

Our Ref: MEM.155538

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](mailto:org-admin@finance.nsw.gov.au)

Dear Colleagues

### **Removing barriers to eContracts**

Thank you for your discussion paper and invitation for submissions.

The submission of Colin Biggers & Paisley is as follows:

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

Yes

We submit that NSWLRS should implement a system of lodgement of electronic dealings by solicitors or conveyancers which mirrors that for the lodgement of ePlans by surveyors. That is, the system should involve:

- (a) access to the NSWLRS electronic dealing lodgment facility being restricted to persons who have applied for and been issued with a userid and password and (via lodgement of test data) have satisfied NSWLRS that they comply with all standards and requirements before final approval is granted to lodge their dealings for registration; and
- (b) an approval to lodge dealings electronically being suspended or terminated where a solicitor or conveyancer:
  - (i) fails to pay NSWLRS invoiced fees;
  - (ii) fails quality assurance checks; or
  - (iii) ceases to remain licensed as a solicitor or conveyancer.

**Q2. Does the Verification of Identity regime replace the need for witnessing for all land registry documents?**

As noted in the NSWLRS paper, VOI already applies to a solicitor or conveyancer acting for a client in a land transaction.

Where a future NSWLRS electronic dealing or annexure to that dealing also has to be executed by parties other than the solicitor or conveyancer acting for a client in the transaction, the solicitor or conveyancer who uploads a completed dealing to the NSWLRS for registration should at the same time upload a certificate stating that he or she has taken reasonable steps to identify each party and to confirm that each party signed the dealing or annexure as and where its signature appears. Such a certificate would obviate the need for formal witnessing of party signatures.

If and to the extent that party signatures were nevertheless still required to be formally witnessed, there is no reason for electronic dealings to be regulated in any way differently to paper dealings. There is no good reason for excluding the application of the ETA to documents required to be witnessed. This global exclusion operates only in the ETAs of NSW, Qld and WA and (as occurred last year in SA) should be deleted from the NSW ETA.

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

*Stamping of documents*

The OSR must be consulted on the procedure for "stamping" eContracts.

Currently:

- (a) if a solicitor or conveyancer has EDR (in house stamping) capability, the OSR does not require that solicitor or conveyancer to generate paper for contract stamping; but
- (b) if the solicitor or conveyancer uses an agent for stamping, the OSR requires that the agent be supplied with a signed paper copy of the contract front page and special conditions.

We see reason in a difference of approach because, in case (a), the person handling the contract is stamping it but, in case (b), the person stamping has no familiarity with the transaction.

To facilitate "stamping" of eContracts in future, subject to the views of the OSR, we believe all legal and conveyancing firms should be required to employ at least one person qualified with EDR authority.

*Conveyancing Act section 66ZG*

Section 66ZG provides that:

*(1) An option granted for the purchase of residential property is void:*

*(a) unless it is granted by way of exchange of counterparts, one of which is signed by the purchaser and the other signed by the vendor, or*

*(b) if it is exercisable within 42 days after it is granted or, if a different period is prescribed, within that period.*

An eContract is not an exchange of 2 counterparts each of which is signed only by one party. It is a single document signed by all parties.

There is no reason for procedure to be any different where dealing with an option or contract for sale. Further, given that vendor disclosure provisions operate in relation to options exactly in the same fashion as they do to contracts for sale, we cannot see any good reason for retaining paragraph (b) either.

We therefor submit that section 66G be repealed or, if not, at least section 66G(1)(a) be repealed.

**Q.4 Should legislation intervene to regulate the use of electronic contracts in conveyancing, or is this matter best left for conveyancing practice to develop within the current framework?**

We note that Australian courts have for the last 18 years largely ignored ETA legislation in cases concerning electronic contracts, and that the business community generally (including the legal profession) has remained largely ignorant of the existence (let alone operation) of this legislation.

