

Risks and Liabilities
in
Electronic Conveyancing

Barbara Flett
Registrar Land Titles
Melbourne

RISKS AND LIABILITIES IN ELECTRONIC CONVEYANCING

Any major change begins with that first small step and in the development of electronic conveyancing in Victoria and ultimately in Australia, that first step happened back in 1998 where a dedicated project team was established in Land Registry. At the time Land Registry was in the throes of titles automation and conversion of the records to electronic form – a massive undertaking which culminated in the deployment of the Victorian On Line Titles System (VOTS) in December 2001. Moving beyond the titles automation phase was hard to imagine.

But the challenge to look over the horizon was thrown out to this project team by the then Registrar of Titles and so the project began. From the start industry participation was seen as critical and the initial project team include a legal practitioner from a specialised conveyancing practice and a conveyancer. 11 specialist working groups were established with industry and most of the fundamental design principles of the electronic conveyancing system developed during that period have carried forward into the ultimate design.

In 2002 the Victorian Government provided project funding for the Land Exchange (LX) which is the umbrella for a number of IT related projects in land administration. Electronic conveyancing and a project for a web-based lodgement of plans of subdivision are the two main LX reform initiatives.

Status

Land Registry and the Land Exchange recognise that this development requires considerable business change. Significant resources are devoted to working through with the legal profession, conveyancers and the financial institutions the implications for their business operations and seeking solutions which suit all participants.

At present through the Land Exchange project software development for electronic conveyancing is proceeding at a fast pace. The Land Exchange software is designed to synchronise with other software modification to the back end IT system in Land Registry.

The first pilot implementation will be confined to discharges of mortgages and mortgages by financial institutions. This restricted pilot operation is planned for January 2005, with a pilot of all functionality in June 2005 and rollout from September 2005. The current paper based lodgement system will be maintained in parallel for those who do not wish to use electronic conveyancing and for the lodgement of out-of-scope transactions.

Legislation to support the introduction of electronic conveyancing - the *Transfer of Land (Electronic Transactions) Act 2004* was recently passed in the Autumn 2004 session of the Victorian Parliament and came into operation on 19 May 2004.

This legislation in conjunction with the *Electronic Transactions Act*, provides authority for the creation of digital instruments and the development of an electronic network for the purposes of lodgement of digital instruments. In developing the legislation, Land Victoria looked at legislation already in place in other jurisdictions - in particular New Zealand. We also engaged in the lengthy consultation process with stakeholders via specialist working groups referred to above. An exposure draft of the Bill was also released before finalisation of the legislation.

The introduction of electronic conveyancing in Victoria although new to Australia is following on similar lines to the development of systems in other parts of the world. Use of the Internet for electronic lodgement or filing of land transfer and mortgage documents is already available in four Canadian provinces and New Zealand and projects are underway in other parts of Canada, England, Scotland, Sweden and the Netherlands. In Ontario where the first electronic filing system was introduced in 1999, over 3 million land transactions have been lodged using this system.

In Australia, the Registrars of Title in the various states have recognised that it is important to ensure national consistency as far as possible in the development of systems. This is managed through the Australian Registrars Electronic Conveyancing Steering Committee (ARECSC) which meets quarterly and which also includes representatives from peak stakeholder bodies such as the Law Council of Australia, the Australian Conveyancers Association and the Australian Payments Clearing Association.

Collectively the Australian Registrars of Title visited New Zealand in August 2003 to their system and first hand. In more recent months consultation documents on the introduction of electronic conveyancing have also been recently released in New South Wales and South Australia.

How does EC work

The proposed system for Electronic Conveyancing is a web-based system, which uses the Internet for electronic commerce and electronic lodgement of land transfer documents. EC based on the concept of an electronic lodgement file or ELF. In essence the ELF is a shared workspace for each separate conveyancing transaction and will be completed by the relevant parties to a transaction.

While electronic conveyancing requires implementation of a highly complex infrastructure, for users of the system, this embedded complexity of the software and business rules remains hidden to the user. Any person using electronic conveyancing will only require three skills –

1. A knowledge and understanding of conveyancing law and practice.
2. The ability to access the Internet.
3. A capacity to use software no more complex than a World Wide Web browser.

To ensure safety and integrity, Electronic Conveyancing is restricted to settlement parties. The settlement parties who will complete the ELF will typically include the representatives of the vendor and the purchaser (their solicitor or conveyancer) and the representatives of the outgoing and incoming mortgagees.

