



# Consultation Paper:

## Electronic Creation and Execution of Documents

Landgate 2023



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# 1. PURPOSE OF THIS PAPER

This Paper seeks to uncover the legal impediments to creating and executing a range of documents in electronic form, particularly those that relate to interests in land, and explores dispensing with the requirement for witnessing. It also identifies solutions to create a more efficient process for the creation and execution of these documents, in an attempt to align our requirements with permanent changes made in other jurisdictions.

## 2. ISSUES PAPER

In June 2021, Landgate published an Issues Paper<sup>1</sup> (Issues Paper) seeking stakeholder input into the proposals for change to enable mortgages to be created and signed in electronic form.

Landgate received 16 written submissions, many of which were highly detailed, demonstrating significant engagement with and an understanding of the concepts. The desire to see change from the old common law and legislative requirements for mortgages and deeds to be in a paper form towards an electronic form together with the removal of the need for witnessing, is overwhelming.

### 2.1 Stakeholders' Support

All stakeholders that responded to the Issues Paper generally supported the proposals to make legislative change to provide for the creation and execution of electronic mortgages and electronic deeds.

Many stakeholders supported technology neutral and not prescriptive reforms, which currently operate successfully on a principles-based approach, avoiding provisions becoming obsolete due to the rate of technological change with new solutions being developed rapidly.

It has been submitted that different solutions may be appropriate for different situations as they involve procedures, investment, costs or risks that may be more bearable or necessary in one case than another. Being prescriptive can create traps for non-compliance and can create burdens for parties. What may be appropriate for one technology may not be appropriate for another or it may prevent the use of a more suitable solution that arises later.

In addition to supporting the proposals there is a desire to go further in that:

- Western Australian law should not exclude deeds being created and executed electronically, like other contractual documents, leaving to parties to decide whether to have electronic or paper documents. This should apply to deeds signed by corporations, governments, other bodies as well as individuals;
- deeds should generally be able to be executed without witnessing and attestation, leaving it to parties as to whether they will require it; and
- mortgages and other dealings able to be registered electronically should not need to be on paper. Requiring paper for electronic dealings destroys much of the advantage

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<sup>1</sup> [https://www0.landgate.wa.gov.au/data/assets/pdf\\_file/0008/95822/2021-0026-Att-1-Issues-Paper-Electronic-Mortgages.pdf](https://www0.landgate.wa.gov.au/data/assets/pdf_file/0008/95822/2021-0026-Att-1-Issues-Paper-Electronic-Mortgages.pdf)

of having an electronic process proposing that the verification of identity processes are sufficient to mitigate the risk of abuse of registration by fraud or forgery.

## 2.2 Benefits Identified

Many stakeholders identified the following benefits of the proposals to the economy in moving from paper to electronic transactions:

- Commonwealth electronic communication and information storage are rapidly becoming the norm in general life and commerce;
- there are significant savings in cost and environmental impact. Electronic processes are speedier, easier, more convenient and more efficient;
- generally, services are more accessible to consumers and businesses, including those working from home;
- in particular, regional Western Australia has greater access and is not as burdened by the tyranny of distance or isolation;
- it promotes competition by making it easier for new entrants to a market and increasing availability;
- electronic records and communications are often more accessible, secure and reliable — it is easier to store and locate documents executed electronically;
- in practice, often it is easier to establish that documents and communications have been properly signed, or received and opened as there is a clear trail;
- paper communication is not becoming any easier or more reliable;
- alignment with other Australian and International jurisdictions; and
- we are in a digital age, where an increasing number of documents, transactions and other interactions are electronic, and there are now well-accepted and understood technologies for dealing remotely. The issues are generally well tested and familiar. See paragraph 10 Risks and Mitigation Actions below.

## 3. NATIONAL APPROACH – FINANCIAL BENEFITS

In June 2021, the Commonwealth and states and territories agreed through the Council on Federal Financial Relations to prioritise document execution reforms to explore a common approach across the federation to modernising document execution with a particular focus on statutory declarations and deeds.

A public Commonwealth Consultation Paper<sup>2</sup> was released in September 2021 which sought feedback from businesses, consumers, professional bodies, regulators and other stakeholders on possible reforms to modernise document execution. This process is ongoing and we see the issues outlined in this paper being consistent with the Commonwealth's approach.

As noted in the Commonwealth Consultation Paper<sup>3</sup>,

***“The use of statutory declarations and deeds is widespread in the day-to-day operations of business. Research by Accenture for the Deregulation Taskforce found that over 4.5 million deeds and more than 3.8 million statutory declarations are completed each year by small and medium enterprises and consumers; with reforms to the execution of these documents estimated to save over \$400 million in direct costs and wasted time each year”.***

## 4. IMPACTS

Irrespective of the legislative approach adopted, the impact of reforms to enable the creation and execution of deeds and mortgages would see these documents and any others on which the legislative change is adopted, to be able to be sent, signed and witnessed, if required, to be carried out more speedily, easily, conveniently and efficiently.

