

Witnesses to Executions

General Law

[60-0360]

²An instrument under the *Land Title Act* 1994 is validly executed by an individual if it is executed in a way permitted by law and the execution is witnessed by a person mentioned in Schedule 1 of the *Land Title Act* 1994 (s 161(2) of the *Land Title Act* 1994).

^{1,3}A document under the *Land Act* 1994 is also validly executed by an individual if it is executed in a way permitted by law and the execution is witnessed by a person prescribed under the regulations (s 310(2) of the *Land Act* 1994). Section 46 of the *Land Regulation* 2009 provides that documents may be witnessed by similar persons as mentioned in Schedule 1 of the *Land Title Act* 1994.

The provisions of s 162 of the *Land Title Act* 1994 or s 311 of the *Land Act* 1994 require witnesses to executions or signatures to:

- take reasonable steps to ensure that the individual is the person entitled to sign the instrument or document;
- have the individual execute the instrument or sign the document in their presence; and
- not be a party to the instrument or document.

‘Instrument’ and ‘document’ are defined in Schedule 2 of the *Land Title Act* 1994 and Schedule 6 of the *Land Act* 1994 respectively and include all Titles Registry forms and powers of attorney which are lodged for registration.

The persons who can witness the execution of an instrument or document are listed in Schedule 1 of the *Land Title Act* 1994 or s 46 of the *Land Regulation* 2009. Definitions in the *Land Title Act* 1994, the *Justices of the Peace and Commissioners for Declarations Act* 1991, the *Acts Interpretation Act* 1954 and other Acts apply to some of the terms in this list. For example:

- ‘lawyer’ means an Australian lawyer that is a person who is admitted to the legal profession under the *Legal Profession Act* 2007 or a corresponding law;
- ‘justice of the peace’ or ‘commissioner for declarations’ means a person holding the relevant office under the *Justices of the Peace and Commissioners for Declarations Act* 1991.

Where an instrument or document is executed outside Australia a person prescribed by regulation is also authorised to witness an execution, for example:

- Part IV of the *Defence Force Regulation* 1952 (Cth) provides that a *competent officer* (as defined in reg 15 of the Regulation) may attest the execution of a document by a member of the Defence Force (or a person who accompanies a part of the Defence Force) while on service outside Australia. See [60-0390]; or
- the *Australian Consular Officers’ Notarial Powers and Evidence Act* 1946 (Qld) and *Consular Fees Act* 1955 (Cth) authorises witnessing of an instrument or document by an Australian Consular Officer, an Australian Diplomatic Officer, or an authorised employee of the Commonwealth.

The Registrar may also approve ‘another person’ in a State or Territory of Australia, or in any place outside Australia to witness the execution of an instrument or document. The Registrar will only approve another person in a State or Territory of Australia to

witness the execution of an instrument or document in exceptional circumstances. Categories of persons who have been approved to witness executions are:

- a Justice of the Peace or Commissioner for Declarations under the law of an Australian State or Territory other than Queensland;
- a licensed settlement agent authorised under the *Settlement Agents Act* 1981 (WA);
- a Registrar or Deputy Registrar of the Supreme, District or Magistrates Courts of Western Australia;
- a Commissioner for Oaths appointed in the Northern Territory (provided the Registrar's requirements are met). See [60-0390].

The requirements for making a submission to the Registrar to approve 'another person' to witness the execution of an instrument or document outside Australia are outlined in [60-0390].

Section 161(3) of the *Land Title Act* 1994 or s 310(3) of the *Land Act* 1994 also gives the Registrar discretion in exceptional circumstances to register an instrument or document even though the execution is not witnessed or was witnessed by a person other than mentioned in Schedule 1 of the *Land Title Act* 1994 or in s 46 of the *Land Regulation* 2009.

If the *Land Title Act* 1994 or the *Land Act* 1994 provides for a document to be signed or executed and the document is an electronic conveyancing document, the document must be digitally signed as provided for under Part 2 of the Electronic Conveyancing National Law (Queensland).

If a registry instrument, other than a plan of survey, is digitally signed in accordance with the Queensland Participation Rules for e-conveyancing, the requirements of any other Queensland law relating to the execution, signing, witnessing, attestation or sealing of documents must be regarded as having been fully satisfied (s 9(3)(b) of the Electronic Conveyancing National Law (Queensland)).

Practice

[60-0390]

Additional Witnessing Requirement for Form 1, Form 2 and Form 3

Form 1 – Transfer, Form 2 – Mortgage and Form 3 – Release of Mortgage require the completion of a separate witnessing provision for each signature which is required to be witnessed, even if the signatures are made in front of the same witness.