Each settlement party will contribute the data that they would normally supply to Land Registry in a paper environment – that is, the data included on a Transfer of Land form together with (if applicable) a discharge of mortgage and registration of mortgage form. To assist the parties and to maintain data integrity, relevant data will be pre-populated from the Titles Register and this data will only require confirmation. Electronic Conveyancing also includes financial disbursement of funds, provision of duty to the State Revenue Office (SRO) and settlement via electronic funds transfer.

Currently, the documentation required for a conveyancing transaction is separated into the component parts of the transaction – for example, discharge of mortgage, transfer and mortgage. Although this reflects the progress and preparation of the documentation, it is contrary to the intention of the parties. For example, no mortgagee will give a discharge of mortgage unless it can be sure of receiving repayment of its funds and these funds can only be provided by a mortgagee who is prepared to advance money. However, the mortgagee advancing money will only do so on receiving security that is dependent upon its mortgagor receiving a transfer of the land to be mortgaged.

The data and terms from all the various parts of a transaction under Electronic Conveyancing are combined into ELF to which each of the parties must agree. Upon settlement, this file will be the origin of all financial data transmitted to the Financial Settlement Manager and all the data transmitted for registration. The data transmitted for registration will continue to be in discrete instruments but these will be simplified plain text instruments signed by the relevant parties.

EC will not capture all types of dealings lodged with Land Registry. The initial transactions that Land Registry will accept electronically are Discharges of Mortgage, Transfers, Mortgages, together with Withdrawals of Caveat and Survivorship Applications, either singly or in any combination. These simpler lodgements account for over 80% of the total volume.

Land Registry also proposes to introduce the Electronic Certificate of Title (eCT) in parallel with the implementation of Electronic Conveyancing.

All settlement parties (legal practitioners, conveyancers and financial institutions) will be required to enter into an agreement with the Land Exchange in order to use the system. Settlement parties using the system will be required to act in an agency role on behalf of their clients, and to comply with the LX Public Key Infrastructure security arrangements.

The ELF, together with this security infrastructure, creates the original instruments as required by Land Registry. When provided to the Registrar on electronic lodgement, the information becomes the searchable and auditable item in case of dispute. A non-repudiable digital signature is used to provide this instrument. With Electronic Conveyancing, there are no paper instruments to be lodged with Land Registry.

One of the major benefits of electronic conveyancing is the elimination of physical settlement meetings to exchange the relevant documents and bank cheques. Settlement and lodgement can occur electronically at a date and time stipulated and agreed by the parties. The financial settlement data is taken from the ELF and is also digitally signed by the parties. This data is then sent to the Financial Settlement Manager (FSM) for electronic disbursement of funds. Lodgement of electronic data with Land Registry occurs after successful settlement and electronic funds transfer. The data to be provided to the SRO and Valuer General (VG) on a Notice of Acquisition is also transmitted at this time. Data required by Municipalities and other statutory authorities to update their records will also be transmitted by this system.

LX has retained the services of the Sydney Futures Exchange as FSM and intends to have these services integrated with Electronic Conveyancing in time for its larger pilot implementations.

As part of the implementation of Electronic Conveyancing, it is necessary for every subscriber to have confidence in the system and its operations. This ensures that every subscriber can be sure that both they and their clients are protected in the event of fraud or negligence by another user of the system. In most circumstances, this is best done by all subscribers holding professional indemnity and fidelity insurance which will be mandatory.

Electronic Conveyancing Design Principles

In development of the electronic conveyancing model, the aim was to minimise any changes to existing conveyancing practice as far as possible. Conveyancing is a system of checks and balances between the powers and capacities of each of the parties to a transaction. Ideally, Electronic Conveyancing will not alter those checks and balances or change the role of the Registrar of Titles. Electronic Conveyancing envisages no alteration to the Torrens system of land registration. It is based on the unaltered maintenance of the State Guarantee.

The Registrar of Titles will continue to be the officer charged by relevant legislation with the tasks of land registration and of determining the proprietorship of interests in land. Introduction of electronic conveyancing uses the discretionary powers of the Registrar to establish a framework by prescribing the requirements for execution and data presentation. Prescription of these requirements is in conformity with the traditional role of the Registrar.

Based on an Irish system of land registration, paper-based conveyancing of general law land developed over more than four hundred years into a system that, in England and Wales, that worked well and reliably, if not cheaply.

