

Modernising Document Execution: submission by Australian Banking Association

Summary

Australian Banking Association (ABA) welcomes the opportunity to provide feedback to the consultation, *Modernising Document Execution*. ABA and industry stakeholders strongly support allowing consumers and businesses to sign deeds and statutory declarations electronically. It is an important step in realising the benefits of a digital economy, and making the benefits of modern business communications consistent and scalable.

Currently, significant delay, financial costs and opportunity costs result from the need to sign and witness deeds and statutory declarations on paper; these costs also result from inconsistent and uncertain regulations under Commonwealth, State and Territory laws. The Commonwealth Bank of Australia has testified to the House of Representatives Standing Committee on Economics that allowing acceptance of electronic signatures has allowed the bank to reduce processing times for business loans from 24 days to 6 days.¹ Some transactions cannot be completed fully electronically where a deed (or in some cases a statutory declaration) is involved, and broadly similar time savings could result for these transactions if legislative reform makes expressly clear that these documents can be electronically created and executed.

Australians are among the earliest adopters of technology in the world in areas such as online banking and digital payments. During the COVID-19 pandemic, a greater number of consumers and businesses have increased their digital footprint or have adopted to online and digital channels.

In this context, an increasing number of consumers and businesses have electronically signed documents using a range of technologies. For example, individuals may have used technology to sign contracts or other agreements, make payments, access government services or access banking and telco services. As online and digital services evolve, execution of documents is already occurring as part of another online transaction, by clicking on a webpage, and in an app.

Allowing consumers and businesses to continue using a broad range of technologies to execute deeds and statutory declarations, as long as the legal requirements for due execution can be satisfied, would maximise the benefit from the proposed reforms.

As such ABA strongly advocates for the reforms to remain technology neutral and provide a single, consistent approach to executing deeds and statutory declarations. Otherwise the reforms may make it harder to use, and therefore disincentivise the use of, electronic execution. Reforms should be closely modelled on the existing Electronic Transactions Acts and relevant specific reform such as those to section 127 of the *Corporations Act 2001*.

Principles-based and technology neutral approach: Reforms should avoid being prescriptive as to the process or specifications of how deeds and statutory declarations can be electronically signed, the types of electronic signatures that can be used, or whether and how the signatory may be identified.

Single consistent regime: Critically, reforms also should not prescribe different requirements for electronic signing or witnessing depending on who is signing the document. This approach would be inconsistent with the approach taken under other legislation including section 127 of the *Corporations Act*.

Legal considerations: The question of due execution of deeds and statutory declarations should remain a legal question and should not be treated as a technology question. ABA also notes that deeds are different from statutory declarations and the considerations for reform may differ in some respects.

¹ House of Representatives Standing Committee on Economics, Australia's four major banks and other financial institutions: four major banks, 15 April 2021, available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommrep%2F26c49088-d663-46bf-a768-efbd55f5d4a9%2F000%22>

A statutory declaration is a prescribed document made under statutory authority, and providing false information in a statutory declaration can be a criminal offence. This is not the case for deeds.

A prescriptive approach or applying different requirements depending on the person signing may have a number of consequences that limit the benefits of reform:

- Reduced take up: if legislation requires more bespoke technology solutions, this can potentially create a digital divide between individuals and businesses that have access to particular technology or products, and those that do not.
- Legal and operational risk: each time someone has to check what the document is, who signed the document, how the document was signed and whether that signing complied with the legal requirements in relation to that document, it creates operational risk, particularly where there is a complex matrix of requirements to be considered. This can also create legal risk. Consumers and small businesses who seek to rely on a deed may not have the resources to assess whether the deed is duly executed and binding.
- Delay: paradoxically, creating differentiated requirements also increases the time to process signed documents when consumers and businesses would expect electronic signing to reduce processing time.
- Accessibility of technology: if a more complex or bespoke technology solution is required to meet differentiated requirements, this can lock in a particular technology solution or electronic signature product, creating a barrier to technological enhancements or innovation.
- Complexity and cost: prescriptive requirements for electronic execution can create conflict or complexity when deeds or statutory declarations need to be executed as part of other regimes that contain their own identity verification requirements or requirements for conducting transactions.

