
# NATIONAL ELECTRONIC CONVEYANCING SYSTEM

January 2015

## PURPOSE

1. To provide an update to practitioners on recent developments on the National Electronic Conveyancing System (NECS).

## BACKGROUND

2. The Law Council of Australia has been involved with the development of the NECS since 2005, largely through the Law Council's NECS Committee. In July 2013, the Law Council agreed to participate in the Electronic Conveyancing Group (ECG) with the Australian Bankers' Association and the Australian Institute of Conveyancers, to represent the interests of legal practitioner users of electronic conveyancing.
3. On 24 November 2014, the first electronic transfer was lodged and registered with simultaneous electronic financial settlement.

## PROPERTY EXCHANGE AUSTRALIA LIMITED (PEXA)

4. PEXA (formerly NECDL) is a company limited by shares. The key financial stakeholders are the Victorian, New South Wales, Queensland and Western Australian Governments, ANZ, CBA, NAB, Westpac, and Macquarie Capital, together with the Link Group and the Little Group. Read more on PEXA…
5. The online business platform developed by PEXA enables electronic settlement of property transactions, including the preparation of the transfer of title documents, payment of duty, financial settlement and lodgement and registration of the transfer of title at the relevant land registry.
6. The roll-out of the PEXA system is being staged. The first release of PEXA (stand-alone transactions such as mortgage discharges, new mortgages and refinances) is already live in NSW, VIC, QLD and WA with 10 banks using the platform.
7. PEXA has begun its pilot rollout of the second release of the platform to selected lawyers and conveyancers in metropolitan Sydney and Wollongong, with Melbourne, Bendigo and Geelong scheduled to begin transacting by January 2015. The second release is the key release for property lawyers and conveyancers as it extends functionality to include the ability to lodge and withdraw caveats and complete electronic property transfers, including online lodgement and financial settlement.
8. From February 2015, the PEXA roll-out will extend to all Victorian and New South Wales practitioners. Queensland and Western Australian practitioners are scheduled to begin transacting in PEXA from May 2015. It is envisaged that practitioners in South Australia, Tasmania and the Northern Territory will all be invited to join PEXA in the third and fourth quarters of 2015. Further details on the release schedule are available here.

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9. The Law Council's consultation with PEXA has been in two main areas:
    a. the development of the platform, and
    b. the extensive documentation that practitioners need to sign to register to use the PEXA platform.
10. The principal agreement with PEXA is the Participation Agreement, which incorporates a number of other documents or policies such as:
    a. the Service Charter,
    b. the Security Policy, and
    c. the Standard Operating Environment Requirements.
11. The question of liability under the Participation Agreement was discussed extensively in the consultation process and has been improved markedly from PEXA's original and very limiting approach. A substantial number of amendments requested by the Law Council to the documentation were agreed to by PEXA, but not all. For an indication of the types of issues raised by the Law Council, see the submission dated 25 September 2014.
12. A number of the documents or policies that must be signed or agreed to by practitioners are available on the PEXA website, along with the Participation Agreement. Other useful information on the PEXA website is in the FAQs.
13. One particular area of interest to the Law Council and its Constituent Bodies has been the development of a PEXA Source Account for use by practitioners who do not have a trust account. In an electronic settlement environment it is not possible for solicitors to ask their clients to provide additional funds by way of a bank cheque payable as directed by the vendor. If funds are required for a purchase in addition to any loan funds, the funds must be provided via the practitioner's trust account or by the client depositing funds to the PEXA Source Account.
14. In the course of consultation on the Participation Agreement, further information has been provided about the proposed PEXA Source Account as follows:
    a. The PEXA Source Account is a trust account at an authorised deposit-taking institution supported by the PEXA Settlement Money Trust. This trust was created by PEXA by a Deed Poll dated 4 September 2014, being a trust that will allow persons that are not Subscribers (that is, clients) to contribute money to the trust's bank account for use and application in the conveyancing settlement as specified by the client.
    b. PEXA has confirmed that any interest earned on funds held in the PEXA Source Account does ***not*** accrue for the benefit of anyone other than the trustee (PEXA) and can be used at PEXA's discretion for any purpose, including maintaining the account.
    c. Funds must be provided to the PEXA Source Account so as to be cleared funds three days prior to settlement.
15. It is difficult to determine the likely impact of the PEXA Source Account on Public Purpose Funds (PPF) across the jurisdictions, however, there is a risk that use of the PEXA Source Account by practitioners could lead to a reduction in statutory deposits from practitioners' trust accounts, reducing interest earned and a resulting decrease in the PPF. Constituent Bodies may wish to consider this issue further as it relates to their jurisdiction.
16. PEXA is actively encouraging practitioners who have a trust account to continue to use that trust account and the PEXA documentation facilitates registering an existing trust account. While it may be that practitioners make greater use of their existing trust accounts with the onset of electronic conveyancing, other practitioners may choose to have their clients use only the PEXA Source Account.

