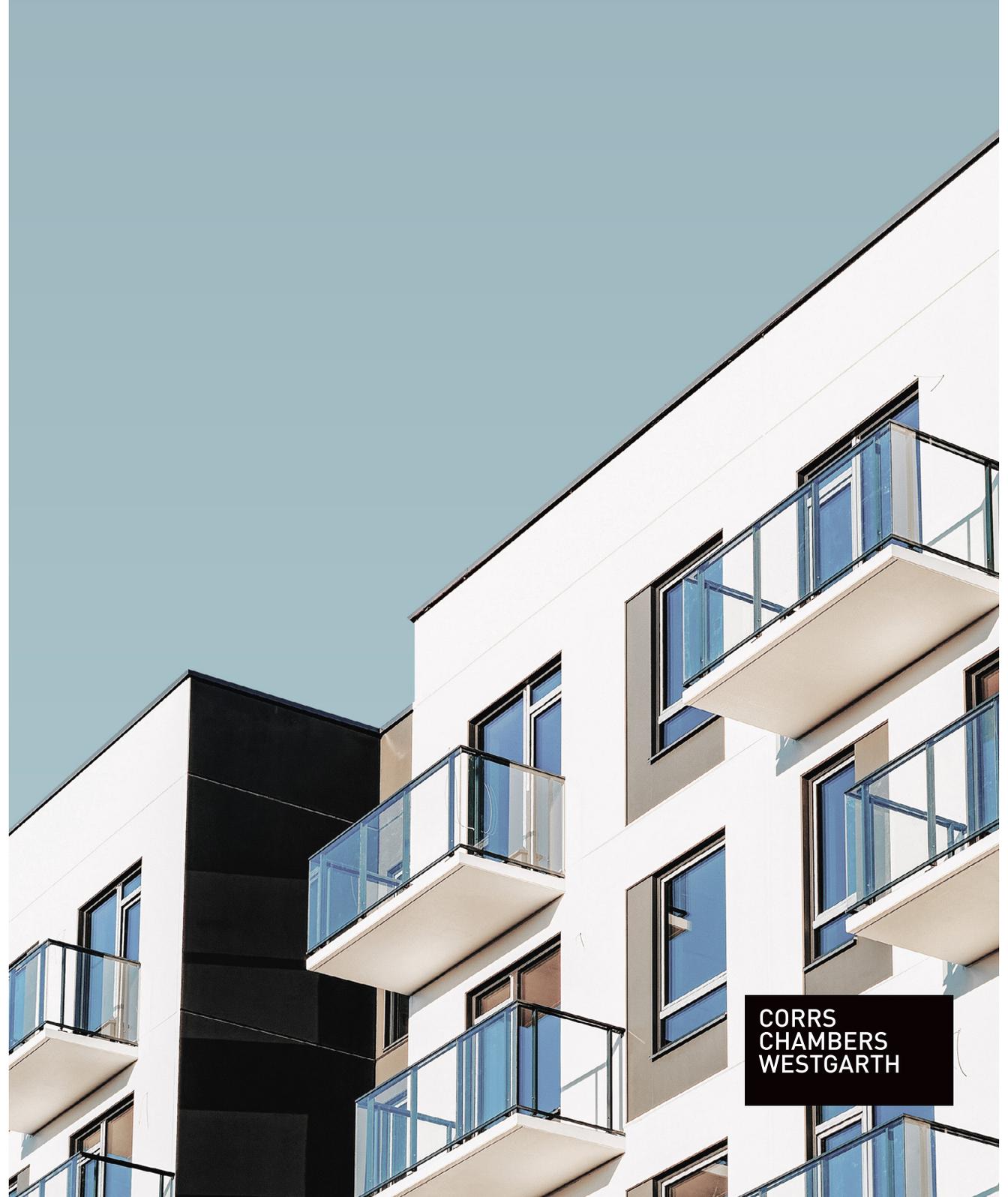

Securing property in just one click

29 May 2020

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The opportunities and risks of contracting property online

From groceries to clothes to holidays to cars, we buy almost everything online. While buying or leasing real estate is hopefully a more important and considered decision than the average online purchase, there is no reason we can't be transacting from the couch.