ABA highlights that the Commonwealth Treasury's recent consultations to amend sections 127 of the Corporations Act considered similar issues including the need for additional prescription. Following consultation, proposed reforms to section 127 of the Corporations Act adopted principles-based and technology neutral drafting that are consistent with the provisions of the *Electronic Transactions Act 1999* (Cth).

Consultation questions

1. As a business or as an individual, when and why do you use statutory declarations or deeds?

A bank may use a deed in a range of circumstances:

- A bank may use deeds rather than agreements where there is no clear consideration or only past consideration. An example of this is where an individual provides a personal guarantee for a business loan and provides their property as security and there is no new advance or forbearance from the bank. This situation is rare.
- A bank uses general security deeds and specific security deeds.

A bank may need to obtain the authorisation for another person to sign a deed (for example, bank's deeds include a power of attorney clause which permits a bank officer to sign another deed on behalf of the security provider).

- A bank may use statutory declarations for attestations that guarantors have received independent legal advice to allow them exemption from the 3 day (cooling off) rule.

A bank may need to seek statutory declarations in a range of circumstances, for example:

- Statutory declarations to confirm ownership of assets (as required under an Asset Finance buy-back procedure)

- Declarations by prescribed persons to confirm ID (if the bank is unable to sight that ID in person).

2. What barriers, challenges or difficulties have you experienced with physical document execution? Do you have examples relating to paper requirements, witnessing requirements or jurisdictional inconsistencies? Are there other barriers that aren't captured here? What can we learn from international approaches?

ABA provides the following examples from members

- Prior to the COVID-19 pandemic, many loan documents were executed with a pen and wet ink on paper. Many loan documents, including deeds and mortgages, need to have the signature witnessed when they are signed on paper. People often need to travel long distances to sign documents (whether this happens at a bank branch, place of business or private residence). People often need to travel long distances to attend the signing ceremony. This is particularly common for remote and rural businesses.
- During the COVID-19 pandemic, the lockdown restrictions mean that signing documents that need to be witnessed was impossible without breaching laws and putting community health at risk. Businesses were often seeking funds to respond to or survive the pandemic conditions.
- In general, banks have sought to utilise electronic signature of loan documents wherever possible. This has been challenging as federal and state laws have had different requirements around which documents can be signed electronically. In summary Queensland, NSW and Victoria have allowed deeds to be signed electronically while the other jurisdictions have not. NSW have required a witness for deeds even when signed electronically but allowed the witnessing to be via audio visual link. Uncertainty arises where the bank does not always know which jurisdiction that a signatory is going to be in when they sign their documents. Often there are multiple parties to a loan that reside in or travel to different jurisdictions.
- In some cases, banks have been able to introduce some tools to expedite document processing, for example technology that allows users to electronic sign and deliver applicable documents and instructs users to print and sign other documents requiring wet ink on paper, parchment or vellum. These solutions have helped to process lending and provide much needed assistance to consumers and businesses during the pandemic but adds mailing, printing costs, time and risk to the process. They also add complexity and potentially delay to the process, particularly for the customer.

Other consequences of physical witnessing requirements include:

- Time delays in awaiting original documentation, or when not possible to sign in counterpart
- Transit risks in sending documentation through internal/external mail channels
- No independent verification to check that a witness is who they claim to be
- Jurisdictional inconsistencies regarding whether a witness is required or not required (for execution of deeds) which makes it confusing, difficult to provide a national approach and increases risk of implementing jurisdictional dependent processes (in case the requirements for the wrong jurisdiction are used).

By contrast, one member provides an example of how electronic execution of documents can allow a bank to help customers:

In early 2021, a bank's Agribusiness Relationship Manager based in Dubbo had an urgent loan to finalise for the customer. Instead of waiting for his banker to drive two hours to deliver the documents, the customer instantly received the documents via the bank's electronic agreement application. He quickly and conveniently completed the electronic sign-up during his morning



break. Meanwhile, the employee was travelling to see another customer who is a farmer in Nyngan when he was alerted that the farmer had completed the application. From the roadside, the employee accessed the digital envelope and completed the sign up. The entire process was completed in under three hours – less than the time it would have taken to drive from Dubbo to Nyngan and back.

Finally, difficulties can arise due to differences in legislation between jurisdictions, as it means technology solutions will not be scalable or may be less readily available. Jurisdictional differences affect businesses operating across two or more jurisdictions (including having customers from two or more jurisdictions) if, instead of adopting a consistent solution across the business, technology and process may be different for jurisdictions and/or different types of persons within each jurisdiction.

