

**eConveyancing: Principles, platforms and procedures.\***Dr Simon Blount<sup>1</sup> Claire Martin<sup>2</sup>*Introduction*

eConveyancing is start to finish online conveyancing in which contracts are created and exchanged, documents lodged for registration, funds transferred, and interests registered, entirely electronically. The legality of the electronically registered interest 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).

The seamlessness with which eConveyancing can now be conducted is the product of online contracts capable of being electronically populated, shared and digitally signed, the willingness of local councils and other public institutions to produce prescribed documents in electronic form, and the development of online platforms permitting the creation and sharing of electronic settlement documents and their electronic lodgement in land titles registries.

This paper sets out the international instruments, domestic legislation and common law decisions underpinning eConveyancing before turning to the detail of the ECNL. The paper identifies the principal online software permitting the creation of contracts and documents and their means of exchange and lodgement. Finally, there is a chronological account of the stages of an eConveyance.

We conclude that, for all the many advantages of eConveyancing - it is quick, transparent, efficient and cheap - the process is vulnerable. Insecure management of passwords and digital signature keys is just one example of a potential threat to the integrity of an electronic system of conveyancing.

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## Principles

### *Conventions, legislation and general law*

The principal international convention underpinning the ECNL is the Model Law on Electronic Commerce (MLEC). The MLEC has, in part, been enacted in every jurisdiction in Australia by the Electronic Transactions Acts.<sup>3</sup>

The MLEC is intended to unify electronic communications law by triggering national legislation in conformity with it. It 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 provisions of the MLEC are: §5 - that an electronic information will not be invalid solely on account of it being wholly or partly in electronic form; §6 - the electronic information will be in writing if it is accessible so as to be useable for subsequent reference; §7 - a signature will not be invalid so long as a method is used to identify the signatory, and the method of signing is appropriate to the purpose for which the electronic information was generated; and §11 - a contract formed by electronic information shall not be invalid solely on account of it being wholly or partly in electronic form.

Electronic Transactions Acts, based on the MLEC, were enacted in Australia in 1999 – 2003, and later amended to incorporate substantive provisions of the Convention on the Use of Electronic Communications in International Contracts (CUECIC). Section 8 of the Electronic Transactions Act 1999 (Cth) essentially reproduces §5 of the MLEC. Section 9 provides that where a law of the Commonwealth requires a person to give information in writing, information given by means of an electronic communication will satisfy the requirement. Arguably, this is a narrower enabling of electronic communications than §6 of the MLEC, referring only to information required, such as certificates of title, and not to contracts for the sale of the land which are *inter partes* and not required by legislation.

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<sup>3</sup> Electronic Transactions Act 1999 (Cth); Electronic Transactions Act 2001 (ACT); Electronic Transactions Act 2000 (NSW); Electronic Transactions (NT) Act 2000; Electronic Transactions (Qld) Act 2001; Electronic Transactions Act 2000 (SA); Electronic Transactions Act 2000 (Tas); Electronic Transactions Act 2000 (Vic); Electronic Transactions Act 2003 (WA).

Signature provisions, which have an added test of “reliability” in the Australian Electronic Transactions legislation, were considered in *Get Up Ltd v Electoral Commissioner*<sup>4</sup> and *Russells v McCardel*.<sup>5</sup> In *Get Up* an Australian citizen sought to register to vote using a digital pen to create her signature. The electoral commissioner decided the electronic signature was insufficient to complete the process of registration because the method used was not reliable. The court held that s 10 of the Electronic Transactions Act 1999 (Cth) set a standard for reliability to be determined by a court, not the commissioner. It followed that for applications submitted via a website and signed using a digital pen, the only requirements were that an application be in approved form, signed and that evidence of identity was provided. In *Russells v McCardel* the Supreme Court of Victoria considered whether an exchange of emails constituted a conditional costs agreement under the Legal Profession Act 2004 (Vic). The solicitor argued that the client, by typing his first name at the bottom of the email containing the agreement, had indicated his approval of the information contained in the email. The court agreed that under s 9 of the Electronic Transactions Victoria Act 2000 the client’s typed first name was “reliable as appropriate” for the purpose of signing the conditional costs agreement. However, as a matter of construction, the signed email was not an agreement, but a representation by the client that he would sign the agreement after it had been amended.

