



Landgate

ISSUES PAPER 01/2021 ELECTRONIC MORTGAGES IN WA

Under Electronic Lodgement Network

EXECUTIVE SUMMARY

The purpose of this Issues Paper is to:

- identify the issues and recommend changes to enable signatures and witnessing on mortgages lodged electronically to be fully electronic in Western Australia.
- seek feedback from stakeholders on the identified issues and proposals for reform.

1. Background

Landgate introduced the ability to lodge mortgages electronically in June 2014 under the National Electronic Conveyancing System (NECS) initiative. From 1 August 2016, all stand-alone residential mortgages subject to the National Credit Code are required to be lodged through the Electronic Lodgement Network (ELN) if the mortgagee is an authorised deposit-taking institution.

From 1 December 2018, all new eligible stand-alone mortgages and any lodgement cases consisting of eligible mortgages are required to be lodged electronically in accordance with the *Transfer of Land Regulations 2004*.

Despite the introduction of the ELN, wet signatures on mortgage counterparts are still utilised in Western Australia. However, NSW and VIC permanently, and QLD and SA temporarily, have moved to electronic execution. This paper recommends that WA should do the same and move to a position in which deeds, which include mortgages, can be created and exist in electronic form and can be electronically signed and witnessed.

2. Western Australia requirements

2.1 NECS

Section 105 of the *Transfer of Land Act 1893* (TLA) currently provides that a mortgagor must sign a mortgage counterpart (Bank's Counterpart) before an electronic counterpart, which is not signed by the mortgagor, is registered on the Land Titles Register.

To satisfy this requirement 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.

The TLA also currently provides that certain information in a Bank's Counterpart must be exactly the same as the electronic version of the mortgage lodged for registration at Landgate. This requirement for certain information in the Bank's Counterpart to be exactly the same as the electronic one is being addressed in the proposed *Transfer of Land Amendment Bill 2021* (TLA Bill).

2.2 Paper mortgages

There are circumstances under which paper mortgages are still lodged for registration at Landgate, for example when a mortgage is lodged simultaneously with a document that is not eligible for lodgement under the ELN. Unlike the Bank's Counterpart that is retained by them, the mortgagor is required to sign the counterpart that is presented for lodgement and the mortgagor's signature must be witnessed in accordance with the provisions of section 145(1)(a) of the TLA.

3. Current position in NSW

In November 2018, section 38A was inserted into the *Conveyancing Act 1919* (NSW) (NSWCA) allowing:

- (a) deeds, which include mortgages, to be created in electronic form; and
- (b) natural persons to electronically sign and witness deeds.

Although a deed can now be electronically signed and witnessed in New South Wales, a witness must still:

- (a) be physically present at the time that the document is being signed by the signatory.
- (b) observe the signatory signing the document voluntarily; and
- (c) sign (and know that he/she is signing) the same document (and not a separate copy of the document) at the same time as the signatory signs it.

To ensure the validity of the signature, the requirements of the *Electronic Transactions Act 2000* (NSW) must also be satisfied. Specifically, section 9 of that Act requires that:

- (a) identity – a method is used that identifies the person and indicates that person’s intention to be bound by the document.
- (b) reliability – the method used is reliable, in light of all the circumstances, in identifying the person and in indicating that person’s intention to be bound by the document; and
- (c) consent – the recipient of the electronic signature consents to the method used to identify the signatory and to indicate the signatory’s intention to be bound by the document.

Accordingly, a deed can be electronically signed in New South Wales if the method used satisfies the above 3 requirements.

Comment

- It may be difficult for a witness to satisfy these requirements if witnessing a deed electronically, particularly if digital signing software is being used. The witness would need to understand how the software operates.
- Section 38(5) of the NSWCA expressly states that the execution requirements of section 38 do not affect the execution of deeds by corporations. The impact of this approach is that companies cannot sign mortgage documents electronically without permanent amendments to *Corporations Act 2001* (Cth) being implemented.

4. Victoria

The *Justice Legislation Amendment (System Enhancements and Other Matters) Bill 2021* (Vic) passed on 23 March 2021 (Vic Bill), made permanent the temporary changes that were introduced during the COVID-19 crisis, which allowed for documents to be signed electronically and remotely.

The Vic Bill amended the Electronic Transactions (Victoria) Act 2000 (ETA Vic), the electronic signing and remote witnessing of deeds and mortgages is enabled. Specifically, the ETA Vic now:

- (a) expressly includes deeds and mortgages as ‘transactions’ for the purposes of the ETA Vic, provided the signature meets the conditions for electronic execution under the ETA Vic;
- (b) permits split executions for the purposes of the execution of transactions under the ETA Vic, by allowing signatures to appear on separate copies of the same document, as long as each person whose signature or consent is required on that document receives every copy on which a signature appears.
- (c) provides for the valid use of ‘audio visual link’ in the witnessing of transactions under the ETA, for example, a witness can now remotely witness a person sign a document or confirm a person’s identity over audio visual link. The witness must sign to confirm what they observed and must include alongside their signature a statement that indicates the observation was done by audio visual link in accordance with the legislation.

