

***Removing Barriers to Electronic Land Contracts  
Discussion Paper***

**The Real Estate Institute of New South Wales  
Limited**

**Submission on the Discussion Paper**

**31 January 2018**

**To:**

Electronic Contracts Review  
Office of the Registrar General

**By email:**

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

This submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the Discussion Paper on removing barriers to electronic land contracts, issued by the Office of the Registrar General in December 2017 (**Paper**).

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. It seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

REINSW congratulates the NSW Government on issuing the Paper and for taking the time to consider the use of digital technology in conveyancing.

REINSW has made previous submissions to the NSW Government in relation to the ability of property-related documents to be created and signed electronically. REINSW resubmits its position by **enclosing** the joint submission from the national and all State and Territory Real Estate Institutes dated 18 November 2015 as well as REINSW's subsequent submission dated 4 April 2016.

As set out in the enclosed submissions, REINSW suggests that simple amendments be made to the *Electronic Transactions Regulations*. If those amendments were implemented, they would:

- (a) enable a party entering into an e-contract with a company to rely on the same assumptions under the *Corporations Act 2001* (Cth) relating to the validity of the company's execution that they can rely on if the contract were in paper form; and
- (b) remove the exemption that prevents the *Electronic Transactions Act 1999* (Cth) (**ETA**) from applying to documents required or permitted by law to be witnessed. In that regard, REINSW's legal advice is that, in NSW and Queensland, contracts for the sale of land are not required by law to be witnessed yet other commonly used property-related documents must be. Such documents include deeds (for instance, a deed of option to purchase land) and the prescribed NSW residential tenancy agreement. REINSW cannot see any reason why the ETA should not apply to a document where a party's signature must be witnessed. This is particularly so when the exemptions do not of themselves render a property-related e-contract invalid or unenforceable.

REINSW submits that implementation of the simple amendments proposed in the enclosed joint submission is critical to improving productivity within the property industry. Property industry professionals and consumers would have the benefit of the Electronic Transactions legislation as a guide for procedure in relation to the creation, transmission and signing of documents electronically. The amendments would also eliminate the confusion and uncertainty in property-related e-commerce transactions because there would be a clearer understanding of the procedures governing those transactions.

REINSW agrees that the laws dealing with property acquisition are stuck in the age of paper and ink. It commends the NSW Government for taking steps to bring the 20<sup>th</sup> century laws governing property acquisition in line with the expectations and commercial environment surrounding the 21<sup>st</sup> century consumer.

REINSW appreciates the opportunity to provide this submission and would be pleased to discuss it further, if required.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Tim McKibbin', written in a cursive style.

**Tim McKibbin**  
Chief Executive Officer  
The Real Estate Institute of New South Wales Limited

4 April 2016

Kevin Wilde  
Chief of Staff to the Attorney-General  
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Dear Sir

### Request for amendments of Commonwealth, State and Territory Electronic Transactions legislation

1. Thank you for agreeing to meet myself and Tim McKibbin of REINSW on 19 April 2016 to discuss the submission dated 18 November 2015 from all Australian REIs to all Australian Attorneys-General (**REI Joint Submission**), a copy of which is **attached** for your ease of reference.
2. In relation to NSW specifically, our clients respectfully request of the Attorney-General the following legislative amendment and political assistance.

