

Our ref: Property and Development Law Committee

4 February 2013

The Research Director  
Agriculture, Resources and Environment Committee  
Parliament House  
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Dear Research Director

### **Electronic Conveyancing National Law (Queensland) Bill 2012**

Thank you for providing the Queensland Law Society the opportunity to provide comments on the *Electronic Conveyancing National Law (Queensland) Bill 2012* (the Bill).

The Queensland Law Society has supported in principle the introduction of electronic conveyancing into this State for many years. This support has always been qualified by a desire to see the implementation of the system providing real benefits to consumers and not to increase the risk and professional liability for legal practitioners.

The Society notes that the Australian Registrars' National Electronic Conveyancing Council (ARNECC) has conducted public consultation on the text of the Electronic Conveyancing National Law (ECNL). The Society and its Federal counterpart, the Law Council of Australia, have contributed to that process.

While there has been prior public consultation on the text of the ECNL, there has been no public consultation on the amendments to the *Land Act 1994* or the *Land Title Act 1994* to accommodate electronic conveyancing. QLS is strongly of the view that broad consultation on policy and legislation at an early stage is the key to good law and considers that it would have been useful and appropriate for such consultation to have taken place.

Given the timing of the period for making submissions on the Bill it has not been possible to conduct an exhaustive review. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

This submission has been prepared with the assistance of the Society's Property and Development Law Committee.

## *ECNL*

The Society has already provided its views to ARNECC on the ECNL and most of our concerns have been addressed in the public consultation process.

The Society remains concerned that the process to repudiate an electronic signature in section 12(4) of the ECNL is unduly onerous. The Society notes that even when a digital signature is created fraudulently a subscriber will be liable for its use unless the subscriber can establish:

- The subscriber did not create the digital signature
- The digital signature was not created by an employee of or with the authority of the subscriber
- That the subscriber's employees, agents and officers at all times complied with the participation rules and took reasonable care.

In the circumstance where a sophisticated hacker has accessed a subscriber's system a subscriber may be placed in an invidious position as it may be impossible to prevent the attack but may prove difficult to meet this test to repudiate the use of a digital signature in a transaction.

The Society acknowledges that the test in this section was set deliberately at a high level to ensure that there could be a high degree of confidence in the use of a digital signature by other parties to a transaction. The issue, as far as the Society sees it, is striking the right balance between properly promoting confidence in the use of the system and not unfairly imposing liability on a subscriber for events (including frauds) over which they had no knowledge or control. The Society is uncertain whether the result of the drafting of section 12 has reached that balance.

The Law Council of Australia has also expressed its continuing concern that the definition of 'digital signature' in the ECNL is defective as it appears the drafter has confused the way a digital signature operates. The Society shares this concern.

The term 'digital signature' is defined in the ECNL as:

digital signature means encrypted electronic data intended for the exclusive use of a particular person as a means of identifying that person as the sender of an electronic communication or the signer of a document.

In Public Key Infrastructure a person has a pair of linked mathematical keys, one made public and one kept private. A document encrypted by the use of one key can only be decrypted successfully by use of the other key. A person digitally signs a document by encrypting it with their private key. The receiver of the document can then decrypt that document only by using the sender's public key. In doing so the receiver can be assured that it was the sender (as the only person who knows their private key) who encrypted the

document. The concern of the Law Council and the Society is that the key definition of 'digital signature' in the ECNL does not correctly reflect this process which is to be used in the electronic conveyancing system and is fundamental to the legislative framework.

At this stage there may be little opportunity to amend the ECNL, but it would be desirable if a clarification of this key definition could be progressed by Government prior to electronic conveyancing coming into operation in Queensland.