Multiple Executions

On instruments or documents that do not require separate witnessing provisions and where multiple executions are needed due to signatories signing before different witnesses, separate witnessing provisions must be completed by each witness. The full execution for each party (signature, date and completed witnessing provision) must appear on the same instrument or document. In cases where there is insufficient room on the instrument or document, a Form 20 – Enlarged Panel may be used subject to the following:

- It is permissible for the execution Item (e.g. Item 6 on a Form 1 – Transfer) to appear partially on the face of the instrument or document and partially on a Form 20 – Enlarged Panel;

- It is not permissible for all of the executions to appear on a Form 20 – Enlarged Panel where there is space on the face of the instrument or document for one of the executions;
- The Item number and heading (e.g. ‘Item 6 Execution’) must be included on the Form 20 – Enlarged Panel and otherwise comply with requirements for completing a Form 20. See [20-2020].

Witnessing Within Australia

The Registrar requires the full name and qualification of a witness to be shown legibly adjacent to their signature.

²Section 161(3A) of the *Land Title Act* 1994 provides that for an instrument that transfers or creates an interest in a lot, the execution by the legal practitioner acting for the transferee or the person in whose favour the interest is created need not be witnessed. Where a legal practitioner executes an instrument in this capacity, his/her full name and qualification must be shown.

Executions signed personally or by an attorney for an individual are required to be witnessed.

The requirement that a witness must not be a party to the instrument or document is not infringed by an employee of a bank or other entity, who is a qualified witness by virtue of Schedule 1 of the *Land Title Act* 1994 or s 46 of the *Land Regulation* 2009 witnessing the execution of an instrument or document that their employer is a party to. For example, a bank officer who is a justice of the peace is not a party to a mortgage to the bank.

Notwithstanding a person may be authorised to take a declaration, they are not authorised to witness the signing of an instrument or a document unless included in a category listed in Schedule 1 of the *Land Title Act* 1994 or s 46 of the *Land Regulation* 2009. For example, the following are considered not to be authorised if they do not also hold an office or qualification mentioned in Schedule 1 of the *Land Title Act* 1994, s 46 of the *Land Regulation* 2009 or are not persons approved by the Registrar:

- an *ex officio* commissioner for declarations under the *Oaths Act* 2001 (Tas); or
- a person who is an authorised witness under the *Oaths, Affidavits and Statutory Declarations Act* 2005 (WA); or
- a person authorised under the *Statutory Declarations Act* 1959 (Cth); or
- a legal executive or a paralegal; or
- a Commissioner for taking affidavits in the Supreme Court of South Australia under the *Oaths Act* 1936 (SA).

Justice of the Peace and Commissioner for Declarations

When witnessing the execution of instruments or documents, justices of the peace must clearly write, type, print or stamp the words ‘Justice of the Peace’ or the abbreviation ‘JP’ after or under their signature.

Similarly, commissioners for declarations must place the words ‘Commissioner for Declaration’, ‘Com Dec’ or even ‘CDec’ adjacent to their signatures. Each commissioner for declarations is allocated a number on registration.

Where a justice of the peace or commissioner for declarations has been given a registration number, this number should be included as part of their qualification when witnessing instruments or documents.

A justice of the peace appointed prior to 1 November 1991 who has not applied to be appointed as a commissioner for declarations by 30 June 2000 ceases to hold that office

and instead holds the office of a justice of the peace (commissioner for declarations) (s 42(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991*). Section 42(1) does not apply to a lawyer who remains a justice of the peace for life. When witnessing the execution of instruments or documents a justice of the peace (commissioner for declarations) may repeat their full title or use the abbreviation ‘JP (C.Dec)’.

Notary Public within Australia

An Australian Notary Public who witnesses the execution of instruments or documents within Australia must print their full name, qualification and jurisdiction (i.e. Australian State or Territory) on the instrument or document.

Commissioner for Oaths appointed in the Northern Territory

When witnessing the execution of instruments or documents, a Commissioner for Oaths appointed in the Northern Territory must clearly write, type or stamp their full name, qualification as a Commissioner for Oaths (NT) and contact address or telephone number below their signature.

Details of the identification documents sighted by the Commissioner for Oaths must be provided to the land registry:

- on the face of the instrument or document by the Commissioner for Oaths, in a clear space near the witnessing officer’s signature. This information must be legible and not obliterated by any other information; or
- by a separate statement by the Commissioner for Oaths (similar to the information provided by a notary public on a Form 20 outlined in the paragraph on the following page/s); or
- by a letter from a solicitor who has been advised by the Commissioner for Oaths as to the relevant information.

