

# Discussion Paper

## Removing barriers to electronic land contracts

December 2017

Submissions accepted until **5pm Friday, 16 February 2018**

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Title: Discussion Paper – Removing barriers to electronic land contracts

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# Minister's Foreword

There are broadly three phases to property acquisition; the investigation phase, the acquisition phase and the registration of title phase.

For the investigation phase, we have introduced significant reforms to the real estate and property sector including pre-purchase inspection reports, better training standards for agents and through the introduction of Rental Bonds Online.

For the registration of title phase, we have committed to a detailed timetable for the introduction of paperless conveyancing, reducing settlement delays, removing reams of unnecessary paperwork and preventing fraud.

Unfortunately the laws dealing with property acquisition phase are still stuck in the age of paper and ink.

This paper seeks to take the 20th century laws governing property acquisition and bring them in line with the expectations of a 21st century homebuyer.

Alongside being one of the most important life events for Australians, buying a home is also one of the most stressful experiences. In some cases a 28 day settlement feels more like 28 hours. There just isn't enough time to get it all done.

But imagine if you could do everything from paying your deposit to settling your home from your smart phone, PC or tablet.

In our digital world, people should not have to rush to solicitors and bankers to sign paper documents. Instead, that time can be better spent reading through the important documents that upon execution, would mark one your most important life events.

Fortunately, in the digital age, this is no longer a fantasy. Advancements in technology mean that we now have the ability to sign and exchange contracts online in a secure and reliable manner. Our government is committed to improving the citizen experience when it comes to property acquisition whilst at the same time preserving if not enhancing the protections and safeguards currently available.

I am confident that the paper will initiate a discussion that will help pave the way for a better experience for homebuyer's and the many professionals involved in the purchase or sale of property.

In the 21st century to drive positive change we don't just need to think differently, we need to think digitally. Critical to any good reform is consultation and listening to stakeholders so that we are all on this journey together. Your contribution will enable us to breathe life into a system that will benefit the next generation of homebuyers in NSW.



Victor Dominello MP

**Minister for Innovation and Better Regulation**



## Purpose of this Paper

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New technology is driving more rapid change than ever before, and change in digital technology is accelerating each year. Today, people expect to manage their lives around technology. They want greater efficiencies, fewer errors, more transparency, fewer delays. It is critical for every industry to keep pace with changing technology. The Government wants to support industry involved in the conveyancing process transition to a digital environment.

This Paper explores the role of digital technology in conveyancing transactions. It considers ways that electronic processes may assist in achieving a seamless and expedient transaction from contract formation to completion. It seeks to uncover legal impediments to this process under current law, and identify solutions that take advantage of new technology to create a more efficient conveyancing process and maintain the integrity of the system.

Buying and selling land has traditionally involved large volumes of paper. Contracts are prepared in duplicate with extensive disclosure documents attached, certain forms require 'wet' signatures and, up until recently, settlement monies have primarily been paid by bank cheque. New South Wales is transitioning to a wholly electronic system for settling conveyancing matters and for the lodgment and registration of land dealings ('eConveyancing'). While this reform assists in *finalising* a property transfer quickly and reducing the scope for delay and error, it only deals with part of the sale of land process. The beginning of a transaction, including the negotiations between the parties, vendor disclosure and exchange of contracts, falls outside the scope of the eConveyancing platform and has traditionally involved manual processes and paper instruments.

As digital signatures become increasingly prevalent in commercial dealings, practitioners have started to use wholly electronic contracts in conveyancing transactions. While some firms embrace this technology, others are reluctant to leave the paper system behind, citing concerns about meeting vendor disclosure requirements and the validity of electronic contracts under current law. There are some documents relevant to conveyancing that must still be prepared in paper. Deeds and some registry instruments (such as mortgages and leases) must meet certain formalities, including witnessing, which prevent their execution by electronic means.

This Paper considers whether there is a need for legislation to regulate the use of digital technology in conveyancing, or whether practitioners should continue utilising and adapting available digital technology within the existing, well-established, framework. Perceived impediments relating to vendor disclosure, formal requirements of writing and signature, as well as exchange of contracts are also discussed.

