

Information Bulletin No 13

July 2002

Executing and Attesting a Document Lodged for Registration Pursuant to the Real Property Act 1900

This bulletin is a general guide to the requirements for executing (signing) and attesting (witnessing) any document (including a dealing, Primary Application, caveat or plan and s.88B instrument) prepared for lodgment and registration in Land and Property Information New South Wales under the Real Property Act 1900.

The legislative base for information in this guide may be found in the Real Property Act 1900, the Conveyancing Act 1919, the Conveyancing (General) Regulation 1998 and the Real Property Regulation 1998.

This guide does not supersede or replace the requirements of these or any other Act or Regulation.

Note: *Where the Registrar General believes that a document has not been duly executed or attested, the Registrar General is empowered to require the execution or attestation be proved in such manner as the Registrar General thinks fit - see s. 36(1E) of the Real Property Act 1900.*

What is meant by an 'Execution'?

It is the *signing* of the document by the method appropriate to the situation. A document lodged pursuant to the Real Property Act 1900, or any allied Act, is said to be executed when signed by any person disposing of, or acquiring, an estate or interest in land. This includes a company or corporation signing under seal - for more information see the paragraph '*Who can execute a document?*'.

What is meant by an 'Attestation'?

It is the *witnessing* of the execution by the method appropriate to the situation. It is certification of the correctness of the execution, signed by an appropriate witness.

See the later paragraphs '*What is a certificate of correctness?*', '*Who can attest to an execution?*' and '*Example forms of attestation*'.

What is a Certificate of Correctness?

It is a statement certifying the information contained in the document is true and correct. It should be signed by each party to the document, or by a solicitor, licensed conveyancer or agent signing on their behalf - see the later paragraph '*Solicitor or Licensed Conveyancer*'.

This certification is usually found in the body of the document immediately before the area provided for execution. Approved forms usually have a joint certificate by all parties to the document. If it is not provided for in an approved form, it is not required.

The Registrar General may refuse to accept a document which does not include a certificate of correctness - see S.117 (1)(b) of the Real Property Act 1900.

Execution and Attestation

The requirements regarding the attestation and execution of documents lodged for registration pursuant to the Real Property Act 1900 have been revised following the commencement of the Real Property and Conveyancing (Amendment) Act 1991.

Section 36(1D)(b) of the Real Property Act 1900 provides that execution of a dealing lodged for registration shall be attested by a witness who is not a party to the dealing. The provisions of sections 107 and 108 of the Act have been repealed by the amending legislation so that, regardless of the place of residence of the executing party and regardless of the place of execution, whether within New South Wales, within other States or foreign countries, the only statutory requirement for valid attestation is that the attesting witness be a person who is not a party to the dealing. It should also be noted that the approved forms will continue to require the attesting witness to state that she/he personally knows the executing party. The name and full residential or business address of the witness must be given.

The Registrar General is empowered, pursuant to the new section 36(1E) of the Real Property Act 1900, to require, where he has grounds for believing that a dealing or caveat has not been duly executed or attested, that the execution or attestation be proved in such manner as he thinks fit.

Of course, where an approved form, such as a caveat incorporates a statutory declaration, the declaration must continue to be made in accordance with the Oaths Act 1900, or, if made outside New South Wales, the relevant law of that place.

Who can Execute a Document?

A document should be executed by any 'party' disposing of, or acquiring, an estate or interest in land. In this context reference to 'party' includes a person, a corporation (executing under seal), a marksperson (a person unable to write) and a local council.

The form of execution will vary according to whether the 'party' is:

- disposing of, or acquiring, an estate or interest in the land; and/or
- whether they are acting on their own behalf or have a person to act for them.

Person(s)

A document may be executed by the registered proprietor(s) in person, or by one of the following substitutes:

- an agent under power (attorney, receiver, delegate, administrator, liquidator); or
- a statutory agent (e.g. a Sheriff); or
- a judicial agent (appointed by a court); or
- a person directed to sign a registered proprietor's signature pursuant to S.38 (1A)(a) of the Conveyancing Act 1919 - see example 3 in the later paragraph '*Example forms of attestation*'.

Any agent executing a document must state the source of their authority.

Corporations (excluding Local Councils)

A corporation may execute a document under its common seal or without using a seal. See the Company Law Review Act 1998. Information Bulletin No.69 provides further information in this regard.

Where there is cause to affix a seal to a plan foil, you may stamp or emboss the common seal directly onto the plan foil or attach the seal, fixed to a paper type medium, onto the plan foil.

The document should also include a statement of attestation that the seal has been properly affixed - see example 2 in the later paragraph '*Example forms of attestation*'.