Digitising the sale and leasing of real estate has been discussed – and attempted – many times. COVID-19 has forced many industries, including real estate, to acknowledge that the real barriers to digitisation have been behavioural. There are no insurmountable legal or practical barriers to digitising many processes. Doing so is not only possible, but allows business continuity, drives efficiency, and opens up new opportunities to create value.

This paper looks at the opportunities to digitise each of the major steps in selling or leasing a property, and the considerations to bear in mind at each step.

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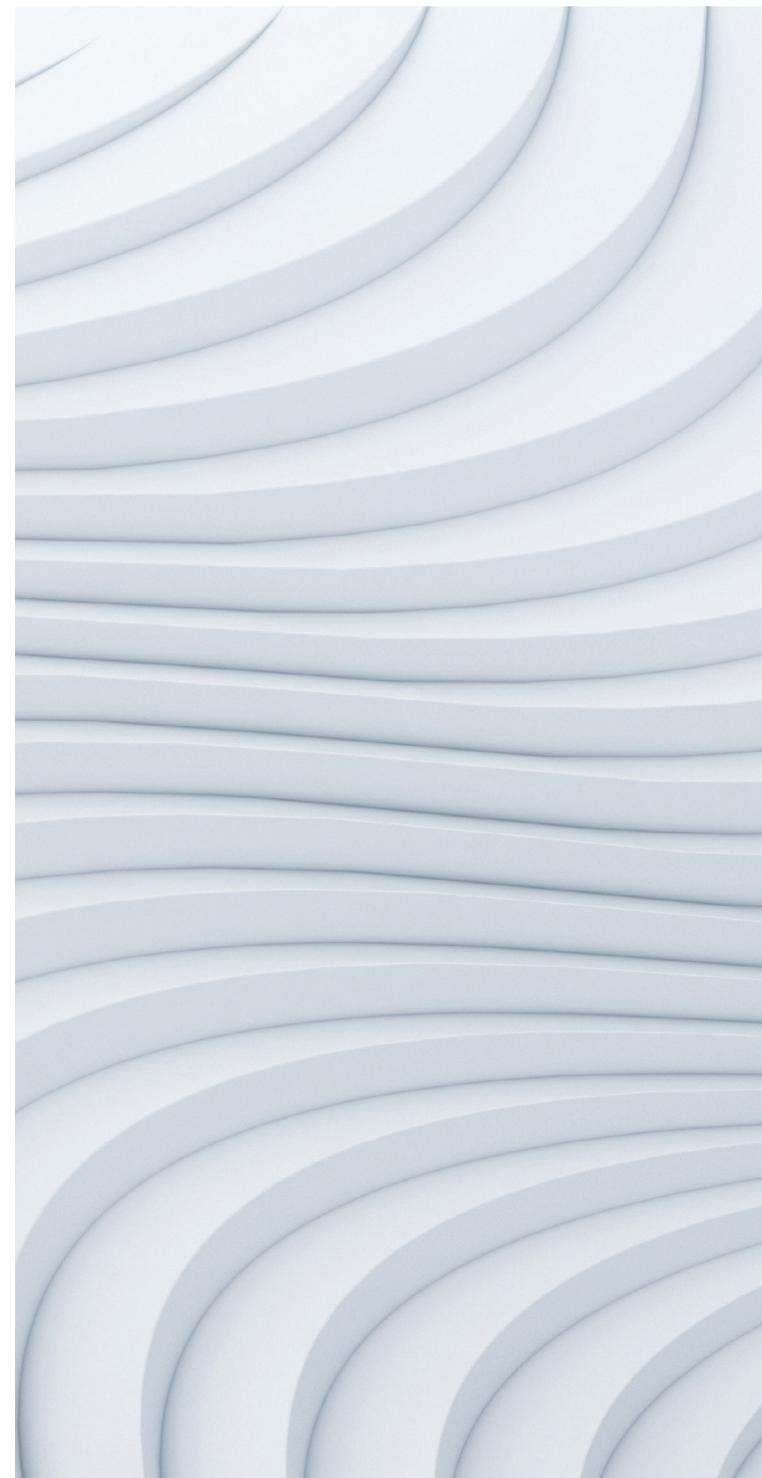
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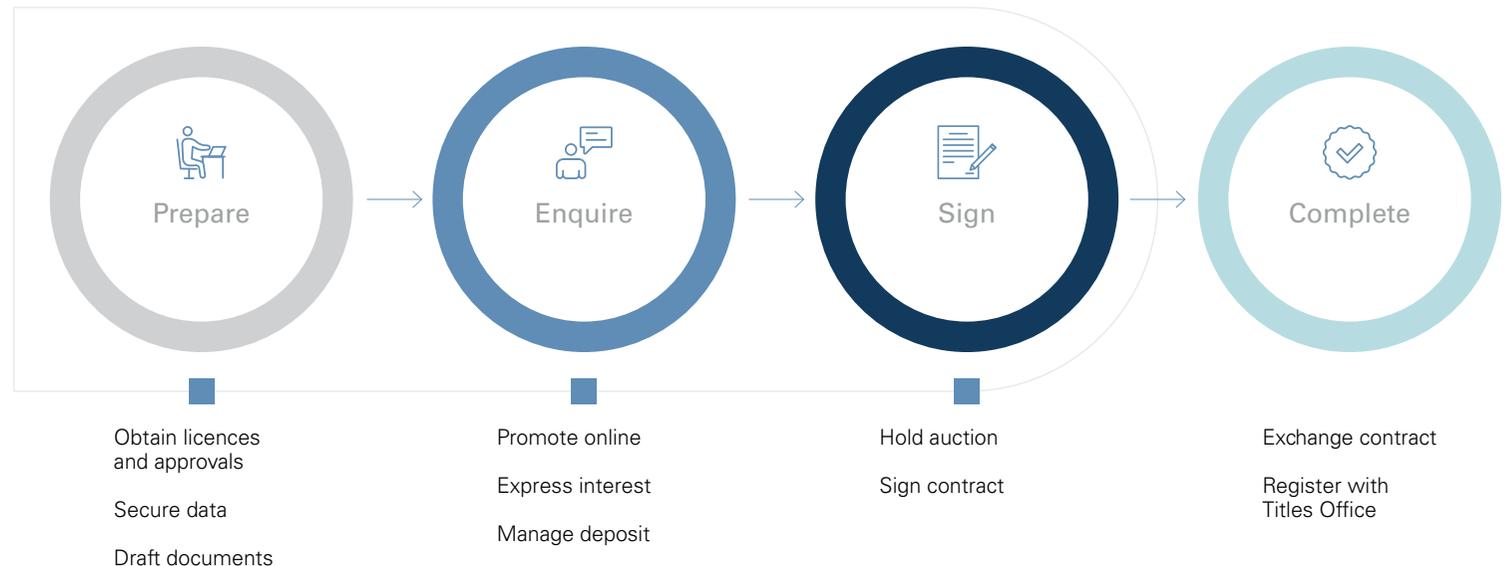
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The digital infrastructure and contracting process

