

eConveyancing: principles, platforms and procedures

By Simon Blount & Claire Martin



Dr Simon Blount is a barrister at State Chambers and Adjunct Associate Professor at University of Notre Dame Australia. **Claire Martin** is a Property Lawyer at Kreisson.

eConveyancing is simply on-line conveyancing in which contracts are created and exchanged, documents lodged for registration, funds transferred, and interests registered, entirely electronically. The legality of the electronically created and registered interests is the product of the law's indifference to contractual and documentary form and the express legislative intent of the Electronic Conveyancing National Law ('ECNL').

Principles

The United Nations Model Law on Electronic Commerce ('MLEC') creates functional and legal equivalence between electronic and paper media by defining concepts such as 'writing', 'signature' and 'original' in ways that include electronic records and signatures.

The key provision is contained in §5 - that an electronic information will not be invalid solely on account of it being wholly or partly in electronic form. Further provisions are that an electronic information will be in writing if it is accessible so as to be useable for subsequent reference; a signature will not be invalid so long as it is appropriate to the purpose for which the electronic information was generated and a method is used to identify the signatory; and a contract shall not be invalid solely on account of it being wholly or partly in electronic form.

Legislation based on the MLEC has been enacted in every jurisdiction in Australia. Section 8 of the *Electronic Transactions Act 1999* (Cth) reproduces §5 of the MLEC. Section 9 provides a narrower enabling of electronic communications than the MLEC because it refers only to information required by government. Section 10 carries the added burden of an objective test of 'reliability' of method to identify the signatory (*Get Up Ltd v Electoral Commissioner* (2010) 189 FCR 165; see also *Russells v McCardel* [2014] VSC 287).

Arguably, the common law does not require the assistance of legislation to recognise the validity of electronic writing and signatures for dealings in real property. Since the nineteenth century, common law courts have held that telegrams were capable of forming valid contracts for transacting interests in land (*Godwin v Francis* (1870) LR 5 CP 295). Since then, courts in the United States, Canada, Australia, New Zealand and Singapore have held mailgrams (*Hessenthaler v Farzin* (1989) 564 A.2d 990), faxes

Snapshot

- The legality of the electronically created and registered interest is the product of the law's indifference to contractual form and the express legislative intent of the Electronic Conveyancing National Law.
- The question of authority to sign is likely to arise in contested transactions.
- Digital signatures are only as reliable as the persons entrusted with them.

(*Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* (NSWSC, Young J, No 3551 of 1989, 15 August 1989, unreported)) and emails (*Shattuck v Klotzbach* (2001) 14 Mass L Rep 360; *Rosenfeld v Zerneck* (2004) 776 NYS 2d 458; *Girouard v Drouet* [2012] N.B.J. No 136; *Cox v Coughlan* [2014] NZHC 164; *Joseph Matthew anor v Singh Chiranjeev anor* [2009] SGCA 51) capable of forming valid contracts for dealings in interests in land.

Where the courts have not upheld the validity of such contracts it is because the substance, rather than the form, has been deficient (*Harvey v Facey* [1893] AC 552; *Singer v Adamson* 2003 WL 23641985 affd (2005) 837 NE 2d 313).

The object of the ECNL, adopted by each state and the Northern Territory in 2012 and 2013, is to enable documents in electronic form to be lodged and processed by the land titles offices of each participating jurisdiction without derogating from the fundamental principles of the Torrens system of land title. Section 13 of the ECNL provides for the creation of an Electronic Lodgement Network ('ELN'), enabling the preparation of land titles instruments and other documents in electronic form for electronic lodgement and processing by land titles offices. Sections 14 and 15 provide that the Registrar General may operate an ELN or approve another person to be an Electronic Lodgement Network Operator ('ELNO').

Sections 22 and 23 of the ECNL empower the Registrar General to make operating rules for ELNOs, and participation rules for subscribers to an ELN. In practice, Registrars General adopt the Model Operating Rules and Model Participation Rules ('MPR')

Section 3 of the ECNL defines a subscriber as a person authorised under a participation agreement to use an ELN to complete conveyancing transactions either on their own, or on someone else's behalf. Rule 4 of version 3 of the New South Wales MPR prescribes eligibility criteria for subscribers, including that they must be of good character and comply with the insurance rules at schedule 6 to the MPR. Sections 26 and 27 of the ECLN provide that subscribers must comply with the participation rules, but that the Registrar General may waive a requirement.

Platforms

The 2017 version of the standard Law Society of NSW and REINSW Contract for Sale and Purchase of Land, known as

the Electronic Contract of Sale ('eCOS'), includes Clause 30 (initially introduced in the 2014 version) regulating Electronic Transactions or eSettlements.