## 5. DOCUMENTS TO WHICH PROPOSED REFORMS MAY APPLY

Landgate has identified a number of documents which may be subject to reform proposals. In addressing differing categories of documents, we raise specific questions for feedback to assist us in reviewing and considering our proposed recommendations for reform outlined in part 9 below together with other proposals as a result of submissions received.

It should be noted that there are several other documents raised in the stakeholder feedback in response to our Issues Paper which are not dealt with in this Paper. Statutory declarations and affidavits are currently being dealt with on a national level: See Commonwealth Consultation Paper<sup>4</sup>. Attorneys-General from each Australian jurisdiction are also currently taking a leading role in pursuing reforms to enduring document arrangements and matters concerning wills and advanced health directives are more appropriately led by the Department of Justice as they are not restricted to interests in land.

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<sup>2</sup> <https://deregulation.pmc.gov.au/priorities/modernising-business-communications/modernising-document-execution#introduction>

<sup>3</sup> <https://deregulation.pmc.gov.au/priorities/modernising-business-communications/modernising-document-execution#introduction>

<sup>4</sup> <https://deregulation.pmc.gov.au/priorities/modernising-business-communications/modernising-document-execution#introduction>

## 5.1 Mortgages

### 5.1.1. Electronic mortgages

Landgate introduced the ability to lodge mortgages electronically at Landgate 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 at Landgate 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 i.e. mortgages that meet the criteria for registration via electronic conveyancing, are required to be lodged electronically in accordance with the *Transfer of Land Regulations 2004* (TLA Regs).

Despite the introduction of the ELN, wet signatures on mortgage counterparts are still utilised in Western Australia.<sup>5</sup>

To satisfy the *Transfer of Land Act 1893* (WA) (TLA) requirements and formal requirements for the creation of deeds under the *Property Law Act 1969* (WA) (PLA), financial institutions generally arrange for a paper counterpart to be “wet signed” by the mortgagor and witnessed.

The proposed reforms whilst extending to the mortgage counterpart, do not extend to other documents lodged under the NECS.

### 5.1.2 Paper mortgages

There are circumstances under which paper mortgages are still lodged for registration at Landgate. Unlike the financial institution’s counterpart that is retained by them, the mortgagor is required to sign a paper counterpart that is presented for lodgement and the mortgagor’s signature must be witnessed.<sup>6</sup>

## 5.2 Other Landgate documents

Signatures on paper documents including leases of more than 3 years, easements, restrictive covenants, notifications and some applications presented for lodgement at Landgate must also be wet signed and attested.<sup>7</sup>

#### 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?

#### Question 2

Could a verification of identity regime replace the need for witnessing for all Western Australia’s land registry documents?

<sup>5</sup> s105 *Transfer of Land Act 1893* (WA)

<sup>6</sup> s145 *Transfer of Land Act 1893* (WA)

<sup>7</sup> s9 *Property Law Act 1969* (WA) and s145 *Transfer of Land Act 1893* (WA)

## 5.3 Deeds

Deeds are a special type of document used to ensure agreements that do not comply with requirements for contracts, such as consideration, are still valid and enforceable. Formalities established by common law and modified by legislation<sup>8</sup> dictate the way in which a deed must be signed to make it enforceable. Essentially, deeds executed in Western Australia must be in paper format, signed in a particular fashion and witnessed.

Deeds are used for a variety of reasons in land transactions. They are used to establish trusts, to create options for the purchase of property and to vary contracts to name a few. Land held under the old system title must be conveyed by deed<sup>9</sup>.

Stakeholders identified in response to the Issues Paper that it is time that WA moved away from the common law requirement that deeds be required to be on paper, parchment or vellum. Noting that this has no modern policy justification or basis, but dates from centuries ago, when for some reason it was thought that documents written on these materials were more immutable than those on wood or stone. These were the only options available under pre-industrial technology at the time.

It has also been expressed in the stakeholder feedback that the paper, parchment or vellum rule has clearly passed its use-by date as technology has provided many other options. It was further expressed that the rule is anachronistic and should be removed.

Another view is that if there are particular dealings which need particular rules relating to paper then, those rules should be limited to apply to those dealings, rather than applying to all deeds of any kind in any context, regardless of the effect of the deed.

There is strong support for allowing electronic deeds, regardless of the nature of the party executing them, noting that there is no reason to limit it to individuals and that it should apply to corporations and other incorporated and statutory bodies.

It has also been submitted that the common law rule that a deed that can only be amended by another deed be removed.

In jurisdictions which have abolished the common law paper rule by statute, a deed may be created and signed electronically in a broad range of circumstances. In WA, due to the common law paper rule not having yet been abolished together with the requirements of the PLA and the TLA when dealing with and registering interests in land, a deed, must be signed and attested. In regard to the lodgement of paper documents with Western Australia's land registry, these must be wet signed and attested where they fall outside the electronic conveyancing regime under the *Electronic Conveyancing Act 2014*.

Legislative change<sup>10</sup> enabling deeds and mortgages to be executed electronically has now been passed in Victoria. Deeds in Victoria are not required to be witnessed where they are signed by individuals<sup>11</sup>.

