



E-Conveyancing Fact Sheet

The system that enables online financial settlement and lodgement of instruments with Land Victoria went live in Victoria on 27 January 2015. It will probably be some time before it is being widely used for transactions. When it is, however, practitioners may find the use of it inescapable. Therefore, now is the time to get a grip on what it is all about. The information set out below should help.

CONCEPT

The system eliminates the need to attend a physical settlement with bank cheques and documentation, and the lodgement of paper instruments with Land Victoria. It is effectively a virtual settlement room that stores the data required for lodgement of dealings at Land Victoria and the transfer of funds upon settlement. At a nominated time, the funds are transferred and data lodged. It is not involved in the other aspects of the conveyancing transaction. The challenge has been to develop an online system that retains the integrity of the existing paper one.

LEGAL FRAMEWORK

Existing legislation envisaged the use of paper. It was necessary to effect legislative change that encompassed both paper and electronic transactions. It also needed to have national application across the eight state- and territory-based legal regimes. The way this has been achieved is explained in an article by Murray McCutcheon (October 2013 87 (10) *LJ*, p.40). Basically, one state, being NSW, had passed legislation that the other jurisdictions then adopted, adding consequential amendments to their own legislation. The national law set up a regulatory structure that provided for the Australian Registrars' Electronic Conveyancing Council (ARNECC) to regulate the process.

SYSTEM

The legislation provides that electronic dealings are to be processed through an Electronic Lodgement Network (ELN), which can also provide the facility for funds transfers. The entity that owns the ELN is an Electronic Lodgement Network Operator or ELNO. There is only one ELNO, which is PEXA Ltd. Information about it can be found at www.pexa.com.au/. It is a public company, the major shareholders of which are:

- Commonwealth Bank;
- National Australia Bank;
- ANZ Bank;
- Westpac Bank;
- Macquarie Capital;
- Little Group;
- Link Group; and
- Victorian, New South Wales, Queensland and Western Australia Governments.

The website states that the company has a "commercial focus", which presumably means its shareholders expect a return on their investment.

ACCESS

In order to use the system you must become a subscriber. This means registering with PEXA. You will need to have your identity verified and meet certain requirements. These include:

- having an ABN;
- being of good character;
- appropriate fidelity and professional indemnity insurance; and
- entitlement to act for parties in a conveyancing transaction.

Fortunately, having a current practising certificate satisfies the last three points.

USE

To use the system, you will require a Digital Signing Certificate (DSC). This is effectively your unique online identity and signature. More information about DSC's appears below. In order to carry out financial settlement with your client's funds, you are required either to register a trust account with PEXA or sign up to use the PEXA Source Account.

SIGNING ONLINE

Your DSC is made up of:

- a token (USB);
- software on your computer; and
- a password.

It identifies the subscriber and its ABN and any person using the DSC to sign. In practice, what this means is that when you apply for a DSC, you must provide evidence of the identity of your business and have the individual who is responsible for the use of the DSC identified. That person can then allow others to sign with the DSC after verifying their identity.

ELIGIBLE TRANSACTIONS

In addition to financial settlements, the system can process caveats and withdrawals, mortgages and discharges, and transfers of land. However, this is predicated on all parties involved in the transaction being willing and able to use the system for these purposes. In the early stages, this will limit the number of

E-CONVEYANCING FACT SHEET

matters that can be conducted electronically. If there is rise in use of the system over time, as anticipated, more transactions will meet this requirement. It is important to determine as early as possible if the system can be used for a given transaction. This will mean making enquiries of all the other parties involved.

CLIENTS

Some clients will be happy with the conveyancing process being conducted electronically. Others, however, may not be as sanguine about it. Both sets of clients should be advised about what is involved and specific instructions should be obtained by practitioners. The advice could include information about:

- nature and effect of the client authorisation;
- requirement for identity verification;
- absence of signed instruments and paper titles;
- method of obtaining and transferring funds; and
- additional cost.

Armed with that information, clients can make an informed decision about whether to transact electronically.

CONTRACT

The standard contract of sale of real estate does not envisage electronic settlement and lodgement. If the transaction is to be conducted this way, terms dealing with the system may need to be incorporated into the contract. The Law Institute of Victoria has developed a suggested special condition (<http://tinyurl.com/e-conveyancing>). It deals with things such as:

- ensuring all parties are subscribers;
- opting out;
- responsibility for opening workspace and setting time of settlement;
- when settlement has occurred;
- failed settlement;
- payment to wrong account; and
- provision of physical items required for settlement.

There is also a tick box which, if filled in, triggers the special condition. Before ticking the box, make sure you are aware of the effect of these conditions and that you will be able to comply with them.

