and
- contracts, and other pre-settlement steps, which are private, and are not usually irreversible. Contracts can be challenged and parties relying on them put to proof, in the normal way.

As a matter of policy, one would expect less stringency and more flexibility in relation to pre- settlement steps, and so it has proved. The law has in fact imposed little in terms of formal or other requirements for contracts. As mentioned in the Discussion Paper, it has not required witnessing. By statute, it has generally required the terms of contracts and documents affecting land to be in writing so that there is a record of the terms, and of the assent to them by the relevant parties, but this has been applied very liberally. The courts have long given significant leeway as to what might satisfy the requirements that a document be in writing and signed by a party in the context of contracts formed by non-electronic means. They have been less focussed on imposing protections against fraud or forgery and more on there being a record of the contract's terms and the parties' assent. They have been more focussed on holding a party to its bargain if it gave some enduring record of assent. In relation to paper documents, they have not insisted on a 'wet-ink' handwritten signature and have accepted mechanical methods for 'signing'

documents. They have accepted that statutory or contractual requirements for a document to be signed by a party can be met if the party's name appears:

- as a printed name;[2]
- as a typed name;[3]
- as a facsimile of the signature applied by an impress stamp;[4]
- using a signature-writing machine even when operated by an agent without authority;[5]
- as a seal or chop that bears no resemblance to a written signature;[6] and
- in various other ways, at least where the party separately adopts the signature;[7]

and that documents can be signed by inserting:

- a mark, such as an "X", rather than a name;[8]
- initials;[9] or
- a false name.[10]

Many of those methods give less assurance against fraud, forgery or unauthorised execution than a wet-ink handwritten signature. Of course the usual rules of evidence and burdens of proof apply in establishing whether or not documents were assented to. With some methods it may be necessary to show that the name was affixed by the party or by another person with actual or ostensible authority to do so on its behalf. The reason why the courts have accepted such a smorgasbord of mechanisms is because they have been concerned to see that where a party recorded its assent to a contract in an enduring form, it should not be able to escape its bargain on the grounds that the record it helped create does not satisfy some strict standard of what constitutes a signature.

While there may be a smorgasbord of mechanisms that the law will recognise, the point is that there is no compulsion for counterparties to accept them as satisfactory. Parties select from the smorgasbord. Normal practice, at least when parties are advised by lawyers, would be for counterparties to accept very few. But it is open to parties to accept any of the others.

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[2] *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324.

[3] *Parkesinclair Chemicals (Aust) Pty Ltd v Asia Associates Inc* [2000] VSC 362 [107].

[4] *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [49]; *Northcott v Davidson* [2012] NZHC 163 [39]; *Bennett v Brumfitt* (1867) LR 3 CP 28, 30; *Ex parte Dryden* [1893] NSWR 77, 80; *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324; *Goodman v J Eban Ltd* [1954] 1 QB 550, 557; *USA v Yiu* [1991] HKCFI 312 [10]; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 [18]; *Ex parte Durack* (1915) 32 WN (NSW) 18; *R v Brentford Justices, Ex parte Catlin* [1975] QB 455, 462-3; *Korber v Police* [2002] SASC 441 [20]; *Lazarus Estates v Beasley* [1956] 1 All ER 341, 343-4; *Ex parte McQuillan, Re Priddis* (1932) 49 WN (NSW) 87, 89; *R v Burchill and Salway, Ex parte Kretschmar* (1947) QSR 249, 254; *Lazarus Estates v Beasley* [1956] 1 All ER 341, 343-4; *R v Brentford Justices, Ex parte Catlin* [1975] QB 455, 462-3; *Korber v Police* [2002] SASC 441 [20]; *Welsh v Gatchell HC Blenheim* [2009] 1 NZLR 241 [49]; *Northcott v Davidson* [2012] NZHC 163 [39]; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 [18].

[5] *Ramsay v Love* [2015] EWHC 65 (Ch).

[6] *Fujian Xun Jie Telecommunication v Tsang* [2010] HKCFI 816 [80] (albeit in *obiter*).

[7] That is, where the name of the party appears: on the front page of a sale catalogue that an auctioneer physically cuts out and pastes into the book that the auctioneer uses to record a sale made as the party's agent (*Cohen v Roche* [1927] 1 KB 169, 176-179); as the addressee of a letter that is prepared by the party for execution by the other party (*Evans v Hoare* [1892] 1 QB 593, 598-599); • in the letterhead of a sale document prepared by the party (*Schneider v Norris* (1814) 105 ER 388, 389); in a record of the agreement prepared by a third party, if the party does an act by which he or she recognises it as a record of the agreement *Durrell v Evans* (1862) 158 ER 848, 855); and in a form for the sale of property where the auctioneer as vendor's agent inserted the vendor's initials and surnames before the sale *Leeman v Stocks* [1951] Ch 941, 952).

[8] *Baker v Dening* (1838) 8 A&E 94, 97-8. See also *Morton v Copeland* (1855) 16 CB 517, 535; *R v Moore; Ex parte Myers* [1884] 10 VLR 322, 324; *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 [18].