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<sup>8</sup> s9 *Property Law Act 1969* (WA)

<sup>9</sup> *Registration of Deeds Act 1856* (WA) & s33 *Property Law Act 1969* (WA)

<sup>10</sup> *Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021* (Vic)

<sup>11</sup> s73 *Property Law Act 1958* (Vic)

In New South Wales, deeds and agreements can now be executed electronically and witnessed via audio-visual link.<sup>12</sup>

In Queensland, as a result of permanent legislative change<sup>13</sup> deeds no longer have to comply with the common law requirements for deeds. They can now be in electronic form, electronically signed and made in counterparts/split execution. An individual's signature in a deed does not need to be witnessed.

The Law Society of WA have submitted that they have reservations in extending trust deeds and deeds of family arrangements being able to be created and executed electronically.

**Question 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?

**Question 4**

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

**Question 5**

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

**Question 6**

What verification of identity regime should be implemented for deeds? Should deeds be the subject of a 3<sup>rd</sup> party verification arrangement? If so, should the arrangement 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?

**Question 8**

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

**Question 9**

Should the signatory be present when the witness signs the electronic document?

**Question 10**

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

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<sup>12</sup>*Electronic Transactions Amendment (Remote Witnessing) Act 2021 (NSW)*

<sup>13</sup>*Justice and Other Legislation Amendment Act 2021 (Qld)*

## 5.4 General Powers of Attorney

The Law Society of Western Australia also expressed reservations in creating and executing powers of attorney, electronically. Again, some states have introduced measures that allow electronic means of execution of powers of attorney.

### 5.4.1 Powers of attorney

In Victoria, permanent legislative change<sup>14</sup> enabling general powers of attorney to be executed electronically and witnessed by audio-visual link has now been passed with the additional requirement of having a 'special witness', who is either an Australian legal practitioner, a justice of the peace or person who is a member of a prescribed class of person.

In New South Wales, powers of attorney can now be witnessed via audio-visual link.<sup>15</sup>

General powers of attorney for business i.e., corporations, partnerships and unincorporated associations in Queensland can now be executed electronically and witnessed by audio-visual link if the person is a 'special witness' who is an Australian legal practitioner, justice of the peace, commissioner of declarations, or a notary public.

#### Question 11

What is the preferred approach in WA for powers of attorney?

### 5.4.2 Agents and General Powers of Attorney

The PLA contains a comprehensive set of rules which govern execution by agents and those with powers of attorney. An agent is required under section 34 of the PLA to have been appointed in writing. There are no formal requirements for such an appointment under the PLA. However, the common law requires that when an agent is authorised to execute a deed, their appointment must also be executed as a deed,<sup>16</sup> which confers a power of attorney on the donee of the power.

This requirement has not been abrogated in Western Australia<sup>17</sup>. In all other senses, the requirements of dealings in land executed by an agent are the same as those for their principal, having regard only to any differences that may flow from the different legal personality or status of the agent.

A duly appointed agent or holder of a power of attorney has all the authority to deal in land as the proprietor of the land, subject to the terms of the document. However, the conferring instruments must be executed in accordance with the common law requirements for the authority to be validly conferred on or vested in the agent. The interposition of an agent or attorney creates an additional identification issue in any electronic transaction.

<sup>14</sup> Justice Legislation Amendment (System Enhancements and Other Matters) Act 2021 (Vic)

<sup>15</sup> Electronic Transactions Amendment (Remote Witnessing) Act 2021 (NSW)

<sup>16</sup> Steiglitz v Eggington (1815) 171 ER 393

<sup>17</sup> cf. Property Law Act 1958 (Vic), s73B

It has been submitted that further reforms be considered to remove the rule that agents signing deeds must themselves be appointed by deed.

**Question 12**

If deeds or powers of attorney were enabled to be executed electronically, is it appropriate for the reforms to go further to remove the rule that agents signing deeds must themselves be appointed by deed?

## 5.5 Statutory declarations provided in support of WA land registry dealings

Historically, the laws in Australia have required statutory declarations to be written on paper and signed with wet ink.

Statutory declarations are often required to be presented as evidence in support of a number of dealings lodged for registration under the TLA.

The *COVID-19 Response and Economic Recovery Omnibus Act 2020 WA* has enabled the witnessing of affidavits and statutory declarations via audio visual communication where the signer and the witness are able to see and hear each other, and the witness observes the person signing the relevant document.

**Question 13**

Should statutory declarations provided in support of Western Australian land registry documents be enabled to be created and executed electronically?

**Question 14**

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?

**Question 15**

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

## 5.6 Contracts for sale of land

### 5.6.1 Freehold land

Buying and selling land has traditionally involved large volumes of paper with sometimes extensive disclosure documents under wet signatures, which are as a matter of practice, as opposed to law, also witnessed.