AUTHORISATION

You need to obtain the authority of your client before lodging electronically. The form of client authorisation, along with other compliance obligations, can be found in the Model Participation Rules (MPR's) on the ARNECC website (<http://www.arnecc.gov.au/>). The client must execute the authority for you to:

- sign documents;
- submit them for lodgement;
- transfer funds for settlement; and
- do anything else necessary.

IDENTIFICATION

Before the client signs the authorisation, you are required to carry out a process to verify the identity of the client. The obligation is to "take reasonable steps". The MPR's set out a Verification of Identity Standard. If this is followed then, subject to a couple of exceptions, it will constitute reasonable steps. There are also processes for identification of corporations, attorneys and clients without photo identification. Provision is made for the use of agents to carry out the identification. More information about this can be found in an article published in the *Law Institute Journal* (October 2014 88 (10) *LJ*, p.40).

CERTIFICATION

Clients authorise you to sign instruments on their behalf. They no longer see or sign them. Instead, you certify the electronic instrument by applying your DSC. You are required to certify that:

- you have identified the client;
- you hold a client authorisation;
- you obtained, considered and retained the requisite supporting evidence;
- the instrument is correct and compliant with relevant legislation; and
- the paper title has been obtained and destroyed.

FUNDS

The funds required for settlement can be transferred from either:

- your trust account;
- the PEXA source account; or
- an earlier electronic settlement.

The PEXA source account is intended to allow subscribers who do not operate trust accounts

to provide funds for settlement. Regulators have raised concerns about its status. Some of these are contained in an information notice from the Legal Services Commissioner (<http://tinyurl.com/system-rollout>).

COST

There will be a cost to use PEXA. Its fees can be found at: <https://www.pexa.com.au/pricing-schedule>. Conducting a standard discharge/transfer/mortgage settlement will cost \$300, which includes the cost to mortgagees. As that is invariably passed on to the customer, it is reasonable to say that the vendor and purchaser will be paying about \$150 each for an electronic settlement. In addition to this, if you outsource the client identification, the provider of that service will charge a fee. That is likely to be in the vicinity of \$100 for a couple.

LINKING SETTLEMENTS

It is not unusual for settlements to be relying on earlier ones. A common way of dealing with the funds is to have bank cheques payable to parties at later settlements. This will not be possible in electronic settlements. PEXA has indicated that its system will allow for up to three settlements to be linked. This means that the funds from an earlier settlement are applied towards a later one. This does, however, require all the linked settlements to be conducted electronically.

BAILING OUT

An electronic settlement can only occur if all parties involved are using the system. This will usually be known at the outset of the transaction and the decision then made to proceed that way. However, circumstances may arise where it is no longer possible to continue. If, for example, a caveat were lodged prior to settlement, the caveator may need to be involved with the settlement. Unless that caveator is able to join in the electronic process, a physical settlement would be required. This means that documentation will have to be prepared and executed by all the parties, and arrangements made with banks to draw cheques and attend settlement. This could result in a lengthy delay in settlement and all that it entails.

E-CONVEYANCING FACT SHEET

RECORDS

You are required to retain certain documentation for at least 7 years from the date of lodgement. This comprises:

- client authorisation and supporting material;
- information about right to deal;
- evidence of verification of identity;
- State Revenue Office forms; and
- other material demonstrating compliance.

It appears that retention of hard or soft copies of the relevant documentation will constitute sufficient compliance with this obligation.

NON-COMPLIANCE

There are consequences for failing to comply with your obligations when using the system. This includes having your access suspended or terminated, which could severely limit your ability to practice in this area. There is also the potential for negligence claims and action for professional misconduct. Therefore, it is important that before using the system, you are familiar with its operation and aware of your obligations.

RISKS

There are risks involved with the current paper system. The electronic process may alleviate some of those but will give rise to some new ones, such as:

- the need to verify the identity of the client;
- certifying transactions;
- responsibility for use of DSC;
- ensuring funds are transferred to correct accounts; and
- technology failure.

These risks need to be weighed against the potential benefits.

BENEFITS

The main beneficiaries of the system are the banks and land registries. That explains why they own it. However, it will also deliver benefits to practitioners. Among them are:

- eliminating the need to arrange and attend physical settlements;
- payout figures available online;
- immediate availability of funds;
- dealings lodged at settlement;
- ability to determine settlement readiness of other parties; and
- reduced risk of identity fraud.

BOTTOM LINE

In the early stages, it is up to you whether you use the system. For the reasons mentioned above, initially it will not be an option for most transactions. This should change over time, and it may become the only viable way of conducting conveyancing transactions in the long term. At some stage, you will need to make a commercial decision about if and when you become enabled to use the online system.

FOR MORE INFORMATION

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