#### *Land Title Act 1994 Amendments (LTA)*

The Society would like to comment on the following proposed amendments:

- Section 157A(3A): "Rejecting instrument for failure to comply with requisition." This provision provides "an electronic conveyancing document that has been rejected under subsection (1) cannot be relodged." The Society considers that there should be facility to allow electronic documents to be relodged as it will assist with efficiency and reduce any further unnecessary delay. However if this clause is to remain, the Society recommends that the Bill be made clear that if an electronic document cannot be relodged parties can lodge a paper instrument instead.
- Section 161: "Execution and proof". The Society considers that instead of an explanatory note, the differentiation between signing paper and electronic documents should be set out as a provision, as has been the case with other sections in the Bill.
- Section 164(3): "Dispensing with production of instrument." The Society considers this subsection, which appears to be aimed at facilitating the phasing out of Certificates of Title when held by mortgagees, is too broad and not specifically necessary for e-conveyancing. The Society recommends that this subsection be excluded from the Act until its impact can be properly assessed. One immediate consequence is that a mortgagee who holds the certificate of title will lose the benefit of knowledge and control over later dealings in relation to the land.
- There does not appear to be a definition of "digitally sign" in the LTA. The Society therefore considers that a definition specifically referring to the national definition should be in the LTA to ensure clarity and consistency.

#### *Definitions of 'settle' and 'completion'*

The Society considers that additional definitions are required in section 36 of the *Acts Interpretation Act 1954* to provide clarity around when a contract 'settles' or there is 'completion' of a contract in an electronic conveyancing transaction. In a paper based transaction there is agreement that these terms refer to the time when the parties come together to exchange cheques for an executed transfer of title document.

Many statutes currently provide unilateral rights to terminate contracts or rescind agreements for the sale of land prior to 'completion' or before a contract 'settles' on the basis of statutory non-compliance or the existence of some other defect in the property, title or some attribute. Again, in the paper based environment, a party can exercise this right up until the point where the parties do exchange and it is relatively clear where the statutory rights cease.

In an electronic conveyancing environment it is more complex. There is a point where all parties have authorised a settlement to take place, there is an appointed time when the system will initiate settlement and a later time when the funds will be transferred and the transfer document lodged. It is unclear at which of these points, or some other time, statutory rights to terminate expire upon 'completion' or when a contract 'settles'. It seems most logical that in the electronic conveyancing environment that the relevant point in time is when the transaction is generally irrevocable.

The Society is firmly of the view that a statutory definition is necessary to provide sufficient clarity around when the existing statutory rights to terminate a contract expire in a transaction. Given the sums involved in property conveyancing it is not satisfactory to leave this matter to industry practice which may be challenged or to rely upon subsequent litigation to make a determination. To do so is to introduce an unacceptable level of risk for the public into electronic conveyancing.

A corollary to the need to introduce clarifying definitions is the need to standardise the way contract termination provisions are expressed to improve certainty and to remove unnecessary red tape. In legislation there is little consistency in the way these provisions are described, while the termination right is generally of the same effect, for example:

- s.421(3) of the *Environmental Protection Act 1994* provides  
... the buyer may rescind the agreement by written notice given to the owner before the completion of the agreement or possession under the agreement, whichever is the earlier.
- s.86(2) of the *Neighbourhood Disputes Resolution Act 2011* provides  
The buyer may terminate the contract at any time before the contract settles by giving a signed, dated notice of termination to the seller or the seller's agent.
- s.217 of the *Body Corporate and Community Management Act 1997* provides  
The buyer may terminate the contract if—  
(a) it has not already been settled ...
- s.27(2) of the *Land Sales Act 1984*<sup>1</sup> provides

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<sup>1</sup> *Land Sales Act 1984* is currently under review by the Department of Justice and Attorney-General

The purchaser may avoid the instrument by written notice given to the vendor before the vendor gives the purchaser the registrable instrument of transfer for the proposed lot.

Thank you again for providing the Society with the opportunity to comment on this Bill. Please contact our Principal Policy Solicitor, Mr Matt Dunn, on (07) 3842 5889 or [m.dunn@qls.com.au](mailto:m.dunn@qls.com.au) for further information.

Yours faithfully

Annette Bradfield  
**President**