



# Understanding National e-Conveyancing

Peter Rosier



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**Background and Overview of the  
Electronic Conveyancing National Law**

**Electronic Conveyancing National Law**

**Model Participation Rules**

**Model Operating Requirements**

# Publisher's Note

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## **NSW Operating Requirements and Participation Rules for Electronic Conveyancing**

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# Preface

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## **Electronic conveyancing — a long-awaited reform**

I have been interested in the concept of electronic conveyancing for a long time. I was a supporter, albeit from afar, of the early attempts by the Law Society of New South Wales — around 1992 — with SEISIN and ESCROW electronic financial settlement and document exchange proposals. These however failed due to a lack of interest from the financial institutions. And since about 2001, the present proposal, in its embryonic stages has been a favourite subject.

But these days whenever I mention electronic conveyancing to colleagues I seem to receive one of two responses: ‘never in my lifetime’ or ‘it won’t work’. There is great surprise (even among many who should know better), when I say that the legislation — the legal framework — has been passed in NSW and Victoria, Queensland and the Northern Territory and is about to pass the Tasmanian parliament. It is being developed by the South Australian and West Australian governments for parliamentary consideration. The fact is that an electronic conveyancing system is operating for financial institutions — the first transaction, a discharge of mortgage, took place in Victoria in late June 2013 — with the legal profession to follow around June 2014.

National electronic conveyancing is here. It is a reality. This book is designed to help those who will find it of greatest benefit to understand the system, the legal framework and how electronic conveyancing works in practice.

## **The overseas experience**

Nowhere in the world is there a land sale contract, completion and titling system that will be as comprehensive as that developed for NECS. The difference is that every overseas system deals with lodgment and registration of title transfer and the associated transaction, but not the financial settlement usually taking place at the same time. NECS will deal with this, making it the most advanced of any of the systems in place globally at this time.

- *New Zealand* has an operating electronic lodgment and registration system by which the instruments that require registration are created, executed and delivered electronically (in XML format — that is as data, rather than as a digitised form) to the land registry. It is a mandatory system for professionals (those acting for themselves can still proceed in the paper environment) meaning that there is no paper alternative for solicitors and conveyancers. However, the settlement of a sale and purchase of land still proceeds in the paper environment, albeit remotely, with the use of faxed undertakings and confirmation of the deposit of funds.
- The Canadian province of *Ontario* has developed a form of e-conveyancing through a public-private partnership with Teranet, which provides document creation, execution and on-line lodgment facilities for the legal profession. Again, the system delivers the dealings to the land registries in XML format. Teranet is essentially a franchisee, and it provides searching facilities for title,

plans and government affectations through various facilities. Access to Teranet is limited to professionals. The rest of the conveyancing process is, nonetheless, not computerised.

- The Land Registry of *England and Wales* had spent some £10.9 million on developing electronic charges, signatures and transfers, and on software to support its planned e-services before abandoning the project as 'a bit ahead of its time'.<sup>1</sup> It is true that the proposal was ambitious — described as 'end-to-end'. In its early stages, it was successful with a limited range of projects, and no doubt will be revisited by the Land Registry.
- *Singapore* has had a form of electronic transfer since 1996. Title registration in Singapore was introduced in 1960 when registration of transfers became mandatory. The Register contains 225,000 titles and 1800 dealings are lodged daily. The Register was converted to electronic titles in 1996 and remote Internet access was made available in 1998 through both a single information broker and directly. Since 2000 it has been possible to order faxed copies of registered dealings on-line.<sup>2</sup>
- *Scotland* has an electronic land registration system, ARTL (automated registration of land title). This went live for some transactions in 2007 and for all in 2008. Access to the system is, as appears to be the norm, limited to regulated professionals.
- In Europe, the *Netherlands*, *Estonia* and *Bavaria* in Germany have all developed types of electronic title registration systems.
- *Ireland* is fairly well advanced. They view with interest the systems that are most advanced in development — Ontario, New Zealand and now Australia. The introduction of e-conveyancing requires that all titles be treated the same — in effect a change for that land under a deeds registration system (old system title in New South Wales) to a title by registration. This was brought about with the passage of the Land and Conveyancing Law Reform Act 2009. The first phase of e-conveyancing, which, as in Australia, dealt with releases/discharges of mortgage, went live in 2009.<sup>3</sup> However concerns about the reliability of digital signatures and the possibilities for fraud have slowed the process.
- *South Africa* which has a number of types of interest in land — unlike the Australian jurisdictions — is developing an electronic Deeds Registration System (e-DRS) to deal with the increase in title registrations. The scheme needs to deal with, and maintain the legal proscriptions associated with, the varying and sometimes overriding interests in land.<sup>4</sup>

<sup>1</sup> Malcolm Dawson, chief land registrar Land Registry England and Wales.