Moving the sale or leasing of real estate online will require a set of commonly agreed protocols or platforms supporting each step of the process, ensuring a mutual, enforceable agreement that complies with all regulatory obligations. Over time, many of these may become integrated, but independent offerings today can provide:

- a marketing platform where the vendor / landlord can provide the details of the property, and a prospective purchaser / tenant can easily review the property
- a facility for deposits and online bank guarantees
- a communication and project management platform
- an online auction platform (if required)
- a contract signing platform (which may integrate smart contract features)
- electronic completion and registration



The selling and leasing processes can be divided up into four main components:

1. **Prepare** – marketing material and transaction documents are prepared for the property
2. **Enquire** – prospective purchasers and tenants enquire about the property
3. **Sign** – purchasers and tenants secure the property
4. **Complete** – contracts are provided and, if necessary, registered

Of course, there are many smaller steps which need to be carried out in each of these components. The final pages of this paper set out example detailed workflows for the selling and leasing property.

01



Prepare

The need to consider regulatory obligations:

Digitisation of processes does not of itself change the obligations on a party to a real estate transaction – whether participating as vendor, landlord, purchaser, tenant or agent. Except where there are specific provisions for digital / online processes, the relevant party / platform will need to identify how to comply with the existing regulatory framework in an online context.

Digitised processes are still covered by the relevant estate agent legislation and regulations. While this does allow for communication using an online platform, as processes are converted, parties should consider who is performing the activities specified under these obligations and whether they are required to obtain licences and to perform statutory obligations.

Securing participants’ data and privacy:

Throughout the electronic process, data will be gathered. The collection of personal information via such platforms will require compliance with the Australian Privacy Principles, including providing collection notifications to purchasers and tenants that submit EOIs specifying the purposes for which the personal information will be used, maintaining a privacy policy, and ensuring reasonable steps are taken to secure such personal information.

Beyond the transaction itself, a major attraction for digitising processes is to have access to the data relating to the properties, purchasers and tenants in future dealings. For example, a platform that can on-board a tenant could automatically extract the incentives, rent review dates and option exercise dates to deliver a seamless experience for tenants. The value of this data grows with scale – it allows the more efficient operation of a portfolio including the potential to offer more flexible, multiple property arrangements. Over time, the data will itself provide useful analytics on behaviour. The parties must be clear that this collection, storage and usage of information complies with the Australian Privacy Principles.



e-transaction readiness

1. Do you need to comply with agency, disclosure or FIRB laws?
2. How will you comply with the Australian Privacy Principles?



02

Promoting the property

Online property marketing has gone beyond wide angle photography and a floorplan – virtual walkthroughs, chatbots, drone footage and video presentations are already standard.

With this shift towards a complete online marketing platform, vendors and landlords should note that the same Australian Consumer Law (ACL) applies even when the entire process is online. Online marketing has almost always been supplemented with the physical inspection, and the lack of face-to-face interaction inevitably increases the risk of misrepresentation and misleading and deceptive conduct.

Even without intent, there is a greater risk of a misunderstanding on the part of a prospective purchaser or tenant. This may not be a breach of the ACL, but could result in increased complaints with the regulator.