#### Legislative amendment

3. Our clients request the deletion of *Electronic Transactions Regulations* 5(f) and 6(f), which exempt the application of the *Electronic Transactions Act* from documents required or permitted by law to be witnessed (**DW exemption**).
4. We note that DW exemption provisions feature also in the ET legislation of Queensland, SA and WA. Such provisions do not, however, appear in the ET legislation of Victoria, Tasmania, ACT or NT.
5. A simple example of a document required by law to be witnessed (and therefore subject to the DW exemption) is a deed of option to purchase land. A simple example of a document not required to be witnessed (and therefore not subject to the DW exemption) is a contract to purchase land. We cannot see any logic in the DW exemption applying to the option to purchase when it does not apply to the contract to purchase.
6. More fundamentally, after extensive and intensive research into the matter, we have not unearthed any explanation (let alone justification) for blanket DW exemption provisions in ET legislation, and ask what difference it can actually make if a witness signs in ink or electronically? In either case, the fact that a person was present and did witness the signature of a contract party can ultimately only be proven by that person, or the party whose signature was apparently witnessed, stating that this was the case. The requirement that a witnessed document only be in paper form does nothing to add to the strength of that proof. Conversely, however, the requirement that a witnessed document be in paper rather than electronic form imposes substantial restrictions on trade and commerce that contradict the parliamentary objectives stated in section 3 of the *Electronic Transactions Act*.

7. We do note that, although there are no blanket DW exemptions in Victoria, Tasmania, ACT or NT, in Victoria there are specific DW exemptions in relation to testamentary documents (wills and codicils), in NT there are specific DW exemptions in relation to testamentary documents and powers of attorney, and in Tasmania there are specific DW exemptions in relation to testamentary documents, powers of attorney and documents granting guardianship rights. If the Attorney-General were minded to consider specific DW exemptions in place of the current blanket DW exemption provisions, we would ask that:
- (a) this exemption not extend to powers of attorney, because documents creating these powers so very often form part of a suite of documents executed by companies in the course of their standard transactions; and
  - (b) although execution of a testamentary or guardianship document rarely constitutes all or part of any "business transaction", this exemption also not be considered unless the Attorney-General's Victorian, Tasmanian or NT counterpart Ministers or departments can offer some explanation of the need for this exemption, because we see no obvious need.

#### Political assistance

8. As also noted in the REI Joint Submission, a very significant cause of confusion prejudicing the objects of ET legislation in all jurisdictions are the Commonwealth Regulations which may (or may not) prevent sections 127-129 of the *Corporations Act 2001* operating in relation to any electronic transaction anywhere in Australia. The relevant Commonwealth Regulations are rather odd because they expressly refer to legislation that was repealed in 2001. Perhaps because of this oddity (which we suspect is the result of simple oversight for the last 15 years) the Commonwealth Attorney-General's Department (in its letter of response to the Joint Submission) has not provided any explanation for, or defence of, the intended operation of the relevant regulations. For as long as they exist, however the regulations render uncertain the question whether ET legislation of the Commonwealth, States or Territories applies in relation to any documents signed by companies. Our clients therefore request that the Attorney-General write to the Commonwealth Attorney-General asking that the Commonwealth Regulations be amended to clarify that *Corporations Act 2001* sections 127-129 operate in relation to documents executed electronically by companies.

Yours sincerely



**Mark Morgan**

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Our Ref: MEM.155538



18 November 2015

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Dear Attorneys-General

### **Request for amendments of Commonwealth, State and Territory Electronic Transactions legislation**

We act for (and **attach** a joint submission from) the national and all State and Territory Real Estate Institutes, who request amendments of legislation clarifying that contracts for sale of land and other common property related documents (sales agency, residential leasing etc) are not prohibited from being created and signed electronically, provided of course that the terms of such document otherwise comply with the same legislative rules as govern paper documents.

The amendments requested are exceedingly simple in form but, as is clear from the joint submission, their implementation is regarded as being of critical importance in improving productivity within the property industry, and we therefore respectfully ask your urgent attention to this request.

