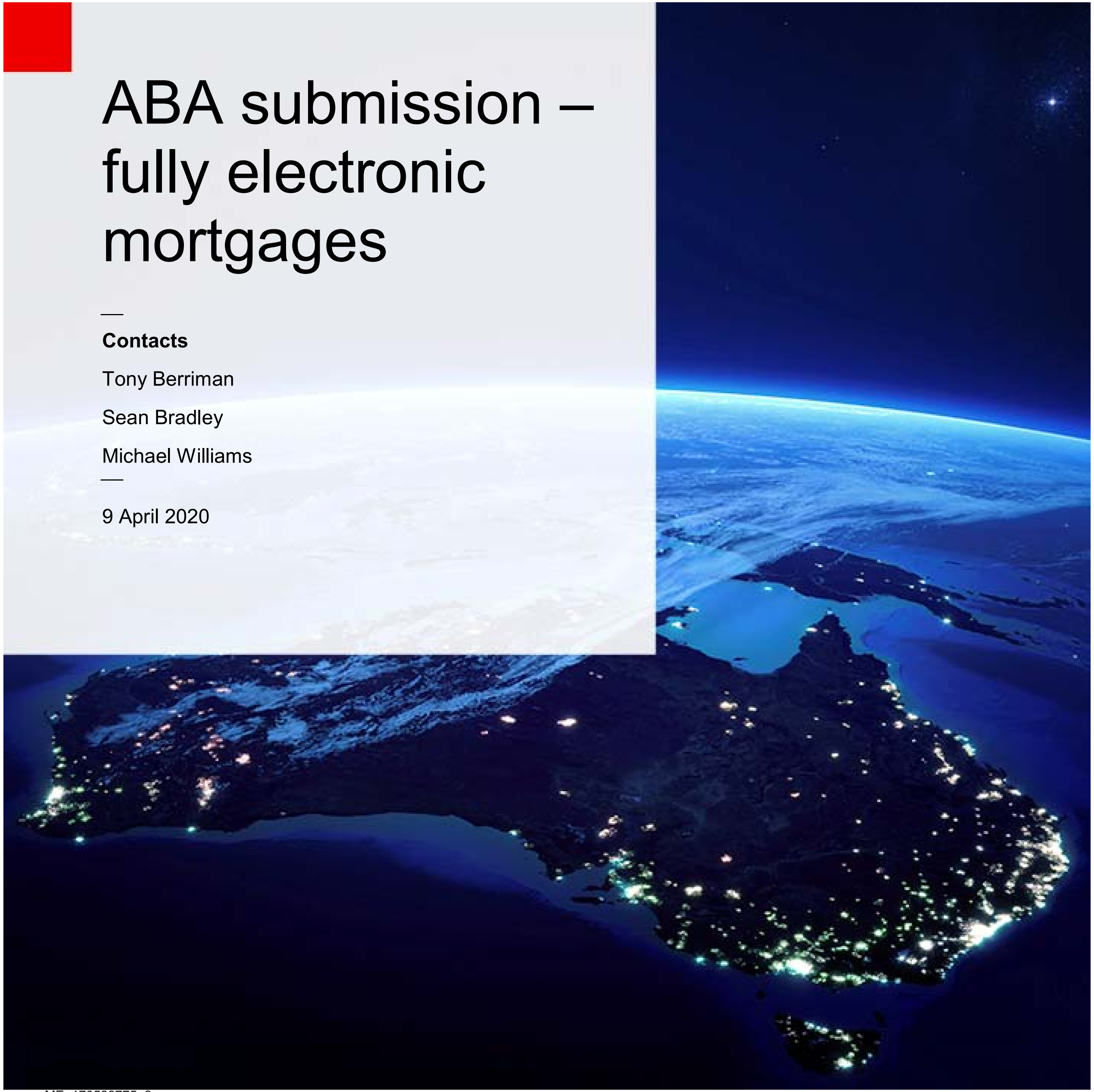

ABA submission – fully electronic mortgages

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A Background

1. The steps being taken to reduce the spread of COVID-19 have heightened the desire for many financial institutions to move to digital channels and avoid the need for physical documents and face-to-face meetings where feasible.

2. The advent of electronic lodgement networks which facilitate financial settlements of land dealings in a number of jurisdictions has for the first time raised the possibility of taking real property mortgages in a 'fully electronic way'. However, there are still impediments:

   (a) each State that facilitates online lodging of mortgages, has approached the legal and practical response to the requirements for fully electronic mortgages in different ways (and, in some instances, interpreted similar concepts in different ways); and

   (b) each State has left some gaps in its legal and practical response which cause concern for financiers who rely on certainty of enforceability.

3. The States (via their registrars of land titles and their peak group, ARNECC) have generally focussed on whether there is a pathway to paperless registration from a process perspective. Lenders however are additionally concerned to ensure certainty of enforceability. This has necessitated a detailed analysis by market participants to identify any potential noncompliance with the legislated requirements and common law requirements for mortgages. In some cases these requirements lack clarity, and in others, they impose impediments to electronic mortgages. As a result, to date, many lenders have been reluctant to embrace the use of mortgages that are electronically signed by mortgagors, and in some instances mortgagors sign all documents for a transaction electronically except the mortgage.