Experience in the Australian colonies with many absent owners and extensive land speculation revealed a number of critical weaknesses in the general law system of conveyancing that had been imported from England. These weaknesses threatened the safety of the conveyancing system and the economic life of the colonies that it underpinned. As a result, a Torrens based system of land registration was progressively introduced from the 1850's in all the Australian colonies to complement the paper-based conveyancing process. The Torrens system was designed to provide cheap conveyancing as well as a safe and certain title for registered proprietors of land.

Although the paper-based system of conveyancing still retains a number of intrinsic risks and weaknesses, procedures have been developed over the years to deal with these risks. Practical checks and balances within paper-based conveyancing have reduced the risks and ensure that, for most people, it offers a trusted and inexpensive means of conducting conveyancing.

Like the Torrens system itself, the Electronic Conveyancing system was developed after careful analysis of the risk factors inherent in paper-based conveyancing. It was also developed with a view to ensuring that the introduction of Electronic Conveyancing did not itself result in the introduction of additional risks or an overall change in the balance of risks.

Within any conveyancing process, whether electronic or paper-based, there will always remain some level of risk. It is very difficult to remove all opportunities for the determinedly negligent or fraudulent to behave in a way that threatens the safety of others. That said although the system integrity features which are build into the design of electronic conveyancing are intended to address or mitigate most of these risk factors.

EC System INTEGRITY

In the paper world the integrity of the land titling system is not just a function of legislation, case law and supporting rules, procedures, guidelines and practice directions. Other system integrity features of a more administrative nature are also critical, including for example physical security features, form design, document management practices and attention to staff training and quality assurance.

In the design of the electronic conveyancing system, Land Registry has considered the interplay of all system integrity features both administrative and legal. In many cases the electronic security feature offers greater levels of assurance than would be able to be achieved with the paper system.

For example the software system design and the business rules which sit behind the working of the Electronic Lodgement File (ELF) are a key component of system integrity. The ELF is a shared workspace which must be used by all participants to the land transaction. It includes design features which 'force' standardisation of data and certifications in much the same way as a hard copy form does in the paper world.

The power of the technology in ELF system design allows for the inclusion of new security features such as prepopulation of data from the Titles Register. The Land Exchange electronic conveyancing software has the ability to control or limit the variability of actions of the respective parties to the transaction. Also the use of the shared workspace allows participants to view information provided and ascertain when and what has been digitally signed.

In addition to the integrity features designed into the IT system to support electronic conveyancing, other safeguards include –

Certifications

Standard forms of Representation

Identity Management

Public Key Infrastructure

The Electronic Lodgement File (ELF)

The Electronic Conveyancing Settlement Module

Electronic Certificates of Title and Administrative Notices

Pre-settlement validation

Insurance Requirements for subscribers

Dealing with each in turn provides an insight into the existing risk in paper-based conveyancing while explaining the safeguards that Electronic Conveyancing will introduce.

Role of certifications

The certifications are regarded as essential to the operation of Electronic Conveyancing because, within a contractual context, they enable the parties dealing with the person giving the certifications (ie other subscribers and the Registrar of Titles) to rely on the truth of the certifications. This has a number of benefits for subscribers. In particular, it gives them a higher measure of security when dealing with other parties to transactions than currently exists in the paper-based system. The paper system is based on "caveat emptor", whereas in Electronic Conveyancing there is an underlying contractual relationship between subscribers, which is capable of enforcement, should one subscriber act fraudulently or negligently towards another.

Because the system rules are designed in such a way that all subscribers to Electronic Conveyancing are a party, privity of contract exists between the person giving the certifications and the person relying on them. Consequently, if a subscriber were to make a fraudulent or negligent mis-statement as to the certifications, this would seem to be a clear breach of contract.

Certifications will be required where a person, for example, a conveyancer or solicitor, signs on behalf of a represented party and where the person signing is an employee of a financial institution. The only difference will be the nature of the representation agreement that has been signed. They must be provided before a matter can go forward to settlement. It is up to the subscriber giving the certifications to decide when to give them. As the certifications form part of an instrument, they would be made at the same time as the instrument is signed by the subscriber.

The certifications form part of the standard text applicable to and contained in each instrument. In Electronic Conveyancing, certifications are not individually signed but each certification has a tick box next to it. All tick boxes need to be completed before the instrument can be signed. The subscriber will then sign the completed instrument. After settlement, the instrument will be passed to and stored in VOTS.