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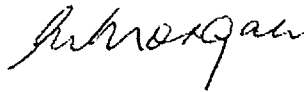
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Yours faithfully



**Mark Morgan**

Partner

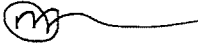
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**JOINT SUBMISSION FROM THE NATIONAL AND ALL STATE AND TERRITORY REAL ESTATE INSTITUTES TO THE COMMONWEALTH AND ALL STATE TERRITORY ATTORNEYS-GENERAL**

**REQUEST FOR AMENDMENT OF COMMONWEALTH, STATE AND TERRITORY ELECTRONIC TRANSACTIONS LEGISLATION**


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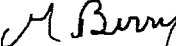
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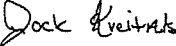
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**18 November 2015**



## 1. Introduction

1. Commencing in 1999, the Commonwealth, State and Territory governments each introduced relatively uniform Electronic Transactions (ET) legislation the objective of which:

"is to provide a regulatory framework that:

- (a) recognises the importance of the information economy to the future economic and social prosperity of Australia; and
- (b) facilitates the use of electronic transactions; and
- (c) promotes business and community confidence in the use of electronic transactions; and
- (d) enables business and the community to use electronic communications in their dealings with government."

*[Electronic Transactions Act 1999 (Cwth) section 3]*

2. Common law recognises the right of Australians to enter into transactions by electronic means. Even where legislation or common law requires a transaction to be "in writing" and "signed", our courts have held these requirements satisfied where transactions have been entered into by fax or email transmission, provided that these transactions otherwise comply with all other legal requirements for validity and enforcement (eg in relation to the content of a contract or the formalities of service of a notice).
3. ET legislation does not purport to terminate or restrict the operation of the common law in this respect. Its stated objective is to "facilitate" and "promote confidence in the use of" electronic transactions. And it seeks to achieve this objective by providing a code for procedure in relation to the creation, transmission and signing of documents by electronic communication. But the code only operates in relation to matters that are not "exempted" from the application of ET legislation. If a matter is "exempt", the code does not apply and the use of electronic communication in relation to the matter continues to be determined in accordance with the principles noted in paragraph 2 above.
4. As any comprehensive review of Commonwealth, State and Territory government websites will readily demonstrate, the promotion of e-commerce is regarded as a critical factor in improving efficiency and productivity in government and private business transactions. It is therefore also critical that there be a regular review of the need to prevent the ET code applying to matters classified as "exempt."
5. In this submission, we request the repeal of ET legislation exemptions applying:
  - (a) if a document needs to be signed by a company;
  - (b) if a signature needs to be witnessed; or
  - (c) in the case of South Australia only, if a document relates to a land transaction.
6. These exemptions affect most property related transactions (land sale contracts, sales agency agreements, residential and retail lease agreements, management agreements etc). As noted above, the exemptions do not of themselves override the validity or enforceability of property related agreements being transacted by e-contract, and this has been confirmed by case law and formal opinions from senior barristers and solicitors in NSW and Queensland. However, the exemptions leave property industry professionals and consumers without the benefit of the ET code as a guide for procedure in relation to the creation, transmission and signing of documents by electronic communication. This has led to uncertainty and confusion as to what procedures should govern property

industry e-commerce transactions, and thereby seriously delayed the process of development of property industry e-contracts that are safe and simple to understand and use.

7. In short, it is submitted that these exemptions substantially impede the fundamental objectives of ET legislation and seriously degrade professional efficiency and consumer convenience within the Australian property industry.
8. The balance of this submission now details:
  - (a) the ET legislative provisions of particular concern;
  - (b) our proposals for amendment of the provisions; and
  - (c) an explanation of our concerns and proposals.

## 2. Commonwealth *Electronic Transactions Regulations 2000*, Schedule 1 items 28 - 31

### 2.1 Text of provisions of concern

#### **Regulation 4 - Exemptions from the Act**

For subsection 7A(2) of the Act, a provision of the Act specified in column 3 of an item of Schedule 1 does not apply to the Commonwealth law specified in column 2 of the item.

