

19 February 2018

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Dear Jeremy

Removing barriers to electronic land contracts - Discussion Paper December 2017

The Australian Banking Association (formerly named Australian Bankers' Association) (**ABA**) welcomes the opportunity to comment on the proposals and questions in this Discussion Paper.

While the centrepiece for member banks is the proposal for the creation of a digital land mortgage by identifying and removing regulatory barriers for achieving this.

In addition, the ABA is supportive of the objective in the Discussion Paper for the creation of an "efficient end-to-end electronic conveyancing process" which must be "balanced against the need for adequate consumer protection". Achieving this balance will be critical to ensure there is confidence by consumers, practitioners and financiers to adopt electronic conveyancing and that the balance ensures the anticipated efficiencies of electronic conveyancing are fully realised.

The ABA believes that the Minister's initiative should stand as a model for other States and Territories which have not yet moved to fully adopt the potential gains of electronic conveyancing, to pursue expeditiously. The ABA would be pleased to discuss with you some ideas as to how this national outcome might be achieved.

General impediments

As a general comment, the ABA believes that a review of the formal requirements, both legislative and at common law, which act as impediments to the creation of a valid fully electronic mortgage or deed in NSW is necessary. The current barriers to a mortgagor accepting a mortgage electronically and a guarantor executing a deed of guarantee electronically prevent the delivery of a fully digital document package to bank customers as a reliable alternative to delivery of paper documents.

In NSW, clarification that a mortgagor's acceptance of a mortgage electronically will create a valid mortgage in the "approved form" would be desirable, despite the legislative reform that has occurred to facilitate electronic transactions (e.g. the NSW Electronic Transactions Act 2000 (**ETA**) and the NSW Electronic Transactions Regulations 2012 (**Regulations**)).

Where the mortgagor is an individual, the requirement for the mortgagor's signature to be witnessed (as contained in the NSW Real Property Act 1900 (**RPA**) together with the provisions in the ETA which facilitate electronic signature and the Regulations which specifically exclude the operation of those provisions in relation to the witnessing requirement under the RPA should be clarified so as to avoid possibly conflicting with the general law relating to electronic signing.

In the case of a corporate mortgagor, although a witness is not required for the purposes of execution pursuant to sections 127-129 of the Corporations Act, there is a separate legislative impediment to valid



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electronic execution. The Commonwealth Electronic Transactions Regulations 2000 exclude the application of certain sections of the Commonwealth Electronic Transactions Act 1999 which facilitate electronic signature by the company, when relating to the Corporations Act.

If it is the case for a deed executed in NSW to be in paper and for the signature to be witnessed this would act as a barrier to the creation of a valid electronic deed of guarantee and should be addressed.

The ABA is supportive of further legislative change to remove these uncertainties so that parties are able to have confidence in executing mortgages electronically while still preserving the flexibility for a “wet” signature on the paper document.

1. Mortgages and leases

Issues for Discussion

1.1 Q.1 Should the formal requirements for registry instruments, such as mortgages and leases, be reviewed so that they can be created wholly by electronic means?

ABA Response:

Yes. Having a witness and wet signature components for registry instruments need to be reviewed. These two components are obstacles for electronic creation and execution of mortgages and leases.

From a business perspective, banks need to ensure that registry instruments are correctly executed and valid. This can be performed wholly electronically where law permits this.

The value of a witness' signature usually anyone over 18 years of age and not involved in the transaction is questionable compared with the execution by the mortgagor or guarantor whose identity has been verified and who executes the instrument.

1.2 Q.2 Does the Verification of Identity regime replace the need for witnessing for all land registry documents

ABA Response:

Yes. It was indicated by some jurisdictions that the VOI regime would replace the need for a witness. In cases where a mortgagor who is not represented by a lawyer or a conveyancer the mortgagee is required to take reasonable steps to verify the identity of the mortgagor.

On a technical point, in the second paragraph of the Discussion Paper there is a reference to a mortgagee's certification that it holds “a mortgage granted by the mortgagor on the same terms as the Registry instrument” which is referred to as “the counterpart mortgage”. It is important to recognise that this mortgage is the mortgage which the mortgagor has granted and is not a counterpart.¹ The value in adding a human witness in the context of a robust process which verifies the mortgagor's identity is questionable. Witnessing will not securely and precisely record the method, location, identity, time and other evidence confirming that the mortgagor intends to be bound by the document.