Further to this:

- any person attesting the affixing of the seal must state their position in the corporation (e.g. Director, Secretary) next to, or underneath, their signature;
- an execution attested to by the Clerk, Secretary or other authorised officer, or a member of the Board of Directors, council or other governing body, is deemed to be in accordance with s. 51A (1) of the Conveyancing Act 1919;
- a corporation may authorise one or more officers, or other agent, to execute a document on its behalf. *The execution by this officer or agent must include a statement as to the source of their authority;* and
- documents executed in New South Wales under the Oaths Act 1900, must be executed by person(s) authorised by the corporation and **not under seal**. *The execution by this officer or agent must include a statement as to the source of their authority.*

Marksperson

A marksperson is someone who is unable to write, through illiteracy or otherwise, but is able to make a 'mark' on the document, usually an 'X'. A marksperson will execute a document by affixing their mark.

This form of execution requires a specific form of attestation - see example 4 in the paragraph '*Example forms of attestation*'.

Solicitor or Licensed Conveyancer

Providing the party they represent benefits from the terms of the document, a solicitor or licensed conveyancer may execute a document on behalf of a person(s), corporation or local council they are representing. These would include situations where the party they act for is the transferee(s), mortgagee(s), lessee(s) or the dominant tenement in the creation of an easement (not in a release or variation).

In signing a document for the party they act for, the solicitor or licensed conveyancer:

- must use their usual signature; and
- must include a statement declaring who they act for, their authority to sign and their full name (printed); and
- need not have their signature witnessed.

Who can Attest to an Execution?

General

A document lodged for registration shall be attested by a witness who is not a party to the document - see S.36(1D)(b) of the Real Property Act 1900. This is the only statutory requirement for valid attestation whether the place of residence of the executing party, or the place of execution, is within the State of New South Wales, another State or Territory of Australia or a foreign country.

The Registrar General also requires the attesting witness to be an adult who personally knows the executing party. If this is not the case, further proof of execution may be required.

The attesting witness should also include their full name, residential or business address and, if necessary, their capacity as a witness, e.g. Solicitor, Mayor, Managing Director, Secretary.

Documents including a statutory declaration

(e.g. Caveat, Writ, Cancellation of Caution and Notice of Death)

These documents must be executed before a prescribed functionary.

A *'prescribed functionary'* is a person before whom a statutory declaration may be declared. Their authority is usually provided for in the statutes of the state or country in which the document is executed:

- if executed in the State of New South Wales, these documents must be attested by a justice of the peace, solicitor, notary public or commissioner for taking affidavits; or

if made outside the State of New South Wales, strike out reference to Oaths Act 1900 and insert reference to the equivalent Local Act.

Local Councils

Where a document includes a transfer or surrender of land from a local council it should be executed under seal. The affixing of the seal should be attested to by any combination of two (2) Officers from the following categories:

- the mayor; or
- the general manager; or
- a councillor (other than the mayor).

See Regulation 43(2) Local Government (Meetings) Regulations 1993.

Where the council has cause to affix its seal to a plan foil, it may stamp or emboss the seal directly onto the plan foil or attach the seal, fixed to a paper type medium, onto the plan foil.

Where the Council is gaining a benefit from the document, e.g. transfer to them of land or the dominant tenancy of an easement, the document may be executed by the solicitor or licensed conveyancer acting for the Council - see the paragraph *'Solicitor or Licensed Conveyancer'*.

What Happens if a Person is Under 18 years of Age (a Minor)?

A document in which a minor is disposing of, or acquiring, an estate or interest in land, may be executed by:

- the minor;
- the minor's parents (both of them), subject to certain conditions - see below;
- only one parent, a guardian or by a person or persons in some other capacity, subject to certain conditions, see below; or
- a solicitor representing a minor, provided the document is in favour of the minor, i.e. the minor is acquiring an estate or interest in land - subject to certain conditions, see below.

A document in favour of a minor, should include their full name and date of birth, e.g. *(name)*, a minor born on *(date of birth)* '.

On turning 18 years of age, an application may be made to have reference to the words '... a minor born *(date of birth)*' removed from the register and the certificate of title.

Any document involving a minor:

- should be authorised by an Order of Court; or
- should be authorised by a statute; or
- should be supported by a certificate given by:
 - an independent solicitor; or
 - the Public Trustee,
 - pursuant to either s. 28 or s. 29 Minors (Property and Contracts) Act 1970, respectively, depending on whether the minor is acquiring or disposing an estate or interest in land. The certificate should also state that:
 - the minor understands the intention and effect of the document, and
 - the minor makes the dealing freely and voluntarily, and
 - the consideration is neither manifestly excessive or inadequate, again, respectively, depending on whether the minor is acquiring or disposing an estate or interest in land.
- which is executed by both parents, should include a statement as to their capacity to sign as parents;
- which is executed by only one parent, a guardian or by a person or persons in some other capacity, should be supported by statements or declarations to explain the irregularity. The Registrar General may require further evidence or information to be produced for documents signed under these circumstances.