Contracts for sale of freehold land, usually in the form of a standard offer and acceptance form can be undertaken electronically subject to the requirements of the *Electronic Transactions Act 2011 (WA)* (ETA). Issues however arise in meeting the criteria of authentication under the ETA where contracts for the sale of land are entered into by private parties where no real estate agent is appointed.

Landgate understands that the existing legal framework dealing with the roles and

responsibilities of real estate agents and the Australian Consumer Law is a robust legal one under which the identity of parties is undertaken before a contract is executed.

However, where there is a private contract of sale of freehold land being negotiated between a seller and buyer without a real estate agent being involved, the issue goes to verifying the identity of each of the parties as the people who they say they are.

For there to be a valid agreement for the sale of land, in addition to the identification of the subject property and the essential terms of sale, the parties must also be identified.<sup>18</sup>

It is understandable that we must act cautiously when dealing with land so to ensure that people are not improperly deprived of their interest. The primary issue in our view is ensuring the authenticity and verification of a person's identity and their right or authority to deal with the land when that person is a party to a contract for an interest in land.

Under section 10 of the ETA, if a signature of a person is required, that requirement is taken to be met in relation to an electronic communication if the methods as outlined below at paragraph 6.1 are met.

However, section 16 of the ETA requires that a purported originator did in fact originate the relevant electronic communication, with no reversal of onus of provision nor any presumption as to validity or regularity. If the purported originator (a buyer) disputes origination, the counterparty (a seller) seeking to charge the originator (buyer) with the burden of the contract, must prove origination, which could be difficult. A third party verification arrangement may in these circumstances mitigate this risk.

**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?

**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?

**Question 18**

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

**Question 19**

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

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<sup>18</sup> See, eg: *Parker v Bennett* (1890) 16 VLR 214, *Beckett v Nurse* [1948] 1 KB 535.

## 5.6.2 Crown land

Subject to the legislative requirements for execution by statutory bodies under relevant legislation, a contract for the sale and purchase of Crown land can also be undertaken electronically.

## 5.6.3 Old system land

As noted above, land held under the old system title must be conveyed by deed<sup>19</sup> and is subject to the formalities of attestation under the PLA<sup>20</sup> by at least one witness not being a party to the deed.<sup>21</sup> These conveyances are held in the Deeds Register maintained by the Registrar of Titles and are not the subject of reform proposals under this paper as there are less than 200 lots in the Landgate systems that are subject to the Registration of Deeds system.

### 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?

# 6. SIGNING ELECTRONICALLY

## 6.1 Methods of signing electronically

Online signature tools enable parties to affix signatures without physically signing documents. These products are particularly useful when parties are in the regions, interstate or overseas, saving time and costs in the transaction. An electronic signature is essentially any form of electronic communication that is intended to be a person's signature. This may be effected in several ways, including:

- using a cloud-based execution platform, such as DocuSign or eSignLive where documents are stored in a cloud, and made available for execution by a link emailed to the relevant signatories, who enter signatures into a protected pdf document;
- signing a PDF copy on a computer using a stylus, trackpad, finger or mouse, and then dispatching it;
- dispatch of an email including the name of the signatory as a sign-off;
- a 'click wrap' signature by clicking on 'I accept' or similar on an electronic document; or
- through the use of an encrypted 'digital signature'.

A digital signature is a particular type of electronic signature. It is a commercial product that utilises public key cryptography to provide a more secure method of identifying the author of a document. The process requires a mathematically linked pair of randomly generated

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<sup>19</sup> s33 *Property Law Act 1969* (WA)

<sup>20</sup> s34 *Property Law Act 1969* (WA)

<sup>21</sup> s9 *Property Law Act 1969* (WA)

numbers, being a private key and a public key. The private key is used solely for signing documentation, while the public key is used by the recipient to verify the signature is that of the person purporting to sign, and that the document has not been altered.

The ETA validates electronic signatures in certain instances. An electronic communication is taken to meet the requirements for a signature if among other things, a method is used to identify the party signing, and the signatory has consented to the use of the electronic communication.<sup>22</sup> The consent may be obtained by an acknowledgement that, when clicking an 'accept' box, that acceptance is taken to be a signature for the purposes of the legislation. The method of identification must be 'reliable as appropriate' in the circumstances, which will differ in each case.

**Question 21**

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

## 6.2 Reliability of electronic signatures and witnessing

We consider that it is appropriate for the parties to decide what they will accept and what precautions they wish to take as to whether there has been due execution, possibly guided by general practice. This should apply to both paper and electronic documents.

It has been submitted that it is not accurate to see electronic signing as particularly fraught or necessarily more open to fraud or forgery, particularly when compared to available methods of execution of paper documents.

Some mechanisms of electronic execution afford the parties very significant protection in ensuring authenticity. In cloud-based execution platforms for instance, the execution document can only be accessed and signed by opening an email addressed to the person who is required to sign. The platform records and certifies the various steps, for example: when the signatory receives the email with the document, when the email is opened and at what IP address, and when the document is signed. It also sends confirmatory emails to the signatory. The system can require geolocation of the signatory, and also require a two-step authentication process.

