

REMOVING BARRIERS TO ELECTRONIC LAND CONTRACTS

RESPONSE TO DISCUSSION PAPER

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INTRODUCTION

1. ANZ thanks the Office of the Registrar-General for the opportunity to contribute to improving the use of electronic land contracts in New South Wales.
2. One of ANZ's community causes is improving the availability of suitable and affordable housing options in Australia. We recognise that buying a house can be stressful and believe that technology that provides for a quick and cost-effective sale process will improve the experience for many residents of New South Wales.
3. ANZ supports the government's ambitions to remove legal and practical barriers to the use of electronic land contracts and acknowledges the importance of policy reform in this area.
4. This submission sets out the principles that we think should be reflected in any legislative reforms to remove barriers to electronic land contracts in New South Wales, as well as ANZ's view on some of the issues raised in the discussion paper.

PRINCIPLES UNDERPINNING REFORM

Technology neutral requirements

5. We believe that one of the cornerstones of any reform in this area should be that the legislative requirements are technology neutral, that is, no specific form of technology should be mandated. We believe that this is important for a number of reasons:
 - It is **consistent** with the *Electronic Transactions Act 2000* (NSW) (**ETA**) and the UNCITRAL model law on which the ETA is based which are technology neutral.
 - The **cost** of prescribed technology may be prohibitive for some and have the effect of creating a new barrier to use. For example, mandating the use of public/private key infrastructure for electronic land contracts may be costly and have the unintended consequence of actually reducing the use of electronic land contracts.
 - Technology may quickly become **obsolete**. Mandating a form of technology for electronic land contracts may result in aging or unsupported technology being used when there is a new alternative that better promotes the principles underpinning reform.
 - It avoids the need for regular **legislative amendments**. Legislative requirements that are technology neutral ensure that the regulatory framework is flexible enough to keep pace with new forms of technology as they emerge, rather than stifling innovation and the uptake of new technology.

Certainty

6. All parties to an electronic land contract must have legal certainty as to the effect of contracts that are executed electronically. At the moment, legal uncertainty is one of the key reasons why there is limited use of electronic land contracts (particularly in respect of deeds and witnessing). Given that buying a house may be the largest investment that many people make in their lives, few people will be prepared to take a risk on using electronic contracts if there is the possibility that it does not meet the legal requirements for an effective land transfer. Similarly, property developers and financiers may be reluctant to take this risk if it could jeopardise their being paid or repaid.
7. We acknowledge that some legal practitioners have satisfied themselves as to the legal effectiveness of various aspects of electronic contracts (including those for transfer of land); however, given the potential consequences we consider that market practice will continue to err on the side of paper transactions while there remains any uncertainty with electronic contracts.

Confidence

8. All parties to a sale of land transaction must have confidence in the integrity of the electronic land sale process, particularly in ensuring that there is no unauthorised interference with the contract that may have implications for title. While this will largely be a matter for the parties, government is able to contribute to stakeholder confidence by promoting the security of records held at the Land Registry Services and continuing to recognise fraud as an exception to indefeasibility of title.

Parity with paper

9. Requirements for electronic land contracts should not be more onerous than paper contracts. Fraud is not an issue that is limited to electronic contracts and requirements that only apply to such contracts may have the effect of eroding confidence in the electronic sales process. Similarly, questions of consumer protection are no different for electronic contracts than for contracts written on paper.

CONTRACT FORMALITIES

Exchange of contracts

10. We note the existing requirements for exchange of contracts outlined in section 4.3 of the discussion paper. In our view the exchange of contracts is merely the manifestation of the parties' intention to enter into legal relations and be bound by the contract; a contract will

not fail for want of exchange if the parties otherwise intend to be bound. See for example *GR Securities v Baulkham Hills*.¹

11. Many transactions do not currently involve the exchange of physical contracts, including contracts for the sale of land. If a party is concerned to ensure that they are not bound by the contract sooner than they intend, they are able to include an express provision in the contract indicating from when they intend for the contract to take effect.

Witnessing documents

12. As noted in section 4.2.3 of the discussion paper, contracts for the sale of land are commonly witnessed although there is no legal requirement for this to occur (unless the sale contract is in the form of a deed). Documents that are signed electronically may not be able to be witnessed in a legal sense despite the fact that digital signing technology is able to authenticate the signing party's identity through other means and often more reliably (eg through dual-factor authentication or digital certificates).
13. The ETA should be amended to provide that where a document is required to be witnessed, this requirement will be satisfied if the identity of the party electronically signing the document can be authenticated with a high degree of confidence. This would allow for both visual witnessing (eg in the witness' physical presence or via Skype) and other forms of authentication (eg dual-factor authentication).

Requirements for deeds

14. We note the requirements for deeds set out in section 5 of the discussion paper and in particular, that the common law continues to apply in relation to the requirement that a document must be written on paper, parchment or vellum in order for it to take effect as a deed.²
15. It is unclear whether a document that purports to be a deed and is executed electronically will satisfy this requirement. Where a document fails to take effect as a deed, it may be unenforceable. Even if a document were subsequently printed, it is not clear that this is sufficient to satisfy the legal requirements for a deed.
16. The ETA should be amended to expressly allow electronic execution of deeds (not just in connection with the transfer of land). We note for reference that the United Kingdom has addressed this issue by:

¹ (1986) NSWLR 631 at 634.

² *Scook v Premier Building Solutions Pty Ltd* [2003] WASCA 263

- abolishing any rule that restricts the substances on which a deed can be written or that requires a deed to be sealed and delivered; and
- giving the relevant Minister power to amend any legislation that requires a person's signature or seal or which is required to be delivered as a deed or witnessed so as to facilitate the use of electronic communications.

Other issues – electronic execution by companies

17. Another issue that creates a barrier to using electronic land contracts is the legal uncertainty as to whether a company can execute a contract electronically under s.127 of the Corporations Act 2001 (Cth) and whether a counterparty is able to rely on the assumptions in s.129. Unfortunately, the *Electronic Transactions Regulations 1999* (Cth) exclude the entire Corporations Act from the provisions of the *Electronic Transactions Act 1999* (Cth) that state that use of an electronic signature does not invalidate a transaction.³ This means that counterparties cannot assume that a digitally signed contract binds the company to the contract without obtaining evidence to this effect.
18. While we acknowledge that this is a matter of Commonwealth responsibility, we raise it here to assist in providing a complete picture of current impediments to electronic transactions.

³ Sections 8(1), 9 to 12, 14, 14A, 14B and 15.