The reason courts have largely ignored the legislation is that, in the cases where electronic contracts have come to be considered (and there have been many of them), the courts have had no difficulty in applying common law principles and statutory requirements to those contracts in the same way as those principles and requirements apply to any other form of written document.

That said, we see common sense in regulations providing for some basic elements of standardisation, and we submit that the regulations should prescribe that:

- (a) notices may be served by email,
- (b) attachments to a notice by email may include documents in pdf format,
- (c) an email is regarded as having attached documents if the email includes a link that enables access by the recipient to those documents in pdf format, and
- (d) notices may be served by USB if the recipient confirms that it has a computer enabling the USB to be docked and all documents stored in the USB are in pdf format.

The reason we would suggest this potential restriction on technology is that, although web based chat sites (eg Facebook) and business sites (eg PEXA) are already in wide operation and enable communication in a more convenient fashion than email, the legal profession is rather conservative and slow to move on technological advances. Email is the only medium that we could confidently consider to be currently accessible to all lawyers, conveyancers and their clients, and pdf reader programs are either installed in or downloadable into all PC and Mac computer devices. Additionally, because most lawyers and conveyancers also use PCs which include USB ports, that second media option should be added on a "subject to recipient device confirmation" basis. As time goes on, if other methods of communication become universal, they could be added to the regulations. Until that time, if parties want to use such other methods when giving notices and those methods are not permitted by statute or accepted by agreement or custom, they must accept that there is some risk of their notices being held defective.

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

Since August 2015, Colin Biggers and Paisley has issued (and exchanged) over 3,000 property sale contracts electronically on behalf of large project vendors in NSW and Queensland. The principal obstacle has been occasional purchaser or conveyancer reluctance to engage in a paperless transaction (but, we would stress, such reluctance has not been commonplace).

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

Not applicable.

**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?**

Colin Biggers and Paisley, and many other firms who are now also issuing electronic contracts, are having no difficulty in satisfying current Sale of Land Regulation requirements.

As per our answer to question 4, a basic degree of standardisation of format would be desirable, provided it is no more prescriptive than proposed in our answer.

**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?**

As the information provided in electronic or paper formats is the same, we do not agree with any view that, somehow, the level of vendor disclosure protection is reduced where the contract is in an electronic format. We also disagree with the view that vendors may be tempted to "over disclose" in electronic format contracts in order to dissuade purchasers from reading the same. The more complex a contract, the harder it becomes to sell a property. If the government wishes to simplify contract annexure requirements, it should begin by reviewing the required detail in disclosures of council certificates and property title encumbrances. This is an issue relevant to all land sale contracts irrespective of format.

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

In our view, they are so available as a matter of both law and common public understanding.

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

This question appears to assume that it is unreasonable for a vendor to request a reimbursement of printing costs where a purchaser or its lawyer or conveyancer requires a paper document. In our view, vendors should be free to set any conditions they wish in an offer to sell their own property. Why should such conditions not include the format of a contract for sale? If any conditions of a sale offer are not acceptable to a purchaser, it doesn't accept the offer. If a vendor is prepared to lose a sale because it will not withdraw a condition of sale that is unacceptable to a purchaser, why should that not be the vendor's prerogative?

**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 cannot see any reason for creating different conveyancing procedure rules for paper and electronic format contracts.

We also see no reason why it should take a solicitor or conveyancer longer to read a contract on its computer than on paper.

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

An assumption that appears to flow through the discussion paper is that risks of fraud and forged signatures are far higher in the case of electronic contracts than with paper contracts.

In our view, the reverse is the case. When an electronic contract is utilised, it is far more difficult for a party to falsely deny that it signed a certain document at a certain time and in a certain

location, or falsely claim that a contract page is missing, or that the contract terms were any different to those that were agreed.