Copies of identification document sighted must not be deposited in the land registry when the relevant instrument or document is lodged. Any identification document numbers referred to in the Certification should be obliterated by black marking pen prior to lodgement of the instrument or document.

Witnessing Outside Australia

The Registrar requires that an instrument or document executed by an individual outside Australia is witnessed by:

- an Australian Consular Officer or authorised employee of the Commonwealth; or
- a competent officer as defined under the *Defence Force Regulation 1952*; or
- a notary public; or
- an Australian Legal Practitioner; or
- an Australian Lawyer; or
- a New Zealand Lawyer (i.e. a solicitor, barrister or barrister and solicitor); or
- another person approved by the Registrar;

and that other relevant requirements set out below are met.

Process for witnessing outside Australia

The following is a process which, if used, will result in the execution of an instrument or document outside Australia having been witnessed in accordance with the Registrar’s requirements under this Part and with relevant provisions of the *Land Title Act 1994* and *Land Act 1994*.

This process applies notwithstanding any other legislation such as the *Evidence (Attestation of Documents) Act 1937*.

- 1 A client or mortgagor located overseas contacts an Australian Legal Practitioner or mortgagee concerning a conveyancing transaction relating to Queensland land.
- 2 The Australian Legal Practitioner or mortgagee takes initial instructions from the client or mortgagor and conducts preliminary enquiries – full name and contact details for the client or mortgagor, land description, transaction details (sale, purchase, mortgage etc).
- 3 The Australian Legal Practitioner or mortgagee reviews with the client or mortgagor what identification documents they have available to them and determines the highest document category in the Verification of Identity Standard they can satisfy. See [60-2000].
- 4 The Australian Legal Practitioner or mortgagee advises the client or mortgagor that they will need to have their identity verified and signature witnessed by:
 - an Australian Consular Officer or authorised employee at an Australian Embassy, High Commission or Consulate (Australian Consular Office);
 - a competent officer as defined under the *Defence Force Regulation* 1952;
 - a notary public;
 - an Australian Legal Practitioner;
 - an Australian Lawyer;
 - a New Zealand Lawyer.

Where the intended witness is an Australian Consular Officer or employee at an Australian Consular Office the Australian Legal Practitioner or mortgagee advises the client or mortgagor to find out where the nearest Australian Consular Office is located, to make preliminary contact with the Australian Consular Office to make an appointment (where necessary) and to notify the Australian Legal Practitioner or mortgagee of the Australian Consular Office location.

- 5 The Australian Legal Practitioner or mortgagee takes reasonable steps to determine the client or mortgagor's right to deal as a particular party to the conveyancing transaction.
- 6 The Australian Legal Practitioner or mortgagee prepares the instrument or document and:
 - where the intended witness is an Australian Consular Officer or authorised employee at an Australian Consular Office, an approved Australian Embassy/High Commission/Consulate Identity/Witnessing Certification (Certification) in the form below; or
 - where the intended witness is a notary public, competent officer, Australian Lawyer or New Zealand Lawyer, an Identity/Witnessing Certification (Certification) in the form below.

The Australian Legal Practitioner or mortgagee then sends the instrument or document and Certification to the client or mortgagor with written instructions advising of the process and what original and current identification documents are to be produced to the intended witness in accordance with the Verification of Identity Standard in paragraph [60-2000] (passport, driver's licence etc).

- 7 The client or mortgagor attends a face to face interview with the witness with the prepared instrument or document and the Certification, original identification documents and the Australian Legal Practitioner or mortgagee's written instructions.
- 8 The witness satisfies themselves that the photos on the identification documents produced by the client or mortgagor are a reasonable likeness of the client or mortgagor. If this is not possible, the witness service should be terminated.
- 9 When reasonable likeness is confirmed, the witness:

- prepares endorsed copies of all original identification documents produced by the client or mortgagor;
 - asks the client or mortgagor to sign the instrument or document and witnesses the client or mortgagor's signature on the instrument or document. (Further witness specific requirements are outlined below); and
 - completes, signs, dates and endorses the Certification for the client or mortgagor.
- 10 The witness hands to the client or mortgagor the:
- original identification documents;
 - signed instrument or document;
 - signed, dated and endorsed copies of the original identification documents produced; and
 - signed, dated and endorsed Certification.
- 11 The client or mortgagor delivers the signed instrument or document, endorsed copies of the original identification documents produced and the Certification to the Australian Legal Practitioner or mortgagee. (The means of delivery are to be arranged between the client or mortgagor and the Australian Legal Practitioner or mortgagee).
- 12 The Australian Legal Practitioner or mortgagee lodges the following with the land registry:
- original executed instrument or document;
 - the Certification (the original not a copy).
- 13 The Australian Legal Practitioner retains the endorsed copies of the original identification documents. The identification documents must not be lodged and any identification document numbers referred to in the Certification should be obliterated by black marking pen prior to lodgement of the instrument or document.