The current VOI requirement and the digital signature of the identified mortgagor which the bank can authenticate will reduce the contribution of human factors to fraud risk and render witnessing redundant.

¹ Otherwise, there is the risk that the Registry instrument which is not executed or accepted by the mortgagor has been created on behalf of and not by the mortgagor. Section 199 of the Consumer Credit Code which is a Schedule to the National Consumer Credit Protection Act 2009 prohibits a credit provider acting as an agent of a mortgagor to enter into the mortgage on behalf of the mortgagor.



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1.3 Q.3 Are there any other gaps or uncertainties that need to be resolved to allow land transactions to be fully electronic?

ABA Response:

Removal of the witnessing requirements for mortgage documents will likely assist. However, any related documentation to which additional regulatory regimes (such as the Corporations Act) or those which are required to be made by deed (such as guarantees) would also need to be considered (see also response regarding deeds).

Therefore, there would need to be clear legislative support to enable a bank to access strong evidence of an electronic contract, including special conditions. Again, if industry had this facility and to maximise its efficiency gains, it will be important to remove the inefficiencies with having difference processes in various jurisdictions by taking a consistent national approach.

Easy access to a system allowing for multiple user access would be desirable. Further, industry should be able to use a PDF document that is stored in the Cloud which can be accessed by all parties with a redacted version which sets out the key information (e.g. the purchase price and special conditions) needed by the bank.²

2. Electronic contracts for the sale of land

Issues for Discussion

2.1 Q.4 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?

ABA Response:

A governance structure to support what is acceptable practice should be developed with limited prescription sufficient to give industry options. This could be addressed in a regulation (rather than by statute) to make it easier to update to take account of developments.

Otherwise, the regulator could provide non-prescriptive guidance to clarify what is acceptable practice.

2.2 Q.5 Have you used electronic contracts? What, if any, obstacles did you encounter in the electronic process?

ABA Response:

Some banks are accepting electronically signed contracts on a case by case basis. To improve confidence in relying on the receipt of electronic contracts more legislative guidance on an acceptable approach would be welcome.

2.3 Q.6 If you have been reluctant to use electronic contracts, what are your concerns?

ABA Response:

One concern is this process is in its infancy with minimal guidance from the regulators about what is acceptable. Guidance would be welcome.

² Instead of receiving the full contract (which can be at times 30+ pages) the bank would only receive a reduced version (in an agreed format) with the key information in this contract such as purchase price and other special conditions which are paramount to the sale.



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3. Issues affecting electronic contracts

Issues for Discussion

3.1 Q.7 Should the Sale of Land Regulation provide an alternative, electronic means of providing the prescribed documents? If so, should this be in a particular format?

ABA Response:

The prescribed format can be adapted for electronic use provided this is recognised as compliance with the legislation.

3.2 Q.8 Electronic contracts may be cheaper and easier for a vendor's solicitor to prepare, but do they provide any form of consumer protection for buyers?

ABA Response:

The key consumer protection the purchaser has is that they can request a paper copy under the Electronic Transactions Act. Additionally, the conveyancing laws could be changed to establish an obligation for the practitioner to certify that the client understands the contract.

3.3 Q.9 Are contracts 'available' at the time a property is marketed, if only in electronic format?

ABA Response:

A practical solution is for the marketing to refer to how to access the contract electronically stipulating that a paper copy may be requested.

3.4 Q.10 Should vendors be permitted to pass on printing and associated costs to a purchaser who cannot receive documents electronically?

ABA Response:

The ABA believes that this should be free if the customer does not have access to electronic means.

3.5 Q.11 Should there be any further protections for a purchaser if disclosure is made electronically (such as a longer cooling off period to enable the electronic file to be considered by a solicitor or conveyancer)?

ABA Response:

No. If the customer has a concern, they can ask to be provided with a paper copy.



4. Contract formalities

Issues for Discussion

4.1 Q.12 What methods of electronic signature are appropriate for sale of land contracts?

ABA Response:

There should be appropriate methods for providing an electronic signature including providing electronic acceptance without signature through an authenticated method.

4.2 Q.13 Is there a need to clarify the appropriate methods to identify a signatory to an electronic contract, or whether that person had authority to sign?