An efficient 'end-to-end' electronic conveyancing process must be balanced against the need for adequate consumer protection. Any legislative change to facilitate electronic contracts or digital disclosure must not create uncertainty in the contract or expose either party to vulnerability. Processes must continue to provide the transparency and protection that the current disclosure regime affords to purchasers, while still providing certainty to both parties that the contract will continue to be binding once formed.

## How to make a submission

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Anyone wanting to comment on the proposals or the issues raised in this Paper is invited to make written submissions.

Please send all submissions to [ORG-admin@finance.nsw.gov.au](mailto:ORG-admin@finance.nsw.gov.au)

Alternatively, please send any paper submissions to:

Electronic contracts review

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SYDNEY NSW 2000

**All submissions must be received by 5pm Friday, 16 February 2018.**

All submissions may be made publicly available. Should you wish to have your personal details omitted in the course of publication, please clearly indicate this in your submission.

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# 1. Background

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For over 15 years the *Electronic Transactions Act 2000* has recognised the importance of the digital economy and has provided a regulatory framework to allow transactions, like contracts and agreements, to take place electronically. The legislation facilitates electronic transactions by stating that a transaction is not invalid merely because it “took place wholly or partly by means of one or more electronic communications”.<sup>1</sup>

Using the legislation, formal requirements for writing and signatures can be satisfied electronically. A legal requirement for information to be given in writing can be provided electronically if the information can be accessed and used for subsequent reference and if the parties consented to the transmission of the information by electronic means.<sup>2</sup>

Where a person’s signature is needed to validate a transaction, that requirement can be met if a method of signing is used to identify the person and to indicate the person’s intention in relation to the information communicated.<sup>3</sup>

## 1.1 Application of the *Electronic Transactions Act* to land transactions

The *Conveyancing Act 1919* and the *Real Property Act 1900* impose specific requirements and formalities on transactions that dispose of land or create an interest in it. Section 23C of the *Conveyancing Act 1900* provides that “...no interest in land can be created or disposed of except by writing signed by the person...” or the person’s agent. Before 1 January 2013 the *Electronic Transactions Act 2000* (the ETA) did not apply to s 23C of the *Conveyancing Act 1900*, significantly restricting the application of electronic technologies to land transactions. This specific prohibition has been repealed but barriers outside of the ETA prevent the Act applying fully to land transactions.

A major hurdle limiting electronic land transactions is the requirement for signatures to be witnessed. Witnessing has traditionally played an important role in authenticating the signatory and providing some formality around the signing process. This formality has prevented some parts of the ETA applying to land transactions. The signing and witnessing provisions of the Act do not apply to:

any requirement for “...a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document”.<sup>4</sup>

This Paper aims to identify all obstacles that prevent electronic transactions relating to land and that place any uncertainty or confusion around the validity of a land transaction. It looks at whether other forms of consumer protection may be needed in the electronic environment and asks how electronic technologies can be utilised to provide a better experience for all parties.

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<sup>1</sup> s 4(1)(a) and s7 *Electronic Transactions Act 2000* (NSW)

<sup>2</sup> s 8 *Electronic Transactions Act 2000* (NSW)