[9] *Bosaid v Andry* [1963] VR 465, 473-4; outside of the Statute of Frauds context, see *Charlton v Hindmarsh* (1859) 1 Sw & Tr 433, 439.

[10] *Byers v Brown* (1859) 2 Legge 1136.

Further, courts have held that requirements that contracts of sale of land be in writing and signed could be satisfied by electronic methods, such as:

- a telegram when received by the recipient;[11]
- a telex;[12]
- a received fax;[13] and
- an email "signed" by typing the sender's name.[14]

These methods have been accepted without reliance on the ETA. In a wide variety of other contexts a number of different electronic methods have been accepted as satisfying requirements of writing and a signature, again without relying on the ETA.[15] As Harrison J said in *Stuart v Hishon* [2013] NSWSC 766 (at [34]): 'Mr Stuart typed his name on the foot of the email. He signed it by doing so. It would be an almost lethal assault on common sense to take any other view.'

Issues for Discussion

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?

We suggest there is no need for further legislative elaboration to clarify the position in relation to contracts generally (though see Q18 below in relation to deeds and [4.2.3] below in relation to s 127 of the *Corporations Act 2001* (Cth)).[16] In our view, particularly with the benefit of the ETA, but even without its operation, electronic documents are capable of satisfying the requirements of conveyancing contracts to be in writing, including under s 54A of the *Conveyancing Act 1919* (NSW).

Nor, in our view, is there any need for intervention or for requirements or processes to be formalised. Parties should be free to use electronic contracts if they so wish. As is currently the case it should be left for conveyancing practice and individual parties to decide what they may accept and what precautions they take, particularly as technology changes over time and newer, more efficient options become available.

The law does not impose rigorous standards on paper contracts. There should not be higher standards for electronic contracts. It is important to note that – just as there is with paper execution – there is a wide variety of mechanisms by which documents can be executed electronically (see 4.2.2) below. Some of these can give significant security or assurance.

To try to impose minimum standards for electronic execution would be a trap. The standards may not cover changing technology or practice, particularly if they are too precise. They may introduce greater uncertainty — does the method used conform to the standard or does it not, did the procedure used follow the requirements? Parties who have electronically executed documents may allege they are not bound because their execution did not follow the minimum standard in some technical respect. A 'safe harbour' approach of specifying non-exclusively what mechanisms are acceptable only casts doubt and uncertainty on mechanisms which do not fully fall within the harbour. The safe harbour may be restrictive and onerous.

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[11] *Godwin v Frances* (1870) LR 5 CP 295, 302-3 (albeit *obiter*).

[12] *Torrac Investments Pty Ltd v Australian National Airlines Commission* [1985] ANZ ConvR 82.

[13] *Molodysky v Vema Australia Pty Ltd* (1988) 4 BPR 9552.

[14] *Green (Liquidator of Still Construction Ltd v Ireland* [2011] EWHC 1305 (Ch);

[15] See Loxton, above n 1, 144.

[16] As we discuss below (see [4.2.3]), it would be beneficial to open up the 'perceived' legislative landscape even further by removing the exclusion in the *Electronic Transactions Regulation 2017* (NSW) regarding requirements that documents be "verified, authenticated, attested or witnessed under the signature of a person other than the author of the document" (although as noted previously the ETA is facilitative and in no way restrictive).

Where parties to transactions are concerned as to whether they can prove that the other party has actually executed the document or they have a lower risk appetite as to such issues, it is open to them to impose requirements or take precautions. This is currently the case both for paper and electronic documents. Sections of the market may adopt particular conveyancing practices to address this, or may choose not to accept contracts signed in a particular way in particular circumstances. They may choose to do this even where the law imposes minimum standards — they may adopt standards or requirements of their own. Imposing minimum standards by law would not change this, nor induce parties to accept particular mechanisms which the parties do not think sufficient. But introducing particular restrictions across the board to apply to all parties would significantly reduce flexibility and lead to unintended consequences.

Importantly, except in the context of registered dealings where rules of indefeasibility come into play, a person requires no protection against his or her signature being forged — the risk of this is borne by the other party to the contract, who may insist on whatever evidence he or she chooses in order to be satisfied that the signature is genuine. The imposition of formal requirements to protect against forgery would therefore be misconceived, serving only to deprive an innocent party of his or her bargain because the other party, whilst having in fact agreed to the particular transaction, failed to comply with the relevant formality.

All current consumer protections in relation to cooling off periods, disclosure etc [17] would equally apply to electronic contracts as ones on paper.

As to disclosure, we deal with this in section 4 below, but our general view is that electronic disclosure should be permissible and indeed, for various reasons, encouraged. Where the contract is electronic, attachments and disclosures should be able to be electronic.

As discussed above, there are stringent requirements at the final stage of a transaction, that is, completion and registration, to address concerns about forgery and fraud. It would be redundant to address them also at the preliminary stages. It would only complicate transactions and defeat the purpose of moving to electronic transactions — that is, promoting simplicity, increasing speed and reducing costs.

