

# PREPARING YOUR PRACTICE FOR E-CONVEYANCING

By Mark Swan



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In March 2015, the electronic conveyancing platform PEXA will become available for general use by legal practitioners and licensed conveyancers in NSW.

Practitioners will be aware that the legal framework for electronic conveyancing consists of the Electronic Conveyancing National Law, its supporting operating requirements and participation rules, as well as the participation agreement mandated by them.

Flowing from these are a number of practical issues that each legal practice, regardless of size or practice type, will need to address when signing up as subscribers in PEXA, and which they will need to keep in mind when settling their clients' transactions by means of the platform.

## Differing practice types – who's the responsible subscriber?

- Sole practices – the sole practitioner is the subscriber.
- Partnerships – the partnership is the subscriber, which means that all partners will be bound by the participation rules (rule 5.5.2). The partner who is nominated to have responsibility for the PEXA relationship, must undergo Verification of Identity (Vol) in accordance with the Vol standard.
- Incorporated legal practices – the company is the subscriber, and a nominated solicitor director must undergo Vol.

## Subscriber administrators

The role of the subscriber administrator is to maintain the subscriber's practice information in PEXA, allocate PEXA login credentials and assign roles and levels of authority to the law practice's users and signers. The subscriber need not be a principal or legal practitioner but he or she must undergo Vol.

The subscriber must also take reasonable steps to ensure that the subscriber administrator has not been, and is not, the subject of any of the disqualifying

## Snapshot

- In March 2015, the electronic conveyancing platform PEXA will become available for general use by legal practitioners and licensed conveyancers in NSW.
- Working out in advance your practice's approach to some of the everyday practical issues may make the transition a lot easier.
- You will need to identify who will be responsible for the PEXA relationship, and the personnel who will be the subscriber administrator, users and signers.
- It will also be worth considering the implementation of some simple changes to procedures to ensure compliance with the rules governing participation in PEXA.

events listed in participation rule 4.3.1(b) (eg, personal insolvency, certain convictions, disqualification from corporate office).

Law practices may wish to consider, depending on their size and structure, whether more than one subscriber administrator should be appointed, perhaps a non-lawyer primary administrator and a lawyer secondary administrator, and require their joint action on all or specified administrator functions, with a view to providing appropriate supervision of the significant responsibilities conferred on the subscriber administrator.

## Digital certificates

A law practice that becomes a subscriber must obtain a digital certificate.

'Child' digital certificates are issued to the subscriber's signers, with the subscriber administrator allocating their roles and level of authority. Signers must undergo Vol before being issued with their digital certificate.

## Users and signers – workspaces, electronic dealings and financial settlement schedules

Users, who are not also signers, can:

- open workspaces and populate them with title data;
- invite other parties to the workspace;
- communicate with other parties through the messaging function;
- prepare electronic dealings; and
- fill in the financial settlement schedule once adjustment figures have been agreed with the other party outside PEXA.

Signers can do all that a user can do, and can digitally sign electronic dealings.

In New South Wales, a signer must hold a current practising certificate as a legal practitioner or licensed conveyancer.

Thus, only persons who are appropriately trained, licensed, professionally regulated and insured are able to sign dealings affecting the Torrens title register.

This is one of the features of the electronic conveyancing system that seeks to ensure that the confidence that the public and the profession repose in the integrity of the register is maintained.

Signing a financial settlement schedule in most cases will involve the handling of trust money or the exercise of power over client money. For financial settlements involving disbursement of money from a law practice's trust account, the signer must:

- hold an unrestricted practising certificate;
- be authorised by the law practice to handle trust money; and
- be recorded on the bank mandate as a signatory.

The same principles might conservatively be applied to dealing with client funds via the PEXA source account, discussed below.

In multi-partner firms or incorporated legal practices, consideration might also be given to requiring co-signing of the financial settlement schedule by the

principal or solicitor director responsible for the matter and another principal or solicitor director, either generally or for transactions over a specified limit.