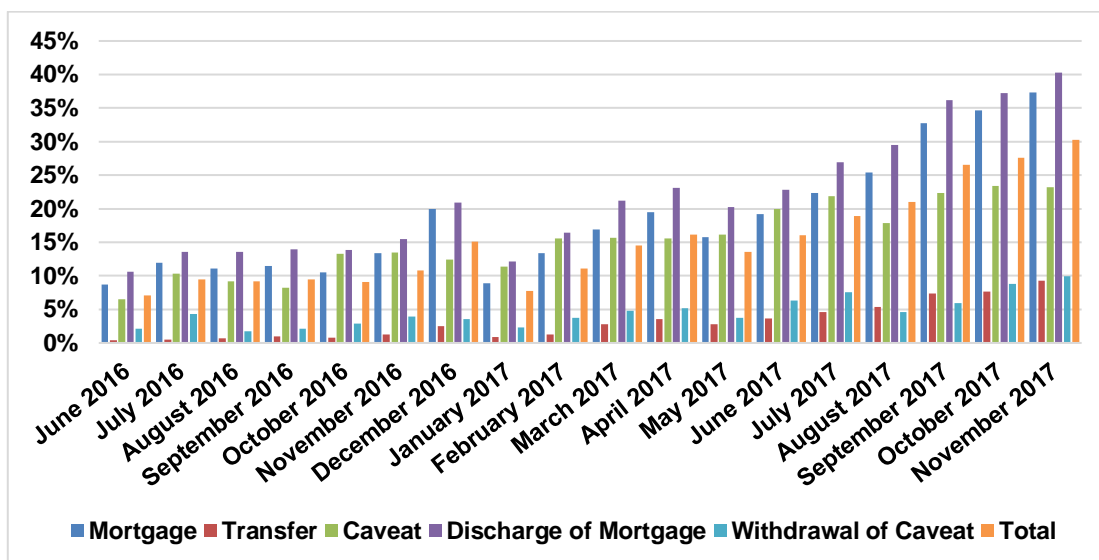
<sup>3</sup> s 9(1)(a) *Electronic Transactions Act 2000* (NSW)

<sup>4</sup> cl 5 *Electronic Transactions Regulation 2017* (NSW)

## 2. Land transactions and eConveyancing

The property industry is transitioning towards a 100% digital future. In July 2016, the then Minister for Finance, Services & Property, the Hon Dominic Perrottet MP announced plans to transition to electronic conveyancing ('eConveyancing') and to progressively phase out paper certificates of title in NSW.<sup>5</sup> By July 2019, all transfers, mortgages and discharges of mortgage must be lodged electronically for registration. Already, just under one third of all lodgments in NSW are electronic (refer Table 1 below).

**Table 1 - Percentage of electronic lodgments to total lodgments**



eConveyancing allows lawyers, conveyancers and financial institutions to enter a secure, online workspace where they interact online. Documents are created, signed and lodged within the online environment and parties complete all necessary steps to settle the transaction within the online environment.

Only subscribers can transact through the online platform that is operated by PEXA<sup>6</sup>, which is currently the only electronic lodgment network provider. Solicitors, licenced conveyancers, financial institutions and government bodies can become subscribers and will be bound by the Participation Rules that govern the use of the eConveyancing platform. Subscribers have strict obligations in relation to Verification of Identity and Client Authorisations which allow them to sign on the client's behalf.<sup>7</sup>

In many ways, the digital lodgment process still relies heavily on paper documents, particularly for mortgage transactions. Mortgages lodged through PEXA are usually backed by a paper instrument which is retained for evidentiary purposes and to ensure the transaction is valid.

<sup>5</sup> See Government announcement: [www.finance.nsw.gov.au/about-us/media-releases/first-step-path-paperless-conveyancing](http://www.finance.nsw.gov.au/about-us/media-releases/first-step-path-paperless-conveyancing)

<sup>6</sup> Property Exchange Australia Ltd

<sup>7</sup> NSW Participation Rules for Electronic Conveyancing



There are a number of barriers preventing fully digital mortgages. To create a valid mortgage, the owner of the land must “...execute a mortgage in the approved form.”<sup>8</sup> The Real Property Act requires all land dealings to be attested by a witness who is not a party to the transaction and to comply with this requirement the approved form requires the borrower’s signature to be witnessed.<sup>9</sup>

When a mortgage is lodged through the online lodgment platform the mortgagee must certify that it holds “a mortgage granted by the mortgagor on the same terms as this Registry instrument”. There is doubt as to whether this certification requires the counterpart mortgage to be also granted “in the approved form” and witnessed.

One suggestion to resolve the uncertainty is simply to amend the approved form of mortgage to remove the requirement for witnessing so that the ETA can apply. But are the general provisions of the ETA sufficient for mortgage transactions or should a stricter standard of authentication for mortgage documents be prescribed?

The Registrar General’s Rules<sup>10</sup> impose a strict standard of verification of identity (VOI) on lawyers and conveyancers who act for a client in a land transaction. This VOI regime would replace the need for a witness in most circumstances but what happens where a mortgagor is not represented by a lawyer or conveyancer?