## REGULATORY FRAMEWORK

17. The national regulatory framework, developed by the Australian Registrars' National Electronic Conveyancing Council (ARNECC), consists of the Electronic Conveyancing National Law (ECNL), which commenced by proclamation on 1 January 2013 in New South Wales, and has been replicated in the other participating jurisdictions. Two sets of Rules have been made pursuant to the ECNL:
    a. the Model Participation Rules (MPR), which govern the relationship between the electronic lodgement network operator (ELNO) and participants in the system such as lawyers; and
    b. the Model Operating Requirements (MOR), which govern the relationship between the ELNO and the land title registries.

c. PEXA is the first ELNO and as such is subject to the MPR and MOR. The activities and responsibilities of lawyers choosing to use PEXA are primarily governed by the ECNL and the MPR. See www.arnecc.gov.au to access more information about the regulatory framework. To find out which version of the MPR is operative in a particular jurisdiction and/or time, see: www.arnecc.gov.au/publications/participation_rules_by_jurisdiction

18. The regulatory framework is in place, despite the Law Council having sought further refinement and consultation on outstanding issues, the primary ones being:

    a. the amendment of the definitions of 'digitally sign', 'digital signature', 'digital certificate' and other related definitions used in the Electronic Conveyancing National Law and the Model Participation Rules, which the Law Council has indicated are defective;

    b. provision of the final form of the Client Authorisation (being the authority signed by clients authorising their lawyer to conduct the transaction electronically);

    c. whether ARNECC will proceed with a proposal to remove the minimum insurance requirements for Subscriber Agents (verification of identity service providers). The Law Council and the ECG have strongly opposed this proposal; and

    d. whether ARNECC will provide any further guidance on the manner in which practitioners should verify the right to deal in accordance with Participation Rule 6.4.

## CONCLUSIONS

19. The NECS Committee maintains a watching brief on the emerging market of verification of identification services, such as those provided by Zip ID, VEDA, ID Secure and Australia Post. The NECS Committee has reviewed the standard terms of several providers' agreements and is seeking to amend these agreements through the ECG.

20. Although a significant milestone has been reached with registration of the first electronic transfer (between two licensed conveyancers, not law firms), there is still a degree of fluidity in the establishment of electronic conveyancing. The NECS Committee will continue to monitor the roll-out of electronic conveyancing across the jurisdictions.

21. At this stage, in the Committee's view, practitioners should be made aware that while there are potential benefits and efficiencies offered by electronic conveyancing, there are different and complex risks associated with using electronic conveyancing compared to the current paper system. Practitioners should ensure that they make an informed and considered assessment of those risks and benefits before deciding to use electronic conveyancing. Some of the risks and benefits identified by the Committee include:

### RISKS

a. explicitly articulated obligation to be satisfied as to the client's right to deal in the subject land without further guidance as to what constitutes 'reasonable steps';

b. ability to rely on non-practitioner Subscriber Agents using the Verification of Identity Standard to achieve 'safe harbour' protection, in the light of:

    i. some unsatisfactory terms and conditions proffered by some commercial operators, particularly in relation to limitation of liability; and

    ii. the practitioner remaining primarily responsible;

    (the Committee notes that alternatively the practitioner can use the Verification of Identity Standard to identify the client directly without recourse to Subscriber Agents);

c. need to maintain and store paper records of client authorisation and verification of client identity, for arguably longer than seven years, which will similarly apply in the paper environment once requirements are aligned as proposed;

d. need to maintain appropriate computer system security (virus and firewall compliance) and consequences of the failure to do so;

e. particular obligations to keep secure digital certificate hardware and passwords;

f. practitioners might participate in the electronic workspace without being fully aware of the rules underpinning its operation;

g. the structural framework has a multi-tiered set of interlinked statutory and contractual obligations – including the contractual shifting/allocating of risk – that are yet to be tested in a "real world" environment; the sheer volume of PEXA documentation is concerning and some documentation has not had the benefit of any scrutiny by the Committee;

h. acquiring a digital credential from PEXA (as one of two current providers of digital certificates) involves agreement to a $50,000 liability cap in respect of obligations that are fundamental to the integrity of an electronic conveyancing system;

i. different professional indemnity insurers may take different views, for example on contractual assumption of risk, or impose different obligations; the professional indemnity insurers have yet to publicly confirm cover;

j. transaction fees for the use of PEXA need to be agreed by clients; and

k. PEXA may be the only ELNO for a significant period of time, given substantial start-up costs for establishing an ELNO.

### BENEFITS

a. greater assurance and protection for parties that dealings will be registered almost immediately after settlement, avoiding the risk inherent in the ‘registration gap’ often contributed to by dilatory mortgagees;

b. reduction of risk of loss of funds through the removal of cheques;

c. reduction in time and cost spent chasing mortgagees (both discharging and incoming) through their involvement in the PEXA workspace;

d. elimination of the time and cost involved in instructing staff or agents and their attendance at physical settlements and lodgement at land registries;

e. increased transparency of parties readiness to settle;

f. multiple updates as to any activity on the title post exchange;

g. less reliance on payout figures provided on the morning of settlement with the workspace facilitating an agreed range for the payout figure;

h. access to pre-settlement lodgement checks, reducing post-settlement requisitions from land registries; and

i. immediate distribution of the proceeds of sale post-settlement.

## MEMBERS OF THE NECS COMMITTEE

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| Expert Member (Chairman) | Mr Phillip Argy |
| Legal Practice Section and Chairman of ECG | Mr Murray McCutcheon |
| ACT | Mr Michael James |
| NSW | Ms Mary Macken, Mr Mark Swan |
| NT | Ms Lyn Bennett |
| Qld | Mr Matthew Raven |
| SA | Mr Philip Page |
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