Despite expressly including deeds and mortgages as ‘transactions’ for the purposes of the ETA Vic, any document lodged with the Registrar of Titles in that state however must still meet the Registrar’s requirements for electronic lodgement or be provided in the approved form of paper lodgement i.e., there is a specific exemption under the regulations of the ETA Vic for approved forms to be lodged with the Registrar.

5. Other states

Subject to the above and outside of temporary measures to facilitate document execution during COVID-19, Australian law does not recognise the validity of a deed which exists in electronic form. In the case of individuals, whilst the legislation differs in each state, deeds generally require the elements of being ‘signed, sealed, and delivered’ with a witness to the signature, which is usually satisfied by wet ink on paper in the physical presence of a witness who then signs the deed.

6. Corporations Act 2001

In the case of Corporations, they may execute deeds in accordance with the requirements of section 127 of the Corporations Act 2001. Outside of temporary measures to facilitate document execution during COVID-19, the exclusion of the Corporations Act 2001 from the Electronic Transactions Regulations (Cth) suggests that it is the Commonwealth Parliament’s intention that a company should not be able to execute a deed electronically. Amendments to the signing of deeds and mortgages by corporations must be dealt with federal legislation. It is understood that the electronic signing of deeds and mortgages is being considered as a key area of reform federally.

7. Reform

7.1 Recommendation for reform

It is recommended that legislative reform in Western Australia is progressed to signature and witnessing requirements that apply to a Bank’s Counterpart retained by them, not lodged for registration to:

- (a) enable the creation of deeds electronically, which include mortgages; and

- (b) enable electronic signatures and witnessing.

The recommendation does not extend to dispensing with the requirement for witnessing due to the greater potential for fraud. This aligns with the permanent amendments to both the New South Wales and Victorian legislation.

7.2 Paper mortgages

Further, the recommendations do not extend to enabling electronic signatures and witnessing for paper mortgages. Again, this aligns with the permanent amendments to the Victorian legislation where documents lodged at Landgate must still meet the Registrar's requirements.

7.3 Considerations

It will be necessary to consider whether the legislation should:

- (a) facilitate electronic deeds for all situations; or
- (b) just allow for the valid execution of a deed in an electronic format in specified circumstances.

Changing the position to enable deeds to be created electronically has far reaching consequences outside of electronic mortgages and would require wide consultation. Limiting the reform to mortgages on the other hand may well be a missed opportunity to enable modernisation of the deed creation process in a digital economy. Landgate is seeking stakeholder views and feedback on this issue.

The reform of the deed creation process has already occurred in New South Wales and Victoria where they have enabled the creation of deeds electronically whilst retaining the ability for deeds to be created in a paper form if required.

8. Alternative options for reform

The proposed amendments to the TLA Bill are considered as having been adopted under each of the below alternatives.

8.1 Electronic Transactions Act 2011 (WA)

The *Electronic Transactions Act 1999* (Cth) (Cth ETA) provides a framework for the use of electronic signatures, while the *Electronic Transactions Regulations 2000* (Cth) provides a list of legislative exemptions, i.e. circumstances when an electronic signature cannot be used. States and territories have also enacted their own *Electronic Transaction Acts* (generally mirroring the Cth ETA) which contain further legislative exemptions.

In WA, electronic transactions are governed by the *Electronic Transactions Act 2011* (WA) (ETA). The ETA allows a person to satisfy a legal requirement for a manual signature by using an electronic communication. The method used must identify the person and indicate their approval of the information communicated.

The ETA, however, does not currently apply to deeds or any documents that are required to be 'verified, authenticated, attested or witnessed under the signature of a person other than the author of the document' by virtue of regulation 3(1) of the *Electronic Transactions Regulations 2012* (WA).

8.2 Amendment through other WA legislation

An alternative approach is to amend the *Property Law Act (WA)* to provide that:

- (a) deeds can be created electronically; and
- (b) can be signed and witnessed using electronic signatures.

8.3 Preferred option

On balance, Landgate's preferred means of legislative reform is via the ETA by providing:

- (a) that deeds may be created in electronic form;
- (b) mortgages under the ELN may be in electronic form; and
- (c) a witness may witness a deed which includes a mortgage by audio visual link.