**Question 22**

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

**Question 23**

What methods of electronic signature are appropriate for each category of document?

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<sup>22</sup> ETA s10(1)

## 7 WITNESSING

There is support for the proposition that the requirement for attestation of deeds should be removed citing that there is limited practical value. *Allens Linklaters* submission makes the following salient points about witnessing:

***“There was a view that having witnesses gives little or no benefit in proving execution. Forgers or fraudsters may forge the witness's signature, or get a crony or innocent dupe to witness their purported signature. The witness may be unknown or untraceable. The perceived benefits are largely illusory.***

***A witness can be a total stranger at random off the street. They may not know the signer, or know or check the signer's identity. They may not be aware of the type or contents of the document. They may have no idea as to whether the signer is signing freely or voluntarily or understands the relevant document. They do not need to know or check any those things — the law does not require it.***

***The law requires only that witnesses actually see the signer sign (and we suspect that in reality many do not), and then attest that fact by signing themselves. But the requirement that a document be witnessed can impose significant procedural burdens on electronic processes, in accommodating the presence (real or virtual) of the witness during signing, and in arranging for the witness to sign.***

***And in the case of deeds, requiring witnessing places a risk on counterparties. If witnessing and attestation of a party's signature are not carried out correctly, then the deed will be invalid<sup>23</sup>. This will apply even where on the surface the witnessing and attestation do seem to comply and other parties are not aware of that defect. This risk is magnified in relation to remote signing if the law specifies a number of requirements or steps.***

***It is sometimes suggested that witnessing is useful to ensure the signer signs voluntarily, free from duress or undue influence<sup>24</sup>. This is largely illusory. In the absence of any statutory requirement, a witness is under absolutely no obligation to be aware of or check on the circumstances. In practice witnesses do no such thing. The vast majority of circumstances in which there may be undue influence or duress, such as an abusive or controlling relationship, or threats, are unlikely to be evident in one brief signing meeting. The witness may be the abuser, or in concert with the abuser, or under the same pressure as the signer. Witnesses' signatures can be forged. The presence of a witness could only make a difference in a vanishingly small set of cases, which may be largely hypothetical.***

***We suggest that generally requirements in relation to deeds or mortgages that signatures be witnessed give very little if any benefit or protection to parties, and can cause practical difficulties in electronic processes.***

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<sup>23</sup> *Netglory v Caratti* [2013] WASC 364 at [150]-[170]

<sup>24</sup> There are some brief passing obiter remarks in some cases that witnessing ensures voluntary execution (*Burns v Lorac Mining* (1985) 4 FCR 301 at 303, *Freshfield v Reed* (1942) 152 ER 171 at 171, *Seal v Claridge* (1991) 7 QBD 519, but not in the more recent detailed survey of the purpose of attestation by Edelman J in *Netglory v Caratti* [2013] WASC 364, [122] – [144]. and it is not borne out by the actual steps required of a witness, or in practice.

***They should be removed. Witnessing of deeds has not been required in Victoria since at least 1958 — so far as we know without ill effect. It is not required under the Queensland Covid Regulation. It is not required for deeds under s127(1) and (3) of the Corporations Act 2001, even where there is only one officer signing (as sole director and sole secretary).***

***In relation to mortgages and other documents being lodged at Landgate then any protection against fraud or forgery said to be given by witnessing will be given much more effectively, by the verification of identity process.”***

There is no legal requirement for the sale of land contracts to be witnessed, although this is prudent practice from an evidentiary perspective. If a party to an agreement later claims to not have signed the document, the witness may be called on to confirm that execution occurred.

Difficulties arise when it is necessary to prove the identity of the person who has purportedly signed an agreement in circumstances where the signature has not been witnessed.

Ascertaining authority is also a key concern when parties are signing on behalf of another eg. powers of attorney.

Concerns about the unauthorised signing of electronic contracts may be alleviated by requiring that a witness attest to the signing. This may seem to be counterproductive as electronic signing allows parties to execute documents without having to be in the same room as all parties. Other methods of attestation however may be considered, such as witnessing through video link. A prescribed method of identifying the signatory drawing on existing verification of identity requirements may also provide further protection.

#### **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 registry?

## **8 REMOTE WITNESSING**

The Western Australian Government enacted the *COVID-19 Response and Economic Recovery Omnibus Act 2020 (WA)*. A key element of this legislation is that it allows for certain documents to be witnessed without the physical presence of a qualified witness on a temporary basis during the COVID-19 pandemic. These amendments are comparable to legislation already enacted by the State Governments of New South Wales, Victoria and Queensland, as well as the Commonwealth in response to the COVID-19 pandemic.

As with the laws in those jurisdictions, WA's e-signing laws do require certain steps to be taken to ensure the signature is valid.

While in operation, the new legislation amends the *Oaths, Affidavits and Statutory Declarations Act 2005 (WA)* (Oaths Act) to allow a person to witness affidavits and statutory declarations via audio visual communication where the person signing and the witness can see and hear each other, and the witness observes the person signing the relevant document.