3. What would you consider to be a desirable outcome from reforming document execution? Are these the right principles for reform? Are there other outcomes or principles we should consider?

Refer to summary.

ABA considers a desirable outcome is for electronic execution of deeds to have the same degree of legal certainty as execution on paper, and for electronic processes to be cost efficient, scalable, and consistent across jurisdictions.

4. Should electronic execution of statutory declarations and deeds be permitted? What would be the benefits and costs for you of digital options?

Yes, ABA strongly supports allowing electronic execution of statutory declarations and deeds.

ABA believes the benefits of digital options can significantly outweigh the costs of electronic execution, if the reforms remain technology neutral, and do not introduce undue complexity such as differentiated requirements depending on who is signing the document or a prescriptive technology solution.

For reasons stated in the summary, if the proposed reforms remain technology neutral and principles-based, consumers and businesses would likely be able to continue using a range of technologies to execute deeds and statutory declarations, as long as the legal requirements for due execution can be satisfied. This would maximise the time, financial and accessibility benefits of digital options.

On the other hand, reforms that depart from existing Electronic Transactions Acts and impose additional, specific requirements for execution of deeds and statutory declarations would be more costly to implement, and can result in lower adoption of digital options for these documents.

5. Is witnessing a necessary requirement for statutory declarations and deeds? Are there documents that should still require the presence of either a physical witness or a witness over AVL? Do advances in digital identity verification make witnessing requirements redundant?

ABA's response to this question specifically relates to deeds.

ABA does not consider witnessing to be necessary for deeds.

The consultation paper suggests that witnesses take steps to verify the identity of the person signing a deed. ABA understands the department has received advice this is not required. Also, ABA's understanding is that, unless there is a separate legal obligation for this to occur (such as Verification of Identity (VOI) for mortgages or specific requirements relating to enduring powers of attorney), this almost never occurs. ABA cautions against legislation that maintain an archaic requirement on the basis of a misunderstanding of what role the witness performs.

ABA further understands that, in the case of a dispute, witnesses are not routinely called on to give evidence of who signed a document and what steps the witness took to verify that person's identity. There is no requirement for the witness to know the signatory and in practice, in many cases it may be impossible to track down a witness after the event. Ultimately, ABA considers that there is no evidentiary or probative benefit in deeds being witnessed and no case for them to be witnessed when agreements do not need to be.



ABA also cautions against the reforms prescribing specific requirements for the signatory's identity to be verified that goes beyond the principles-based requirements in the Electronic Transactions Acts. Due execution is a legal question and should not be dealt with via a prescribed technology solution. Sometimes, establishing the identity of the signatory is important and it may not be important in other times. It is not appropriate for legislation to prescribe a specific standard of verification for all types of deeds. Rather it should be for the bank or the person relying on the deed to consider their risk appetite, the level of risk involved and the method for mitigating that risk.

Setting a specific standard for verification of identity is likely to make electronic execution more difficult to use than paper signing, thus unduly disincentivising the use of digital options. Such an approach also creates the risk of locking users into a particular product and hindering innovation.

6. What minimum reliability requirements should apply to the electronic execution of statutory declarations and deeds? Are the existing provisions in the ETA appropriate and effective? From your perspective, would providing common requirements and definitions, enabling digital verification or improving national usability increase reliability?

ABA considers the existing provisions in the Electronic Transactions Acts are appropriate and effective. The current provisions make electronic signatures enforceable, efficient and effective and can be applied to statutory declarations and deeds. ABA strongly supports legislation being closely modelled on the Electronic Transactions Acts and being consistent across jurisdictions.

However, for reasons stated in the summary, ABA does not support the reforms imposing additional requirements for the execution of deeds.

Adding requirements to the electronic execution that do not exist for paper execution can unduly disincentivise the use of digital options and fail to achieve many of the intended benefits of the reforms. Prescribing a particular digital verification method can create a barrier to adoption and may lock in a particular technology (for example, it could make it more difficult for consumers to use free electronic signature products or make it harder for businesses to change electronic signature products; it can also be more costly to develop new electronic signature products that meet specific requirements for a relatively small class of documents). Usability should be addressed in general rules and regulations about accessibility (such as the accessibility of websites) rather than in a specific regime.