Sub-clauses 30.1 - 30.4 provide that the purchaser may opt for an eSettlement but either party may opt out, even after the purchaser has given notice of opting in. Sub-clauses 30.5 - 30.10 detail the timeframes within which the vendor must create, and the purchaser must join, the electronic workspace and the time frames for adjustments and the digital signature of all documents prior to completion. Subclauses 30.12 - 30.13 provide for the circumstance of online platforms failing at the time set for completion.

It is not possible to electronically sign the eCOS in the format provided by the Law Society. However, in 2015 several large law firms created their own online platforms to facilitate eSigning and eExchange and in 2016, *Infotrack* released *SignIT* making the technology accessible to thousands of law firms. All of the known platforms currently available are supported by *DocuSign*.

DocuSign allows the making of a secure, verifiable and storable digital signature. Digital signatures are difficult, if not impossible, to forge. However, their weakness is insecure management of the private key by the maker of the digital signature.

Property Exchange Australia ('PEXA') is Australia's only ELNO. It is an online platform allowing the creation and signing of settlement documents by vendors and purchasers solicitors, the notification of funds available and owing by third parties, the notification of directions to pay, the notification of pay out figures from discharging mortgagee, and the simultaneous lodgement of transfers, encumbrances and discharge of encumbrances in land titles offices and electronic transfer of clear funds to nominated accounts. The accounts include the Office of State Revenue which, in response to a request from a purchaser, will issue an Electronic Duties Return number for the electronic payment of stamp duty on settlement. Version 5.1 of PEXA enabled property transactions authorised by power of attorney to be conducted in New South Wales. Version 6.1 was released on 24 July 2017 to accommodate the National Mortgage form and various other updates.

Procedure

A law practice contemplating an eSettlement for a client must register with PEXA online and appoint solicitors authorised to digitally sign registry instruments on behalf of their clients. Each solicitor must have his or her identity verified before being provided with a digital certificate in the form of a password protected USB.

The client must provide written authorisation for the solicitor to execute documents on their behalf as required for the eSettlement in the form prescribed in schedule 4 of the MPR. The MPR also requires the solicitor to take 'reasonable steps' to verify the identity of the client (see sch 8 of the MPR) In addition to verifying the identity, the solicitor must also take reasonable steps to verify the 'right to deal'.

To create an eContract the vendor's solicitor may use an online search provider, supported by *DocuSign*, to order the eCOS, import any additional electronic documents such as special conditions and s 66W certificates from their own system, and import

the prescribed documents. The solicitor then emails the draft eContract to the selling agent to enable listing and marketing of the property.

Following successful negotiation of a sale the solicitor may email the agent a link to *DocuSign* giving access to the eContract to enter the purchaser's details and price. These are the only amendments to the eContract that can be made by an agent under current legislation. If the purchaser wishes to make alterations to other terms of the eContract prior to eSigning, the vendor's solicitor must generate a new version of the eContract with agreed changes.

On payment of deposit and eSigning by both parties, the vendor's solicitor clicks on an 'exchange' icon in *DocuSign* and the eContract is electronically dated and emailed to all transacting parties. All parties enter into the same eContract without counterparts. If the purchaser wishes to make alterations to terms of the eContract post eExchange, they can only be made by deed of variation or other agreement in writing because the exchanged eContract is electronically 'frozen' in *DocuSign*.

Following eExchange the vendor's solicitor usually creates the PEXA workspace inviting the mortgagee on title and purchaser to participate. Where the eContract has been created and eExchanged by *Infotrack* supported by *DocuSign*, PEXA will be pre-populated with the details necessary to create the documents required for settlement, and have a set date for automatic electronic settlement.

On settlement three things happen simultaneously. A dealing number giving priority is created, documents are lodged in the land titles office and settlement funds are electronically distributed to pre-designated accounts. eRegistration, however, does not occur until sometime after the documents have been lodged.

Conclusion

The principal platforms allowing an entirely electronic conveyance are supported by *DocuSign* to create eContracts capable of being eSigned and eExchanged, and PEXA which electronically creates and lodges settlement documents as well as provides electronic transfer of funds.

Considerations of security may constrain the practice of eConveyancing though. There have been two cases on this point in the US (*Hugger Mugger LLC v Netsuite Inc* 2005 US Dist LEXIS 33003; *AET Inc Ltd v C5 Communications LLC* 2007 US Dist LEXIS 10279) and one more recently in Australia. In *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265, the respondent was issued an ID and password to make a remote electronic signature and did not change the password. The Court of Appeal of New South Wales held that the respondent's use of remote digital signature technology did not amount to a representation of ostensible authority for someone else to use the signature, nor did the respondent's failure to change his password amount to such a representation.

eConveyancing is quick, transparent, cheap and vulnerable. Digital signatures are only as reliable as the persons entrusted with them, and the question of authority to sign is likely to arise in contested transactions. **LSJ**