Witnessing via audio-visual communication under the amended legislation is only valid where the witness has:

- satisfied themselves that the document they are about to sign is the document signed or otherwise dealt with by the person signing or a counterpart or copy of that document;
- signed the document or the counterpart or copy as required under the relevant enactment. This must happen during the audio-visual communication so that the witness, can see, hear and observe the signing of the relevant document; and
- endorsed the document or a copy with a statement that it was dealt with in accordance with section 23 of the *COVID-19 Response and Economic Recovery Omnibus Act 2020* (WA) prior to 31 December 2022.

**Question 25**

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

**Question 26**

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

## 9 REFORM PROPOSALS

To enable 'end-to-end' creation and execution of documents electronically, based on stakeholder feedback on the Issues Paper, the following options for reform affecting documents relating to freehold and Crown land:

- (a) enable the creation of deeds, mortgages, agreements, trust deeds, powers of attorney, deeds of family arrangement, and statutory declarations, electronically leaving to the originator or the parties to decide whether to have electronic or paper documents;
- (b) dispense with the requirement of witnessing, except on trust deeds, general powers of attorney and deeds of family arrangement, leaving it to the originator, the parties or the person or body relying on the document as to whether they will require it;
- (c) remove provisions requiring mortgages and other dealings able to be registered electronically to be in paper form;
- (d) enable execution requirements for electronic documents to be technologically neutral giving parties the flexibility so that the provisions do not become obsolete because of developments in technology; and
- (e) enable parties to a transaction to determine their attitude to risk and mitigation, without prescription in legislation.

**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 above reform options and the recommendations below will be further considered following receipt of industry feedback to this consultation paper and the questions raised.

From the perspective of the Western Australia's land registry, any reform proposals will be guided by the principle of integrity and security of the land titles system and fraud mitigation.

## 9.1 Electronic Transactions Act 2011 (WA)

In Western Australia, electronic transactions are governed by the ETA. The ETA provides that a transaction is not invalid if it has taken place wholly or partially by way of electronic communication,<sup>25</sup> with certain exceptions discussed below.

The ETA further provides that an electronic signature is valid,<sup>26</sup> if the following requirements are met:

- Identity and intention – there must be a method which can identify the person and indicate their intention in respect of the information communicated;
- Reliability – the method of signing must be 'reliable as appropriate for the purposes of which the electronic communication was generated or communicated';
- Consent – the person to whom the signature is required to be given to must provide their consent to an electronic signature and the method must identify the reliability and authenticity of the party's willingness to be bound by the signature.

The electronic signature method must identify the person and indicate their approval of the information communicated. The focus of the ETA however is not merely on signatures, but consent to receipt of information electronically rather than by paper. It is arguable that the act of signing is sufficient indication of intention to be bound, noting that parties to a transaction can determine the method of electronic signing, their indication of consent is inherent in the process.

The common law recognises the right of Australians to enter transactions by electronic means. Even where legislation or common law requires a transaction to be 'in writing' and 'signed', our courts have held these requirements were satisfied where transactions have been entered into by fax or email transmission, provided that these transactions otherwise comply with all other legal requirements for validity and enforcement, in relation to the content of a contract or formalities.

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<sup>25</sup> ETA s8(1)

<sup>26</sup> ETA s10(1)(a)-(c)

The ETA does not purport to terminate or restrict the operation of the common law in this respect. Its stated objective is to ‘facilitate’ and ‘promote confidence in the use of’ electronic transactions. It seeks to achieve this objective under the provisions of the ETA for matters that are not ‘exempted’ from the application of the ETA. If a matter is ‘exempt’, the ETA does not apply and the use of electronic communication in relation to the matter continues to be determined in accordance with the principles of legislation or common law, as outlined above.

While the ETA permits certain instruments to be signed electronically, this provision does not apply to documents which must be witnessed.<sup>27</sup> Deeds are therefore presently excluded from the application of the signature provisions of the ETA, by virtue of the witnessing requirements.

It is our view that the requirement for witnessing should not rule out a transaction from being able to be done electronically.

#### **Recommendation 1**

We propose that regulations 3(1)(b) and 4(1)(c) of the *Electronic Transactions Regulations 2012 (WA)* (ETA Regs) be amended to remove the exclusion of deeds.

## **9.2 Property Law Act 1969 (WA)**

### **9.2.1 Deeds**

Deeds are required to be signed, attested to by at least one witness and be expressed as a deed. The attestation by the witness must occur at the same time as the signature of the signing party.

#### **Recommendation 2**

We propose that section 9 of the PLA be amended to remove the requirement for a witness but still enabling witnesses. Words to the effect of “*whether or not in the presence of a witness*” can be inserted.

#### **Recommendation 3**

We propose that section 9 of the PLA be further amended to enable all deeds, to be created and executed electronically. Words to the effect that deeds *may be written on any material, or may be electronic and be signed electronically, or both*” would cover the possibility that different parties may sign different counterparts in different ways.

What would constitute signing for this purpose can be left to section 10 of the ETA and general law.