<sup>2</sup> Electronic Settlement Electronic Lodgment and Automatic Registration of Real Property Dealings in NSW: Public Consultation Document May 2004.

<sup>3</sup> See, for instance, the Law Society of Ireland's publication at <http://www.tfpb.ie/Publication%20of%20eVision.pdf> Electronic Settlement Electronic Lodgment and Automatic Registration of Real Property Dealings in NSW: Public Consulta

<sup>4</sup> See article on the South African Legal Information Institute site at <http://www.saflii.org/za/journals/PER/2011/22.html> which is interesting not only because it seems to attribute the development of a title registration system to English reformers to the exclusion of the true proponent, Sir Robert Torrens, but also because the existing New Zealand system and incipient Australian system do not warrant a mention.

## **A short guide to acronyms used in NECS**

The detailed role of each entity involved in the electronic conveyancing system is discussed at [5].

To enable better understanding of this text, there follows a short list of the acronyms used:

ARNECC	Australian Registrars' National Electronic Conveyancing Council
CIV	client identity verification
CoRD	control of the right to deal
ECNL	Electronic Conveyancing National Law
eCT	electronic certificate of title
ELN	electronic lodgment network
ELNO	electronic lodgment network operator
NECDL	National Electronic Conveyancing Development Limited
NECO	National Electronic Conveyancing Office
NECS	National Electronic Conveyancing System
PEXA	Property Exchange Australia

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# **Part 1**

## **Background and Overview of the Electronic Conveyancing National Law**



## Chapter 1

# What is electronic conveyancing?

### [1.1] Not a complete conveyancing system

The National Electronic Conveyancing System — NECS — is not an attempt to deal with the entirety of the conveyancing process. Practice varies from one state to the next, and it is not inherently easy to computerise the entire process. Perhaps when NECS has been established for some time, thought will be given to extending its operation to computerise more of each transaction.

### [1.2] The ‘standard case’

At this time, it is not intended that NECS deal with anything other than the ‘standard case’. A ‘case’, in NECS terminology, is a land title dealing or dealings which form part of the same transaction. The ‘standard case’ is the discharge of a mortgage, a transfer of title and a mortgage — in other words the most common of all grouped transactions.<sup>1</sup> The proving phase of NECS (referred to by PEXA, the ELNO, as Release 1) concentrates only on caveats, mortgages and discharges/releases and will involve only financial institutions.

Figure 1.1 (on the next page) shows which portion of the process is dealt with by the NECS: put in its simplest form it is the part of the process that deals with settlement and land registration.

### [1.3] The stated aim of NECS

PEXA says the aim of NECS is to ‘provide an electronic business environment for completing property transactions including electronic lodgment with land registries and the settlement of funds.