4. Given the risks to lenders, for the market to operate efficiently, there must be a high degree of certainty that a mortgage will be enforceable. The extent of the lending portfolios operated by the ABA's members is such that risks caused by the regulatory framework in relation to mortgage lending are systemic risks.

5. We have been asked to identify the changes that would be required to be made in **New South Wales**, **Victoria**, **South Australia**, **Queensland** and **Western Australia** (the **Relevant States**) in order to facilitate legally effective and binding fully electronic mortgages for both natural person mortgagors and corporate mortgagors. The remaining States and Territories (Tasmania, the Australian Capital Territory and the Northern Territory) have not yet permitted the online lodging of land dealing for registration.

6. Although not specifically relevant to this submission, we note that each State has taken a different approach to fully electronic mortgages (in particular they are not permitted in Tasmania, the Australian Capital Territory and the Northern Territory) which has also impeded mortgagees from creating single nationwide process and this will continue to lead to some inefficiencies.

B What needs to be done

Victoria

7. The key issue in Victoria is whether the counterpart mortgage signed by the mortgagor and retained by the mortgagee needs to be in the 'approved form'[1] and, in relation to a natural person mortgagor, whether the mortgagor's execution must be witnessed.

8. This can be addressed by amendment to section 74 of the *Transfer of Land Act 1958* (Vic) to clarify that sections 74(1) and 74(1A) provide two separate and distinct ways of granting a mortgage (including clarification that 'the mortgage' referred to in section 74(1A)(b)(i) is not the mortgage referred to in section 74(1) and therefore need not be in an 'approved form').[2]

9. While amendment is preferable, an alternative approach would be to create a new 'approved form' of counterpart mortgage which does not include a witnessing panel in connection with a natural person mortgagor's execution (or introducing an Addendum to the National Mortgage Form in Victoria similar to the 'Mortgage Form Design Specification Version 1.5 – NSW Addendum – updated 12 September 2019').

New South Wales

10. The key issue in New South Wales is whether the counterpart mortgage signed by the mortgagor and retained by the mortgagee needs to be in the 'approved form'[3] and signed by the mortgagee.

11. This issue could be addressed by amending section 56 of the *Real Property Act 2000* (NSW) to clarify that sections 56(1) and 56(1A) provide two separate and distinct ways of granting a mortgage (including clarification that 'the mortgage' referred to in section 56(1A)(b)(i) is not the same as the mortgage referred to in section 56(1) and therefore need not be in the 'approved form').[4]

12. Again, while amendment is preferable, an alternative approach would be to create a separate 'approved form' of counterpart mortgage which does not contain an execution panel for the mortgagee (for use in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration).

South Australia

13. The key issue in South Australia is whether the counterpart mortgage signed by the mortgagor and retained by the mortgagee is an 'instrument' (and therefore needs to be in the 'appropriate form') and whether it needs to be signed by the mortgagee.

14. Sections 128(1) and 128(5) should be amended to clarify that the *'corresponding mortgage'* (i.e. the counterpart mortgage) need not be executed by the mortgagee.

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[1] The 'approved form' of counterpart mortgage in Victoria is the ARNECC National Mortgage Form (with Victoria selected as the 'Jurisdiction' and lodgement type 'Signed by Mortgagor only').

[2] If this approach is adopted, a separate National Mortgage Form should also be published for use in Victoria which does not contain a witnessing panel in relation to a natural person mortgagor's execution. While this would not be an 'approved form' (because the proposed amendment would remove the 'approved form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

[3] The 'approved form' of counterpart mortgage in New South Wales is the ARNECC National Mortgage Form (with New South Wales selected as the 'Jurisdiction' and lodgement type 'Signed by Mortgagor and Mortgagee').

[4] If this approach is adopted, a separate National Mortgage Form should also be published for use in New South Wales which does not contain an execution panel for the mortgagee. While this would not be an 'approved form' (because the proposed amendment would remove the 'approved form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

15. The definition of 'instrument' under section 3 of the *Real Property Act 1886* (SA) should be amended to specifically exclude the *'corresponding mortgage'* under section 128(5)(a) (i.e. the counterpart mortgage), thereby removing any uncertainty as to whether it must be in the 'appropriate form'.[5]

Queensland

16. The key issues in Queensland are as follows:

    (a) unlike the equivalent legislation in each other Relevant State, the *Land Title Act 1994* (QLD) does not contain an express provision empowering the Registrar to register a mortgage signed by the mortgagee with certifications;

    (b) the definition of 'instrument' in Schedule 2 of the *Land Title Act 1994* (QLD) is broad enough to encompass the counterpart mortgage signed by the mortgagor and retained by the mortgagee, and therefore:

        (i) under section 10(2) the counterpart mortgage would need to be in the 'appropriate form';

        (ii) under section 11(1) the counterpart mortgage would need to be signed by both the mortgagor and the mortgagee; and

        (iii) in the case of an individual mortgagee or mortgagor, there execution would need to be witnessed in accordance with section 161(2).