If a witness refuses to comply with the process or complete the Certification then, in the first instance, steps should be taken to locate an alternative witness. An Australian Legal Practitioner or mortgagee may wish to contact an intended witness in advance to confirm that they are willing to comply with the process and complete the Certification.

The process has been developed in conjunction with the Department of Foreign Affairs and Trade and failure to adhere to the process may result in an Australian Consular Officer or authorised employee at an Australian Embassy, High Commission or Consulate refusing to witness an instrument or document.

The process is substantially the same as the process outlined in the Australian Registrars National Electronic Conveyancing Council (ARNECC) Model Participation Rules Guidance Note 2: Verification of Identity. ARNECC Model Participation Rules Guidance Note 4: Right to Deal provides guidance regarding what might constitute taking reasonable steps to determine the client or mortgagor's right to deal as a particular party to the conveyancing transaction. The ARNECC Model Participation Rules Guidance Notes are available on the ARNECC website (<http://www.arnecc.gov.au/>). Some of the terminology in the process and the Certifications may not apply to instruments or documents lodged in paper, for example the reference to 'Client Authorisation'.

Certifications

Australian Embassy/High Commission/Consulate Identity/Witnessing Certification

I, _____
[full name of authorised employee /consular or diplomatic officer]
of _____

[Australian Embassy/High Commission/Consulate]

being an authorised employee/consular or diplomatic officer within the meaning of the *Section 3 of the Consular Fees Act 1955* hereby certify that:

- (a) the identification/witnessing relates to _____
[full name of the person being identified] ('the person being identified'); and
- (b) the verification of identity/witnessing was carried out on _____ [date]; and
- (c) the original current identification documents as listed below were produced to me and copies of these documents signed, dated and endorsed by me as true copies were provided to the person being identified; and
- (d) the verification of identity/witnessing was conducted in accordance with the Department of Foreign Affairs and Trade policy for verification of identity, witnessing signatures on documents and making of endorsed copies and in response to the written instructions provided by the person being identified's Australian Legal Practitioner, Law Practice, Licensed Conveyancer or mortgagee; and
- (e) the person being identified was physically present for the verification of identity and the witnessing of the document(s) listed at paragraph (g); and
- (f) I am not a party to the transaction; and
- (g) I witnessed the person being identified execute the following document(s)

(eg, Client Authorisation, transfer of land, mortgage of land etc); and
- (h) this signed, dated and endorsed certification; the signed, dated and endorsed copy identity documents (listed below); and the witnessed document(s) listed in paragraph (g); were returned to the person being identified.

.....
Signature of authorised employee/consular or diplomatic officer

Post Stamp

List of identification documents produced (see (c) above):

Description of identity documents produced and endorsed

Identity / Witnessing Certification

I, _____
[Full name of notary public, competent officer, Australian Lawyer or New Zealand Lawyer]

of _____

[provide full postal address (other than competent officer)]

Telephone number: _____

Email address: _____

being a _____

[Qualification or description of public office or commission, date of expiry of the commission (if applicable) or rank for competent officer]

hereby certify that:

- (a) the identification/witnessing relates to _____
[full name of the person being identified] ('the person being identified'); and
- (b) the verification of identity/witnessing was carried out on _____ [date]; and
- (c) the original current identification documents as listed below were produced to me and copies of these documents signed, dated and endorsed by me as true copies were provided to the person being identified; and
- (d) the person being identified was physically present for the verification of identity and the witnessing of the am document(s) listed at paragraph (g); and
- (e) I am not a party to the transaction; and
- (f) I witnessed the person being identified execute the following document(s)

(eg, Client Authorisation, transfer of land, mortgage of land etc); and
- (g) this signed, dated and endorsed certification; the signed, dated and endorsed copy identity documents (listed below); and the witnessed document(s) listed in paragraph (g); were returned to the person being identified.

