

Electronic Conveyancing in Australia and New Zealand: Issues for
Lenders

Commentary

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Electronic Lodgement

The Introduction to the New South Wales Discussion Paper, "Electronic Settlement, Electronic Lodgement and Automatic Registration of Real Property Dealings in NSW" (Public consultation document May 2004) p10, [www.lands.nsw.gov.au] traces the history of Torrens title lodgement and registration and goes on to say: "Electronic lodgement of dealings is the next logical step in the evolution of land registration systems." The paper sets out recent projects in other jurisdictions, including New Zealand and Canada, and John Greenwood had added valuable insights into the New Zealand experiment from a practitioner's viewpoint in his paper. The EC project in Victoria is about to proceed to a pilot. Electronic lodgement is not a case of "if" but "when" and more importantly for lenders, "how"?

Lenders will value a workable solution to electronic lodgement which will be quicker, cheaper and more efficient than the paper system. A significant benefit will be that, after registration, electronic titles will alleviate document handling and safe custody expenses. The electronic lodgement system will increase the capability for supervisory oversight and audit, the centralisation *or* diversification of processes through networks and the implementation of higher levels of security. Automatic registration as foreshadowed by the NSW paper would be a very welcome addition to risk management.

Since electronic lodgement also presupposes electronic Registrar's instruments, the system could potentially also be integrated with the lender's own electronic products and systems. Thus, these initiatives are timely given the incipient amendments to the Consumer Credit Code to permit electronic credit transactions. (The amending Bill and regulation are currently being considered by the Ministerial Council on consumer affairs, and after a short period for public comment, are expected to be introduced into the Spring session of Queensland Parliament.)

However, the "how" is crucial for lenders and for the achievement of the efficiencies which will drive take up of the system. The Victorian project is important because key facets integrate the conveyancing system into a broader regulatory framework. The system is premised on functional equivalence with the paper system, the broad strategic policy setting adopted by the Commonwealth Government in relations to electronic transactions generally regulatory, for instance the Electronic Transactions Act and by ASIC in relation to the Electronic Funds Transfer Code. For lenders, it is vital that consistent policy settings are

also translated, as far as is suitable, into standards and rules which can be implemented across the whole lending operation. For example, the EC system in Victoria is premised on the use by subscribers to the system of digital certificates issued to ABN holders (ABN-DSC) under the Gatekeeper framework. It therefore utilises already developed infrastructure of existing registration and certifying authorities and an established environment in which liabilities and risks have been articulated. Incidentally, the use of ABN-DSC is likely to obviate the use of powers of attorneys by banks to delegate functions to their officers. Instead, officers will hold an ABN-DSC which will be much easier to issue and revoke. Also, both the New South Wales and Victorian Registrar 's requirements as to identity checks of transacting parties is likely to be identical to, or harmonise with, existing identity protocols which banks are required to adhere to under the Financial Transactions Reports Act.

In addition, while each State jurisdiction obviously has different land titles legislation, certification rules and approaches to the practice of conveyancing (as to the extension to conveyancing companies), it is important for lenders who have cross border markets or who have nationals operations that each State system uses the same data standards and is interoperable. This involves common transmission and authentication systems, and data standards, as far as possible operational platforms that are either the same or can be configured to individual preference.

The electronic conveyancing project has important ramifications for other government departments charged with responsibility for electronic lodgement and registration. It may provide technological and legal solutions which can be readily adopted in those other contexts. It was the capacity to build electronic lodgement systems which encouraged the Canadian Provinces to adopt Personal Property Security Registers. It is notable that in New Zealand, both developments have occurred at roughly the same time. It will be important from an industry perspective that a whole of government approach is adopted in relation to credit and security transactions.

Financial Settlement

However, the most important aspect of the Victorian project, and one also contemplated by the New South Wales Discussion Paper, is the inclusion of financial settlement into the

model. It is this step which is crucial to the success of electronic conveyancing in Australia. Electronic financial settlement is the greatest incentive to take up and delivers the greatest efficiencies to the system.