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

All our firms have been involved in many transactions in which contracts have been remotely effected by exchanging by email PDF signature pages or signed documents. That practice is very common, indeed so common that it may even be regarded as standard practice.[18]

Most of our firms have successfully used other electronic processes. A number have used them in relation to the signing of contracts with buyers in major off-the-plan developments. Many of our clients use them in at least some forms of routine transaction. These include financial institutions and real property owners or managers. A number of corporations have adopted policies of using them generally in all their contractual documents, in transactions big and small.

There is, however, some reluctance on the part of purchasers or their solicitors to the use of electronic contracts or even electronic signatures, in our experience. Some of that reluctance emerges from a lack of familiarity with the process or the technology, but that reluctance is decreasing over time and the convenience of using an electronic platform, particularly where parties are offshore or in a different place, is increasingly being recognised.

The obstacles and impediments listed on page 10 of the Discussion Paper do not, in our view, prevent electronic documents being created.

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[17] See eg Division 8 of the *Conveyancing Act 1919* (NSW) and Schedule 3 of the *Conveyancing (Sale of Land) Regulation 2017* (NSW).

[18] See the Walrus Committee, 'Remote signing protocols for financing transactions' (2015) 43 *Australian Business Law Review* 497 and Bruce Whittaker, 'Remote signings under Australian Law' (2016) 44 *Australian Business Law Review* 229.

- If stamp duty is an issue, it could be removed by adopting the practice in Victoria, where the State Revenue Office insists on lodgement by email. In the meantime it can be solved by lodging a printout of the relevant electronically executed document. The NSW OSR currently accepts the use of electronic signatures, although it still requires lodgement of paper documents for stamping. In any case, stamp duty's historical and anachronistic adherence to being a documentary tax has been eroded significantly over the years and it is time to sever that connection completely.
- Documents can be, and are routinely, retained electronically for evidentiary and compliance purposes, except where there is a particular legislative requirement to the contrary.
- We deal with vendor disclosure below in [4.1].
- As discussed above, courts have held that electronic contracts do satisfy the legislative requirements for writing and signature.
- Electronic signatures can be secure if the parties wish.
- We deal with the exchange issue below in [4.3].

Witnessing can be achieved using such systems or other methods of signing documents electronically (see Q.20 below). But there can be complications. One client that is using cloud-based platforms or similar is finding that setting up its systems to allow for witnessing involves significant administrative or mechanical complications. There are additional steps to be built in. The witness needs to be separately identified and his or her email address obtained, any necessary disclosures need to be made to the witness, and the document needs to be separately sent to him or her for signature. While these are not insurmountable it considerably increases the complexity of what should be a simple process. Other clients have not seen this as a barrier, and have had documents witnessed electronically.

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

The use of electronic contracts is spreading, particularly as their advantages become apparent and clients begin to require them. Major clients are adopting it and actively pushing for it. But it is relatively new. It takes a while for people to become comfortable with new practices, or to adapt their systems and protocols to adopt them. Parties focus on risks of new practices with an intensity that that they do not apply to the familiar. Inertia and force of habit can be significant inhibitors of change.

Our firms have all been comfortable using electronic contracts, but at least to some extent, there are areas of doubt that have limited their use in particular contexts. Further, other firms and participants in the market have varying degrees of comfort and accordingly practice varies considerably.

The key issues to be addressed to facilitate more widespread use of electronic contracts are as follows.

- Whether deeds can be formed electronically.
- Whether contracts formed electronically may be the subject of statutory registration, where this is required.
- Whether documents can be signed electronically under s 127(1), (2) or (3) of the *Corporations Act 2001* (Cth) and accordingly whether the due execution of documents that appear to have been so signed may be assumed under s 128(1) of the *Corporations Act* (Cth). It is generally accepted companies can sign contracts electronically in other ways, though such other ways do not bring with them the protections afforded by s 128(1) of the *Corporations Act* (Cth)).

Clarification of those issues would make a big difference. As noted below, representations have been separately made to the Commonwealth as to the last of them.

Removing the exemption of witnessing from the ETA would also assist in gaining acceptance.

4 Issues affecting electronic contracts

4.1 Vendor disclosure

Issues for Discussion

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?

Yes, electronic provision should be allowed, but the law should not specify a format.

We strongly support the idea that disclosure should be able to be made by electronic means. The current requirement is that the documents need to be attached to the contract. Where the contract is electronic, this is already possible. Indeed it would be absurd to require paper attachments to an electronic document. Further, there is much to be said for amending the Act and Regulations so that documents available electronically, for instance on a website maintained by the vendor, do not need to be attached but could be incorporated by reference or referred to. The main point is to ensure there is disclosure at or before contract formation.