Who Should Execute and Attest to a plan or S.88B Instrument?

Generally, the same rule applies to dealings, plans and S.88B instruments. The legislative base is set out in s. 195D Conveyancing Act 1919.

You should also consult Information Bulletins Numbers 14, 35 & 50 and Information Kit 1 'Lodging a Plan'

Where there is cause to affix a seal to a plan foil, you may stamp or emboss the seal directly onto the plan foil or attach the seal, which is fixed to a paper type medium, onto the plan foil.

In a s. 88B Instrument, the attestation, where required, need only be on the last page of the instrument. Prior page(s) only require the signature of a person either executing or witnessing the last page of the instrument.

What Happens when the Signature and a Person's Name Appear to be Different?

The document will **usually be accepted** for registration if:

- the signature contains fewer initials than the disclosed name; or
- the signature is indecipherable; or
- there are minor spelling differences; or
- the signature is in a non-English format, e.g. Asian, Arabic, Greek or Russian; or
- the signature is in a non-English format and an anglicised name is shown in the document
- an additional name is disclosed in the signature; or .
- a different order of names is disclosed between what is printed as the person's name in the body of the document and the signature of that person.

The document will **not be accepted** if the signature discloses:

- a different name; or
- a major disparity in spelling,

unless the discrepancy is resolved or explained as follows:

- a discrepancy between name and signature on a document that is attested by a person known to the party may be explained by a notation signed by the witness in the form

'This signature is the usual signature of (full name of person) '

and placed next to the signature in the body of the document; or

- by an appropriately worded statutory declaration annexed to the document; or
- by an amendment to the document initialled by the parties to the dealing.

The following table may be used as a guide to signature and evidence requirements:

Name of Party	Form of Signature	Evidence
William Macklin	W. J. Macklin	No
William Macklin	B. (or Bill) Macklin	No
William Macklin	J. Macklin	Yes
William John Macklin	W. Macklin	No
William John Macklin	J. Macklin	No
William John Macklin	J. W. Macklin	No
John Macklin-Smith	J. Macklin-Smith, J. Macklin or J. Smith	No

Example Forms of Attestation

1. General form of attestation

Signed in my presence by (the description of the person, e.g. transferor, mortgagor or lessee, and their full name) who is personally known to me.

If the words ‘..... who is personally known to me’ are omitted or struck out, further proof of execution will be required.

The witness must also clearly show their full name and their full residential or business address.

2. An attestation to the affixing of a seal

This type of attestation should be in the following, or similar form:

"The common seal of(enter full name of corporation) was affixed hereto (see ‘Example alternatives’ below) in the presence of(enter name(s) of person(s) attesting the fixing of the seal and their capacity, Director, Secretary etc., or authority as a witness)"

Example alternatives:

- ‘in accordance with its articles of association’; or
- ‘by the authority of the Board of Directors’; or
- ‘by a unanimous resolution of the Board of Directors’.

3. An attestation pursuant to S.38 (1A)(a) Conveyancing Act 1919

This type of attestation should be by a ‘*prescribed witness*’ using a form similar to the following:

Signed for the transferor John Edward Sing by Francis James Burt by the direction and in the presence of John Edward Sing and in the presence of me Peter Michael James, Solicitor of 21 Young Street, Sydney and I certify that I am a prescribed witness and that the signature "J E Sing" was affixed by the direction of the transferor and in the presence of myself and the transferor by the said Francis James Burt.

.....(signature of P M James)
Solicitor

.....(signature of J E Sing)
Signed by F J Burt for J E Sing

A ‘*prescribed witness*’ is one mentioned in Schedule 6 of the Conveyancing (General) Regulation 1998 (for their application, see cl. 44 of those regulations).

4. An attestation to an execution by a marksperson

This type of attestation should indicate that the contents of the document were read over and explained to the marksperson and the marksperson acknowledged that they understood the nature and effect of the document.

A form similar to the following should be used:

Signed in my presence by (name of person) and I hereby certify that the contents of this document were read over and explained to the said (name person again) who, to the best of my belief, understood the nature and effect thereof.

Inquiries relating to dealings may be made in person at the Client Service Counter, ground floor, Land and Property Information, 1 Prince Albert Road, Queens Square, Sydney or by telephone on 9228 6713 or fax 9223 9464.

Des Mooney
General Manager

Document Registration Services

**Land and Property Information New South Wales
1 Prince Albert Road, Queens Square
Sydney NSW 2000 Australia
telephone 61 2 9228 6666 • facsimile 61 2 9233 4357**

www.lpi.nsw.gov.au