



## Submission to Issues Paper 01/2021 - Electronic Mortgages in WA

### Introduction

Australian Banking Association (ABA) welcomes the opportunity to provide a submission to Issues Paper 01/2021 (Issues Paper), and supports the intended policy outcome of enabling signatures and witnessing on mortgages lodged electronically to be fully electronic in Western Australia.

The issue of electronic execution of mortgages and deeds has been the subject of a number of consultations in Australia including a number of states and the Commonwealth government. Temporary or permanent reforms in some of these jurisdictions have enabled the use of electronic signatures for more types of documents, and either enabling audio-visual witnessing or removing the requirement for witnessing altogether.

These consultations highlighted that many stakeholders agree that electronic signature technology can replace the need for 'wet ink' signature and witnessing requirements. Technology can provide an equivalent and often a reliable indication of the signatory's identity and intention.

Documents can be signed at a time and place convenient for the person, using a range of devices such as computer or mobile. This removes the need for printing, collating, scanning, posting or couriering paper documents, all of which can create significant costs for business and consumers and can create hardships and delays. Electronic signatures also improves accessibility and usability for people living or working in rural and remote areas, people with disabilities and people sheltering and working at home such as during a lockdown.

These consultations also highlighted the view that signature on paper, even those that are witnessed, are susceptible to fraud. Electronic signatures can mitigate fraud risk by implementing multi-layers and factors of security and authentication, and the technology can generate an auditable electronic record, tamper proof seal, and use multiple ways to authenticate the signatory's identity. These protections can provide as much or more protection against fraud than requirements for paper signature and the basic witnessing requirement.

### Clarifying key issues raised in Issues Paper

#### **Not all mortgages are executed as deeds**

The Issues Paper appears to be drafted on the basis that all mortgages are executed as deeds. For example, section 2.1 states: To satisfy this requirement under section 105 of the *Transfer of Land Act 1893 (WA)* and the formal requirements for the creation of deeds under the *Property Law Act 1969*, financial institutions generally arrange for a paper counterpart to be "wet signed" by the mortgagor and witnessed.

Most mortgages are not created pursuant to deeds. As such consideration of reforms in Western Australia should distinguish between the reforms that are necessary to enable electronic mortgages including the counterpart mortgage, and the reforms that need to be made to enable electronic deeds.

#### **Electronic execution of deeds**

ABA strongly supports reforms to enable electronic deeds and not requiring most types of deeds to be witnessed. ABA refers to and supports the detailed submissions made by Allens to this consultation, and further notes the consultation envisaged by the Commonwealth deregulation taskforce on removing the requirement for witnessing for deeds and statutory declarations.

ABA supports giving specific consideration to types of deeds that require 'enhanced' witnessing, being enduring powers of attorney and wills.

#### **Electronic execution of counterpart mortgage**



The Issues Paper states that witnessing is required in NSW. Per the distinction made between mortgages and deeds, there is no longer a requirement for the counterpart mortgage to be witnessed in NSW. The *Statutes Amendment (COVID-19 permanent measures) Bill 2021 (SA)* will include a new subsection 128(9) that expressly states a mortgage prepared under s 128 does not need to be witnessed. While there is some uncertainty, the ABA understands the law in Victoria is not intended to require a counterpart mortgage to be witnessed.

Further to above ABA believes witnessing is not needed for the counterpart mortgage given the significant protections already in place. As such, ABA strongly supports reforms to enable fully electronic mortgages including the counterpart mortgage, and supports reforms in WA to align with the position in NSW, Victoria and SA.

## Proposed reforms in Western Australia – electronic mortgages

The ABA has previously provided to the WA Attorney-General a list of proposed reforms in WA.

### Requirement for witnessing

ABA proposes removing the requirement for witnessing that exists in s.145(1)(a) of the Transfer of Land Act 1893 (WA) insofar as it applies to digital mortgages signed under s.105 of that same Act.

### Approved form

ABA proposes the Registrar create an 'approved form' for the counterpart mortgage that removes both the witnessing panel for the mortgagor's signature and the execution panel for the mortgagee. A similar approach has been taken in NSW.

Legislation requires a mortgage to be in 'an approved form'. The 'approved form' is the National Mortgage Form approved by the Registrar of Titles. The requirement for a mortgage to be in an approved form appears broad enough to include both versions of the mortgage, being:

- The document held by the Bank (known as the 'counterpart mortgage' or 'charging instrument'); and
- The document the Bank lodges with Landgate (known as 'registry instrument').

The National Mortgage Form has a space for the customer to sign and for that signature to be witnessed, as well as for the Bank to sign.

This means that even if the legislative requirement for witnessing outlined in section 1 of this document was removed for digital mortgages, there would still be the implied requirement for the charging instrument to be executed by the customer with a witness present.

We see benefit from clarifying that, for digital mortgages, execution does not need to be witnessed. To make this change, Government could have the Registrar create an 'approved form' for digital mortgages that removes the witnessing panel for the mortgagor.

If the above amendments are to be made around the approved form, there would also be value at the same time in removing the panel in the form that calls for the Bank to sign the charging instrument. The Bank's commitment to the mortgage arrangements are evidenced by the act of making funds available and providing the relevant certifications as to verification of identity when registering the mortgage with Landgate.

The requirement for the Bank to sign a document that the Bank itself retains does not add any value to the customer, but does add inefficiency. To be clear, the requirement for the Bank to sign the version of the mortgage it retains does not preclude us from offering our customers a digital mortgage; so removing it is a lesser priority.

### Clarifying counterpart mortgage does not need to be witnessed



ABA also proposes passing the amendments in Transfer of Land Amendment Bill 2018, in particular by removing the requirement in 4(1CA)(b) of the *Transfer of Land Act 1893* (WA) that counterpart documents to the same conveyance contain exactly the same data and information.

Legislation requires that the charging instrument (the version of the mortgage signed by the customer and held by the Bank) and the registry instrument (version signed by the Bank and lodged with Landgate) need to contain 'exactly the same data or information'.

Because of the differences in purpose between the two instruments (e.g. one is customer facing and must be signed by the customer, and the other is lodged at the Register), there are legitimate reasons why they should have different formatting and to some extent, content requirements.

To amend this, the definition of 'counterpart' in the Transfer of Land Act legislation should also be amended to remove the requirement for the documents to contain exactly the same information, as it unnecessarily restricts the flexibility of the 'approved form', for example, as it may relate to digital mortgages.

This issue could apply to mortgages that are currently signed by hand by the customer but registered by the Bank electronically – if for example the two contain some non-material differences because one is digital and the other paper. That is, this issue could arise even before Government addresses obstacles to full digital mortgages. Government drafted a Bill to amend this provision in 2018 and progression of these amendments would be welcomed.

## Proposed reforms in Western Australia – deeds

ABA also asks the WA government to consider specifying that deeds can be created electronically and removing the requirement for deeds to be witnessed. This would be consistent with the proposed reforms under consideration led by the Commonwealth deregulation taskforce. On this issue, ABA has read and agrees with the detailed submission made by Allens.