There are significant reasons for allowing electronic disclosure as an alternative to paper:

- as the Discussion Paper suggests, there are considerable cost savings; in our experience, particularly in large land sales, the set of disclosure documents can be voluminous;
- any reduction in paper use is welcome in meeting environmental concerns;
- the disclosure material can be more legible in an electronic rather than a paper copy (which may contain barely legible photocopies of photocopies and would also need to be reproduced in hard copy or scanned to be sent to advisors and others involved in the purchase decision);
- depending on the method of disclosure, electronic information can more easily be accessed remotely and outside business hours;
- electronic disclosures can be prepared and sent and received, and passed on to advisers and others, far more quickly, without the recipients needing to scan them or take photocopies; and
- electronic information is also more easily searched for relevant information than a hard copy version (assuming it is not in a non-searchable format).

Under current technology there are many ways in which this can be achieved. These can include those listed in the Discussion Paper like a USB stick and a cloud-based file sharing program, but there are others, for example as an attachment to an email or a pdf document, or access to a website maintained by the vendor or its representative. There may be still others in the future.

In a rapidly developing world, the law should not limit the method by which disclosure documents are available, provided they are available and legible to the purchaser and its advisors, and are in a format that may be downloaded and printed (if so desired). Consistent with the theme of technological neutrality, the legislation should not prescribe the format or mechanism for electronic disclosure, but it might prescribe the requirements which we suggest should be:

- availability in a format that can be read by the recipient; and
- the ability for the purchaser or its representative to download or obtain its own copy. This is both for the purposes of being able to search through it itself, and also so it can keep a record (including hard copy, if desired) of the disclosures.

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?

In our view, generally, yes.

The same consumer protections of disclosure and a cooling-off period apply equally to electronic contracts. For the reasons set out under Q.7, we suggest that consumer protection is actually enhanced if disclosure is made in a readily accessible and searchable form, and not in a dauntingly large paper document.

Further, as well as being able to get, distribute and read disclosures more quickly, parties will be able to sign and 'exchange' (see [4.3] below) electronic contracts more quickly. This will reduce the possibility of gazumping (though contracts will still subject to a cooling off period).

From a consumer protection point of view it may be a retrograde step if particular requirements applied to electronic contracts. For example if purchasers off the plan relied on an electronic signature on behalf of the vendors, they should be able to hold the vendors to the bargain. The vendors should not be able to dodge the contract by relying on some technical or formal defect in the manner of signature.

It might be said that consumer purchasers are more open to fraudulent signatures on contracts by purported vendors. But this is already the case with paper contracts, and the ultimate protections are the procedures on completion and registration (including VOI).

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

That will depend on the method used. For internet display where the purchaser is given any requisite password and link, which gives access in full, the answer generally would be yes. A USB stick would need to be physically available. Emailed information would be available to a recipient when transmitted in a manner able to be opened by the recipient in legible form.

But if made available in those ways they may not be 'available' at an agent's registered office. For that reason, we suggest that s 63 of the *Property, Stock and Business Agents Act 2002* (NSW) be altered accordingly. The requirement is outmoded. This would, we think, be a considerable improvement in terms of accessibility over the requirement that they be displayed in an office which may only be open in business hours and may be geographically difficult for the purchaser to visit, and a requirement only that the documents be available for inspection. The onus on agents should be to have a mechanism under which the documents are available as described above or can be made available in readable format on enquiry (the enquiry being, in an electronic age, the equivalent of entering the agent's office and asking to see a copy).

At the moment, even where electronic contracts are used, a hard copy contract is available at the sales suite.

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

The Discussion Paper raised concerns that some purchasers will not have access to the information. It would, we suggest, be a reasonable expectation that a person with the wherewithal to make a purchase would have internet access, either directly or through a friend, neighbour, relative or internet café, and that their solicitor, conveyancer or other adviser would have such access. In the 2016 Census, 84.8% of those in New South Wales who responded to the relevant question had internet access at home. Access through the internet is generally easier than physical access.

The law does not currently restrict vendors from passing on costs. Whilst it may be unlikely that they would do so when they are in search of a buyer, it would be a change in approach to restrict it.

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)?

We see no reason why there should be a longer cooling-off period if disclosure is made electronically. Electronic documents can after all be more rapidly despatched, accessed, searched and circulated.

If, for some reason, some measures are thought to be necessary in a consumer context (such as the prescription of the format of electronic disclosures and/or a requirement to make available paper copies if requested) they should be confined to the consumer context.

4.2 Contract formalities

4.2.1 Writing and signature requirements

As mentioned above, even without calling in aid the ETA, there is significant case law to the effect that contracts for the sale of land can be created and signed electronically.

4.2.2 Signing electronically

In our experience, and in the experience of our clients, signing documents electronically can have considerable advantages even when the parties are in the same city. One client reports significant savings in relation to execution of leases in shopping centres, as eight laborious and time-consuming steps of sending execution copies backwards and forwards and having them signed are replaced by one.

There are other methods of **electronic signature** in addition to those listed on page 13 of the Discussion Paper. They include the following:

- using a cloud-based execution platform, such as DocuSign or eSignLive where documents are stored in a cloud, and made available for execution by a link emailed to the relevant signatories, who enter signatures into a protected pdf document;[19]
- emailing PDF copies of a physically signed document;
- signing a PDF copy on a computer using a stylus, trackpad, finger or mouse, and then dispatching it;
- dispatch of an email including the name of the signatory as a sign-off; and
- a 'click wrap' signature by clicking on 'I accept' or similar on an electronic document.