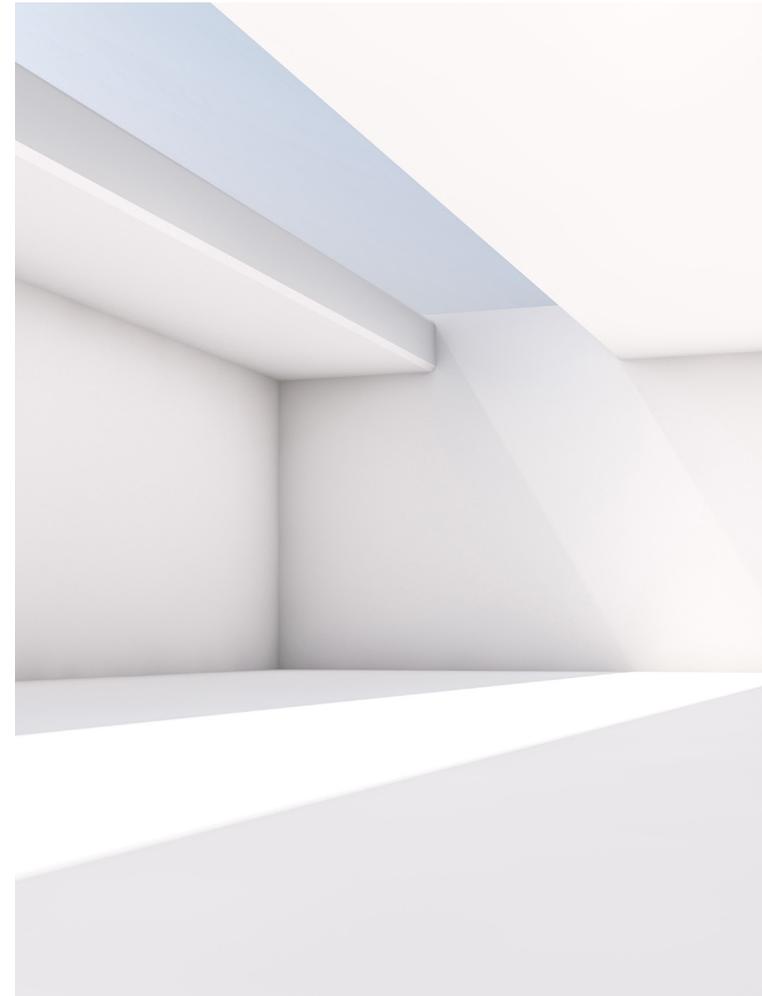
e-transaction readiness

Mitigating the risk of online marketing requires familiar approaches, adjusted for an online context:

1. **Disclaimers** – include them in the virtual experience so that prospective purchasers and tenants are aware that the physical product may differ to its virtual representation;
2. **Updated material** – ensure latest material is uploaded and circulated to team members;
3. **Training** – train sales agents on ACL requirements and specifically how to properly interact on the online platform, and retain training records; and
4. **Online chats** – retain a record of online discussions with prospective purchasers and tenants.



Prepare





03

Expressing interest

Prospective purchasers and tenants will have had the chance to review the contract and inspection reports prior to making an EOI. This qualifies interested parties, who can provide their details, identity / AML compliance documents, financing arrangements, proposed amendments to the contract and make any further enquiries.

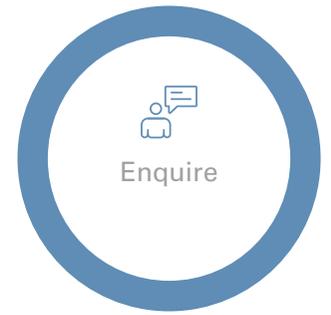
This data can be automatically populated into the relevant agreements, and a summary provided for commercial evaluation by the vendor / landlord. As noted above, such data collection will need to comply with Australian Privacy Principles.

04

Handling deposits

Parties that are considered to be agents under the relevant estate agent legislation will need to ensure that they can comply with their deposit holding and auditing obligations. This will require trust accounts to be opened and maintained while carrying out these services.

In relation to leases, there are examples of the bank guarantee process moving towards an online solution powered by blockchain technology. Successful implementation of such a process could slash processing times for bank guarantees and would create a decentralised ledger for confirming the bank guarantees that have been issued. However, for this to work, landlords and banks need to work together to develop and maintain such platforms.



05



Conducting auctions online

The auction process can be digitised and conducted online – but again, the relevant estate agent and auctioneer legislation and regulations will still apply. Since online auctions are not specifically contemplated by the relevant legislation and regulations, the online platform will need to find alternative ways to comply with the relevant estate agent and auctioneer legislation and regulations.

Some platforms address these obligations through video streaming of a live auctioneer. But moving to a truly online eBay style auction is more complex. Emerging providers enable auctions in this format, but it requires the participants to submit their terms and conditions before being able to bid.



e-transaction readiness

Consider how your online auction will satisfy the following requirements:

1. **Identifying parties** – a platform will need to support pre-registration of bidders, identity document collection and unique bidder identification during the auction. An online platform which captures bidder identity and supporting documents and also allocates unique bidder identification should be able to satisfy these requirements;
2. **Determining when the property is sold** – an online equivalent to the ‘fall of the hammer’ where no further bids can be accepted needs to be incorporated into the platform. This may be streaming the video of the auctioneer or a virtual representation of it;
3. **Notifying parties of conditions of the auction and sale** – most jurisdictions require the auctioneer to make available to the bidders the written conditions of the auction and sale. In Victoria, the relevant rules and conditions must be made available for public inspection at least 30 minutes before the auction starts. These requirements will need to be built into any online auction platform;
4. **Answering questions** – in Victoria, a person is entitled to ask reasonable questions of the land, the contract and the conduct of the auction.