17. In relation to paragraph 16(a) above, section 72 of the *Land Title Act 1994* (QLD) should be amended to include an express provision empowering the Registrar to register a mortgage signed by the mortgagee with certifications.[6]

18. In relation to paragraph 16(b) above:

    (a) the definition of 'instrument' in Schedule 2 of the *Land Title Act 1994* (QLD) should be amended to exclude the counterpart mortgage signed by the mortgagor and retained by the mortgagee; and

    (b) it should be made clear that the counterpart mortgage signed by the mortgagor and retained by the mortgagee need not be in any particular form and the mortgagor's execution need not be witnessed.

Western Australia

19. The key issues in Western Australia are as follows:

    (a) whether the counterpart mortgage signed by the mortgagor and retained by the mortgagee must be in the 'approved form' and signed by the mortgagee;

    (b) whether the counterpart mortgage signed by the mortgagor and retained by the mortgagee and the registry instrument signed by the mortgagee with certifications must contain 'exactly the same data or information';[7] and

[5] If this approach is adopted, a separate National Mortgage Form should also be published for use in South Australia which does not contain an execution panel for the mortgagee. While this would not be an 'appropriate form' (because the proposed amendment would remove the 'appropriate form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

[6] See for instance: *Transfer of Land Act 1958* (Vic) s 74(1A); *Real Property Act 2000* (NSW) s 56(1A); *Real Property Act 1886* (SA) s 128(5); Transfer of Land Act 1893 (WA) s 105(3).

[7] See paragraph 63 below in relation to the requirement that the counterpart and the registry instrument contain 'exactly the same data or information'.

(c) the definition of 'instrument' under section 4 of the *Transfer of Land Act 1893* (WA) is broad enough to encompass the counterpart mortgage signed by the mortgagor and retain by the mortgagee, and therefore the mortgagor's execution must be witnessed under section 145(1)(a).

20. In relation to paragraph 19(a) above, section 105(2) of the *Transfer of Land Act 1893* (WA) should be amended to clarify that the ***'charging instrument'*** (i.e. the counterpart mortgage signed by the mortgagor and retained by the mortgagee) under section 105(3) need not be in an 'approved form'.[8]

21. Again, while amendment is preferable, an alternative approach would be to create a separate 'approved form' of counterpart mortgage which does not contain an execution panel for the mortgagee (for use in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration).

22. In relation to paragraph 19(b) above, the proposed amendments to section 4(1CA)(b) and 105AA provided in the *Transfer of Land Amendment Bill 2018* (introduced to the Western Australian Legislative Assembly on 21 November 2018) should be enacted (see paragraph 64 below for further detail).

23. In relation to paragraph 19(c) above, section 145 of the *Transfer of Land Act 1893* (WA) should be amended to remove the witnessing requirement in relation to mortgages. Alternatively, the definition of 'instrument' could be amended to specifically exclude the ***'charging instrument'*** (i.e. the counterpart mortgage signed by the mortgagor and retained by the mortgagee) under section 105(3) of the *Transfer of Land Act 1893* (WA).

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[8] If this approach is adopted, a separate National Mortgage Form should also be published for use in Western Australia which does not contain an execution panel for the mortgagee. While this would not be an 'approved form' (because the proposed amendment would remove the 'approved form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

C The scope of this submission

24. Despite many recent improvements in the regulatory framework as it applies to fully electronic mortgages in each of the Relevant States, there is still at least one issue to fully electronic mortgages in each such State. These issues are set out in sections **E** – **J** below.

25. This submission only relates to:

    (a) individuals and companies incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**); and

    (b) execution requirements.

26. It does not address other issues such as:

    (a) verification of identity;

    (b) what processes are used to facilitate and store electronically executed documents; or

    (c) other legal and regulatory issues, such as the National Credit Code, Banking Code of Practice or changes to the Regulatory Framework that would potentially enhance a mortgagee's position under a mortgage (e.g. in relation to deeds and powers of attorney).

27. In this document a reference to:

    (a) a **fully electronic mortgage** is a reference to the registration of a mortgage where:

        (i) the counterpart mortgage is signed electronically by the mortgagor (and, if required, by the mortgagee); and

        (ii) the registry instrument is electronically signed by the mortgagee with certifications and lodged electronically;

    (b) a **counterpart mortgage** is a reference to a mortgage signed by the mortgagor (which must be retained by the mortgagee and is not lodged for registration at a land registry). This could be a paper document with wet-ink signatures but for present purposes would more likely be an electronic document; and

    (c) the **registry instrument** is a reference to the mortgage which is electronically signed by the mortgagee with certifications and lodged for registration via an Electronic Lodgement Network (**ELN**) (there are a small number of these, the most well-known is PEXA).