#### **Schedule 1 - Laws of the Commonwealth to which certain provisions of the Act do not apply (regulation 4)**

<i>Item</i>	<i>Commonwealth law</i>	<i>Provision of the Act</i>
28	<i>Corporations Act 1989</i>	<i>Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15</i>
29	<i>Subordinate legislation made under the Corporations Act 1989</i>	<i>Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15</i>
30	<i>Corporations Law</i>	<i>Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15</i>
31	<i>Subordinate legislation made under the Corporations Law</i>	<i>Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15</i>

### 2.2 Amendments proposed

Repeal Commonwealth *Electronic Transactions Regulations* Schedule 1 items 28 - 31, substitute:

28	<i>Corporations Act 2001 (except sections 127, 128 and 129)</i>	<i>Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15</i>
29	<i>Subordinate legislation made under the Corporations Act 2001</i>	<i>Subsection 8(1), Division 2 of Part 2 and sections 14, 14A, 14B and 15</i>

### 2.3 Explanation of concerns and proposals

- (a) The Commonwealth *Electronic Transactions Act 1999* generally provides that, if a Commonwealth law requires or permits a transaction to be documented or executed in written form, that requirement or permission is met if the transaction is documented or executed in electronic form.
- (b) Schedule 1 to the *Electronic Transactions Regulations 2000* (the Principal Regulations) specifies laws of the Commonwealth to which the Act does not currently apply.

- (c) Schedule 1 to the Principal Regulations includes (as items 28 - 31) the *Corporations Act 1989*, the Corporations Law, and subordinate legislation made under those laws. Those laws have now all been repealed and re-enacted as the *Corporations Act 2001* and subordinate legislation made under that Act. The Principal Regulations have for some reason never been updated to reflect this repeal and re-enactment. However, in the opinion of one senior barrister (which is consistent with the opinions of the other senior barrister and solicitors):

"while Schedule 1 does not refer to the *Corporations Act 2001 (Cth)*, but rather refers to '*Corporations Act 1989*', the 'Corporations Law' and their subordinate legislation (all of which have been repealed), section 10 of the *Acts Interpretation Act 1901 (Cth)* would appear to apply such that the Regulations do apply to the current *Corporations Act*. That section provides, in part, as follows:

**"10. References to amended or re-enacted Acts**

*Where an Act contains a reference to a short title that is or was provided by law for the citation of another Act as originally enacted, or of another Act as amended, then:*

*(b) where that other Act has been repealed and re-enacted, with or without modifications, the reference shall be construed as including a reference to the re-enacted Act as originally enacted and as amended from time to time..."*

- (d) Due to this *Acts Interpretation Act 1901* preservation of the operation of Schedule 1 items 28 - 31, the senior barrister's opinion continues:

"there is a real risk that the result of these provisions is that the Commonwealth ET Legislation provisions listed in the table do not apply to the current *Corporations Act*, including provisions relating to the execution of documents by a company (e.g. section 127), and relating to the assumptions people dealing with companies are entitled to make (e.g. section 128 and 129)."

- (e) In other words, when entering into an e-contract with a company, it is uncertain whether persons dealing with the company may rely on the same *Corporations Act* assumptions of validity of the company's execution that they could rely on if the contract were on paper.
- (f) As noted in the introduction, this current legislative exemption does not of itself render an e-contract invalid or unenforceable. All it does is leave the contract parties without the benefit of the ET code as a guide for procedure in relation to the signing of the e-contract.
- (g) This was surely not an intended consequence of the Principal Regulations.
- (h) The amendment requested in clause 2.2 operates partly to update the Principal Regulations (so as now to refer to *Corporations Act 2001* and subordinate legislation made under that Act) but mainly to remove the reference to sections 127 - 129 of the *Corporations Act 2001* from Schedule 1 (in order to confirm that these *Corporations Act 2001* provisions in relation to the execution of a document by a company and the assumptions people may make in relation to a document executed by a company operate in the same way irrespective of whether the document is in paper or electronic form). The amendment does not otherwise substantively alter the current operation of the Principal Regulations.