06



The form of the agreement

Electronically signed property documents are valid and enforceable under the *Electronic Transactions Act 1999* (Cth) provided they meet certain conditions including accessibility, identification, consent and reliability. There are several established providers that meet these requirements – it is not strictly necessary to use one of these, but doing so can lower the risk of potential non-compliance.

The Commonwealth and States have made temporary changes to facilitate electronic signing during this period where wet ink signatures have proved difficult to procure. However, despite these changes, parties will need to have regard to the nature of the documents being executed, whether those documents are to be registered, whether the transaction takes place through PEXA and the temporary nature of some of the legislative amendments.

Going further, ‘smart’ contracts are increasing in usage, where the contract itself is digitised and self-executing. The terms are entered into an online platform that connects to external data sources, and can automatically execute when certain triggers occur. For example, if a tenant does not pay rent within the required timeframe, a notice could automatically be sent to the tenant by the landlord. Another example is where certain funds are to be released on a certain date or rent is to be increased on a certain date – these could be automated by the smart contract.

All changes and activity occurring under the contract are recorded on a blockchain platform so that there is an immutable record of the various notices.

Smart contracts offer a simplified way for parties to manage large volumes of agreements, and for both parties to be sure that they are working from the latest version, with the full set of notices. There are still a number of challenges to the adoption of smart contracts including a lack of standardisation, cyber security issues, the reliance on software engineers to create or amend smart contracts, how to address disputes arising from software and coding failures. However, there is momentum for change, with the Real Estate Institute of Queensland already conducting trials of digitised residential tenancy agreements.



e-transaction readiness

1. Are your documents in a format to be used electronically, and how will they integrate with your other platforms?
2. Do you know in what capacity you will be signing documents?



07

Process management and exchanging documents

A more integrated platform will not just handle an individual task, but allow for communication between the parties, and automatically manage the process.

Once a potential purchaser has uploaded their required details as part of the EOI, the platform would send these for verification. Once verified, the summary would be sent for consideration by the vendor.

Then, once a purchaser has signed the contract, the platform will automatically send an email to the vendor to sign the document. As soon as the vendor signs the contract, the fully executed document can be sent to the parties and their representatives.

08

Registration

Leases

Electronic settlement platforms, such as PEXA and Sympli, allow for the lodgement of electronic leases or e-leasing. The capacity of such platforms reflect a movement towards the electronic lodging of documents. Leases lodged via these platforms may include electronic or wet ink signatures. These signatures are not necessary however, as the lease is to be signed digitally on the platform by the lawyers for the landlord and the tenant. Signatures made on behalf of the landlord and tenant by their respective lawyers are binding.

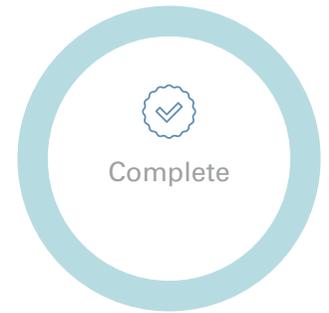
The PEXA workspace now includes fields that have previously been included in official lodging forms, thereby removing the requirement for such forms to be completed.

It is important to recognise that there are certain leases and titles which are not eligible for electronic lodgement, such as leases that are to be registered on lease folios. Each title and lease type will need to be reviewed at the time of drafting the lease to determine whether it may be electronically lodged. Additionally, a copy of the fully registered lease will not be automatically provided when lodged electronically, and will need to be purchased through an approved search provider.

At the moment, in NSW, PEXA supports registration of leases while it is not yet available in WA and Queensland. In Victoria, it is not mandatory for leases to be registered – however, PEXA can support the registration of leases if required.