For a discussion of electronic signatures and authentication of documents see Part 4.2.2 of this Paper.

Similar witnessing requirements apply to other registry instruments, such as leases. All registry instruments will eventually need to be lodged electronically with NSW Land Registry Services (formerly Land and Property Information) so reforms around witnessing and execution of mortgage documents should also be extended to other types of registry transactions.

#### 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?**
- Q.2 Does the Verification of Identity regime replace the need for witnessing for all land registry documents**
- Q.3 Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?**

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<sup>8</sup> s 56(1) *Real Property Act 1900* (NSW)

<sup>9</sup> s 36(1D)(b) *Real Property Act 1900* (NSW)

<sup>10</sup> The Conveyancing Rules, made under s 12E of the *Real Property Act 1900*, apply to documents lodged in paper, and the Participation Rules, made under s 23 of the *Electronic Conveyancing National Law (NSW)*, apply to documents lodged electronically.

### 3. Electronic contracts for the sale of land

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The eConveyancing process is focused on the *completion* of a property transaction. Settlement is booked and conducted online. Settlement cheques are not needed as funds are disbursed electronically, and the direct link with the title registry allows for immediate lodgment and registration of the title documents.

The eConveyancing reform minimises the risk of error and delay associated with manual conveyancing processes, however it does not cover the complete transaction. The negotiations between parties, vendor disclosure and exchange of contracts all fall outside the current eConveyancing framework.

The current edition of the standard form Contract for the Sale of Land<sup>11</sup> is available only as an electronic file. Most disclosure documents are now issued to practitioners by email. As a result, some firms are now preparing wholly electronic contracts with parties signing on tablets (or through other electronic means) to enable more efficient digital 'end to end' conveyancing.

Even though some firms embrace this technology, others are reluctant. There are some practical obstacles to a completely paperless process, like the need for hard copies of documents to be produced for stamp duty assessment, and the requirement to retain supporting documents in hard copy for evidentiary and compliance purposes. Other perceived legal impediments include:

- Vendor disclosure obligations
- Whether electronic contracts satisfy the legislative requirement for writing
- Secure methods of electronic signature
- How electronic contracts are 'exchanged'

The well-established requirement for land contracts to be in writing and signed has been developed to ensure transparency in the transaction and to protect against fraud. Those using electronic contracts have sought to fit modern digital processes into the traditional framework, to achieve those same outcomes. The reluctance of others to embrace the process raises the question of whether there is the need for legislation to clarify the law surrounding electronic contracts. Should practitioners be permitted to continue using digital technology within the traditional requirements, or should the law be changed to formalise and regulate this process?

#### 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?**
- Q.5 Have you used electronic contracts? What, if any, obstacles did you encounter in the electronic process?**
- Q.6 If you have been reluctant to use electronic contracts, what are your concerns?**

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<sup>11</sup> 2017 edition, issued by the Law Society of NSW and Real Estate Institute of NSW.

## 4. Issues affecting electronic contracts

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### 4.1 Vendor disclosure

In New South Wales, the *Conveyancing (Sale of Land) Regulation 2017* ('Sale of Land Regulation') prescribes a comprehensive vendor disclosure regime that requires the vendor to disclose to a purchaser certain information about the property. This obligation is met by attaching prescribed documents to the contract that relate to issues such as the title, zoning and sewerage of the property.<sup>12</sup>

Residential property can only be marketed for sale if a complete version of the draft contract (including all attachments) is available for inspection.<sup>13</sup> If a vendor has not complied with disclosure requirements, a purchaser can rescind the contract within 14 days.<sup>14</sup> These robust protections mean that contracts can be exchanged quickly, with minimal pre-purchase investigation, reducing the incidence of gazumping.<sup>15</sup>

Anecdotal reports suggest that the average size of contracts is increasing. The contractual terms themselves are not generally lengthy<sup>16</sup>, but the disclosure documents are often considerable. Contracts can extend to several hundred pages. Some off-the-plan contracts and complex strata contracts (particularly where the strata scheme forms part of a community scheme) can be over a thousand pages long.