28. The key themes that must be addressed in each State to provide certainty around the effectiveness of fully electronic mortgages are set out below.

D Key themes

Counterpart Mortgage

29. The counterpart mortgage is the document under which the mortgagor grants a mortgage in favour of the mortgagee.

30. In the context of fully electronic mortgages, the counterpart mortgage is the document which evidences the security interest granted by the mortgagor (ie registered proprietor of an interest in land in favour of the mortgagee).

31. This document will not be presented to a Registrar unless the Registrar conducts a compliance audit under the *Electronic Conveyancing National Law*. The purpose of such an audit would be to ensure the mortgagee holds a mortgage signed by the mortgagor on the same terms as the registry instrument (see below).

32. We think that there are certain elements to a Regulatory Framework which, if adopted by the States and the Registrars, will significantly assist in giving mortgagees confidence that a mortgage executed electronically will, all other things being equal, be no more vulnerable to challenge than a paper mortgage with wet ink signatures.

33. There are 5 key elements which, if addressed, will materially simplify the issues for lenders wishing to utilise fully electronic mortgages

    (a) There should be a clear distinction between the counterpart mortgage (being the mortgage signed by the mortgagor and retained by the mortgagee) and the registry instrument (being the mortgage which is signed by the mortgagee with certifications and lodged for registration by an ELN). Currently, this distinction is most clearly demonstrated by the *Real Property Act 1886* (SA) s 128(5).

    (b) The counterpart mortgage should not be an 'instrument' (New South Wales, Victoria, South Australia, Queensland and Western Australia). If a document is an 'instrument' the legislation and regulations (including land registry practice and policies) tend to dictate the form and content of the instrument and the signing and witnessing requirements.

    (c) The counterpart mortgage should not be required to be in any prescribed form (e.g. an 'approved form' or 'appropriate form'). There are significant challenges in ensuring that electronic documents are in a particular form given the range of devices that might be used to display the document. Removing the requirement for counterpart mortgages to be in an approved form gives mortgagees the ability to adopt a nationally consistent approach.

    (d) The counterpart mortgage should require signing by the mortgagor only and signing should not need to be witnessed. Witnessing is particularly problematic in an electronic environment as it is difficult to ensure that the witness is identified with appropriate certainty and is present with the signatory when the document is signed. The current social distancing measures mean that witnessing, even of physical documents in 'wet ink', can be problematic. In some States mortgagees are (at least arguably) required to sign the counterpart mortgage which seems to be unnecessary (and may itself require witnessing). Note that verification of identity requirements which have been introduced with the advent of the ELN's, are an appropriate mitigating factor against fraudulent transactions and largely obviate the need for witnessing.

    (e) Where:

        (i) the mortgagor is a corporation signing under section 127 of the Corporations Act,

        (ii) there are multiple mortgagors, or

        (iii) if a mortgagee is required to sign the counterpart mortgage, the counterpart mortgage should be able to be signed using separate (but identical documents) and a 'single static' counterpart mortgage should not be required. This provides options for different modes of execution including signing in different locations and scanning and sending the signed document.

Registry Instrument

34. The registry instrument is the mortgage document signed by the mortgagee only and presented to the relevant land registry for registration. The registry instrument is not signed by the mortgagor, however it does include a certification by the mortgagee that it holds a mortgage granted by the mortgagor on the same terms as the registry instrument.

35. To provide certainty around the effectiveness of fully electronic mortgages, the following legislative clarifications are required in relation to the registry instrument:

(a) confirmation (either in legislation or via each state registrar) that, for the purposes of the *Electronic Conveyancing National Law*, the mortgage form used for lodgement in the platform of each Electronic Lodgement Network Operator (eg PEXA) is the 'approved form'; and

(b) clarification in relation to the requirement that the mortgagee certify that it holds a counterpart mortgage signed by the mortgagor 'on the same terms' as the registry instrument. In particular, it should only be the substantive mortgage terms to which the certification applies, and formatting differences between the counterpart mortgage and the registry instrument should specially be identified as not causing the certification to be false.

Execution by corporate mortgagor

36. To enable execution of electronic counterpart mortgages by corporations, the following legislative reform is required:

(a) the *Electronic Transactions Act 1999* (Cth) must apply to corporations (e.g. by removing item 28 from the *Electronic Transactions Regulations 2000* (Cth)); and

(b) section 127(1) of the *Corporations Act 2001* (Cth) must be amended to clarify that there is no requirement that two directors (or a director and a company secretary) sign a single, static document for the purposes of binding a company (i.e. that split-execution is sufficient for the purposes of section 127(1)).