STANDARD FORMS OF REPRESENTATION

Electronic conveyancing will introduce a standard form of representation agreement. These are intended to document clearly the scope of the client's instructions while providing comfort to other parties that the settlement party signing on behalf of a party to the transaction has the requisite authority to act on behalf of his or her client and is empowered to sign on his or her behalf.

Within the limitations imposed by the standard forms, these representation arrangements will document any exclusions to the settlement party's capacity and the implications of any such exclusions.

As required by Victorian legal practice rules, these arrangements can incorporate a written quotation for the work to be done. Because the arrangements will be signed by the client, both the client and the settlement party can avoid any later claims common to legal practice where a dispute arises about the extent of the settlement party's authority and the cost of such representation.

Standard forms of representation agreement avoid the risk in conveyancing that arises where the settlement party fails to confirm the client's instructions in writing, or the scope of the client's instructions or the date on which they were received.

By using standard forms of representation agreements, inclusions and exclusions can be confined to those known to all parties to the transaction and so lessen disputes about ostensible authority and a settlement party's responsibilities.

The use of standard forms of representation agreements also assists in ensuring that a party relying on the authority of another party signing for a client can be confident that such authority exists or, if it does not, that the responsibility can be sheeted home to a known individual who has insurance against such a risk.

Identity Management

Before using Electronic Conveyancing any settlement party will be required to identify himself or herself to the 100 points level expected by Federal money laundering legislation in order to be issued with Australian Business Number – Digital Signing Certificate (ABN-DSC) so that the settlement party can sign electronic instruments on behalf of clients.

In turn, a settlement party will be required to identify his or her client to the same level before acting for the client.

This structure of two level identification ensures that all represented parties in a transaction and all parties using Electronic Conveyancing have been identified to a common standard. From a settlement party's point of view, it ensures that any representation arrangement that he or she may have with a client is with an identified client. This, in turn, means that electronic instruments created and signed within Electronic Conveyancing are validly executed by known persons who, in turn, are representing clients known to them.

As Electronic Conveyancing includes a financial settlement module and electronic instruments that will dispose of interests in land, this confidence in the identification of a

settlement party's client and of the other settlement parties with whom settlement party deals is critical to the success and integrity of the Electronic Conveyancing system. This identity management regime means that parties to a transaction can rely on the identity of those settlement parties with whom they deal and the identity of those settlement parties' clients.

Identity management arrangements help to reduce the risk to settlement parties and their clients of fraudulent transactions by parties who pretend to be a registered proprietor or other person holding an interest in land.

Public Key Infrastructure

Public Key Infrastructure (PKI) in the form developed by National Office of the Information Economy is required in Electronic Conveyancing and like the identity management regime described above is one of its critical elements.

In Electronic Conveyancing, settlement parties must use PKI to sign instruments electronically. This requirement restricts access to the system to those who have been appropriately identified and who have a valid and current ABN-DSC. PKI conclusively identifies the settlement parties and ensures that their execution on behalf of their clients is both valid and non-repudiable.

Unlike paper-based conveyancing where execution of an instrument may be incipherable or worse, signed by a fraudulent third party, execution of electronic instruments using PKI technology means that the party signing is always identifiable. It also means that an instrument cannot be altered after electronic signature by the settlement parties. It also compels the execution of an instrument before it can go forward to settlement.

Many of the protections offered by the use of PKI are new to conveyancing and go towards addressing the circumstances that allow the commission of fraud in paper-based transactions.

The use of PKI ensures instrument integrity and reliability and that the instruments are correctly executed by the settlement party with the claimed authority to do so.

Where a settlement party claims that authority wrongly, (whether because of fraud or negligence), any other settlement party can identify that settlement party and obtain proof sufficient to satisfy a court of that settlement party's identity.

Such safeguards are a strong disincentives to fraud or carelessness as the responsibility of the settlement party will be clearly shown without risk of repudiation or denial.

The Electronic Lodgement File (ELF)

Central to the operation of Electronic Conveyancing is an Electronic Lodgement File. This provides a secure shared workspace for settlement parties while, at the same time, providing transparency within the transaction. The ELF provides status indicators as to the progress of a conveyancing transaction, and hence enables every settlement party can identify delays in a transaction and their source.