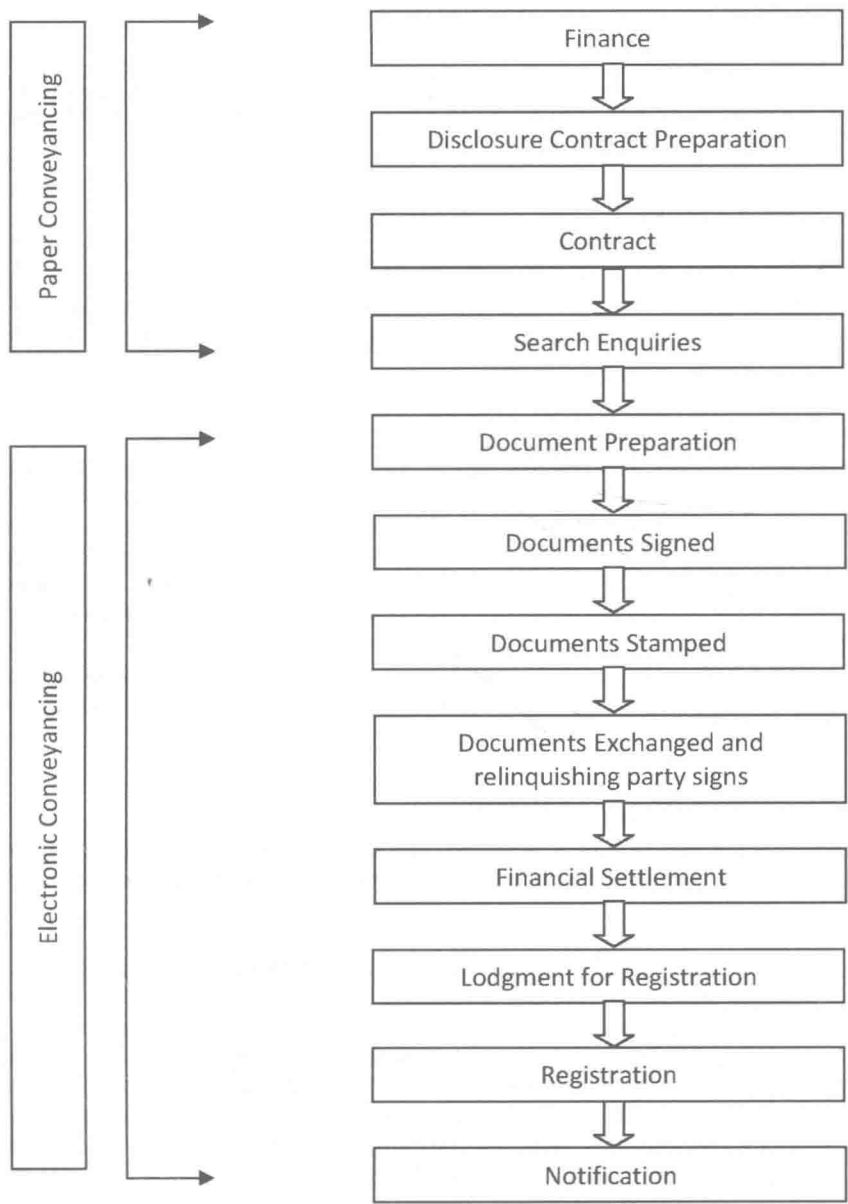
‘This will include providing an electronic environment to:

- Lodge the land title dealing documents and related instruments needed to register changes in property ownership and interests.
- Allow the different and accredited parties involved in the transaction to view and complete the documents to conclude the property exchange or transaction.
- Allow for the electronic settlement of all financial transactions at a nominated date including settlement moneys, duties, taxes and any disbursements.
- Lodge electronically land title instruments for registration with the relevant state or territory land registry for electronic processing.’<sup>2</sup>

<sup>1</sup> See, for instance, the Law Society of Ireland’s publication at <http://www.tfpb.ie/Publication%20of%20eVision.pdf>.

<sup>2</sup> See the NECDL website at [www.necd.com.au](http://www.necd.com.au) for more information.

Figure 1.1 The Conveyancing Process



## Chapter 2

# A short summary of how NECS will work

### [2.1] An evolving system

What follows is a synopsis of how NECS will work. The aim is to give a chronologically correct overview of the process. As the system remains under development, the synopsis may change with time.

At the time of writing, the financial settlement model is somewhat different from that in the paper environment, but as it has been developed is unlikely to give rise to many concerns. Financial settlement will take place after confirmation of document lodgment. Cleared funds held at Reserve Bank level will be 'frozen' until the lodgment confirmation is received. There is detailed discussion of the settlement model later (at [2.22]), and improvements in such a technologically filled space are inevitable. The development of the system has been well described as a 'journey'.

### [2.2] Subscribers, users and signers

Anyone entitled to undertake conveyancing transactions on behalf of others in a particular state or territory and those wishing only to represent themselves (typically, banks and other financial institutions) will apply to become subscribers.

The Participation Rules, which we discuss in detail at [6], set out the qualifications for subscribers. A subscriber may access the ELN by him-, her- or itself via a user.

(At first, the only electronic lodgment network (ELN) will be Property Exchange Australia (PEXA), so I will refer to the ELN as PEXA.)

A user may be a signer. A signer is a user appointed to sign documents and certificates in a PEXA workspace on behalf of a client or a subscriber. The identity of users must be verified by a subscriber before the signer user is allocated a digital signature.

### [2.3] Digital signatures

Each signer must apply for a digital signature. As we shall see later at [5.12], there are strict rules governing the use of these digital signatures.

### [2.4] Client verification

Subscribers and users must take the steps required by the Participation Rules to verify the identity of the client for whom they are to act. This is another aspect of the process which we will discuss at [5.11].

### [2.5] Client authorisation

Before acting for a client in a PEXA workspace, a subscriber must obtain a client authorisation. The form of this document is mandated but it is felt by the Law Council and others that there are problems with the present version of the form. As the form will not need to be employed by anyone until the second quarter of 2014 (because the