.....
Signature of notary public, competent officer, Australian Lawyer or
New Zealand Lawyer

Stamp (if applicable)

List of identification documents produced (see (c) above):

Description of identity documents produced and endorsed

Australian Consular Officer or authorised employee of the Commonwealth

An Australian Consular Officer or authorised employee of the Commonwealth will clearly print their full name and legibly affix the official seal of their mission or post adjacent to their signature.

Honorary consuls are not authorised to undertake notarial functions including witnessing the execution of an instrument or the signing of a document.

Competent officer as defined under the *Defence Force Regulation 1952*

Where a competent officer has witnessed the signature of an individual the following is required in addition to the Identity/ Witnessing Certification:

- the witnessing officer must print their full name and rank adjacent to their signature; and
- supporting documentation must be deposited to verify the execution was made while the member of the Defence Force executing the instrument or document was serving overseas, for example a letter from an Australian Legal Practitioner. There is no need to state the country in which the member of the Defence Force was serving.

Australian or New Zealand Lawyer outside Australia

An Australian or New Zealand Lawyer who witnesses the execution of instruments or documents outside Australia must print their full name and qualification (i.e Australian Lawyer, Australian Legal Practitioner, Australian Solicitor, Australian Barrister, New Zealand Solicitor or New Zealand Barrister).

An overseas lawyer who is not an Australian or New Zealand Lawyer is not able to witness the execution of an instrument or document outside Australia unless:

- they have an additional qualification which permits them to witness the execution of an instrument or document outside Australia e.g. they are also a notary public. If this is the case they must show that qualification adjacent to their signature and on the Identity / Witnessing Certification; or
- the Registrar of Titles has approved the overseas lawyer as ‘another person’ before lodgement of the instrument or document in accordance with the process below.

Notary Public

Where an instrument or document is signed outside of Australia, in the presence of a notary public, the following are required in addition to the Identity/ Witnessing Certification:

- the full name, qualification or description of public office or commission, date of expiry of the commission (if applicable) and official stamp/seal (if one is required to be used) of the notary public must be shown clearly:
 - on the face of the instrument or document; or
 - in the manner required of a notary public when undertaking a witnessing function (Note: if the notary public signs a separate document, rather than the face of the instrument or document, the details of the instrument or document must be clearly referenced on the separate document - for example, type of instrument or document, property and party details);
- a translation of any non-English part of the execution or Identity/ Witnessing Certification statement. Note that an informal translation is acceptable.

Another Person Approved by the Registrar

In special circumstances (for example, due to the remote overseas location of the party signing the instrument or document), the Australian lawyer or financier for the person signing overseas may seek approval from the Registrar for ‘another person’ (other than an Australian Consular Officer; a competent officer; a notary public or an Australian Legal Practitioner) to witness the execution of the instrument or document outside Australia (for example, an overseas lawyer) **before** it is lodged.

The Registrar will only consider a submission seeking approval where it is supported by the following:

- a letter from the Australian lawyer or financier for the person which details the special circumstances why it is unreasonable to expect the person to sign the instrument or document in the presence of a witness listed in Schedule 1 of the *Land Title Act* 1994 or s 46 of the *Land Regulation* 2009; and
- either a statement by an Australian lawyer or financier on their letterhead, or a statutory declaration by the person responsible within the firm or financial institution, explaining how he or she knows that they are dealing with the person entitled to execute the instrument or document, for example:
 - the person is a long standing client or customer;
 - the Australian lawyer or financier had prior written instructions from the person in relation to the sale/mortgage etc;
 - the Australian lawyer or financier has contacted the person on an email address or telephone number that the person provided **prior** to leaving the country; and
- an Identity/Witnessing Certification in the form above.

Note: It is expected that such applications are made **before** lodgement of the instrument or document to allow the Registrar reasonable time to consider each submission.

Where the Registrar approves ‘another person’ to witness the execution of the instrument or document the letter or email of approval must be deposited with the instrument or document. The letter or email of approval will be imaged with the instrument or document and will form part of the publicly searchable registers under section 35 of the *Land Title Act* 1994.

Witnessing not in accordance with the Registrar’s Requirements

Where an instrument or document has been witnessed outside Australia by a person who is a qualified witness by virtue of Schedule 1 of the *Land Title Act* 1994 or s 46 of the *Land Regulation* 2009 but, due to legal or other restrictions, the witness has not complied with the Registrar’s requirements, a submission should be made to the Registrar in writing fully outlining the reasons it is not possible for the witness to comply with the Registrar’s requirements, if possible before the instrument or document is lodged.

The submission should include reference to any relevant legislative provisions and attach supporting documentation where appropriate. For example, legislation in a jurisdiction may require that the witness provide information or endorse documents in a prescribed format.

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