Arguably, the common law does not require the assistance of legislation to recognise the validity of electronic writing and signatures for the sale of real property. Common law courts in the United Kingdom, the United States, Canada, Australia, New Zealand and Singapore have all held that telegrams,<sup>6</sup> mailgrams,<sup>7</sup> faxes<sup>8</sup> and emails<sup>9</sup> are capable of forming valid contracts for transacting interests in land. Where the courts have not upheld the validity of such a contract it has

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<sup>4</sup> (2010) 189 FCR 165

<sup>5</sup> [2014] VSC 287

<sup>6</sup> *Godwin v Francis* (1870) LR 5 CP 295

<sup>7</sup> *Hessenthaler v Farzin* (1989) 564 A.2d 990

<sup>8</sup> *Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* (NSWSC, Young J, No 3551 of 1989, 15 August 1989, unreported)

<sup>9</sup> *Shattuck v Klotzbach* (2001) 14 Mass L Rep 360; *Rosenfeld v Zerneck* (2004) 776 NYS 2d 458; *Leoppky v Meston* (2008) 87 Alta LR (4<sup>th</sup>) 238; *Girouard v Drouet* [2012] N.B.J. No 136; *Cox v Coughlan* [2014] NZHC 164; *Crestwood Shops, LLC v Hilkene* (2006) 197 S W 3d 641; *Joseph Matthew anor v Singh Chiranjeev anor* [2009] SGCA 51; *SM Integrated Transware Pte Ltd v Schenker (Singapore (Pte) Ltd* [2005] 2 SLR 651.

tended to be because the substance, rather than the form, of the contract has been deficient.<sup>10</sup> The ubiquity of electronic signatures is now such that the recent decision of the Court of Appeal of New South Wales in *Williams Group Australia Pty Ltd v Crocker*<sup>11</sup> turned not on the validity of the electronic signature, but on the question of ostensible authority to sign.

### *Electronic Conveyancing National Law*

In 2011, the Council of Australian Governments by Intergovernmental Agreement made the Electronic Conveyancing National Law (ECNL) adopted by each state and the Northern Territory in 2012 and 2013. The Intergovernmental Agreement also provided for the establishment of the Australian Registrars National Electronic Conveyancing Council (ARNECC), consisting of Registrars and Deputy Registrars General, or their equivalent, of participating jurisdictions to develop, oversee and ensure compliance with the regulatory framework established by the ECNL.

The object of the ECNL 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), a system that enables 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 of the ELCN provide that the Registrar General, or equivalent, 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 tend to adopt the Model Operating Rules (MOR) and Model Participation Rules (MPR) promulgated by ARNECC. However, not all jurisdictions have the same versions of the MOR or MPR. The rules adopted by each jurisdiction reflect their readiness to engage in electronic conveyancing. In New

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<sup>10</sup> *Harvey v Facey* [1893] AC 552; *Twynam Pastoral Co Pty Ltd v Anburn Pty Ltd* (NSWSC, Young J, No 3551 of 1989, 15 August 1989, unreported); *Singer v Adamson* 2003 WL 23641985 affd (2005) 837 NE 2d 313.

<sup>11</sup> [2016] NSWCA 265

South Wales, version 3 of the MOR and MPR were adopted by the Registrar General and commenced operation on 9 November 2015.

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. Rule 5 of the New South Wales MPR contemplates two types of subscribers - principal subscribers acting on their own behalf, such as banks and financial institutions and representative subscribers such as solicitors and licenced conveyancers. Sections 26 and 27 of the ECLN provide that subscribers of either type must comply with the participation rules, but that the Registrar General may waive a requirement if it is reasonable in the circumstances.

Section 33 of the ECNL empowers the Registrar General to carry out compliance examinations of ELNOs and subscribers and s 34 imposes an obligation on ELNOs and subscribers to "cooperate fully" with any such investigation. There is a defence of "reasonable excuse", but the onus on an ELNO or subscriber remains high. For instance, it is not a reasonable excuse that giving required information may incriminate an ELNO or subscriber, although any such information may not be admitted in evidence against the ELNO or subscriber in a criminal proceeding. Section 35 of the ECNL empowers the Registrar General to refer the matter to an "appropriate authority" before, during or after a compliance examination.

## **Platforms**

### *eContracts.*

On 17 November 2014, the Law Society of New South Wales published an updated version of the Contract for Sale and Purchase of Land also known as the Electronic Contract of Sale (eCOS). The most significant change was the inclusion of Clause 30, which regulates the settlement of eConveyancing. Sub-clauses 30.1 - 30.4 provide that the purchaser may opt for an eConveyance settlement but either party may opt out, even after the purchaser has given notice of opting in. The subclauses expressly refer to the ECNL and the participation rules and

provide that an electronic document is served at the moment it is digitally signed in the “electronic workspace” as defined in the participation rules. Sub-clauses 30.5 – 30.9 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. Subclauses 30.14 – 30.15 deal with the service, if needed, of documents, and subclause 30.16 contains definitions.