In 2016, the Office of the Registrar General released a discussion paper<sup>17</sup> as part of a review of the Sale of Land Regulation. The paper considered whether the number of disclosure documents should be reduced. This proposal was not generally supported. Instead, it was suggested that there was additional information that a vendor should be disclosing<sup>18</sup>.

The increasing size of the contract creates two problems:

- 1. COST** - Adding more pages to a contract increases the legal cost for vendors and purchasers, both in preparing the document and reviewing it. Paper, printing and postage costs increase as the size of the document increases, particularly given the contract is prepared in duplicate.<sup>19</sup>

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<sup>12</sup> s 52A *Conveyancing Act 1919* (NSW), cl 4 and Schedule 1 *Conveyancing (Sale of Land) Regulation 2017* (NSW)

<sup>13</sup> s 63, *Property, Stock and Business Agents Act 2002* (NSW)

<sup>14</sup> cl 17 *Conveyancing (Sale of Land) Regulation 2017* (NSW)

<sup>15</sup> Gazumping occurs when a vendor has reached a verbal agreement with one buyer, but sells to another at a higher price before the first purchaser has exchanged contracts.

<sup>16</sup> The standard form Contract for the Sale of Land issued by the Law Society of NSW and Real Estate Institute of NSW (2017 edition) is 18 pages long. Additional 'special conditions' pages are usually added to the standard terms.

<sup>17</sup> Discussion Paper: Review of the Conveyancing (Sale of Land) Regulation 2010 and the Conveyancing Process in New South Wales; August 2016; NSW Office of the Registrar General

<sup>18</sup> The Sale of Land Regulation was remade to require copies of all by-laws affecting a strata scheme to be attached to a contract for a strata unit, as well as an additional sewer diagram for all properties.

<sup>19</sup> Contracts are prepared in duplicate, with the vendor and purchaser each signing an identical counterpart, and the formal agreement coming into existence when these are 'exchanged'.

**2. COMPLEXITY** - As more information is attached to the contract, the more complex the agreement becomes. It can be difficult for a purchaser to determine the key issues affecting a property when that information is buried within hundreds of pages. For off-the-plan transactions, the proposal<sup>20</sup> to introduce a form of prescribed disclosure statement may assist in alerting purchasers to the key features of the relevant contract, but this will not reduce the size of the complete document.

If the information a vendor must disclose cannot be reduced, consideration must be given to more practical and efficient ways for that disclosure to occur. The eConveyancing reform moves settlement, lodgment and registration of title to an electronic environment. Should vendor disclosure requirements also be moved to an electronic format?

This might be achieved by permitting disclosure documents to be given on separate electronic media, such as a USB stick or a cloud-based file sharing program, rather than require these to be attached to a paper contract. Alternatively, the issue may be alleviated where complete contracts are created and executed electronically.

Most disclosure documents are now emailed to practitioners and do not need to be scanned and converted to an electronic file. Removing the need to print these documents in duplicate will make for a more efficient process and reduce expenses. Parties will also enjoy the convenience of accessing relevant files on mobile and electronic devices. However, not all purchasers will be able to receive documents electronically, or may not be able to read the document on a tablet or screen. Vendors may seek to pass on costs of preparing paper contracts to these purchasers.

While the move towards digital disclosure may be more efficient and expedient, the proposal could also be counterproductive. Without the limitations of paper, vendors may be tempted to 'over-disclose' by including unnecessary documents in the electronic file. The purchaser, faced with an enormous bundle of documents in a compressed file format, may find it difficult to determine the key issues. A more complicated disclosure is likely to increase the costs and delay the exchange of contracts. Reforms to address the size of the contract must not cause any unnecessary delay, or place the purchaser at a disadvantage.

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<sup>20</sup> Discussion Paper: Off-the-Plan Contracts for residential property; November 2017; NSW Office of the Registrar General (Part 2 "Mandatory 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?
- 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?
- Q.9 Are contracts 'available' at the time a property is marketed, if only in electronic format?
- Q.10 Should vendors be permitted to pass on printing and associated costs to a purchaser who cannot receive documents electronically?
- 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)?