The Victorian EC System utilises netting arrangements through the low value stream of the RTGS system of the Reserve Bank, with Sydney Futures Exchange providing the financial services manager role following a competitive tender process. In value terms, the stream is small beside the wholesale transfers of funds which occur through the Reserve Bank every day. Risks and processes are well understood and one would expect that putting in place the rules ought to be relatively straight forward. The use of netting to settle conveyancing transactions removes the cumbersome process of drawing and exchanging bank cheques, which were liable to the risk of stoppage for theft or forgery.

The challenge posed by the integration of electronic settlement into conveyancing is that the system must provide for mutuality between the parties themselves replicating physical settlement. This includes creating system checks to alert parties to changed or corrupted information. If presettlement communications can take place electronically between the parties then efficiency is enhanced by allowing parties to check and enter information in their own time, rather than waiting for the settlement time to discover an error or omission. The EC System does this by providing a secure shared workspace accessible through any internet browser in which parties to the transaction can, as appropriate, view each other's progress (by indicators of signing, readiness to settle, settlement figures etc). Thus the technology does away with one on one correspondence or phone calls and produces the greatest certainty and efficiency possible.

Apart from operational issues, the other key question is the allocation of risk in the pre registration environment, both pre and post lodgement. EC Rules, currently under negotiation, identify and deal with these risks. The concept of delivery against payment in the electronic context is not a new one in Australia. Australia led the world in this regard with the CHES system for the electronic settlement of trading in shares (1994, with financial settlement October 1995). The experience with CHES shows that managing the relationship of the parties in this context has two facets: the parties to the electronic system itself and the relationship between the parties and their clients. Based on the precedent of CHES, it is expected that a suitable outcome in relation to risk allocation is achievable.

The relationship with the customer

It is important not to lose sight of consumer issues in the area of electronic credit transactions, including electronic conveyancing.

The EC System appears to safeguard the privacy of customers through the limited access of parties only to information relevant to their interest. Unlike solicitors, lenders are already very attentive to the issues involved in collecting, using and retaining personal information related to identity.

There are some features of the EC System which will require attention to customer interests. One is the accuracy of customer bank account details. The same problems in relation to payments to and from the wrong account will arise here as in other electronic funds transfer environments. It would be helpful if contractual arrangements were put in place at the outset between subscribers to cope with reversal of this, rather than relying on the sometimes obscure common law (not all recipients of funds will be subscribers, but that is probably the exception, rather than the rule).

It is also the case that the customer may be defrauded in circumstances where there is no fault on the part of the lender or other subscribers or the system itself. It would be desirable for an insurance regime like CHESS to be instituted to give customers total protection.

Although an electronic system in which intermediaries who are insured such as banks or conveyancers offers protection to consumers, online transacting carries its own risks relating to anonymity, and speed. Lenders face issues such as: what kind of procedures will lenders need to adopt where an electronic title is in place, particularly if it is unencumbered. What evidence of the right to deal will be required? What lessons can be learned from Queensland practice in this regard? If banks have an incentive to move to electronic titles for the reasons set out above, should they encourage their customers to surrender the paper CT? What will be the cost of this surrender and who will bear it? And what sort of advice should a lender give the customer about the pros and cons? Will administrative fees be lower for transactions involving an eCT and what equity issues will this give rise to? When the Consumer Credit Code permits online lending, what are the barriers to mortgage financing online from a risk perspective? Will both the mortgagor and the witness need a digital certificate? How will the perennial problem of intra family pressures be guarded against and will this militate against joint electronic mortgages?

These questions make a more general point. It is that the contracting process is at a half way stage. The technology has solved the mechanics of transacting online such as transmission and signature of the instruments and payment systems. It has not found the means of protecting the individual consumer from identity theft and pressure from third parties other than by reverting back to face to face meetings. Biometrics might provide part of the answer; the ability to verify proofs of identity with the issuer is another. The solution will evolve.

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