7. What processes and/or technologies do you consider appropriate for executing statutory declarations and deeds electronically? Please provide examples.

There are a number of ways for persons to apply an electronic signature, including but not limited to electronic signing products and platforms. This is comparable to the broad range of ways that a signatory can apply a 'wet ink' signature including by making a mark.

For reasons set out in the summary and in question 6, ABA does not support prescribing particular processes and technologies for electronic execution. Instead, ABA proposes taking a technology-neutral and principles-based approach to allow consumers and businesses to continue using a broad range of – and adopting new – technologies for executing documents, and do not create undue additional complexity compared to the execution of agreements.

ABA reiterates that due execution is a legal question (to which the technology solution can and should evolve over time) and should not be dealt with using a prescriptive technology solution. For example, banks defines processes around the electronic signature technologies that ensure compliance with all relevant laws and minimise risks.

8. Have you experienced problems with executing documents across jurisdictions? Please outline what issues you faced. How would greater consistency affect you?

ABA members have experienced problems with executing documents across jurisdictions.

For example, business loans often involve multiple customers that reside in or travel to multiple jurisdictions. Even where a bank has explicitly nominated a governing jurisdiction in a deed there is uncertainty as to whether it is enforceable if the signatory electronically signs the deed in a jurisdiction

that does not allow electronic signature. Consistency across the jurisdictions would eliminate this uncertainty and risk.

ABA highlights that if the reforms introduce specific process requirements or verification of identity requirements, it would also create additional complexity, cost and risk that detract from the intended policy outcomes.

9. Are there risks with document execution that might lead to an adverse outcome for you, your clients or other third parties as a result of reforms to document execution?

ABA does not consider the proposed reforms would create additional risk with document execution that may lead to an adverse outcome.

Instead, imposing additional process or technology requirements specific to the electronic execution of deeds can heighten legal risk for all parties that seek to rely on a deed, if the reforms make it more difficult to be confident that a document has been signed and is binding. The risk can arise through human or technology error, not just instances such as fraud. This can also increase operational risk.

10. Do you have suggestions as to other potential reforms relating to document execution?

ABA provides the following suggestions for reforming the execution of deeds:

- Allowing foreign corporations to execute deeds (and other documents) in accordance with the Corporations Act and with the benefit of similar assumptions to those set out in s.127 of the Corporations Act. Many jurisdictions do not recognise deeds and it creates significant uncertainty as to how they should execute deeds governed by Australian law.
- Bodies corporate be able to execute deeds (and other documents) in the same way as companies incorporated under the Corporations Act can execute under s.127 also with the benefit of similar assumptions as set out in s.129. This would include incorporated associations and statutory corporations. Again, having a consistent approach to electronic (and wet-ink) signing makes any solution scalable and much more likely to be implemented. It will make it much easier for all counterparties to have confidence that they know a document has been signed and is binding on the body corporate, regardless of the basis of the body corporate's incorporation.
- An agent should not need to be appointed by a deed to execute and deliver a deed. The law of agency requires that an agent (such as an attorney appointed under a power of attorney) must be appointed by a deed in order to execute and deliver a deed. This can create significant difficulties for transactions involving attorneys of foreign companies that are incorporated in jurisdictions that do not recognise the concept of a deed. Similarly, in the context of syndicated lending, the facility agent and security trustee will often be appointed by the lending document meaning that the facility agreement will need to be in deed form if the facility agent or security trustee needs to sign deeds in the future. This creates unnecessary complexity for how syndicated facility agreements must be signed.

11. Are there other issues with document execution not canvassed in this paper that you wish to share?

Consistent with the summary, ABA would strongly support legislation relating to document execution (including but not limited to deeds and statutory declarations) being consistent across the Commonwealth, States and Territories.

ABA provides additional proposals for the execution of other documents:

- Electronic execution be extended to mortgages in all States and Territories. ABA welcomes the work that has already been done by a number of States on this matter and strongly supports further work and harmonisation of requirements across jurisdictions.



Australian Banking Association

- Specifically, clearly permitting VOI remotely (particularly the VOI of mortgagors) by using electronic meeting platforms. The requirement to conduct physical face to face interview has caused difficulties, particularly for clients residing in rural and remote areas, during the pandemic.