The transparency of the ELF to the settlement parties removes causes of last minute settlement failures. These causes can be identified and remedied well before settlement. This provides the parties with a greater confidence that settlement will go ahead and go ahead on time. Because all information is confirmed by at least two parties to the transactions, this ensures that most errors will be identified and eliminated before lodgement of any instruments. This means that requisitions made by Land Registry will be reduced. In Victoria, where settlements of a sale are often dependent upon the purchase money paid in another simultaneous settlement, the ELF makes the relationship and dependencies clear and transparent.

Access to the data in the ELF is based on the need of the settlement parties to see it. This provides each of the clients of the settlement parties with a higher level of privacy than is enjoyed under paper-based conveyancing.

A new protection offered by Electronic Conveyancing is the use of an electronic Certificate of title. All paper Certificate of title must be converted to its electronic equivalent which is then held by the Registrar on behalf of the person entitled. No longer just before settlement will the Certificate of title be discovered to be missing, misplaced or unavailable. Instead, the Registrar is instructed to provide the electronic Certificate of title so that a transaction may be settled. Again, this increases the likelihood of settlement occurring at the correct time and reduces the risk of fraud being committed by persons having access to the paper Certificate of title or counterfeiting it.

By using the services of the Land Register which will show the state not only of the interests affecting the land as it does now but also of the state of the Certificate of title and who is entitled to possession of it. Electronic Conveyancing offers settlement parties an opportunity to assess these before settlement instead of relying on the first presentation of a paper Certificate of title at a settlement table where the assessment is likely to be undertaken by junior staff.

The EC Settlement Module

Although other jurisdictions such as New Zealand and some of the Canadian provinces have introduced electronic lodgement of instruments with their Land Registries, the Victorian Electronic Conveyancing has a unique characteristic. It is structured to enable full electronic funds transfers to take place in near real time. This enables conveyancing settlements to be conducted online with lodgement of the resulting instruments as part of the settlement process.

Using a centralised clearing house (the Sydney Futures Exchange), Electronic Conveyancing has arranged settlement in near real time with the Reserve Bank of Australia through a modification of its low value clearing stream arrangements.

Part of this, and intrinsic to the safety of the parties, is an arrangement whereby any bank providing funds for the purposes of a conveyancing transaction signals its readiness to provide the funds at settlement by pre-approving the payment of funds.

All parties can be confident that the funding for settlement will be available at the time of settlement provided that all parties agree that the settlement should proceed.

The Electronic Conveyancing settlement module also addresses the risk that there will be a failure of consideration after settlement. Currently in paper-based conveyancing, settlement

takes place on the basis of bank cheques being exchanged for instruments that should be capable of lodgement by the party who receives them. In essence, this gives settlement the legal effect being the exchange of one promise for another – a promise to pay contained in a bank cheque exchanged for a promise that the instruments handed over will be capable of lodgement and registration.

Bank cheques can be and are dishonoured in a small number of cases, leaving a vendor and financial institution in the situation of having handed over instruments that will deprive them of their interest without getting any funds in return. They can later sue for redress but wily purchasers can place themselves in a position, using the indefeasibility provisions of the Torrens system, to prevent recovery of the interests disposed of.

The Electronic Conveyancing settlement module addresses the financial components of that risk by ensuring funds are cleared before any lodgement of the instruments takes place. This is a new protection offered to vendors and financial institutions to safeguard their interests.

Protection against the conveyancing risk of the settlement is offered to purchasers and incoming mortgagees by the new service of pre-settlement validation offered by Land Registry. This is discussed later.

Inherent in the paper-based conveyancing system are the risks that a purchaser's interest and those of incoming mortgagees can be defeated because of the gap between settlement and lodgement. Under the Torrens system, only lodgement provides safety to a purchaser's and incoming mortgagee's interest.

Although uncommon, this risk is real and will result in the defeat of the incoming interests. In Electronic Conveyancing, this risk is eliminated by making financial settlement and lodgement of the resulting instruments a common and dependent operation. That is, one cannot be undertaken without the other. Payment of funds and receipt and lodgement of instruments occur sequentially but one is linked inextricably with the other under the financial netting rules established by Commonwealth banking legislation.

Financial settlement and the consequent lodgement in Electronic Conveyancing occur at a time agreed by the parties. However, neither will occur unless all instruments are signed and all funds are approved for payment. Then, at the time specified, financial settlement and lodgement occur as one set of linked tasks but only if all parties to the transaction have agreed and their approval remains current.