E Current status in each jurisdiction

	General	Counterpart Mortgage						Electronic Registry Instrument	
	Is there a clear distinction between the counterpart mortgage and the registry instrument?	*Is it clear that the counterpart mortgage need not be in any particular form?*	*Does the counterpart mortgage only need to be signed by the mortgagor?*	*Does the counterpart mortgage not need to be signed by the mortgagee?*	*Is electronic execution by a natural person mortgagor available?*[9]	*Is it clear that the mortgagor's signature need not be witnessed?*	*Can a mortgagor execute counterparts (for corporate mortgagors and multiple individual mortgagors)?*	*Does the registry instrument only need to be signed by the mortgagee?*	*Is it clear that the mortgagee's signature need not be witnessed?*[10]
Victoria	✓	✗	✓	✓	✓	✗	✗	✓	✓
New South Wales	✓	✗	✗^	✗^	✓	✓	✗	✓	✓
South Australia	✓	✗	✗^	✗^	✓	✓	✗	✓	✓
Queensland	✗	✗	✗^	✗^	✓	✗	✗	✓	✓
Western Australia	✓	✗	✗^	✗^	✓	✗	✗	✓	✓

^ Under the current Regulatory Framework in each of these jurisdictions, it appears that the counterpart mortgage must be signed by both the mortgagor and the mortgagee (see paragraphs 43-44 below in relation to New South Wales, paragraphs 47-49 in relation to South Australia, paragraph 56 in relation to Queensland and paragraphs 65 – 66 in relation to Western Australia).

Key:

✓	*Issue sufficiently addressed by State's Regulatory Framework*
✗	*Issue not sufficiently addressed by State's Regulatory Framework*

[9] This requirement is satisfied by each Relevant State's electronic transaction legislation.

[10] Under the *Electronic Conveyancing National Law* (which has been adopted by each Relevant State), section 9(3)(b) provides: 'If a registry instrument is digitally signed in accordance with the participation rules applicable to that instrument… the requirements of any other law of this jurisdiction relating to the execution, signing, witnessing, attestation or sealing of documents must be regarded as having been fully satisfied'.

F Victoria

***Transfer of Land Act 1958* (Vic) s 74(1) and (1A)**

74 Creation and nature of mortgages and charges

(1) By instrument in the approved form, the registered proprietor of any land may—
(a) mortgage the land; or
(b) charge it with the payment of an annuity.

(1A) The Registrar may register a mortgage if the mortgagee has—
(a) signed the mortgage; and
(b) certified that—
(i) the mortgagee holds a mortgage granted by the mortgagor; and
(ii) the mortgage held by the mortgagee is on the same terms as the mortgage lodged for registration.

Counterpart Mortgage need not be in any prescribed form

37. It is not clear whether sections 74(1) and 74(1A) of the *Transfer of Land Act 1958* (Vic) (**TLA**) must be read together, such that a mortgagor must grant a mortgage 'by instrument in the approved form' under section 74(1) even where section 74(1A) is used to register a registry instrument signed by the mortgagee with certifications.

38. Section 74 should be amended to clarify that sections 74(1) and 74(1A) provide two separate and distinct ways of granting a mortgage, and that the mortgage referred to in section 74(1A)(b)(i) is not the mortgage referred to in section 74(1) and need not be in any particular form (noting that, in accordance with the mortgagee's certifications, the counterpart mortgage will nevertheless need to be 'on the same terms' as the registry instrument lodged for registration).[11]

Mortgagor's signature of counterpart mortgage need not be witnessed

39. Adopting a conservative interpretation and assuming that sections 74(1) and 74(1A) must be read together, the counterpart mortgage granted by the mortgagor under section 74(1) must be 'by instrument in the approved form' (i.e. the ARNECC National Mortgage Form). The ARNECC National Mortgage Form in Victoria for a natural person mortgagor contains a witnessing panel. Accordingly, it is arguable that the counterpart mortgage will only be 'in the approved form' for the purposes of section 74(1) if the witnessing panel is completed.[12]

40. This uncertainty could be removed by amending section 74 of the TLA in accordance with paragraph 38 above (which in our view is the preferred approach) or by creating a new 'approved form' of counterpart mortgage which does not include a witnessing panel in connection with a natural person mortgagor's execution. Alternatively, the Registrar could introduce an Addendum to the National Mortgage Form in Victoria similar to the 'Mortgage Form Design Specification Version 1.5 – NSW Addendum – updated 12 September 2019'.

[11] If this approach is adopted, a separate National Mortgage Form should also be published for use in Victoria which does not contain a witnessing panel in relation to a natural person mortgagor's execution. While this would not be an 'approved form' (because the proposed amendment would remove the 'approved form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.
[12] Note that there is no express requirement under the TLA that the mortgagor's execution of the counterpart mortgage be witnessed.

G New South Wales

***Real Property Act 1900 No 25* (NSW) s 56(1) and (1A)**

56 Lands under this Act: how mortgaged or encumbered

(1) Whenever any land or estate or interest in land under the provisions of this Act is intended to be charged with, or made security for, the payment of a debt, the proprietor shall execute a mortgage in the approved form.