## 4.2 Contract formalities

### 4.2.1 Writing and signature requirements

Generally, simple contracts do not have to comply with any formality. However, specific requirements apply to contracts disposing interests in land. In New South Wales, a contract for the sale of land is not enforceable unless it is in writing and signed by the party to be bound.<sup>21</sup>

### 4.2.2 Signing electronically

Online signature tools enable parties to affix signatures without physically signing documents. These products are particularly useful when parties are interstate or overseas, saving time and costs in a transaction. Parties do not have to be in the one place to sign a document, there is no need to rely on post or courier services to deliver hard copies of documents, and the scope for error in execution (such as where a party signs in the wrong place on a document or otherwise signs incorrectly) is reduced.

An **electronic signature** is essentially any form of electronic communication that is intended to be a person's signature. This may be effected in several ways, including:

- signing a tablet or mobile device with a stylus;
- using a scanned image of a person's signature in electronic communications;
- a person typing their name into a webpage within a document and acknowledging this to be a signature;
- through the use of an encrypted 'digital signature'.

A **digital signature** is a particular type of electronic signature. It is a commercial product that utilises public key cryptography to provide a more secure method of identifying the author of a document. The process requires a mathematically linked pair of randomly generated numbers, being a private key and a public key. The private key is used solely for signing documentation, while the public key is used by the

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<sup>21</sup> s 54A *Conveyancing Act 1919* (NSW)

recipient to verify the signature is that of the person purporting to sign, and that the document has not been altered.

The ETA validates electronic signatures in certain instances. An electronic communication is taken to meet the requirements for a signature if a method is used to identify the party signing, and the signatory has consented to the use of the electronic communication as a signature.<sup>22</sup> The consent may be obtained by an acknowledgment that, when clicking an “accept” box, that acceptance is taken to be a signature for the purposes of the legislation. The method of identification must be “as reliable as appropriate” in the circumstances, which will differ in each case. This is likely to be satisfied by solicitors and conveyancers through VOI practices required by eConveyancing<sup>23</sup> although others who facilitate the signing of contracts (such as real estate agents) are not bound by the same VOI obligations.

#### 4.2.3 Reliability of electronic signatures and witnessing

There is no requirement for the sale of land contract to be witnessed, although this is prudent practice from an evidentiary perspective. If a party to an agreement later claims not to have signed the document, the witness may be called upon to confirm that execution occurred.

Difficulties arise when it is necessary to prove the identity of the person who has purportedly signed an agreement in circumstances where the signature has not been witnessed in the traditional sense. While digital signatures provide greater security than using an image file of a person’s signature or signing a tablet with a stylus, particularly in terms of ensuring the contents of the document has not been altered since the signature was applied, the unauthorised use of this technology can render a contract unenforceable.

The decision of the NSW Court of Appeal in *Williams v Crocker [2016]*<sup>24</sup> calls into question the effectiveness and reliability of electronic signatures in commercial contracts. In that case, the Court refused to enforce a director’s guarantee which was executed using a digital signature. The director’s digital key was used to place his signature on the document, but without his knowledge. The Court found that the use of a digital signature did not amount to ostensible authority for someone else to use the signature and the guarantee was not enforceable. This decision raises questions about the reliability of a digital signature in the absence of clear evidence that a person has authorised its use.

Ascertaining authority is also a key concern when parties are signing on behalf of another. This might occur pursuant to a Power of Attorney, which is a paper document. Also, it is not uncommon in conveyancing transactions for parties to authorise their solicitor, conveyancer or auctioneer to sign a contract on their behalf, often through a simple letter of authority. Ascertaining authority may be difficult where a contract is signed electronically but is supported by an authority given in paper.