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<sup>27</sup> ETA Regs clause 3(1)(b) & 4(1)(c)

## 9.2.2 Execution by corporations, statutory and foreign corporations

It has also been submitted that reforms provide a mechanism for corporations, including statutory and foreign corporations to enable execution of a deed without a seal, allowing officers to sign in a similar way to Australian companies.

On 22 February 2022, the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) (Amendment Act) received Royal Assent making the electronic execution of documents by corporations under the *Corporations Act 2001* (Cth) (Corporations Act) permanent.

The Amendment Act provides that a company, or a person exercising the powers of a company, may sign a document, including a deed, in an electronic form using electronic means.

### Recommendation 4

We propose that section 10 of the PLA be amended to enable corporations, statutory corporations and foreign corporations to execute deeds in a similar manner to Australian companies.

## 9.3 General powers of attorney

General powers of attorney can be created under general law by deed or under the TLA. Under the provisions of the PLA and the TLA, a general power of attorney must be on paper and signed in ink.

### Recommendation 5

To align Western Australia in part with Victoria, Queensland and New South Wales, we propose that legislative change be implemented to enable general powers of attorney to be created and executed electronically and witnessed via audio visual link, in the same way as New South Wales.

### Recommendation 6

We propose that the PLA be amended to repeal the rule that agents signing deeds must themselves be appointed by deed.

## 9.4 Statutory declarations provided in support of WA land registry dealings

The requirement for statutory declarations to be in writing and the requirement for witnessing falls under section 12 of the Oaths Act.

### Recommendation 7

We propose that the TLA be amended to enable statutory declarations produced in support of Western Australian land registry documents to be created electronically and witnessed by audio-visual link.

## 9.5 Contracts for sale of land

### Recommendation 8

We propose that no legislation change be implemented for the verification of parties and the authentication of signatures, leaving the parties to comply with the provisions of section 10 of the ETA and other requirements that the parties themselves may choose, including the use a third party verification provider, if desired.

### Recommendation 9

The creation and execution of a contract of sale of Crown land can be achieved via an amendment to the *Land Administration Act 1997 (WA)* essentially providing that all interests in Crown land can be created electronically and have the same effect at law as if created in writing. We propose that the change also enable the execution of these electronic documents by electronic signature of the Minister for Lands or the duly authorised delegate of the Minister without the need for that signature to be witnessed.

## 10 RISKS AND MITIGATION ACTIONS

### 10.1 Contracts for the sale of land

eConveyancing minimises the risk of error and delay associated with manual conveyancing processes, however it does not cover the complete transaction. The negotiations between parties, seller disclosure and signing of an offer and acceptance all fall outside the current eConveyancing framework.

Most disclosure documents are now issued to practitioners by email. As a result, some firms are now preparing wholly electronic contracts with parties signing on tablets (or through other electronic means) to enable more efficient digital 'end to end' conveyancing. Even though some firms embrace this technology, others are reluctant. There are some practical obstacles to a completely paperless process, like the need for supporting documents to be retained in hard copy for evidentiary and compliance purposes.

Other perceived legal impediments include:

- Seller disclosure obligations
- Whether electronic contracts satisfy the legislative requirement for writing
- Secure methods of electronic signature
- How electronic contracts are created. The well-established requirement for land contracts to be in writing and signed has been developed to ensure transparency in the transaction and to protect against fraud. Those using electronic contracts have sought to fit modern digital processes into the traditional framework, to achieve those same outcomes. The reluctance of others to embrace the process raises the question of whether there is the need for legislation to clarify the law surrounding electronic contracts. With the benefit of

the ETA, Landgate considers that there is no need for further legislative amendment for contracts of sale.

**Question 28**

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

**Question 29**

If you have been reluctant to use electronic contracts, what are your concerns?

## 10.2 Electronic signatures

### 10.2.1 We have identified the following risks with electronic signatures generally:

- Forgery – as with traditional paper-and-ink signatures, forgery or identity theft is a real risk for electronic signatures. To reduce this risk, electronic signatures should be kept secure with password protection and a two-factor authentication, where possible
- Fraud – there is also the possibility that a person could alter an electronically-signed document after it is signed. The risk of this kind of dishonesty is not limited to electronic signatures. As with traditional paper-and-ink agreements, both parties should keep their own copies of what was agreed.
- Exclusions – signatures on some types of documents, may be excluded from the ability of being executed electronically, for example powers of attorney. If the ‘wet signature’ requirement for these documents remains, then if signed electronically, they would be invalid.
- While there is a clear legislative intention to generally promote electronic transactions under the ETA, there is a risk that a court may choose to treat electronic signatures as not equivalent to ‘wet ink’ signatures. This will be dependent on the strength of the legislative provisions and presumption in favour of validity to bring certainty to the parties contracting electronically.
- Invalidity and unenforceability – signing a document electronically carries the risk of it being non-binding due to a failure to comply with its formalities. An example here is the signing of a deed. The formalities include that a deed be ‘signed, sealed and delivered’, the signing of the deed by the signatory be attested by at least one witness not being a party to the deed.
- General security risks – a general issue with documents signed by electronic signatures is that they could be accessed and amended without the consent of the parties. This challenges the value of the documents as evidence of the arrangements the parties sought to put in place. If a party can demonstrate that an electronically signed document, was, or could be, amended without a signatory’s consent after the document was electronically signed, a court could discount the evidentiary value of the document.