The Law Society of New South Wales eCOS is capable of being electronically populated using software such as *Adobe*. However, it is not possible to electronically sign the eCOS in the format provided by the Law Society. In 2016, *Infotrack* released *Sign2Exchange*, now called *SignIT*, an eContract for the sale of land that can be electronically signed and exchanged. *SignIT* is supported by *DocuSign* technology, allowing the agent or vendor’s solicitor to fill in the purchaser's details and email the eContract to purchasers and vendors for eSigning prior to electronic exchange. Some of the larger law firms, such as Gadens, Collin Biggers & Paisley and Maddox, have also developed their own platforms enabling the creation, eSigning and eExchange of eContracts.

### eSigning

A number of online platforms, such as *DocuSign*, *EchoSign* and *AdobeSign* allow the making of a secure, verifiable and storable digital signature. *DocuSign*, for instance, allows parties to affix digital signatures, exchange signed contracts and verify other parties’ signatures. *DocuSign* uses public key cryptography, in which an algorithm creates two different but mathematically related numbers, typically two very large prime numbers, one of which is a private key used to create a digital signature, and the other of which is a public key used to verify the signature. In the process of creating a digital signature, a further algorithm produces a “hash value” which is smaller than, but unique to, the digital signature. The digital signature is only verified when the public key relates to the private key and the hash value computed by the verifier is the same as the hash value generated by the digital signature. Once the digital signature has been verified, securely stored metadata indicates the time and place of signature. Although digital signatures are

difficult, if not impossible to forge, the weakness of digital signatures is insecure management of the private key by the maker of the digital signature and insecure storage of the data by the service provider.<sup>12</sup>

### *Property Exchange Australia*

Property Exchange Australia (PEXA) is Australia's only ELNO and is operated by Property Exchange Australia Limited, the board of which consists of directors nominated by the major stakeholders in eConveyancing, including all states except Tasmania and South Australia, the four major banks, Macquarie Bank, Link Group and Little Group. PEXA is an online platform allowing the creation and signing of settlement documents by vendors and purchasers or their solicitors, the notification of funds available and owing by third parties, the notification of directions to pay by the vendor's solicitor, the notification of directions to pay to any incoming mortgagee by the purchaser, 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 (EDR) number for the electronic payment of stamp duty on settlement. Version 5.1 of PEXA now enables property transactions authorised by power of attorney to be conducted in New South Wales and it is likely that a settlement adjuster will be included in future releases. *Infotrack*, used to create, sign and share eContracts for sale of land, has integrated its system with PEXA so that the PEXA workspace is prepopulated with the data necessary for settlement.

### **Procedure**

#### *Preliminaries, Authorisation and Verification of Identity*

A law practice contemplating an eConveyancing settlement for a client must be a subscriber to an ELNO, currently PEXA, and have a digital certificate to execute documents on the client's behalf. The law practice must register online and appoint solicitors authorised to digitally sign registry instruments and the financial settlement statement. Each solicitor must have his or her identity verified

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<sup>12</sup> Blount S *Electronic Contracts 2<sup>nd</sup> ed* (2015) LexisNexis Butterworths Sydney at [2.17].

before being provided with a digital certificate. It is critical that digital certificate hardware and passwords are kept secure.

The client must provide written authorisation for the eConveyance in the form prescribed in schedule 4 of the MPR. Rule 6.5 of version 3 of the New South Wales MPR now also requires the solicitor to verify the identity of the client (VoI). A solicitor must take “reasonable steps” to ensure the identity of clients. Reasonable steps include following the procedure set out at schedule 8 of the MPR or verifying identity in some other way that constitutes the taking of reasonable steps.

VoI of a client may be undertaken by the solicitor or may be electronically provided by an identity agent. “Identity agent” is defined in the MPR. The most important qualification for an identity agent is that it complies with the insurance rules at schedule 6 to the MPR. *Australia Post*, *ID Secure*, *IDFY*, *ZIP ID* and *VOI AustraliaOnline* can all produce electronic reports satisfying the requirements for identification under schedule 8. However, the solicitor must reasonably believe the identity agent is reputable and competent and should be aware of any agreed limits to the liability of the identity agent in any contract for services entered into between the solicitor and the identity agent. If, in entering into the agreement with the identity agent, the solicitor has complied with the standard under schedule 8, he or she will be deemed to have taken reasonable steps to have identified the client.

### *eContracts*

As in paper conveyancing, the vendor’s solicitor must create a contract capable of being signed and exchanged by the parties. An eContract is simply a digital tool to achieve the same result as a paper contract in an electronic environment. eContracts comply with the formal requirements of the standard contract attaching the prescribed documents in electronic format, but do not have to be printed out to be valid.

To create the eContract the vendor’s solicitor uses an online search provider, typically *Infotrack* supported by *DocuSign*, to order the eCOS, add any additional electronic documents such as special conditions and section 66W certificates from his or her own system, and import prescribed documents. If the property is located within a Local Government Area providing online section 149 zoning

certificates, the certificate can be electronically imported into the eContract. The solicitor then emails the eContract to the selling agent to enable listing of the property and commencement of marketing.