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<sup>22</sup> s 9(1) *Electronic Transactions Act 2000* (NSW)

<sup>23</sup> Rule 4, Conveyancing Rules and Rule 6.5, NSW Participation Rules for Electronic Conveyancing

<sup>24</sup> *Williams Group Pty Ltd v Crocker [2016]* NSW CA 265

Concerns about the unauthorised signing of electronic contracts may be alleviated by requiring that a witness attest to the signing. This may seem to be counterproductive as electronic signing allows parties to execute documents without having to be in the same room as all parties. However, other methods of attestation may be considered, such as witnessing through video link. A prescribed method of identifying the signatory drawing on existing VOI requirements may also provide further protection.

Electronic signatures are not validated by legislation in all cases. As noted, signatures which must be witnessed or attested to are exempted from the operation of the ETA. While contracts do not need to be witnessed, some bodies corporate and incorporated associations must execute documents under seal in the presence of a witness.

A further complication exists for companies. While the Commonwealth *Electronic Transactions Act*<sup>25</sup> authenticates electronic contracts and signatures in a similar manner as discussed in the New South Wales context, these provisions do not apply to the *Corporations Act 2001* (Commonwealth). This means that where a company has purportedly executed a contract electronically, the other contracting party cannot rely on the Commonwealth ETA for validation of that signing method<sup>26</sup>.

Any clarification on the validity of an electronic signature on a sale of land contract must ensure that contracting parties are protected from fraudulent or unauthorised use of their signature. However, care must be taken to ensure that certainty of contract is not affected, and that parties can proceed confidently on the basis that an electronic signature is as binding as 'wet' signature on a paper instrument.

#### Issues for Discussion

- Q.12 What methods of electronic signature are appropriate for sale of land contracts?**
- 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?**
- Q.14 Should there be a witnessing requirement for requirement for electronically signed contracts? How might this be achieved in an electronic environment?**

## 4.3 Exchange of contracts

### 4.3.1 The requirement for exchange

In New South Wales, a contract for the sale of land becomes binding when contracts are exchanged. Up to this point, the parties can change their minds and withdraw from the agreement. Even though a

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<sup>25</sup> *Electronic Transactions Act 1999* (Cth)

<sup>26</sup> s 127(1) of the *Corporations Act 2001* (Cth) permits a company to execute a document without a seal, provided it is signed by two directors, a director and a secretary, or the sole director/secretary. Section 129 provides that a person can assume the document has been validly executed if it appears to be executed in accordance with s127(1).

vendor has agreed on a price with one purchaser, unless there has been an exchange of contracts, that vendor can negotiate with other interested parties and elect to sell the property to someone else.

Exchange of contracts occurs when the parties are ready to proceed with the transaction. The vendor and purchaser, who have each signed separate identical<sup>27</sup> copies of the agreement, physically exchange the counterparts. The purchaser receives the copy signed by the vendor, and the vendor receives the copy signed by the purchaser. The contract is dated and the 10% deposit<sup>28</sup> is paid at this time.

The exchange process provides certainty as to when the parties' obligations arise, and has been described as 'the crucial and vital fact which brings the contract into existence'.<sup>29</sup> There is a strong presumption that, until the parties exchange contracts, no binding agreement has come into existence.<sup>30</sup> However, the Supreme Court of NSW has considered that there is nothing to stop parties forming a binding contract without a formal exchange of counterparts, provided there is clear evidence that this is their intention.<sup>31</sup> This would seem to permit the execution of an electronic contract where both parties agree to the same terms in an electronic instrument.

#### 4.3.2 Exchange of Contracts in an electronic environment

How does exchange of contracts work in an electronic environment? To overcome logistical issues, solicitors and conveyancers have exchanged contracts by telephone, facsimile and email. Each of these arrangements relies on there being two counterpart agreements, one signed by the vendor and the other signed by the purchaser. Where there is a wholly electronic contract, there are no counterparts to be exchanged. In some instances, when the parties are ready to exchange contracts, the vendor's representative performs the exchange by clicking an 'exchange' button in an online platform. This raises issues about the parties' intentions, and how to determine the time at which the binding obligations come into existence.