The discussion paper states (in section 4.2.3) that the decision of the NSW Court of Appeal in *Williams v Crocker* calls into question the effectiveness and reliability of electronic signatures in commercial contracts. We do not agree with this statement, which is presumably based on the comment in paragraph 4 of Ward JA's decision that:

*Williams* [the unsuccessful appellant] raises the spectre that, if this appeal is not allowed, the ability of a trade creditor ever to rely on electronic signatures will be in real doubt. Of course, that arguably elides validity with authentication. Moreover, if it is the case that drastic consequences flow from the application of the principles relating to ostensible authority and ratification in the electronic signing context, that may be a matter for the legislature to address.

In *Williams v Crocker* the proven facts which caused most damage to the appellant's case were that:

- (a) the respondent's signature was forged, and
- (b) the "witnessing" of that signature predated the signature.

So the circumstances and results of this case would have been no different if the contract had been on paper and "wet ink" signed. Cases of paper contract fraud and forged signatures are, sadly, something of a regular occurrence. From time to time, some quite extreme claims of paper document fraud are alleged. See for example the following extract from Lawyers Weekly, published 18 January 2018:

*Suspended lawyer David Allan McHenry has been ordered by the Supreme Court of Queensland to stop telling clients that he is a practising solicitor, amid claims the man forged bank deposit slips, Federal Circuit Court orders and emails from banks.*

*Claims that suspended lawyer David Allan McHenry lied to former clients by saying he had 'fought the Law Society and won' moved the Queensland Legal Services Commissioner to obtain a court order against the man last year.*

*According to the commissioner, a "large number of complaints" from former clients had been received concerning the solicitor's conduct before his practising certificate was suspended by the Queensland Law Society (QLS) in March 2017.*

*Lawyers Weekly understands that the commissioner's case against Mr McHenry concerns complaints from 10 clients about allegedly false, misleading and dishonest behaviour over an eight-year period from 2004 to 2012.*

*Mr McHenry faces 30 charges of alleged misconduct to be heard by the Queensland Civil and Administrative Tribunal later this year.*

*They include a slew of claims that the practitioner made false representations to clients about the progress of their matters and falsified documentation to give his clients the impression that proceedings were afoot when nothing had been done to progress them.*

*One of the charges alleged that Mr McHenry falsified orders by a Federal Circuit Court judge dated March 2017.*

*The commissioner also claimed that on separate occasions, Mr McHenry falsified a grant of probate, forged emails purported to come from CBA and ANZ, and that he forged email purported to come from barrister Steve Kissick.*

*Mr McHenry was also accused of allegedly forging a summons document bearing the seal of the Supreme Court of NSW.*

Far more common are cases of persons who falsely witness documents for reasons of convenience rather than with an intent that they actually understood to be criminal. See for example a report in the Sydney Morning Herald on 19 January 2018 that:

*There is a "widespread" problem with financial advisers cutting corners when clients sign a key superannuation document, the corporate cop has warned, ordering the industry to lift its game.*

*The Australian Securities and Investments Commission on Friday said many advisers were failing to comply with the law when clients signed a document that sets out who will receive their superannuation and insurance benefits if the client dies.*

*The shortcuts being taken could lead to the forms being invalid, potentially creating "very poor outcomes" for consumers, acting ASIC chairman Peter Kell warned.*

*ASIC said some advisers were acting as witnesses on the "death nomination form," as it is known, even though they were not present when the client signed. Other advisers were backdating forms, ASIC said, without providing details on the number of breaches it had found.*

So the bottom line is that, if someone is determined to cheat or defraud, wet ink signed paper presents no greater difficulty than a computer entry. In fact, cheating is more difficult with the computer entry, because it becomes so much harder to cover up the time and place of the fraud (eg, in *Williams v Crocker*, the respondent could prove the time and place his forger and "witness" signed the disputed guarantee, because those times and places were embedded in the computer record).

Accordingly, there is no good purpose in setting a standard method of electronic signature. The only real issue, as Ward JA indicated above, is authentication.

**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?**

As noted above, Colin Biggers and Paisley has since August 2015 issued (and exchanged) over 3,000 electronic sale contracts on behalf of major development clients in NSW and Queensland.