Under Electronic Conveyancing, parties to a transaction may withdraw the signature of instruments or their approval of the transaction right up until the moment of settlement. Beyond the time agreed by the parties, the transaction proceeds without any input from the parties. Indeed, provided the time for completion of the transaction has been reached and all parties' approval is current, the parties lose any capacity to withdraw from or refuse the transaction.

The Electronic Conveyancing settlement module offers a number of new protections not available under paper-based conveyancing. These include confidence that all parties have approved and authorised the transaction and that there will be sufficient funds for the settlement to proceed. Because there can be no failure of consideration, it eliminates the failure of transaction settlements.

More importantly, the module will deliver financial settlement and lodgement in one continuous process and so will close the lodgement gap that threatens every conveyancing transaction where the parties settle and then lodge later.

Thus, it eradicates the weakness of current paper-based conveyancing settlements by ensuring that money is exchanged for registrable instruments that are transmitted for lodgement as part of the settlement process. No longer will parties settle by exchanging a promise to pay in the form of a bank cheque for an instrument that might be able to be lodged.

In addition, the Electronic Conveyancing settlement module provides a safe, secure and auditable mechanism for fund transfer whereas bank cheques, moved from office to office, sometimes go missing or astray.

Because the funds electronically transferred are cleared funds in near real time, the parties entitled to funds can use their receipt for further transactions, including chained settlements.

Where parties receiving funds require cash, the module offers guaranteed access to ready cash by no later than 9.00 am the next morning. However, cash can be made available earlier by pre-arrangement with the receiving financial institution.

Electronic Certificates of Title and Administrative Notices

Currently, conveyancing transactions in Victoria require a paper Certificate of title to be supplied as part of the conveyancing settlement process. Although Queensland and some Canadian provinces have made a Certificate of title optional in some conveyancing transactions, Electronic Conveyancing in Victoria adopts a different approach.

It is clear that the paper Certificate of title cannot be successfully used within an electronic environment. However, Victoria is of the view that a token such as a Certificate of title provides a measure of security to the community as well as ensuring higher integrity to the conveyancing process if it must be produced at a conveyancing settlement. To achieve this security and integrity, Electronic Conveyancing will require parties using it to convert their paper Certificate of title into an electronic Certificate of title. Quite apart from the differences in the form of the two, there is another critical difference between the two tokens. The paper Certificate of title is held by the party entitled to it, usually a financial institution, as security for its mortgage. The electronic Certificate of title will be held by the Registrar on behalf of the person entitled to it.

The Registrar will then act on the instructions of that person in dealing with it. For example, if it is needed to complete a transaction, the person entitled to it will request the Registrar to nominate it for the use of the instruments created in a specific ELF.

The Administrative Notices are the instructions that a party who would ordinarily be entitled to a paper Certificate of title may give to the Registrar for the disposition of the electronic Certificate of title.

Although an electronic Certificate of title must be used for Electronic Conveyancing, a person entitled to it can choose to have either an electronic or a paper Certificate of title at the conclusion of the electronic transaction.

These Administrative Notices will provide a mechanism for the conversion of a Certificate of title from one form to another. They are used to convert a paper Certificate of title to an electronic form and vice versa.

Because the Registrar holds an electronic Certificate of title on behalf of the person entitled, these Administrative Notices enable the parties entitled to retain control of a Certificate of title until they are ready to settle the conveyancing transactions. As part of the process of gaining the agreement of the parties in an ELF so that settlement may proceed, the party entitled to the Certificate of title will give the Registrar instructions to release or "nominate" the electronic Certificate of title for the use of the transaction if it settles. Failure to settle will see the token remaining with the Registrar under the control of the party entitled to it.

Use of the Administrative Notice to nominate an electronic Certificate of title means that all parties can transparently see whether or not a vendor can bring the Certificate of title as a necessary part of the transaction. Currently, under paper-based conveyancing, the parties settling will only know that the vendor can bring the appropriate Certificate of title to the settlement table at the moment of settlement.

Because the state of the electronic Certificate of title will be provided as part of a search of the interests affecting the land, Electronic Conveyancing ensures that everybody interested in the land is in a position to see the status of the Certificate of title and, by implication, the capacity of a vendor to comply with his or her contractual obligations. This also provides parties with a warning of a fraudulent attempt by a vendor to sell or mortgage the land multiple times.

When committing to a chain of conveyancing settlements that are so common in Victoria, the use of electronic Certificates of title and the Administrative Notices that support give parties a sense of security and confidence that the appropriate Certificates of title will be provided as required.

