



24 May 2023

Mr Bruce Roberts
Registrar of Titles
Registration Services
Landgate

By email: haveyoursay@landgate.wa.gov.au

Dear Mr Roberts,

Consultation Paper – Electronic Creation and Execution of Documents

The Australian Banking Association (**ABA**) welcomes the opportunity to respond to Landgate's consultation paper, *Electronic Creation and Execution of Documents* and is supportive of the Landgate's efforts to enable the creation and execution of documents in electronic form.

The ABA supports electronic creation and execution of documents that:

- aligns legal requirements and regulatory processes with other States and Territories that have already adopted law reform in this area;
- adopts a technology-neutral approach to electronic signing, without mandating a particular type of technology or making the requirements for electronic signing more onerous than wet-ink signing; and
- recognises the limited utility of witnessing and the limited relevance in a modern economy of distinguishing between deeds and agreements.

To assist Landgate in its deliberations, we provide answers to the specific questions in the consultation paper (in the Attachment). We would be happy to provide further feedback on draft changes to assist Landgate in achieving the objectives outlined above.

Separately, we note Landgate's 2021 issues paper on electronic mortgages. Industry's interpretation of the relevant state/territory laws differs in some aspects to that presented in the issues paper. If useful, the ABA is able to provide details of the differences in views regarding the issues paper.

If you require further information or would like to discuss any of the content of this letter, please do not hesitate to contact Mitchell Frater-Baird

Yours sincerely,

Brendon Harper

Policy Director
Australian Banking Association

About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership



Questions and comments

Question 1: *Should the formal requirements for registry instruments and other documents, such as leases, easements, restrictive covenants, applications, memorials and notifications be reviewed so that they can be created wholly by electronic means?*

The ABA is supportive of this measure.

Question 2: *Could a verification of identity regime replace the need for witnessing for all Western Australia's land registry documents?*

Yes, the usual verification of identity procedures that apply for land dealings should be sufficient.

Questions 3: *Should all deeds be the subject of the reform proposals, or should some form of deeds be excluded, for example, trust deeds and deeds of family arrangements?*

All deeds should be covered by the reforms.

Question 4: *Should these reforms on deeds be limited to land agreements and transactions such as land options, leases, easements, and restrictive covenants?*

No comment

Question 5: *If a deed is to be executed electronically, what form of electronic or digital signature is appropriate?*

Prescriptive rules regarding the specific form of electronic signature may quickly become outdated. Such rules may also restrict the use of innovative technologies that could provide more secure and efficient methods of electronic execution in the future. A technology-neutral approach in line with the *Corporations Act 2001*, *Electronic Transaction Act 2011 (WA)* and other ETAs would therefore, in our view, be more appropriate.

Question 6:

What verification of identity regime should be implemented for deeds? Should deeds be the subject of a 3rd party verification arrangement? If so, should the arrangement extend to all deeds?

The requirements should align with the position in other Australian jurisdictions. Verification of identity procedures should not extend to all deeds.

Question 7: *Should electronic or digital signatures on deeds be witnessed? If so, should a witness attest to a signature in an electronic environment?*

The ABA submits that deeds should not need to be witnessed, regardless of whether the deed is in paper or electronic form.

The advantages of witnessing are overstated. Witnesses can be unknown or untraceable, and their signatures can be forged or given by someone who does not know the signatory. They may not check the signatory's identity or the contents of the document and may be ill-placed to determine if the signatory has the capacity to sign or is doing so under duress. Further, in an electronic environment, there are other ways of validating the integrity and authenticity of a signature, making the witnessing of electronic signatures particularly unnecessary.

There is no common law requirement for deeds to be witnessed and Victoria has not required deeds, whether in paper or electronic form, to be witnessed for many years. There has been no appreciable increase in deed fraud as a result. In a modern economy, it is difficult to justify why agreements do not need to be witnessed but deeds do.

Question 8: *Should the witness be physically present when the signer signs, or can this be performed through video link or other means?*

Where a witnessing requirement is retained, witnessing by audio visual means should be permitted.



Question 9: *Should the signatory be present when the witness signs the electronic document?*

While noting the ABA's position to Question 8, if a witnessing requirement is retained (which the ABA does not endorse), the witness should be permitted to attest whether or not the signatory is still present.

Question 10: *Should the rule that a deed can only be amended by another be removed by legislative change?*

No comment

Question 11: *What is the preferred approach in WA for powers of attorney?*

The ABA prefers alignment to progress towards a national approach. We note that the comments in paragraph 5.4 of the consultation paper regarding the witnessing requirements in Queensland and Victoria for general powers of attorney are inconsistent with our understanding of the legal position in those jurisdictions.