3. **New South Wales *Electronic Transactions Regulation 2012* clauses 5(f) and 6(f), *Electronic Transactions (Queensland) Act 2001* schedule 1 item 6, South Australia *Electronic Transactions Regulations 2002* clauses 4(1)(b) and 5(1)(b), Western Australia *Electronic Transactions Regulations 2012* clauses 3(1)(b) and 4(1)(c)**

3.1 Text of provisions of concern

**NSW ELECTRONIC TRANSACTIONS REGULATION 2012**

***Regulation 5(f)***

***Certain requirements excluded from Division 2 of Part 2 of the Act***

*Division 2 of Part 2 of the Act does not apply to the following requirements and classes of requirements:*

- (f) *any requirement under a law of this jurisdiction for a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document*

***Regulation 6(f)***

***Certain permissions excluded from Division 2 of Part 2 of the Act***

*Division 2 of Part 2 of the Act does not apply to the following permissions and classes of permissions:*

- (f) *any permissions under a law of this jurisdiction for a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document.*

**ELECTRONIC TRANSACTIONS (QUEENSLAND) ACT 2001**

***Section 7A***

***Act does not apply to particular transactions etc.***

- (1) *This Act does not apply to a transaction, requirement, permission, electronic communication or other matter of a kind mentioned in schedule 1.*

***Schedule 1***

***Excluded transactions***

- 6 *A requirement or permission for a document to be attested, authenticated, verified or witnessed by a person other than the author of the document.*

**SOUTH AUSTRALIA - ELECTRONIC TRANSACTIONS REGULATIONS 2002**

***Regulation 4(1)(b)***

***Certain transactions excluded from section 7(1) of Act***

- (1) *Subject to subregulation (2), section 7(1) of the Act does not apply to the following:*
- (b) *a law of this jurisdiction requiring a document to be witnessed, attested, verified or authenticated under the signature of a person other than the author of the document;*

**Regulation 5(1)(b)**

**Certain requirements and permissions excluded from Part 2 Division 2 of the Act**

- (1) Subject to subregulation (3), Division 2 of Part 2 does not apply to the following requirements or classes of requirements:
- (b) a requirement under a law of this jurisdiction that a document be witnessed, attested, verified or authenticated under the signature of a person other than the author of the document;

**WESTERN AUSTRALIA - ELECTRONIC TRANSACTIONS REGULATIONS 2012**

**Regulation 3(1)(b)**

**Exemptions from s. 8(1) — transactions**

- (1) Section 8(1) of the Act does not apply to -
- (b) any other transaction that requires a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document.

**Regulation 4(1)(c)**

**Exemptions from Part 2 Division 2 - requirements and permissions**

- (1) Part 2 Division 2 of the Act does not apply to -
- (c) any other requirement that a document is to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document.

**3.2 Amendments proposed**

*Repeal:*

- (a) NSW Electronic Transactions Regulations 5(f) and 6(f)
- (b) Electronic Transactions (Queensland) Act 2001 Schedule 1 item 6
- (c) South Australian Electronic Transactions Regulations 4(1)(b) and 5(1)(b)
- (d) Western Australian Electronic Transactions Regulations 3(1)(b) and 4(1)(c)

**3.3 Explanation of concerns and proposals**

- (a) These "DW exemptions" provisions are considered together because they are all of similar operation.
- (b) As with the Commonwealth *Electronic Transactions Act 1999*, the ET legislation of the States and Territories generally provides that, if a transaction is by law required or permitted to be documented or executed in written form, that requirement or permission is met if the transaction is documented or executed in electronic form.
- (c) The DW exemptions are not included in the ET legislation of ACT, NT, Victoria or Tasmania, and we submit that the DW exemptions are also no longer appropriate in NSW, Qld, SA or WA for the following reasons.
- (d) Our legal advice is that, in NSW and Queensland, contracts for sale of land are not required by law to be witnessed. We have not asked our advisers the question specifically, but understand that the same advice would hold throughout the Commonwealth. The DW exemption would therefore not apply to contracts for sale of land (except in South Australia, for reasons we will address in part 4 of this

submission). But there are numerous property-related contracts which do require to be witnessed. For example, deeds and (at least in the case of NSW) residential tenancy agreements, and the DW exemption applies to all such contracts.