Administrative Notices as a means of instructing the Registrar as to control of an electronic Certificate of title deals with a number of risk factors inherent in paper-based conveyancing. They give transparent warning as to whether or not a vendor can meet his or her contractual obligations as well as protecting purchasers and financial institutions against multiple fraudulent sales and mortgages.

They, and more particularly the electronic Certificates of title that they support, enable a purchaser and incoming mortgagee to assess the vendor's title before settlement while helping to prevent the failure of chain of multiple dependent settlements.

From the perspective of financial institutions which hold 85% of all Certificates of title, the electronic Certificate of title has one overwhelming advantage. It obviates the need by financial institutions to maintain secure high grade storage of Certificates of title. As a corollary, because an electronic Certificate of title is held by the Registrar on behalf of the party entitled, it also avoids the expense of lost paper Certificates of title.

Pre-settlement validation

The Electronic Conveyancing settlement module protects vendors and their mortgagees against a failure of funds. Pre-settlement validation, new to Electronic Conveyancing, protects against purchasers and their mortgagees from a failure to lodge their instruments successfully and against most failures of registration of these instruments.

Immediately prior to financial settlement and at any other time chosen by a party, Electronic Conveyancing enables instruments that later will be lodged for registration to be validated as capable of lodgement.

Thus, using this tool, subscribers to Electronic Conveyancing will be provided with a means of checking whether or not their instruments are complete and valid. This will avoid almost all later requisitions from the Registrar and ensure that common failures, such as failing to execute or referring to wrong or non-existent land will be eradicated.

This gives purchaser and their mortgagees a level of confidence that their instruments will be accepted on the completion of financial settlement. It also gives parties safety and security when committing to a series of chained and dependant settlements.

Because the Registrar is obliged, under statute, to exercise a judgement as to registration, registration cannot be guaranteed by this process. However, it is expected that failures of registration will become unusual, only occurring where the Registrar believes that the transaction is unlawful or otherwise breaches legal requirements.

Insurance requirements

Victoria is unique in the Torrens jurisdictions in that conveyancing in this State is totally deregulated. Anyone without training, experience or insurance is free to offer conveyancing services for reward.

While this means a very competitive market offering excellent pricing for conveyancing services, it also means that those who rely on deregulated conveyancers to undertake their conveyancing have no recourse to insurance should there be a problem with the services offered. More importantly, those who must deal with deregulated and uninsured conveyancers are also dependent upon the quality of services offered by them to their clients. In the event of dispute, it is unlikely that any of these deregulated and uninsured conveyancers would have sufficient personal assets to meet any payments ordered by the courts.

Electronic Conveyancing will improve that situation and provide a level of confidence not possible in paper-based conveyancing. To use Electronic Conveyancing, all users will be required to demonstrate that they carry appropriate levels of professional indemnity and fidelity insurance. As insurance companies are reluctant to provide insurance cover to those whose knowledge and experience is unknown, this is likely to set levels of professional standards for those working in conveyancing.

Both the insurance coverage and the likely professional standards resulting will give those working in Electronic Conveyancing a sense of security when dealing with one another. They are also highly likely to engender confidence in the integrity and reliability of Electronic Conveyancing, both in conveyancing professionals and their clients.

A requirement for compulsory insurance coverage for all users of Electronic Conveyancing will address an existing inability of conveyancing professionals to rely on the integrity and quality of service provided by others in the conveyancing industry. It is also likely to drive from the industry those who are not prepared to adopt professional standards and high quality in the service that they provide.

Powers of Attorney

In relation to the risks for lenders, special mention should also be made of the benefits of Electronic Conveyancing in cases where a power of attorney is used in the transaction.

In all jurisdictions, powers of attorney used in paper-based conveyancing carry significant risk for those acting for a donee or for those who must deal with a donee. Some of these risks are eliminated by the registration of powers of attorney but most remain in paper-based conveyancing, even in jurisdictions that maintain a registration regime.

Probably most immediate of the difficulties is that a power of attorney may be forged. Forgeries are difficult to detect and more difficult in Victoria where powers of attorney given before 2004 had no legal requirement for a specimen signature of the donee. Even with specimen signatures, this throws the task of examining the signature of a donee onto those acting for a donee or for those who deal with a donee who may have no experience or expertise in examining signatures.