Questions 12: *If deeds or general powers of attorney were enabled to be executed electronically without a witness, is it appropriate for the reforms to go further to remove the rule that agents signing deeds must themselves be appointed by deed?*

Yes, consistent with recent law reform in Queensland and under the *Corporations Act 2001*, the ABA supports the abolition of the rule that agents signing deeds must themselves be appointed by deed.

Question 13: *Should these statutory declarations used under the TLA be able to be witnessed remotely or alternatively, should the requirement for a witness be dispensed with?*

No comment

Question 14: *Should statutory declarations and affidavits be able to be witnessed remotely or alternatively, should the requirement for a witness be dispensed with?*

No comment

Question 15: *Should legislation intervene to regulate the verification and authentication if the requirement for witnessing is dispensed?*

No comment

Question 16: *What level of verification and authentication is appropriate for contracts of sale for freehold land? Should there be a requirement for a third party verification arrangement?*

Yes, third party verification to the usual standard for land dealings may be appropriate where no real estate agent involved.

Question 17: *Should legislation intervene to regulate the use of electronic contracts in conveyancing, or is this a matter best left for conveyancing practice to develop within the current framework?*

Legislation would be helpful to ensure the contracts are valid but should not prescribe requirements that are more onerous than required for paper-based transactions.

Question 18: *What protections can be implemented to ensure preliminary negotiations do not constitute a legally binding agreement?*

No comment.

Question 19: *Are there any other gaps or uncertainties that need to be resolved for all land transactions to be fully electronic?*

There is a need to ensure robust and flexible processes for authentication and identification of all parties, with alignment with other Australian jurisdictions where possible.

Question 20: *What is the preferred approach in Western Australia for contracts of sale of freehold and Crown land and the creation of interests in that freehold or Crown land?*

That documents be able to be signed and lodged electronically.



Question 21: *Is the current legislative framework under the ETA adequate for the utilisation of electronic signatures for land transactions without requiring attestation.*

Yes, the ABA considers that a technology-neutral approach (in line with the current approach in Corporations Act 2001, Electronic Transaction Act 2011 (WA) and other ETAs), supported by usual verification of identity procedures that apply for land dealings, should be adequate without the need for attestation.

Question 22: *Is it appropriate to have electronic signatures apply to all forms of documents? If not, why not?*

It would be appropriate to have all documents available for electronic signing.

Question 23: *What methods of electronic signature are appropriate for each category of document?*

We consider that it should be up to the parties to consider what they will accept and what precautions they wish to take.

Question 24: *Should witnessing requirements be dispensed with by legislation, and if so, should they be dispensed with on all documents created and executed electronically, and on paper, trust deeds, deeds of family arrangements, powers of attorney, statutory declarations and documents lodged for registration or recording on the Western Australia's land?*

Yes, witnessing should be removed for all documents mentioned. For some documents (eg registrable land documents) a verification of identity procedure should apply (or continue to apply). Different considerations may apply in relation to documents such as enduring powers of attorney.

Question 25: *If witnessing requirements are retained, should it be enabled by audio visual technology or by any other means?*

Yes, as above

Question 26: *If enabled, should there be any special requirements on specific documents eg. 'special witness' on a power of attorney?*

Requirements should align with other jurisdictions where possible. Special requirements may be appropriate for enduring powers of attorney. We note that the comments in paragraph 5.4 of the consultation paper regarding the witnessing requirements in Queensland and Victoria for general powers of attorney are inconsistent with our understanding of the legal position in those jurisdictions.

Question 27: *Do you agree with the reform proposals contained in paragraph 9(a) to (e)? If you disagree with the reform proposal, then please provide your reasons and suggested solutions.*

The ABA supports the reform proposals. With respect to counterpart mortgages, the reforms should address witnessing requirements created directly or impliedly by sections 105(2) and 145(1)(a) of the Transfer of Land Act 1893 (WA), as well as the National Mortgage Form which currently contemplates witnessing by the mortgagor. The reforms should also clarify that the mortgagee is not required to sign the counterpart mortgage in an electronic lodgement situation. The NMF currently includes a mortgagee signature panel which creates uncertainty as to whether the mortgagee may be required to sign the counterpart mortgage.

In relation to paragraph 9(b), if a witnessing requirement is retained for some trust deeds or powers of attorneys (which the ABA does not endorse), the witnessing requirement should not apply to trust deeds or powers of attorney that are part of commercial or other arms-length transactions or arrangements. For example, the witnessing requirement should not apply to a security trust deed in a financing transaction.

Question 28: *Have you used electronic contracts? What, if any obstacles did you encounter in the electronic process?*

No comment.



Australian Banking
Association

Question 29: *If you have been reluctant to use electronic contracts, what are your concerns?*

No comment.