9. Other matters

For ELN lodgements, and as part of this reform initiative, the ARNECC registration forms and requirements should extend to permitting that the witnessing requirement can be completed by audiovisual link.

10. Practical impact of reforms

Irrespective of the legislative approach adopted, the impact of these proposed reforms would see the Bank's Counterpart of mortgages lodged for registration in Western Australia under the ELN to be able to be sent, signed, witnessed and returned to the financial institution electronically. However, the following practical matters need to be addressed.

10.1 Method

The method of electronic execution must satisfy the following three requirements of section 10 of the ETA WA:

- (a) one that identifies the mortgagor and indicates the mortgagor's intention to be bound by the mortgage;
- (b) one that identifies the mortgagor and the mortgagor's intention to be bound by the mortgage is reliable; and
- (c) the financial institution consents and indicates its consent to the method used to identify the mortgagor and the mortgagor's intention.

It is suggested here that industry and government agree on what best meets these criteria as best practice, however the following are some suggested criteria:

- (a) naming the signatory in the execution clause;
- (b) inserting a provision in the mortgage that states that the parties consent to the mortgage being created and signed electronically;
- (c) using an effective method of authorisation and authentication of digital signatures;

- (d) Storage requirements of digital signatures including data formats;
- (e) Email password accounts; and
- (f) Locking of signed documents to prevent further amendments

10.2 Witness

In practice, a witness must still:

- (a) be either physically present or observe by audio visual link at the time that the document is being signed by the mortgagor.
- (b) observe the mortgagor signing the document voluntarily; and
- (c) sign, and know that he/she is signing the same document and not a separate copy of the document at the same time as the signatory signs it if present, or if by audio visual link, the requirements for witnessing by audio visual link occur on the same day are satisfied.

10.3 Technology

The key principle known as ‘technology neutrality’ in the ETA WA where there is no prescribed type of technology for effecting electronic signatures means that a document may be electronically signed using either:

- (a) a standard electronic signature – the insertion of a virtual representation of the signatory’s handwritten signature into a document. It may include a person typing his/her name in the electronic format or scanning and pasting an image of his/her handwritten signature into an electronic document (e.g., Word or PDF); or
- (b) a digital signature – using a Public Key Infrastructure (‘PKI’ technology), which encrypts a has with a user’s private key, creating a unique identifier that can be checked for authenticity and used as evidence for non-repudiation to prevent the mortgagor later denying execution of the document. Examples include Adobe Sign or DocuSign.

The Registrar of Titles requirements on documents lodged either through the ELN or paper lodgement must still be met.

11. Key risks in using electronic signatures

The law and industry practice relating to electronic signatures can be complex and is evolving. It is prudent to understand the following risks associated with using electronic signatures compared with ‘wet signatures’ and then to take steps to mitigate those risks.

11.1 Invalidity and unenforceability

The use of electronic signatures has not been considered in much detail by the Australian courts. As such, there is a risk that a court may choose to treat an electronic signature as not being valid if legislative requirements are not clear or if they are not strictly met.

11.2 Invalidity and unenforceability

Signing a document electronically carries the risk of it being unenforceable if it does not comply with any required formalities.

11.3 Identity fraud

A standard electronic (non-digital) signature can be created very easily. There is a risk that a document will be enforceable against a person whose electronic signature was applied without that person's authority.

11.4 General security risks

There is a risk that document which are signed using electronic signatures can be accessed and amended without the consent of the parties. If a party can demonstrate that an electronically signed document can be amended without a signatory's consent after the document is electronically signed, then a court could discount the evidentiary value of the document.

12. Mitigating key risks in using electronic signatures

12.1 Adopt a reliable method

Design and implement a method which reliably identifies the signatory and indicates the signatory's intention to be bound by the document as outlined in 10.1(a) and (b) above.

12.2 Ensure that there is 'positive' consent

Ensure that the financial institution obtains consent as outlined in 10.1(c) above.

12.3 Employ an effective method of authorisation and authentication

Use an effective method of authorisation and authentication to ensure that a document is signed by the intended signatory and not by any other person who may have access to the signatory's devices and applies the intended signatory's signature without their consent.

12.4 Store signed documents securely

Ensure that documents are stored securely after they have been signed electronically so that they cannot be accessed and amended or have an electronic signature copied and pasted from them and used elsewhere without authority.

12.5 Retain all records

Records should be kept of all action taken, correspondence exchanged, and issues considered in relation to the electronic signing of a document in the event that its validity is questioned at a later date.

13. Your feedback is needed

Landgate values your feedback on the proposed reforms. You can provide feedback by emailing it to Annalisa.letter@landgate.wa.gov.au

Landgate needs your feedback on these proposals by 31st August 2021.