(1A) The Registrar-General may register a mortgage if the Registrar-General is satisfied:
(a) the mortgagee has signed the mortgage, and
(b) the mortgagee has certified (in words to the effect) that:
(i) the mortgagee holds a mortgage granted by the mortgagor, and
(ii) the mortgage held by the mortgagee is on the same terms as the mortgage lodged for registration.

Counterpart Mortgage need not be in any prescribed form

41. Similar to the position in Victoria, it is not clear whether sections 56(1) and 56(1A) of the *Real Property Act 2000* (NSW) (**RPA**) must be read together, such that a mortgagor must 'execute a mortgage in the approved form' under section 56(1) even where section 56(1A) is used to register a registry instrument signed by the mortgagee with certifications.

42. Section 56 should be amended to clarify that sections 56(1) and 56(1A) provide two separate and distinct ways of granting a mortgage, and that the mortgage referred to in section 56(1A)(b)(i) is not the same as the mortgage referred to in section 56(1) and need not be in any particular form (noting that, in accordance with the mortgagee's certifications, the counterpart mortgage will nevertheless need to be 'on the same terms' as the registry instrument lodged for registration).[13]

Counterpart mortgage need only be signed by mortgagor

43. Adopting a conservative interpretation and assuming that sections 56(1) and 56(1A) must be read together, the counterpart mortgage granted by the mortgagor under section 56(1) must be 'in the approved form' (i.e. the ARNECC National Mortgage Form). The ARNECC National Mortgage Form in New South Wales includes an execution block for the mortgagee. The execution block takes different forms depending on the type of mortgagee and the way in which the mortgagee intends to execute the counterpart mortgage.

44. This introduces uncertainty because it is arguable that the counterpart mortgage will only be 'in the approved form' for the purposes of section 56(1) if it is executed by the mortgagee.[14]

45. This uncertainty could be removed by amending section 56 of the RPA in accordance with paragraph 42 above (which in our view is the preferred approach), or by creating a separate 'approved form' of counterpart mortgage which does not contain an execution panel for the mortgagee for use in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration.

[13] If this approach is adopted, a separate National Mortgage Form should also be published for use in New South Wales which does not contain an execution panel for the mortgagee. While this would not be an 'approved form' (because the proposed amendment would remove the 'approved form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

[14] There is no express requirement under the RPA that the mortgagee execute the counterpart mortgage in circumstances where the registry instrument is lodged for registration.

H South Australia

***Real Property Act 1886* (SA) s 128 (1), (2) and (5)**

128 Mortgage of land

(1) If land is to be charged or made security in favour of a person, a mortgage must be executed by the registered proprietor and the person.

(2) A mortgage lodged for registration in the Lands Titles Registration Office must be in the appropriate form.

…

(5) The Registrar-General may register a mortgage lodged for registration in the Lands Titles Registration Office that is executed solely by the mortgagee—

(a) if the Registrar-General is satisfied that a mortgage on the same terms as the mortgage lodged for registration (the ***corresponding mortgage***) has been executed by the mortgagor and the mortgagee as required under subsection (1) and retained by the mortgagee; and

(b) in a case where the mortgagee is not an ADI—if certification required under section 273(1) in relation to the mortgage has been provided—

(i) by a legal practitioner or a registered conveyancer; or

(ii) if the Registrar-General has given written approval for another person to provide the certification—by that person.

Counterpart Mortgage need not be in any prescribed form

46. Unlike the position in Victoria and New South Wales, it is clear in South Australia that sections 128(1) and 128(5) of the *Real Property Act 1886* (SA) (**RPA**) must be read together.[15]

47. While section 128(1) does not require the counterpart mortgage to be in a prescribed form, section 54(1) of the RPA provides that, the Registrar may not register or record an 'instrument' that purports to transfer or otherwise deal with or affect an estate or interest in land unless the 'instrument' is, among other things, 'in the appropriate form'. 'Instrument' is defined broadly under the RPA, and could arguably include the counterpart mortgage signed by the mortgagor and retained by the mortgagee (even where section 128(5) is used to register a registry instrument signed by the mortgagee with certifications).

48. The definition of 'instrument' should be amended to specifically exclude the ***'corresponding mortgage'*** (i.e. the counterpart mortgage) under section 128(5)(a) of the RPA, thereby removing any uncertainty as to whether it must be in the 'appropriate form' (noting that, in accordance with the mortgagee's certifications, the counterpart mortgage will nevertheless need to be 'on the same terms' as the registry instrument lodged for registration).[16]

Counterpart mortgage need only be signed by mortgagor

49. Sections 128(1) and (5) of the RPA make it clear that the counterpart mortgage retained by the mortgagee must be executed by both the mortgagor and the mortgagee. We also note that the 'appropriate form' of counterpart mortgage in South Australia currently contains an execution block for the mortgagee.

50. Sections 128(1) and (5) should be amended to clarify that the ***'corresponding mortgage'*** (i.e. the counterpart mortgage) need not be executed by the mortgagee.