As explained above at [3], the law allowed a considerable spectrum of methods by which parties can satisfy statutory requirements that paper contracts be signed. Recent cases are doing the same with electronic contracts. It is for the parties to decide what they will accept and what precautions they wish to take as to whether there has been due execution (guided often by general practice).

This should continue, both for paper and electronic contracts.

While there can be issues, it is not accurate to see electronic signing as particularly fraught or necessarily more open to fraud or forgery, particularly when compared to available methods of execution of paper documents. Indeed some mechanisms of electronic execution afford the parties very significant protection in ensuring authenticity. For instance, in cloud-based execution platforms the execution document can only be accessed and signed by opening an email addressed to the person who is required to sign. The platform records and certifies the various steps, for example: when the signatory receives the email with the document, when the email is opened and at what IP address, and when the document is signed. It also sends confirmatory emails to the signatory. The system can require geolocation of the signatory, and also require a two-step authorisation, eg, requiring the execution party to complete a code sent to it by SMS

[19] See the description in Loxton, above n 1, 135.

(similar to most banks' electronic banking platforms). Some financial institutions give their customer access to a document to be signed only through the on-line banking platform, where the customer has entered a number and a password to get in. In other cases, as with paper signatures, the parties may accept less secure mechanisms.

As mentioned above, while the ETA does set out certain criteria for it to validate electronic signatures, the general law also allows electronic signatures and can be satisfied without relying on the ETA.

Further, the ETA is intended to be, and is, interpreted broadly and with a view to facilitating commerce, not restricting it. The courts have given a very liberal interpretation as to the requirements for signing in s 9(1) of the ETA and its equivalents in other jurisdictions, those requirements being for identification, consent, and reliability:[20]

- the identification requirement does not require the recipient of the electronic communication to have separately verified the identity of the signatory, only that the identity of the signatory and their intention in relation to the information communicated can be determined (which can be by referring to other evidence). For example, an email communication satisfied this requirement (and the other requirements);[21]
- the consent requirement is unlikely to require anything in addition to the relevant party's act of using the chosen electronic mechanism or engaging with the process; and
- reliability is objectively determined and can be satisfied easily. Courts can assess reliability by comparing the mechanism in question to currently accepted mechanisms.

The courts have accepted that normal email correspondence, 'signed' with an email signature, satisfies these requirements.[22]

The legislation does not in our view require any particular VOI-type approaches. Nor should it in relation to contracts of sale. As discussed above, any stringent mandatory verification of identity requirements should be left to the finality of settlement where the transaction is indefeasible, rather than a contract which is a preliminary step to completion.

4.2.3 Reliability of electronic signatures and witnessing

Section 4.2.3 of the Discussion Paper sets out some issues and difficulties which may arise with electronic contracts. We think these may be overstated and it is worth addressing the points.

As stated above as a general matter witnessing in our experience can be overrated as a mechanism for ensuring proper execution of contracts and as a protection against fraud or forgery. Nevertheless, as discussed elsewhere (see Q.5 and Q.20) witnessing can be achieved electronically, though it can involve practical complexities.

The possibility that a signature may not be genuine, or if genuine, may not be authorised, or may not be proved to be so, has affected contracts for centuries before electronic

[20] See the cases listed in Loxton, above n 1, 147.

[21] *The Corporation of the City of Adelaide v Corneloup & Ors* [2011] SASCFC 84 [150]; *Claremont 24-7 Pty Ltd v Invox Pty Ltd (No 2)* [2015] WASC 220; *Luxottica Retail Australia Pty Ltd v 136 Queen Street Pty Ltd* [2011] QSC 1; *Stellard Pty Limited v North Queensland New Fuel Pty Ltd* [2015] QSC 119.

[22] See *Legal Services Board v Forster* (2010) 29 VR 277, and the cases mentioned in n 21 above.

execution. Paper execution is by no means an assurance. Signatures can be forged. This can be achieved particularly easily when the purported signature is typed or printed, or a mark, or made by an impressed stamp, or made by a signature-writing machine, but it is not limited to those mechanisms. Even with handwritten signatures, in our experience, much of the time parties do not actually check signatures against specimens or take other steps to verify them. In particular retail consumers would rarely if ever check the authenticity of suppliers' signatures.

It is open for parties to take precautions to ensure a signature is genuine, and indeed to elect what sort of signing they will accept. If they choose to accept electronic signatures it should be open to them to decide what to accept. The law does not mandate what a person accepting a paper signature should do, nor should it with electronic signatures.

We do not think that it is a necessary feature of electronically signed documents that they can be altered. For a start, counterparts and versions can be checked against each other. PDFs can be protected against alteration. For example, this is the case with cloud-based platforms. Paper documents are not immune from the issue. Multi-page paper documents can be altered or the counterparts signed by various parties can be inconsistent.