## 10.2.2 Key risk mitigants relating to the use of electronic signatures:

- Check for legislative exemptions under the ETA and the *Commonwealth Electronic Transactions Act 1999* (Cth), if applicable relating to electronic transactions.
- Design and implement a method to reliably identify the signatory and to indicate the signatory's intention. Generally, in addition to naming the signatory in the execution block, it would be prudent for a party to require proof of identity documentation to confirm the identity of the person actually carrying out the electronic signing. Reliability should be considered objectively in light of all the circumstances, including the type of document being signed, the importance of the document, and the likelihood of legal challenges to the signature.
- Ensure that there is 'positive' consent. On the basis that the ETA is designed to facilitate e-commerce, there are arguments to support the view that a signatory could provide consent electronically for the use of electronic signatures to execute documents. That said, it would be prudent to ensure that a document intended for electronic execution includes a term that provides it can be signed by electronic means. For example, if acting for a lender, a legal practitioner can draft wording into forms and agreements that specify the borrower positively consents to the lender's electronic signature process and electronic communications generally.
- Employ a method of authorisation and authentication. A method of authorisation and authentication should be used to mitigate the risk that a duly authorised person has not signed the document. This may occur in situations where a person, X, has access to a mobile device that belongs to another person, Y. The application of X's electronic signature by Y on a document without X's knowledge may be invalid. By way of example, a lender could require a borrower to confirm that they have personally applied their electronic signature to a document, or that they have duly authorised another person to apply their electronic signature to the document on their behalf.
- Utilising a certificate-based signature which contains encrypted information that is unique to the signer. The signature can also be verified and informs recipients whether the document was modified after the signer initially signed the document.

## 11 CONCLUSION

It is impossible to predict the solutions of the future, beyond the obvious point that rapid change will continue indefinitely. It is key that the law should apply technological neutrality to its legislative models, being able to embrace any current or future technology that achieves the relevant policy goals.

The ability for parties to create, sign and have their signatures witnessed if appropriate, including remotely and send a document to the appropriate person or entity electronically and to enable that person to sign the agreement electronically and return it as a legally binding document allows the parties to carry on business in the way best suits their circumstances.

Electronic communication and information storage are rapidly becoming the norm in general life and commerce. There are significant savings in cost and environmental impact. Electronic processes are more convenient, more efficient and for some, more accessible.

Records are often more accessible, secure and reliable, as it is easier to store and locate documents executed electronically. In practice, often it can be easier to establish that documents and communications have been properly signed or received and opened as there is a clear electronic forensic trail. Paper communication is not becoming any easier or more reliable.

We submit that there should however not be a prohibition on parties using hard copy documents and physical signing where appropriate. These proposed reforms should be as an alternative method to provide flexibility to progress matters in the way that best suits the parties. Any reform that limits the ability to use paper documents and to physically sign these could impact vulnerable people, who may not have the same level of access to digital resources. This will ensure no unintended digital divide.

## 12 HOW TO MAKE A SUBMISSION

Anyone wanting to provide answers to the questions raised in this paper or to comment on the proposals, recommendations or the issues raised in this Paper is invited to make written submissions.

Please send all submissions to: [haveyoursay@landgate.wa.gov.au](mailto:haveyoursay@landgate.wa.gov.au)

**All submissions must be received by 5pm, 17 May 2023.**

## 13 QUESTIONS

### 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?

### Question 2

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

### Question 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 family arrangements?

### Question 4

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

### Question 5

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

### Question 6

What verification of identity regime should be implemented for deeds? Should deeds be the subject of a 3<sup>rd</sup> party verification arrangement? If so, should the arrangement 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?

### Question 8

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

### Question 9

Should the signatory be present when the witness signs the electronic document?

### Question 10

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

### Question 11

What is the preferred approach in WA for powers of attorney?

**Question 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?

**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?

**Question 14**

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

**Question 15**

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

**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?

**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?

**Question 18**

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

**Question 19**

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

**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?

**Question 21**

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

**Question 22**

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

**Question 23**

What methods of electronic signature are appropriate for each category of document?

**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?

**Question 25**

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

**Question 26**

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

**Question 27**

Do you agree with the reform proposals contained in paragraphs 9(a) to (e)?

If you disagree with the reform proposal, then please provide your reasons and suggested solutions.

**Question 28**

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

**Question 29**

If you have been reluctant to use electronic contracts, what are your concerns?

## 14 RECOMMENDATIONS

### Recommendation 1

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We propose that section 9 of the PLA be amended to remove the requirement for a witness but still enabling witnesses. Words to the effect of “*whether or not in the presence of a witness*” can be inserted.

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### Recommendation 4

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**Recommendation 9**

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