[15] See section 128(5)(a) which refers to 'a mortgage…as required under subsection (1)…'

[16] If this approach is adopted, a separate National Mortgage Form should also be published for use in South Australia which does not contain an execution panel for the mortgagee. While this would not be an 'appropriate form' (because the proposed amendment would remove the 'appropriate form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

I Queensland

***Land Title Act 1994* (QLD) s 72(1)**[17]

72 Mortgaging lot etc. by registration

(1) A lot or an interest in a lot may be mortgaged by registering an instrument of mortgage for the lot or interest.

Distinction between counterpart mortgage and registry instrument

51. Unlike the equivalent legislation in each other Relevant State, the *Land Title Act 1994* (QLD) (**LTA**) does not contain an express provision empowering the Registrar to register a mortgage signed by the mortgagee with certifications.[18]

52. Section 72 should be amended in accordance with the position in the other Relevant States to include an express provision empowering the Registrar to register a mortgage signed by the mortgagee with certifications.

Counterpart mortgage need not be in any prescribed form

53. Section 10(2) of the LTA provides that an 'instrument' required or permitted to be executed must be in the 'appropriate form' when it is executed (i.e. the National Mortgage Form). 'Instrument' is defined inclusively in Schedule 2 of the LTA and would be capable of encompassing both the counterpart mortgage signed by the mortgagor and retained by the mortgagee and the registry instrument signed by the mortgagee with certifications and lodged for registration.

54. The definition of 'instrument' in Schedule 2 of the LTA should be amended to specifically exclude the counterpart mortgage signed by the mortgagor in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration.

55. Assuming section 72 is amended in accordance with paragraph 52, section 72 should also clarify that the counterpart mortgage signed by the mortgagor and retained by the mortgagee need not be in any particular form in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration (noting that, in accordance with the mortgagee's certifications, the counterpart mortgage will nevertheless need to be 'on the same terms' as the registry instrument lodged for registration).

Counterpart mortgage need only be signed by mortgagor

56. Under section 11(1) of the LTA, an 'instrument' to create an interest in a lot must be executed by the person creating the interest (e.g. the mortgagor) and the person in whose favour the interest is to be created (e.g. the mortgagee). As noted above, the definition of 'instrument' in Schedule 2 of the LTA is broad enough to include the counterpart mortgage signed by the mortgagor.[19]

57. The definition of 'instrument' in Schedule to of the LTA should be amended in accordance with paragraph 54 and, assuming section 72 is amended in accordance with paragraph 52, it should be clear that the counterpart mortgage need not be signed by the mortgagee.

Mortgagor's signature of counterpart mortgage need not be witnessed

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[17] Note that section 340 of the *Land Act 1994* (Qld) applies to mortgages of lease and sublease, and would also need to be amended in accordance with this section.
[18] We note that there are sporadic references to 'supporting document' and 'registry instrument' in the LTA which we understand to have been the result of amendments to the LTA to support electronic mortgages.
[19] Note that section 288 of the *Land Act 1994* (Qld) applies to non-freehold interests and would also need to be amended in accordance with this section.

58. Section 73(1)(a) of the LTA provides that the 'instrument of mortgage' must be 'validly executed'. As noted above, the definition of 'instrument' in Schedule 2 of the LTA is broad enough to include the counterpart mortgage signed by the mortgagor and retained by the mortgagee.

59. Under section 161(2) of the LTA, to be 'validly executed' an instrument of mortgage must, in the case of an individual, be executed in a way permitted by law and witnessed.[20]

60. The definition of 'instrument' in Schedule 2 of the LTA should be amended in accordance with paragraph 54 and, assuming section 72 is amended in accordance with paragraph 52, it should be clear that the mortgagor's execution of the counterpart mortgage need not be witnessed.[21]

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[20] Eligible witnesses are set out in Schedule 1 of the LTA.

[21] Alternatively, section 161 of the LTA could be amended to include a new subsection to the effect that the mortgagor's execution of the counterpart mortgage need not be witnessed in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration. Note that a similar amendment would be required to section 340 of the *Land Act 1994* (QLD).

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***Transfer of Land Act 1893* (WA) s 105(1)-(5)**

105 Mortgages and charges for annuities, creating

(1) The proprietor of land under the operation of this Act may —
(a) mortgage the land; or
(b) charge the land with the payment of an annuity.

(2) A mortgage or charge shall be in an approved form.

(3) Subsection (4) applies if —
(a) a counterpart of an instrument purporting to mortgage or charge any land under the operation of this Act (the ***charging instrument***) is lodged for registration in accordance with regulations made under this Act or requirements determined under section 182A; and
(b) the counterpart of the charging instrument lodged —
(i) purports to be signed by the person who, on registration of the mortgage or charge, will become the proprietor of the mortgage or charge; but
(ii) does not purport to be signed by the proprietor of the land; and
(c) a counterpart of the charging instrument purporting to be signed by the proprietor of the land is not also lodged for registration; and
(d) the charging instrument is registered.

(4) If this subsection applies, the mortgage or charge is not valid or binding against the proprietor of the land unless, before the charging instrument was registered, the proprietor of the land signed a counterpart of the charging instrument.