Issues as to authorisation, that is as to whether a person purporting to sign as or on behalf of an entity or another person has been authorised to do so, are, we suggest, agnostic as to the method used to make that signature. They are no different where the signature is applied electronically as when it is applied in the traditional manner.

Nor, we suggest, does it matter whether or not the authorisation given by the party to a person purporting to sign on its behalf is electronic or paper. A party can, by paper, authorise an agent to sign electronically just as it can electronically authorise an agent to sign a paper document (though an agent can only be appointed to sign a deed by another deed). We do not follow the comment at the foot of page 14 of the Discussion Paper that issues may arise where the authorisation is given by paper to sign a document electronically.

The decision of *Williams v Crocker*[23] turns on its particular facts. On analysis, there is nothing surprising or novel about the case. The question was not about electronic execution — it was merely one of actual or ostensible authority, which has been an issue for paper documents as long as they have existed. It would have been answered in exactly the same way had the contract in question been purportedly signed in paper form. The court held that Mr Crocker had not done anything to clothe any person with authority to sign documents on his behalf as an individual (as opposed to his capacity as a director of a company). The answer may have been different had the electronic signature which had been created been applied to a document to which a company was party, Crocker signing as its director. It is, we suggest, up to the parties as to whether or not they wish to take precautions against such an eventuality, such as to check the authenticity of signatures, or mechanically applied signatures. Further, as discussed above, with some forms of electronic execution, there are some protections against unauthorised use.

In relation to the comment in the second paragraph of page 15 of the Discussion Paper, it is important to note that the *Electronic Transactions Regulation 2017* (NSW) (clauses 5(f) and 6(f)) only exempts the requirement of witnessing from the operation of the ETA. The actual signature of the signing party is not so exempt. The ETA still applies to the original signature by the party. Nor does the fact that the requirement that a witness authenticate the document is exempt from the ETA mean that the attestation cannot be achieved

[23] [2016] NSWCA 265.

electronically. As stated above (at [3]) the mere fact that the ETA does not apply to an activity does not mean that the activity cannot be achieved electronically. The Act is facilitative.[24]

In our experience, even where bodies corporate or incorporated associations under their constitutions execute contracts using their seal in a form which is witnessed, they can instead authorise individuals to sign on their behalf, such as by an appropriately drawn power of attorney, or simply by board resolution. Companies incorporated under the *Corporations Act 2001* (Cth) do not need to execute under seal (see ss 126 and 127).

In any event the Regulation can be easily be amended to remove the exemption, and we suggest it should be so amended. We are not aware of any policy reason behind the exemption. There is no equivalent in Victoria. In Victoria the ETA applies to witnessing. Removing the exemption would extend the protection of the ETA to attestation by witnesses, clarify that a witnessing can attest by signing electronically, and remove any possibility of parties suggesting that the ETA does not extend to witnessed signatures or to documents containing them.

Equally, the exemption of the *Corporations Act 2001* (Cth) from the Commonwealth ETA does not prevent a company registered under that Act signing a document electronically. As mentioned above, the ETA is facilitative. No matter what view one takes as to whether documents can be signed electronically under s 127(1), (2) or (3), s 127(4) makes clear that those provisions do not exclusively set out the mechanisms by which a company may execute a document. A company may execute a document through a person who is appointed through a power of attorney, or (except in the case of deeds) who in some other way is authorised to execute it on behalf of the company This occurs regularly in practice. In addition there is authority that an authorised director may sign as the company.[25]

The Commonwealth law is of course a matter for the Commonwealth, but we would suggest that it should not be seen as a reason for not generally allowing electronically created and signed contracts under New South Wales law. The issue could disappear at any stage by a simple amendment to the relevant Commonwealth regulations. We have made representations to the Commonwealth seeking precisely that outcome.

Issues for Discussion

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

For the reasons given above, we do not think it is any more appropriate to limit the methods of electronic execution of a contract for sale than it is to limit the methods of execution by other means. Parties already make a choice as to what signature methods they will accept in a paper contract. They should have that choice for electronic contracts. It is not a consumer protection issue. For the reasons set out in the introduction to this Submission and in the Minister's Foreword, every effort should be made to facilitate electronic commerce, in relation to land contracts and more generally, to make commerce easier. Particularly in a fast changing world, as technology develops, any attempt to specify particular methods of electronic execution, or to impose restrictions or requirements, would be a significant brake on that progress.

See our response on Q.4 above and the discussion in [3] above.

[24] See the cases listed in Loxton, above n 1, 145.

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. We suggest that there is no greater need for the law to mandate mechanisms to identify an electronic signature or to establish the authority of a person signing than there are with other methods of execution. As stated above, issues of whether the person is authorised apply irrespective of the mechanism used to apply the signature. The legislation regulating contracts should be technologically neutral. To require steps in relation to electronic contracts which are not required in relation to contracts created by other mechanisms would impose unnecessary barriers and hurdles.

What is or is not accepted as appropriate should be left to the parties. General practices will develop. See also our comments in [4.2.2].

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

We do not think there should be any additional witnessing requirements for electronically signed contracts. There are none for paper contracts.