(e) This raises an obvious question. Why should the requirement to witness a party's signature on a document exempt the application of the ET code to that document? This question is all the more puzzling because, as noted at introduction paragraph 6 and in paragraph 2.3(f) above, exempting a document from the ET code (by application of the DW exemption or otherwise) does not of itself render an e-contract invalid or unenforceable. All it does is leave the contract parties without the benefit of the ET code as a guide for procedure in relation to the signing of an e-contract.

(f) We note that, by letter addressed to the South Australian Attorney-General and dated 23 March 2015, the Law Society of South Australia argued for retention of the DW exemption for the reason that:

"The requirements referred to in [the DW exemption] sub-regulations provide a degree of protection to parties to transactions since, in the event of a subsequent dispute, important evidence is available from a third person regarding the circumstances in which the transaction was entered into. The removal of this safeguard would, in the Society's view, make parties to electronic transactions even more vulnerable."

(g) This reasoning does not address the issue raised in paragraph (e) above. We do not propose any relaxation of a requirement that party signatures on certain documents be witnessed. Our proposal would simply be that contract parties should also be able to use the ET code as a procedural guide in relation to witnesses signing such documents by electronic means.

#### **4. South Australia *Electronic Transactions Regulations 2002* clauses 4(1)(a) and 5(1)(a)**

##### **4.1 Text of provisions of concern**

###### ***Regulation 4(1)(a)***

###### ***Certain transactions excluded from section 7(1) of Act***

(1) *Subject to subregulation (2), section 7(1) of the Act does not apply to the following:*

(a) *a law of this jurisdiction relating to the disposition of land, to the creation or disposition of an interest in land, or to any other dealing or other action relating to an interest in land;*

###### ***Regulation 5(1)(a)***

###### ***Certain requirements and permissions excluded from Part 2 Division 2 of the Act***

(1) *Subject to subregulation (3), Division 2 of Part 2 does not apply to the following requirements or classes of requirements:*

(a) *a requirement under a law of this jurisdiction that the disposition of land, the creation or disposition of an interest in land, or any other dealing or other action relating to an interest in land be effected by instrument or be evidenced in writing;*

##### **4.2 Amendments proposed**

*Repeal South Australian Electronic Transactions Regulations 4(1)(a) and 5(1)(a)*

### 4.3 Explanation of concerns and proposals

- (a) The above "land transaction exemption" provisions are unique to South Australia, and we submit that the land transaction exemption is no longer appropriate for the following reasons.
- (b) We note that, by letter addressed to the South Australian Attorney-General and dated 23 March 2015, the Law Society of South Australia argued for retention of the land transaction exemption on the basis that:  
  
"the Society's greatest concern is the potential risk of electronic contracts being amended or varied after they have been "signed" by one or both of the parties. This risk is virtually absent in the paper environment, since the parties commonly initial every page of physical land contracts. Any amendments to the terms are also more obvious and are similarly initialled by the parties to confirm their awareness of, and agreement to, the changes."
- (c) Once again, this reasoning does not address the fundamental issue that exempting a document from the ET code (by application of the land transaction exemption or otherwise) does not of itself render an e-contract invalid or unenforceable. All it does is leave the contract parties without the benefit of the ET code as a guide for procedure in relation to the signing of an e-contract.
- (d) As is very clear from the judgment of the Full Court of the Supreme Court of South Australia in *Lucke v Cleary & Ors [2011] SASCFC 118*, valid and enforceable land transaction agreements can be entered into in South Australia by e-contract (in that case, by exchange of emails). In the circumstances of that case, it was entirely appropriate for the court to have so decided and, in light of the court's decision, our proposal goes no further than enabling contract parties to use the ET code as a procedural guide in relation to the signing of e-contracts.