#### **Use of a law practice's trust account**

A law practice can register one or more trust accounts as source accounts with PEXA. Client contributions to settlements can then be deposited to the nominated trust account for debiting at settlement.

When using their trust account to receive surplus client funds on a sale transaction, it should also be easier for subscribers to nominate the registered trust account rather than having to enter account details as a one-off payment destination.

Most law practices operate using some form of paper requisition to raise a cheque or EFT payment on, or to record a deposit to, the practice's trust account. Consideration should be given to what extent your practice will need to modify its trust account paperwork to accommodate PEXA transactions on the practice's trust account.

To avoid the accidental overdrawing of the matter ledger or the trust account by another transaction being processed in ignorance of a transaction that has been signed off in PEXA but has not yet gone through, law practices should consider whether and how the commitment of funds to a PEXA workspace should be recorded in the trust ledger in advance of the actual debiting.

Consideration should be given as to whether the law practice's trust accounting software offers any means of entering a 'soft' debit or funds reservation that would act as a placeholder pending the actual transaction going through.

PEXA debits from a law practice's trust account will be for the lump sum required for each settlement, rather than for the individual payments directed by the vendor in the PEXA workspace. They should be recorded in the trust ledger for the matter as a single line item.

#### **PEXA source account**

PEXA has established the PEXA source account, into which incoming parties can deposit their contribution to a financial settlement when the subscriber acting for them does not maintain a trust account, or where that account is not available for use. Any interest earned on the PEXA source account is not paid to the public purpose fund, it accrues to the benefit of PEXA.

Clients will no longer be able to make a contribution to the financial settlement in person over the counter at the bank branch as PEXA only will receive client contributions to the PEXA source account by EFT or RTGS (Real Time Gross Settlement).

At present, PEXA requires client contributions to a settlement to be received in the PEXA source account as cleared funds at least three business days before the day scheduled for settlement.

Where a practitioner digitally signs a financial settlement schedule involving the use of client money contributed through the PEXA source account, that will amount to the exercise of power over trust money for the purposes of section 258 of the *Legal Profession Act 2004* (NSW).

#### **Record keeping**

The PEXA platform will provide a record, as print-out and/or PDF, of the transactions undertaken on the subscriber's trust account and the PEXA source account.

The law practice or conveyancer acting for the vendor who has exercised control over the settlement money will also be able to print a statement of the transaction recording to whom the settlement money has been disbursed.

The statements obtained from the PEXA platform must be retained as part of the trust account records for the matter file and, where relevant, to comply with the record keeping requirements for the exercise of power over client money.

Copies of Vol documents and client authorisations must be retained by the subscriber for at least seven years.

As signers derive their authority to sign dealings from their status as legal practitioners or licensed conveyancers, law practices may consider obtaining and retaining a copy of each signer's practising certificate when Vol is first carried out, and updating that record each year.

#### **Training**

The participation rules and the participation agreement require subscribers to provide training to their users appropriate to their role, and regarding the subscriber's security obligations.

Digital signatures are difficult to repudiate. It is recommended that law practices reinforce how important it is for the law practice's signers to keep their digital certificates and passwords secure.

#### **Housekeeping**

If a user or signer leaves the law practice, or a signer loses their entitlement to sign dealings, their PEXA login credentials and digital certificate should be cancelled, or level of authority amended, promptly.

#### **Professional indemnity insurance**

Lawcover advises that e-conveyancing work undertaken by a law practice and arising from the provision of legal services to a client would be covered subject to the terms and conditions of the Lawcover professional indemnity insurance policy.

A law practice would also be covered if engaged as a Subscriber Agent and the Verification of Identity check was performed in the provision of a legal service to a client, notwithstanding the client was another law practice.

However, disputes with PEXA in relation to the terms of the Participation Agreement or of a commercial nature, would not be covered by the Lawcover policy. **LSJ**

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