#### *Agreement for sale*

It is possible for a vendor to sign any sales agency agreement electronically as, with the exception of bond lodgement and bond transfer forms, all Real Estate Institute of New South Wales approved forms are now in electronic form and have the capacity to be eSigned. On the sales agent informing the vendor's solicitor that a sale has been negotiated, the solicitor emails the agent a link to *DocuSign* giving the agent access to the eContract to enter the purchaser's details and price. The agent then emails the eContract and the link to *DocuSign* to the purchaser or their solicitor for eSigning. Alternatively, the vendor's solicitor may complete the purchaser's details and email the link to *DocuSign* directly to the purchaser's solicitor.

Although the eContract is capable of being edited up until the point of eSigning and eExchange, the purchaser's details and price are the only amendments to the eContract that can be made by the agent under current legislation. If the purchaser wishes to make alterations to other terms of the eContract prior to eExchange, the vendor's solicitor can simply generate a new version of the eContract with agreed changes.

#### *eExchange*

Once the purchaser has paid the deposit into the agent's trust account, the vendor and purchaser eSign the eContract in the relevant field. On eSigning by both parties, the vendor's solicitor is prompted to click on an "exchange" icon in *DocuSign* and the eContract is electronically dated and emailed to all transacting parties. The eExchange results in all parties entering into the same eContract. There are no counterparts. If the purchaser wishes to make alterations to terms of the eContract post eExchange, the alterations can only be made by deed of variation or other agreement in writing because the exchanged eContract is electronically "frozen" in *DocuSign*.

#### *eSettlement*

Prior to eSettlement, the vendor's solicitor, under cl 30 of the eCOS, must create an electronic workspace. In effect, this means giving all parties to the transaction access to PEXA. Where the eContract has been created and exchanged 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 time for automatic electronic settlement. The parties should adhere to the timeframes agreed in the eCOS. 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 happen until sometime after the documents have been lodged.

In the future, there will be no hard copy certificate of title in an electronic settlement, as any certificate of title issued after 1 January 2004 can be transferred electronically. In New South Wales, Land and Property Information has introduced an option for parties to elect to have an electronic certificate of title (eCT). But at present, parties eligible to elect to have an eCT are limited to Australian Prudential Regulation Authority (APRA) regulated financial institutions which hold registered mortgages and which subscribe to PEXA, or are represented by a subscriber to PEXA.

eCTs present potential problems in evidencing the right to deal and particularly, the control of right to deal (CoRD) for APRA regulated institutions holding a registered mortgage over property. In New South Wales the Registrar General's Directions define a CoRD as a party having authority to consent to the registration of a subsequent dealing in land. The right of CoRD in New South Wales is evidenced by either the possession of the physical certificate of title or an eCT. An eCT exists where a party who would be entitled to a physical certificate of title has its name recorded on the land title. The holder of a CoRD entitled to an eCT can electronically consent to a dealing depending on whether it is a party to the dealing or a third party.

## **Conclusion**

The principal platforms allowing an entirely electronic conveyance are *Infotrack* supported by *DocuSign* to create electronic contracts for the sale of land, linked to

PEXA which electronically creates and lodges settlement documents and provides electronic transfer of funds. eConveyancing is quick, transparent, efficient and cheap. It is quick because prescribed documents can be provided electronically from external sources,<sup>13</sup> and funds are paid immediately on settlement. It is transparent because after exchange there is only one version of the contract and the parties can view through PEXA what is happening at each stage of the conveyance. It is efficient because there are no constraints to the number of transactions that can take place simultaneously on settlement, and cheap because there are no physical materials and no physical signing, exchange of contracts or lodgment of documents needed.

However, a process relying on digital signatures is vulnerable. In *Hugger Mugger LLC v Netsuite Inc*,<sup>14</sup> an IT manager without actual authority was found to have had ostensible authority to bind the plaintiff because he possessed the user ID and password necessary to sign. In *AET Inc Ltd v C5 Communications LLC*<sup>15</sup> the plaintiff denied an agreement on the basis that the electronic signature of its employee was a fraud. The defendant's owner's son was an employee of the plaintiff and it was common ground that the son put the employee's electronic signature into the agreement. However, the employee had sent the son an email containing the employee's electronic signature. In the circumstances, the email could have been evidence of authority to sign, or evidence of the son fraudulently accessing the employee's signature to sign the agreement.

In *Williams Group Australia Pty Limited 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 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.

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<sup>13</sup> Pittwater Council, for example, has an online service with a turnaround time for a section 149 certificate of approximately twenty minutes. Land and Property Information and Sydney Water Corporation have been providing their documents online for over a decade in anticipation of eConveyancing.

<sup>14</sup> 2005 US Dist LEXIS 33003

<sup>15</sup> 2007 US Dist LEXIS 10279

We conclude that 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.