For authentication of local resident purchaser signatories, our process is that a contract will not be issued unless the signatory presents with a passport or drivers licence and, in the case of attorneys, with a copy of the power of attorney. As well as signature authentication, this process also ensures the correct spelling of purchaser names and (where, as is usually the case, the ID document is a drivers licence) confirmation of purchaser addresses. We copy and file scans of the ID documents. For overseas purchasers (and there have been quite a number), we require and retain copies of the same photo ID. We generally cannot confirm first hand that the face of an overseas resident matches the photo ID we receive, but see little scope for fraud in such cases because it's hard to imagine how a forger could benefit from paying a 10% deposit on a property purchased in another person's name.

Having regard to our experience we submit that, if NSWLRS were inclined to prescribe a minimum standard of authentication of purchasers, it would be unnecessary to go beyond requiring the purchaser to produce a drivers licence or passport. In the case of vendor signatories, the same standard would apply, because we could consider it adequate for vendor identification to match the names on those documents with the registered proprietor names appearing on relevant title searches.

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

We see the issue as no different whether a sales contract is in electronic or paper format. Accordingly, if NSWLRS is minded to add a contract witnessing procedure to sale contracts, it should do so for all sale contract formats.

That said, we are not aware of any problems in the past arising from Conveyancing Act section 54A not requiring witnesses to vendor or purchaser signatories. Accordingly, there appears no good reason for alteration of this statutory standard.

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

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

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

We have put these 3 questions together because, in our view, there is a single answer to all 3.

Courts have for hundreds of years been dealing with disputes concerning the question of at what point of time correspondence between parties constitutes a binding contract. Perhaps the best known case in Australia is *Masters v Cameron*. In our view, this long history of disputes (and the remarkably wide range of different fact situations revealed in the relevant case reports) demonstrates that it would be very dangerous, and inadvisable, to legislate a definition of the point of time at which a contract becomes binding.

The NSWLRS paper (at paragraph 4.3.2) describes the recent Queensland Supreme Court case of *Stellard v North Queensland Fuel* as a case concerning "parties inadvertently forming a binding contract through email communications, even though these were expressed to be subject to contract." The case report does not support the suggestion that the court believed the parties formed their contract "inadvertently". Nor is there anything in the case report indicating that the case would have been decided in any way differently if the correspondence had been by way of letter rather than email.

**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)?**

There seems no good reason for deeds to be in paper form only. We agree that this presently appears to be the law, and therefore submit that this barrier should be removed legislatively.

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

As noted in our response to question 12, there is no good purpose in setting a standard method of electronic signature. The only real issue is authentication, which we have dealt with in our response to question 13.

**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?**

We would consider it generally appropriate that there to be a witness for any signatory to a deed who assumes obligations without consideration. The 2 most obvious examples are:

- (a) where the document is a deed poll (ie, there is only one party), and

- (b) where the document is a trust deed, and the trustee is non-corporate, the trustee's and (if there is one) the settlor's signatures should be witnessed.

In cases where obligations are assumed for consideration, there seems no good reason to have different procedural rules for agreements and deeds.

As with paper documents, a witness to a deed signatory should be physically present when the signatory signs. The use of video link for contract witnessing appears logical, but to the best of our knowledge video link facilities are not widely available at the offices of lawyers and conveyancers. For this reason, to facilitate practice in future, it may be a good idea to provide for the making of regulations that can create exceptions to the "witness personally present" rule where NSWLRS is satisfied that a particular video link procedure is adequately reliable and widely available.

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

It is not technically difficult to ensure that an electronic deed signatory be present when the witness signs.

We see the issue as no different whether a deed is in electronic or paper format. Accordingly, If NSWLRS is minded to alter custom by adding a further witnessing condition for deeds, it should do so for all deed formats.

Yours faithfully



**Mark Morgan**  
Consultant  
Email: mark.morgan@cbp.com.au