By using ABN-DSC's as the means of execution and requiring a party executing to have been identified to the standards set out in the *Financial Transaction Reports Act 1988 (Cth)* before he or she may execute on behalf of a client, Electronic Conveyancing ensures that parties using the system can be confident of the identity of the party executing. They can also determine the name of the party executing and the firm or entity for whom they worked.

Thus, Electronic Conveyancing offers a way of resolving one of the risks of those who act for a donee or for those who must deal with a donee.

However, powers of attorney have a number of other difficulties. Both those acting for a donee or for those who deal with a donee must ensure that the power of attorney under which execution is authorised is valid and has not been revoked at the time of execution.

With all powers of attorney, there are difficulties in assuring oneself that a power of attorney was validly given by a person capable at that time of giving a power of attorney. This is particularly true of donors who may have since lost competence.

There is also a risk that the person claiming to be a donee of a power of attorney may not be the donee so authorised, especially when confronted by a power of attorney with no specimen signature.

In Victoria where there is no registration, there is also no means of formally notifying revocation of a power of attorney. Thus, those acting for a donee or for those who must deal with a donee are always in the difficult position of ensuring that the power of attorney has not been revoked.

The final responsibility of those acting for a donee or for those who deal with a donee is to assure themselves that the donee is acting within the scope of a power of attorney. The law applicable to powers of attorney is unique in that it requires strict construal of the power and the powers given in the power of attorney are always construed against the donee. In addition, a donee, to act within the scope of a power of attorney, must always act to the benefit of the donor. Both these requirements are difficult to ascertain.

Given Land Registry's experience, these requirements are also often unclear to conveyancing practitioners and yet a failure to satisfy themselves as to these facts by those acting for a donee or for those who deal with a donee will result in the practitioner being enmeshed in a legal action.

Electronic Conveyancing, by seeking to use standard forms of representation agreements and multiple ABN-DSCs that are all derived from a common identification undertaken for a subscriber, was designed to minimise the risks for practitioners associated with the use of powers of attorney. It is expected that in most cases, a representation agreement and a ABN-DSC will replace the need for a power of attorney.

By standard forms of representation agreements and multiple ABN-DSCs, those who deal with a subscriber signing on behalf of his or her client can be sure that a subscriber signing on behalf of a client was authorised to act and that his or her authority had not been revoked.

If this is incorrect and a subscriber signed without authority, those dealing with the subscriber could be confident of identifying the employee who executed an instrument and his or her firm. Those dealing with such a situation could be sure that the firm so identified had insurance that made recovery possible for the client. By using a standard form of representation agreement, those who deal with the subscriber could be confident that he or she had the powers claimed as these would be standard.

Under Electronic Conveyancing, incapacity on the part of a client would remain a question for the subscriber representing that client to determine as it is today. However, those who might deal with the subscriber representing an incompetent client would, at least, have an identifiable and insured third party that they might join in the event that the incompetence became an issue for the courts.

There are long standing risks inherent in the use of powers of attorney in paper-based conveyancing. Through Electronic Conveyancing, most of these risks are addressed so that those acting for a donee or for those who deal with a donee have a greater measure of confidence and a much reduced risk if a representation agreement is used as the basis of authorising a subscriber to act on behalf of a client.

Electronic Conveyancing will permit parties to continue to use powers of attorney but, if they are used, these risks outlined above will continue to fall on those who either act for a donee or deal with a donee.

Risk Mitigation

Throughout the development of Electronic Conveyancing, the risks associated with paper-based conveyancing were reviewed over and over with a view to introducing an electronic system for conveyancing that would alleviate current intrinsic risk factors associated with paper-based conveyancing.

Some of the issues addressed included –

- Failure by practitioners to identify the source and initial scope of instructions
- Failure to obtain comprehensive and clear instructions to act
- Preparation of documents that are incomplete, inaccurate and/or ambiguous
- Documentation that is incorrectly signed and witnessed
- Inaccurate or incomplete title documents
- Issues surrounding the location and availability of the Certificate of Title
- Inability to make mutually satisfactory settlement arrangements
- Shortfall of funds at settlement or cheques incorrectly drawn
- Failure of consideration

- Title documentation unacceptable for lodgement
- Failure to stamp and lodge as soon as practical after settlement
- The gap between settlement and lodgement
- Multiple fraudulent sales

Conclusion

From this brief analysis, it is suggested that there appears to be no additional risks and liabilities in using Electronic Conveyancing. Indeed, an examination of paper-based conveyancing points towards Electronic Conveyancing having significantly less risk for user than that assumed by participants in the current paper-based system.