In Queensland, there is no formal exchange of contracts as is the case in New South Wales. Rather, the contract becomes binding when both parties sign it. A recent case has seen parties inadvertently forming a binding contract through email communications, even though these were expressed to be 'subject to contract'. In *Stellard Pty Ltd v Sharmen Pty Ltd* [2014]<sup>32</sup>, the Supreme Court of Queensland found that negotiations conducted by email amounted to a binding contract for the sale of land, and that the electronic communication and signing of an email satisfied the requirements of writing under the *Property Law Act 1974 (Queensland)*, which is in the same terms as the requirement in New South Wales.

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<sup>27</sup> In the exchange process, contracts are compared to ensure they are identical. However, in *Sindel v Georgiou* (1984) 154 CLR 661, the High Court held that it was possible to have a binding agreement where counterparts were not identical, but the question is one that ultimately depends on ascertaining the parties' intention.

<sup>28</sup> Or as otherwise agreed.

<sup>29</sup> *Eccles v Bryant* [1948] Ch 93 at 99, cited with approval by the High Court in *Sindel v Georgiou* (1984) 154 CLR 661

<sup>30</sup> *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 per McHugh JA at 634

<sup>31</sup> *Hill v Newth* [2014] NSWSC 298 at [20]

<sup>32</sup> *Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd* [2015] QSC 119



The exchange of contracts process in New South Wales gives certainty to the timing of obligations. Without a formal exchange, the objective intention of the parties will determine the time at which the contract becomes binding. Any proposal that removes the accepted exchange of contracts must not create uncertainty in the contractual relationship.

#### Issues for Discussion

- 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?**

## 5. Deeds

Deeds are special type of instrument used to ensure agreements that do not comply with requirements for contracts (such as consideration) are still be valid and enforceable. Deeds have been described as 'the most solemn act that a person can perform with respect to a particular piece of property or other right'.<sup>33</sup> Formalities established by common law<sup>34</sup> and modified by legislation<sup>35</sup> dictate the way in which a deed must be signed to make it enforceable. Essentially, deeds executed in NSW must be in paper format, must be signed in a particular fashion and must be witnessed.

Deeds are used for a variety of reasons in land transactions. They are used to establish trusts, to create options for the purchase of property, to vary contracts. Land held under old system title must be conveyed by deed.<sup>36</sup>

While the ETA permits certain instruments to be signed electronically, this provision does not apply to documents which must be witnessed.<sup>37</sup> Deeds are therefore presently excluded from the application of the signature provisions of the ETA, by virtue of the witnessing requirement. The common law requirement for a deed to be executed on paper or parchment is an added impediment, which may be resolved legislatively.<sup>38</sup> The United Kingdom has passed legislation to remove the restriction on the types of substance on which a deed may be executed.<sup>39</sup>

Logistical issues arise in land transactions where some parts of the transaction are effected in deed format. An electronic contract will need to be varied by a paper form deed of variation. An option deed

<sup>33</sup> *Manton v Parabolic Pty Limited* (1985) 2 NSWLR 361, at 369 per Young J

<sup>34</sup> *Goddard's Case* (1584) 76 ER 396 at 398 "there are but three things of essence and substance of a deed, that is to say writing on paper or parchment, sealing and delivery". Signature, sealing and delivery has been addressed by s38 *Conveyancing Act 1919* (NSW)

<sup>35</sup> s 38 *Conveyancing Act 1919* (NSW)

<sup>36</sup> s 23B *Conveyancing Act 1919* (NSW)

<sup>37</sup> Clauses 5(f) and 6(f) *Electronic Transactions Regulation 2000* (NSW)

<sup>38</sup> Seddon, N; *Seddon on Deeds* (2015); The Federation Press at [2.3]

<sup>39</sup> s1a *Law of Property (Miscellaneous Provisions) Act 1989* (UK)

must include as an annexure a copy of the proposed contract, in paper format, even though that contract could be effected electronically.

Should deeds transactions continue to be limited to paper documents, formally executed and witnessed? Witnessing has traditionally been seen as a fraud prevention measure. However, secure digital signature tools arguably perform similar functions in reducing scope for fraud and may be seen to perform the traditional role of an attesting witness, albeit in an electronic format.

#### **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)?**
- Q.19 If a Deed is to be executed electronically, what form of electronic signature is appropriate?**
- 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?**
- Q.21 Should the signatory be present when the witness signs?**