Conveyancing

Electronic settlement platforms are now a part of most conveyancing processes. Key considerations include how to integrate any online process with the mandatory electronic processes and how to integrate registration through PEXA and Sympli into the processes outlined in this paper.



Detailed Workflow – Selling Property



Prepare



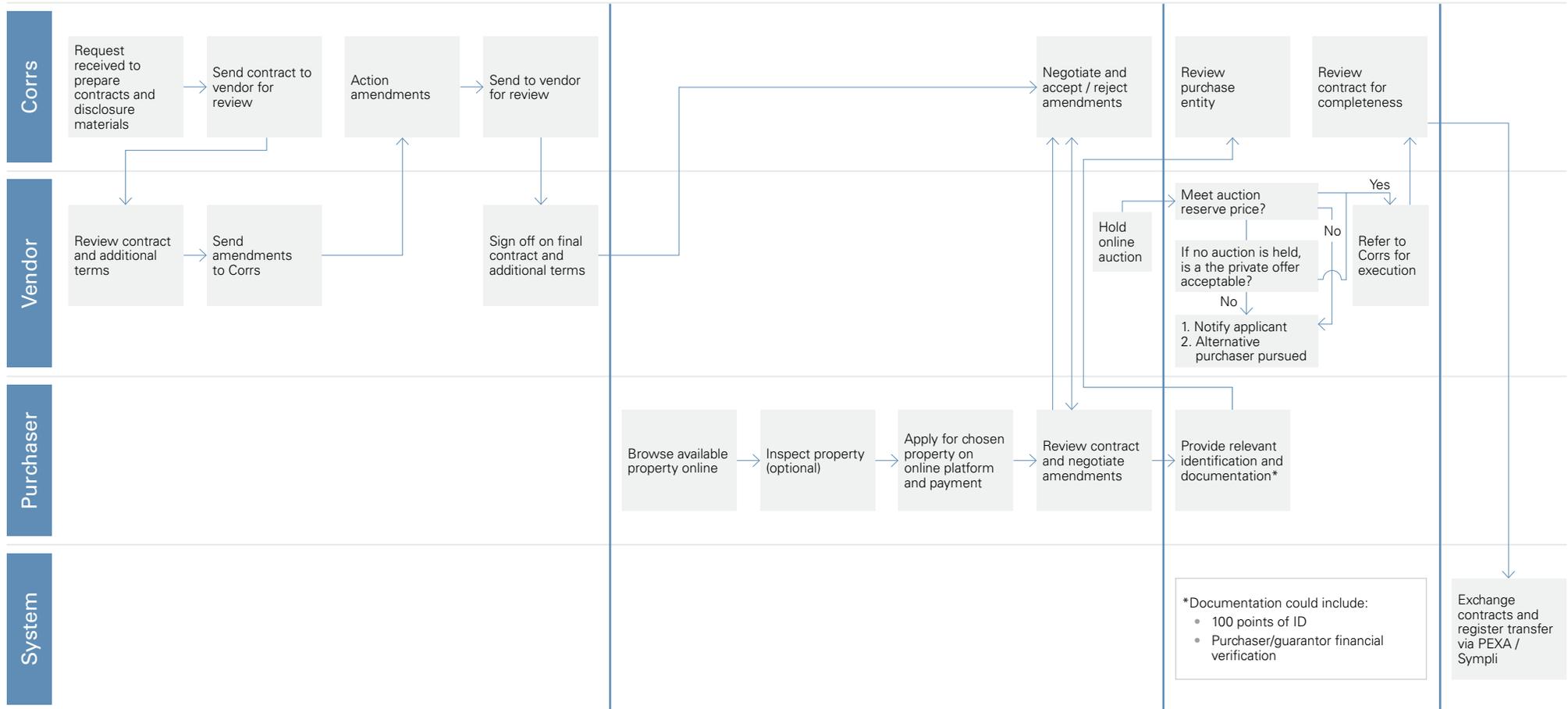
Enquire



Sign

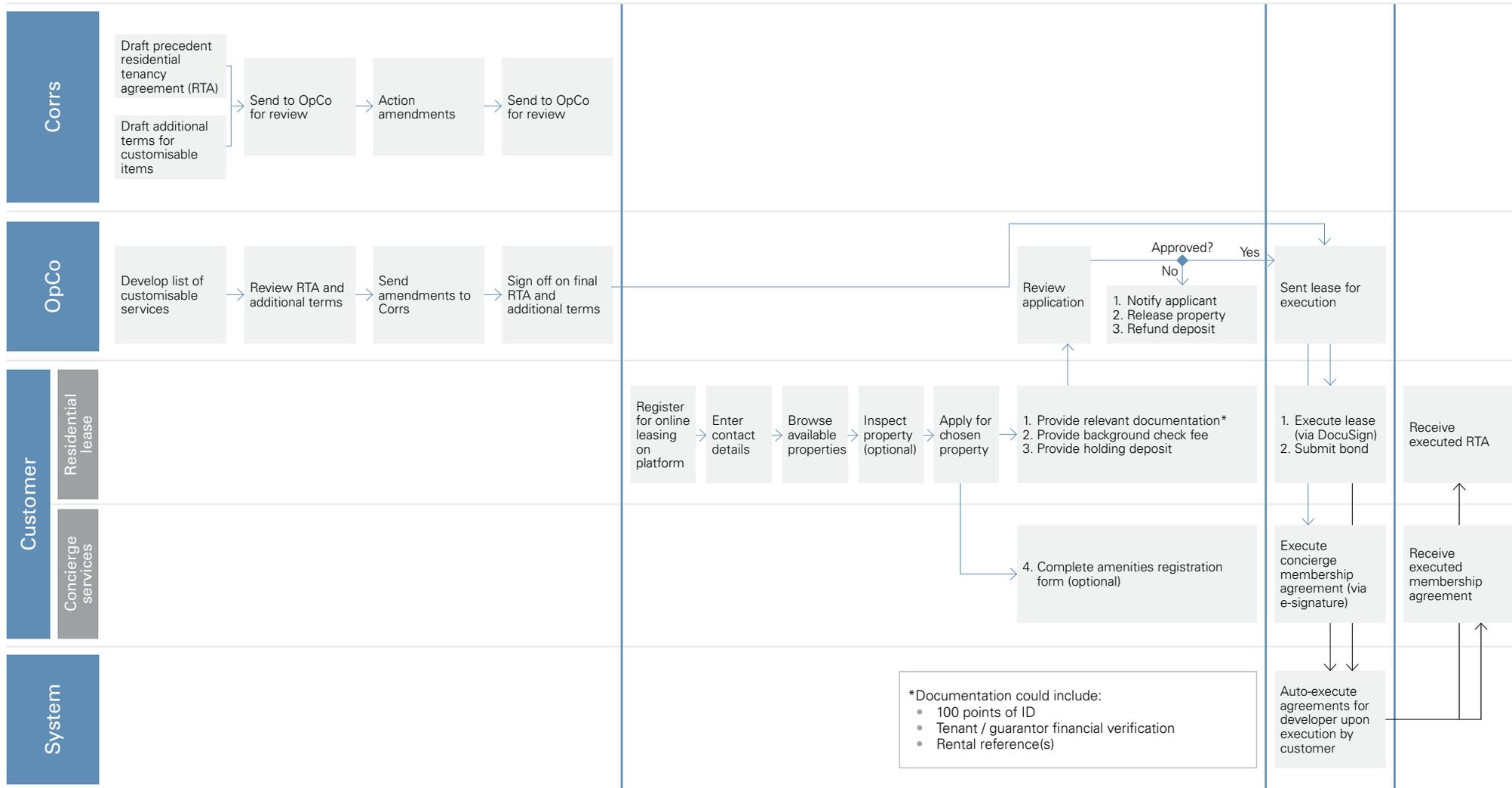


Complete



Detailed Workflow – Leasing Multifamily Property

A similar workflow could equally apply to any other form of leasing.



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