

5 February 2018

The Directors
Office of the Registrar General
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email ORG-admin@finance.nsw.gov.au

Our ref: JAD/38202236

Dear Sirs

Dentons Submission on Discussion Paper – Removing Barriers to Electronic Land Contracts

Who makes this submission?

We welcome the opportunity to make a submission in relation to the Removing Barriers to Electronic Land Contracts Discussion Paper, released in December 2017.

This submission is made on behalf of the Mortgage & Finance Association of Australia (MFAA), several ADIs and non ADI mortgage lenders. Therefore this submission will focus on the digital signing of real estate mortgages.

Executive summary

In our view, permitting digital signing by mortgagors of real estate mortgages, with no requirement for witnessing, is a highly desirable outcome. Whilst elements of this process are currently available when mortgages are lodged through PEXA, most mortgagees are reluctant to change until there is express confirmation from the Registrar General that such a process is held as valid and enforceable. We also note that alignment of paper lodgements is also desirable.

There are numerous advantages to digital signing:

- reduced delays (i.e. no postal delivery);
- reduced re-works (i.e. mortgagors often sign paper documents incorrectly)
- reduced errors (i.e. when mortgages are sent to mortgagors for printing and the print quality or style is often unacceptable)

- reduced risk of fraud and forgery (digital checks have been found to be not as susceptible to forgery).

We support:

1. the implementation of entirely electronic mortgages; and
2. facilitating execution by companies; and
3. removing the requirement for deeds to be witnessed.

Responses to the Issues for Discussion

Q1) Should the formal requirements for registry instruments, such as mortgages and leases, be reviewed so that they can be created wholly by electronic means?

Yes. It should be made clear that registry instruments can be created and signed electronically without witnessing.

Does the Verification of Identity regime replace the need for witnessing for all land registry documents?

The VOI regime has significantly improved the process for verifying the identity of any individual signing land registry documents.

In our view, the requirement of a witness adds little or nothing to the identity verification process because witness signatures and attestations can easily be forged. Further, where there are two parties to a dealing (e.g. joint mortgagors), the temptation for one party to sign for the other is high, in order to expedite the signing process.

Rather, VOI and other reasonable verification measures to confirm the identity of any signatories are more efficient in reducing the risk of fraud and forgery.

Overall, we find it unlikely that the shift to a digital process will create a perception that mortgage documents are not a binding legal requirement. Fundamentally, both individuals and financial intuitions alike must ensure that all signatories are aware of the legal implication of the document and the obligations imposed.

Q2) Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?

As noted above, digitally signed mortgages without witnessing are arguably already valid in NSW (although they will need to be registered through PEXA because they appear not to comply with the paper lodgement rules).. This is because of the following.

- Rule 6.13 and Schedule 3 of the NSW Participation Rules were amended in Version 2, removing the requirement for a 'signed mortgage' to be held. Instead, a 'valid mortgage' granted by the mortgagor must be held, so that each State's rules will specify whether a mortgage must be signed, witnessed, and/or in paper form; and
- Section 9(3) of Schedule 1 of the *Electronic Conveyancing (Adoption of National Law) Act 2012 (ECNL)* provides that a registry instrument digitally signed in accordance with the relevant participation rules applicable to that instrument will be considered to be in writing and to have satisfied the requirements of any other laws in NSW relating to the execution, signing, witnessing, attestation or sealing of documents.

However, the situation is unclear because of the following: **Note:** this is not an exhaustive list)

- (a) Schedule 2 of the NSW Lodgement Rules implies that documents must be wet signed http://www.registrargeneral.nsw.gov.au/_data/assets/pdf_file/0004/319936/Lodgment-Rules-Section-12F-Real-Property-Act-1900-Version-1.0.pdf

- (b) The *Electronic Transactions Regulation 2017 (NSW)* provides that some provisions of the *Electronic Transactions Act 2000 (NSW)* do not apply to 'any requirement or permission under a law of this jurisdiction for a document to be verified, authenticated, attested or witnessed under the signature of a person other than the author of the document'.
- (c) The notes to the NSW National Mortgage Form version 1.5 specify requirements for witnessing.
- We have separately made representations to Commonwealth Treasury to amend the Commonwealth *Electronic Transactions Regulations 2000* to remove or amend the exemption under the *Corporation Act* so that companies can sign digitally and obtain the protections offered by sections 124 to 129 of the *Corporations Act*

Q4 to 17 (dealing with contracts for sale) have been dealt with in a separate submission made by Dentons

Q18) Should the law be clarified to enable a deed to be formed by electronic means? If so, should this relate to all deeds or limited only to those specifically relating to land transactions (such as option deeds)?

In our view, the law should permit the electronic execution of all deeds *without* the requirement for witnessing.

A deed is an important legal document. We think it highly unlikely that the shift to a digital process will alter perception in a such manner that the document is not considered an important and binding legal obligation. Individuals relying on deeds will be at risk of challenge to the document if they do not make sure that persons signing do not understand the importance of the document.

The requirements for a witness in relation to the execution of deeds by individuals in section 38 of the *Conveyancing Act 1919 (NSW)* (Conveyancing Act) precludes the use of electronic signatures. There is also concern that the common law requires a deed to be in writing in paper format, despite some judicial views to the contrary.

Further, we note that deeds are not required to be witnessed in Victoria and we are not aware of any adverse consequences arising from the introduction of the practice.

Our comments in Q3 regarding the *Electronic Transactions Regulations 2017 (NSW)* and the *Commonwealth Electronic Transactions Regulations 2000* apply equally to deeds.

Q19) If a Deed is to be executed electronically, what form of electronic signature is appropriate?

Any law should provide for flexibility. So long as the person agreeing to be bound has expressly displayed an intention to sign or agree, there will be sufficient certainty. For example, ticking a box, typing 'I agree' should be held to be just as valid and enforceable as an electronic stylus signature. Ultimately, the burden lies with parties relying on the documents to make their own inquiries to ensure that the person 'signing' is who they claim to be.

Q20) Should electronic signatures on deeds be witnessed? If so:
a. How can a witness attest to a signature in an electronic environment?
b. Should the witness be physically present when the signer signs, or can this be performed through video link (such as Skype or Facetime) or other means?

As discussed above, electronic signatures should not require a witness.

Q21) Should the signatory be present when the witness signs?

As discussed above, this is not applicable.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Denovan', with a long horizontal flourish extending to the right.

Jon Denovan
Dentons Australia