(5) Subsection (4) overrides section 58.

Counterpart Mortgage need not be in any prescribed form

61. Section 105(2) of the *Transfer of Land Act 1893* (WA) (**TLA**) provides that a mortgage shall be in an 'approved form' (i.e. the National Mortgage Form). Section 105(2) is broad enough to include both the counterpart mortgage signed by the mortgagor and retained by the mortgagee and the registry instrument signed by the mortgagee with certifications and lodged for registration.

62. Section 105(2) of the TLA should be amended to clarify that the ***'charging instrument'*** (i.e. the counterpart mortgage signed by the mortgagor and retained by the mortgagee) under section 105(3) need not be in an 'approved form' (noting that, in accordance with the mortgagee's certifications, the counterpart mortgage will

nevertheless need to be 'on the same terms' as the registry instrument lodged for registration).[22] This could be achieved by adopting similar language to section 128(2) of the *Real Property Act 1886* (SA) (e.g. only mortgages lodged for registration need to be in an 'approved form').[23]

63. Section 4(1CA)(b) of the TLA also provides that a document is a 'counterpart' in relation to another document if, among other things, it contains 'exactly the same data or information' (apart from the signatures appearing on each document, witness details and certain other irrelevant differences). Consequently, the counterpart mortgage signed by the mortgagor and retained by the mortgagee must 'contain exactly the same data or information' as the registry instrument signed by the mortgagee with certifications and lodged for registration. This in effect requires the counterpart mortgage signed by the mortgagor and retained by the mortgagee to adopt a particular form (i.e. the form of the registry instrument signed by the mortgagee with certifications and lodged for registration).

64. Section 4(1CA) should be amended to remove the requirement that a 'counterpart' of a document be 'exactly the same'. We note that the *Transfer of Land Amendment Bill 2018* seeks to replace the current section 4(1CA)(b) with a requirement that a 'counterpart' in relation to another document be 'in the same terms or substantially the same terms'. In our view, this amendment would be sufficient to address the issue identified in paragraph 63, however we note that there have been no developments in the parliamentary process since the *Transfer of Land Amendment Bill 2018* was introduced on 21 November 2018.

Counterpart mortgage need only be signed by mortgagor

65. The counterpart mortgage granted by the mortgagor under section 105(2) must be in the 'approved form' (i.e. the ARNECC National Mortgage Form). The ARNECC National Mortgage Form for Western Australia includes an execution block for the mortgagee. The execution block takes different forms depending on the type of mortgagee and the way in which the mortgagee intends to execute the counterpart mortgage.

66. It appears that the counterpart mortgage will only be in the 'approved form' for the purposes of section 56(1) if it is executed by the mortgagee.

67. This uncertainty could be removed by amending section 105(2) of the TLA (which in our view is the preferred approach) in accordance with paragraph 62, or by creating a separate 'approved form' of counterpart mortgage which does not contain an execution panel for the mortgagee for use in circumstances where the registry instrument signed by the mortgagee with certifications is lodged for registration.

Mortgagor's signature of counterpart mortgage need not be witnessed

68. Section 145(1)(a) of the TLA provides that an 'instrument' executed in Australia (by an individual or a corporation) shall be deemed to be duly executed if the Registrar is satisfied that each signature is witnessed.[24] 'Instrument' is defined inclusively under section 4 of the TLA and would include the counterpart mortgage signed by the mortgagor and retained by the mortgagee.

69. Section 145 of the TLA should be amended to remove the witnessing requirement in relation to mortgages. Alternatively, the definition of 'instrument' could be amended to specifically exclude the ***'charging instrument'*** (i.e. the counterpart mortgage signed by the mortgagor and retained by the mortgagee) under section 105(3) of the TLA.[25]

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[22] If this approach is adopted, a separate National Mortgage Form should also be published for use in Western Australia which does not contain an execution panel for the mortgagee. While this would not be an 'approved form' (because the proposed amendment would remove the 'approved form' requirement in relation to the counterpart mortgage), it would be useful in circumstances where the mortgagee has not created its own form of counterpart mortgage for execution by the mortgagor.

[23] We note that the *Transfer of Land Amendment Bill 2018* (introduced to the Western Australian Legislative Assembly on 21 November 2018) provides for a new section 105AA, which seeks to confirm key requirements for registration of a registry instrument lodged electronically. In our view, the proposed section 105AA would not itself be sufficient to remove all doubt as to whether the counterpart mortgage needs to be in an 'approved form'. Accordingly, section 105(2) would still need to be amended in accordance with paragraph 62.

[24] Under section 145(3), if the signature of a party to an instrument has not been witnessed, the Registrar may register the instrument if the genuineness of the signature of the party is proved to the Registrar's satisfaction by a statutory declaration of a person who knows the party and the party’s signature.

[25] If this were adopted, the national mortgage form in Western Australia should be amended to remove the witnessing block for the mortgagor.