Such requirements, while achievable, add a number of steps to the process, and are mechanically more difficult. We deal below (in relation to Q.20) as to how witnessing electronically can be achieved.

As stated above (see Q.2), witnessing has limitations as a precaution.

Nevertheless, if parties want signatures to their contracts to be witnessed it is open to them to require it. There is no need for the law to impose it, and certainly no reason for it to do so merely because the contracts are in electronic rather than paper form.

4.3 Exchange of contracts

(a) The requirement for exchange

Other than the requirement for writing, there are no particular requirements for the formation of a contract for the sale of land. Like any other contract, such contracts simply involve an offer and acceptance, sufficient certainty of terms, consideration, and the intention to form legal relations. Exchange of contracts is a standard, but by no means necessary, mechanism by which this is achieved in New South Wales conveyancing practice. The cases mentioned in the Discussion Paper illustrate the more general principle that parties are not bound until there is an intention to create legal relations. Where the parties set out for an exchange of contracts, there is no such intention until the exchange takes place. But as McHugh JA said in one of the cases mentioned, *G R Securities v Baulkham Hills* (a case in which a contract was held to be formed without an exchange):[26]

> However, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances: *Godecke v Kirwan* (1973) 129 CLR 629 at 638*; Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 332-334, 337**.** If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction

In our experience, in major transactions, there is often not an exchange of physical contracts in the traditional sense of a representative of each party handing over a signed document, and the purchaser handing over a cheque for the deposit. Rather, each party sends to the other a signed PDF document (usually by email), and when that is done, the purchaser makes the requisite deposit payment.

[26] (1986) NSWLR 631, 634.

It is up to the parties as to what mechanism recognised by law they choose to adopt.

(b) Exchange of Contracts in an electronic environment

There is therefore no magic in whether there is an exchange, or the mechanism to achieve it, should there be one. Parties can send to each other, by email or otherwise, electronic versions of the document just as they can physical copies.

Or they can sign the same document electronically. It is for the parties to have an understanding amongst themselves as to the procedure under which they become bound, and the point in time at which they agree to be bound. They may choose to have arrangements under which that is delayed pending the delivery of the requisite deposit. For example, one party could by stylus sign an electronic copy of the document, and then forward it by email or some other mechanism to the other party, who might do the same, or who might execute in some other fashion. If the documents are being signed using a cloud-based electronic signature platform, then there is no need for an exchange. Both parties would place their signatures into the same PDF document in the cloud, and such platforms have mechanisms under which the documents are not effective until a further step is completed.

The issues described in the Discussion Paper in its discussion of *Stellard*[27] are not limited to emails or other electronic correspondence. They can arise in relation to any exchange of correspondence where the parties are negotiating a contract. The correspondence could have been by traditional 'snail mail', with no difference to the result.

These issues merely arose out of the terms of the correspondence, they were not affected by the fact that the correspondence was exchanged electronically, rather than by hard copy letters. There is no greater uncertainty, we would suggest, in signing documents by electronic means than there is by signing through some other means.

Issues for Discussion

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

It is neither more nor less relevant than where contracts are in paper form.

As stated above, an exchange is not necessary, but should the parties still require an 'exchange' of contracts, there are ways in which it can be achieved electronically. For example, parties could exchange PDF counterparts signed electronically, or simply provide in the relevant cloud-based transaction that the signed contracts are now in force.

We do not think it is necessary for the law to specify or anticipate the mechanism by which the parties may choose to achieve this. Technological neutrality and flexibility should be paramount. There are a myriad of ways by which the parties can indicate their intention to be bound by a contract, or reach or record an understanding as to how it will be achieved.

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

See above.

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

See above. The issues are the same irrespective of how correspondence is carried out.

[27] *Stellard Pty Limited v North Queensland New Fuel Pty Ltd* [2015] QSC 119.

5 Deeds

As the Discussion Paper states, deeds are instruments satisfying certain formal requirements in order to achieve certain legal results. Those formal requirements have been changed by statute, and under the general law, and vary according to whether the party is signing through an individual or not.[28] For example attestation by a witness is not a common law requirement. In New South Wales s 38 of the *Conveyancing Act 1919* (NSW) requires execution by individuals to be attested by a witness, but it does not apply to corporations. Companies can sign deeds without a witness. While often s 127(3) of the *Corporations Act 2001* (Cth) will require two signatures (2 directors or a director and a secretary) for a company with a sole director and secretary, one unwitnessed signature will suffice.

In Victoria, these requirements have been further simplified. There is no requirement that a deed be witnessed.

One ancient common law requirement is that a deed must be on paper, parchment or vellum. As a matter of general policy, there is no reason why this should continue. The requirement originated in the Middle Ages in the belief that these materials were unalterable (curiously, in contrast to documents created on cloth, wood or stone). This is questionable particularly in relation to a paper document of several pages. Under today's technology there are far more durable materials, and permanence can be achieved electronically.

As stated above ([4.2.3] and [5]) if deeds are still required to be witnessed, the exemption of witnessing from the ETA in the regulations should be removed, as a clarification. It serves no policy purpose. There is no equivalent exemption in Victoria.