ABA Response:

It is important to avoid adding new requirements for signatories to electronic contracts which are already covered in paper contracts. Flexibility is needed for parties to satisfy themselves regarding the validity of an electronic signature. An individual's identity could be verified by simple ID/password security verification or implementing biometrics such as finger print via electronic instrument.

Avoidance of prescription will ensure that future developments in verification mechanisms are available to be employed.

The objectives for appropriately identifying a signatory can be performed electronically with no added increase in risk.

4.3 Q.14 Should there be a witnessing requirement for electronically signed contracts? How might this be achieved in an electronic environment?

ABA Response:

No. If there is a concern about fraud, instead of a witness which is a fallible mechanism, perhaps applying the VOI process would be more appropriate. This would ensure an obligation on the real estate agent or conveyancer to perform a verification of identify of the contracting party.

If the role of a witness is to verify identity of a signatory and that person holds authority to sign in a non-electronic environment (today), then electronic verification is available to replace the witness.

Electronic verification/authentication can provide a more secure means to fulfil the purpose of witnessing.

5. Exchange of contracts

Issues for Discussion

5.1 Q.15 Is a formal exchange of contracts relevant where contracts are formed electronically? If so, how can exchange be effected?

ABA Response:

Possibly use of an electronic lodgement network operator such as PEXA's platform could be considered.



5.2 Q.16 How can the parties' intention be clearly determined without a formal exchange process?

ABA Response:

It would be uncertain without a clear legal process which would confirm the parties' agreement to be legally bound by the contract. Applicable legislation would be desirable for the parties and for third parties such as financiers who rely on the binding nature of the contract.

5.3 Q.17 What protections can be implemented to ensure preliminary negotiations do not constitute a legally binding agreement?

ABA Response:

There is a body of law which governs the formation of legally binding contracts.

Further, prescribed terms in the standard form contract could address this.

6. Deeds

Issues for discussion

6.1 Q.18 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)?

ABA Response:

Aligned with the ABA's response to Q.2, there is the query about the value of a human witness with respect to any legal document in the context of a solution which may securely and precisely record the method, location, identity, time and other evidence confirming that the mortgagor intends to be bound by the document.

Regarding non-land related documents, there may not appear to a significant change in the risk profile between a deed which is witnessed by a human and signed in wet ink and one which is executed by means of an electronic solution without a witness.

In addition to the witnessing requirements, the NSW Government and Federal Government should address the uncertainty in the common law requirements concerning deeds, such as those purporting to require deeds be made on paper (or parchment).

Perhaps property law and the conveyancing legislation could be reviewed nationally to ensure that simple conveyancing documents which industry may consider need to be in the form of deeds need not be so.

6.2 Q.19 If a Deed is to be executed electronically, what form of electronic signature is appropriate?

Q.20 Should electronic signatures on deeds be witnessed? If so:

- How can a witness attest to a signature in an electronic environment?
- 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?



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Q.21 Should the signatory be present when the witness signs?

ABA Responses to Qs 19-21:

Given the current requirements of having a witness and wet signature drive poor user experience, the method of executing electronic acceptance should be convenient and secure in an electronic environment. From a user experience perspective, a signatory should be able to verify identity without intervention of a witness or a third party and enable execution of electronic acceptance through one electronic instrument. The means of effecting an electronic signature on a deed or a mortgage should not be limited to digital signature (as in using key cryptography) but should extend to other acceptable means of electronic signature (e.g. electronic signature within a secure online banking profile).

The ABA appreciates the depth, insight and forward-looking approach in the Discussion Paper and again commends the Minister for this opportunity to provide our members' views, which understandably are more focused on the means of a mortgagor's electronic acceptance of mortgage and the uncertainties over the requirements of deeds than other parts of the Discussion Paper which are more related to the role of practitioners in the conveyancing process.

7. Concluding comments

The ABA understand that information concerning banks' experiences with the current application of electronic processes for mortgage transactions would be helpful to the department. We would welcome the opportunity for members to meet with the department to share their thoughts and experiences at your convenience and look forward to hearing from you.

Finally, regarding potential legislative reform to remove barriers to a fully electronic mortgage and deed of guarantee in NSW the ABA would welcome some early indications about the:

- a) plans for further industry consultation following release of Discussion Paper
- b) proposed legislative changes, and
- c) timeframe for reforms.

Yours faithfully

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