There are arguments, accepted by some, that the paper, parchment or vellum requirement no longer applies. Nevertheless, more needs to be done to achieve sufficient comfort in the market that a deed can indeed be created electronically, and does not require paper, parchment or vellum.

As to the logistical issues discussed at the foot of page 17 of the Discussion Paper, we do not follow why, if a deed can be created electronically, it could not be amended by another deed created electronically, or why it cannot annex an electronic copy of a document, or may simply cross refer to an electronic copy of a document. We are not aware of any requirement that an annexure to a deed or a document referred to in a deed needs to be on paper.

Issues for Discussion

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)?

Yes, in an electronic age it is anachronistic to maintain a requirement that a document be in paper, parchment or vellum. There is no reason why that removal should not apply to all deeds, not just those specifically relating to land transactions. The issue affects all deeds, and is a barrier to electronic documents in all sectors of the economy, not just real estate.

The simplest way to achieve this is simply to insert a provision in the *Conveyancing Act 1919* (NSW) to the effect that a deed need not be on paper or any other substance and may be electronic. This is similar to the British legislation[29] referred to in the Discussion Paper (which we understand is generally regarded

[28] See Diccon Loxton, 'Not Worth the Paper They're not Written on? Executing Documents (Including Deeds) Under Electronic Documentation Platforms: Part B' (2017) 91 *Australian Law Journal* 205.

[29] The *Laws of Property (Miscellaneous Provisions) Act 1989* (UK)

by practitioners as curing the issue[30]) but with the added assurance of an express confirmation that deeds can be electronic.

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

We strongly suggest that the requirements be technologically neutral. Any form of signature on a representation of the document which states that it has been signed, sealed and delivered, and otherwise satisfies the requirements for a deed, should also suffice when the deed is electronic.

Q.20 Should electronic signatures on deeds be witnessed? If so:

The law should be technologically neutral. Where witnessing of an instrument in paper form is required or not required, then the same should apply to the instrument in electronic form.

However, addressing this question more generally, we suggest that it is appropriate for New South Wales to follow the Victorian model and to remove the requirement of a witness for all deeds (whether executed electronically or in traditional form). It would make creating electronic documents considerably easier.

Other than having a particular formality for its own sake there is no policy reason why deeds should be required to be witnessed and contracts not. The same considerations of fraud and forgery protection apply to both, and as discussed above, the protection given by witnessing can be overstated. Companies can already sign deeds without them being witnessed.

If parties intend a document to be a deed so as to engage the additional legal benefits available, they should only have to make that intention clear in the terms of the document (as is the case already under general law), but without also having to satisfy the formal requirements of witnessing and a physical medium.

As discussed below, for some companies the requirement is a major deterrent from setting up electronic documents as deeds, even where deeds have significant advantages.

There is no reason why this should not be extended to paper documents.

• How can a witness attest to a signature in an electronic environment?

In our experience, this can be achieved, though the ease of doing so will vary according to the mechanism used. Witnessing involves two steps: first, the witness sees the signatory sign; and second, the witness attests that it has done so by signing.

For example, where a party is using a stylus on a screen to sign a PDF document, the witness can observe that being done, then take the stylus and attest the signature by signing in the appropriate place.

Where the parties sign using a typical cloud-based electronic signature platform, attestation can also be achieved, though there are further steps to set up the arrangements in the system. In brief, the witness can observe the signatory make the appropriate entry to sign the requisite document with a stylus, keyboard, mouse, or other device. Then a link to the signed pdf document is sent by email to the witness for the witness to insert his or her signature attesting due execution. This is more complicated than a straight signature, as it requires the document to be sent sequentially to two different people, but it can be achieved. Nevertheless the procedural complexities have meant that some institutions setting up their systems to have customer documents signed through cloud-based platforms are deterred from having witnessed signatures. In at least one case this has meant they are avoiding having deeds even where they are prepared to take the risk that, because they are not on paper, they may only take effect as contracts, not deeds.

[30] See the practice note "Execution of a Document Using Electronic Signature" issued 13 July 2016 by a joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees, available at http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/. Though see Hill R, Johnson L, Conway J, "Using electronic signatures in finance transactions" (2016) 31 JBFL 174.

• 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?

We think the law should be clarified so as to allow it to be done through video link. There is currently simply no guidance under general law or statute as to whether this would be effective.

As a policy matter, it should be sufficient for witnesses to satisfy themselves through any mechanism by which they get a clear picture in real time, that they saw the person signing, and then sign the document themselves attesting to that execution. If witnessing is to remain as a requirement, and the documents are to be truly electronic, then we suggest that as a logical step as a policy matter there should be no barrier to remote witnessing.

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

No, we can see no policy reason for this requirement. The purpose of the witness is to see that the signatory signs. Nothing is achieved by requiring the signatory to see the witness attesting that the witness saw the signatory signing. Further, such a requirement would make execution through some electronic mechanisms at best extremely cumbersome.

The fact that a signatory is signing electronically does not change this.