

TRANSFER OF LAND AMENDMENT BILL 2001

EXPLANATORY MEMORANDUM

PURPOSE OF THE BILL

The *Transfer of Land Amendment Bill 2001* (Bill) will make the necessary amendments to the *Transfer of Land Act 1893* (TLA) to:

- a) provide for the legal and operational registration requirements necessary for the proposed new digital title system;
- b) permit the introduction of an alternative method of subdivision of land; and
- c) modernise some outdated provisions of the Act to enable more efficient administration of the land register.

BACKGROUND AND OUTLINE OF CHANGES MADE BY THE BILL

Digital Title System

The former Government approved the drafting of the amendments made to the TLA as contained in the Bill on 16 August 1999.

The Department of Land Administration's (DOLA) current document and certificate of title management system is a paper-based process that requires upgrading to deliver a more progressive and professional service to the Western Australian community.

With the emergence of electronic commerce as a business medium, and in support of the Government's *WA Online* strategy, it is necessary that DOLA join the Australia-wide move to the creation of a digital title register and a system of online digital processing of land transactions. This initiative is known as "*SmartRegister*".

The building of a digital title system will also enable DOLA, in the future, to use its own considerable datasets in relation to land and link them to the title for the relevant land. It will also permit DOLA to link to other datasets in State and local government to enable the title to become the 'one stop shop' for all interests and information about particular parcels of land.

Under previous amendments made to the TLA by the *Transfer of Land Amendment Act 1996*, the Registrar of Titles (ROT) was given the power to create and maintain a digital register or a combination of digital and paper titles. This was the first building block to the proposed Digital Register. DOLA has commenced building the "*SmartRegister*" system and some aspects of the system are now operating. The proposed amendments are needed to facilitate changing from a paper-based system to a digital title system. This will enable DOLA to reap the benefits of being able to link to and utilise land datasets from within State and local government and apply those datasets to land titles.

DOLA undertook an examination of a number of Australian Title Registry Offices and found that the digital title data base and digital registration system, developed and operated by the New South Wales Land Titles Office, provides substantial improvements in service delivery.

DOLA has purchased the digital package to provide:

- A base for the introduction of electronic commerce in real property transactions;
- Improved document registration turn around times;
- Improved land title search information turn around times;
- Greater internal productivity for DOLA; and
- A base for future advances in technology.

It is anticipated that the move to a digital environment will also achieve internal productivity gains and improved work practices within DOLA, improve in the delivery of land title searches and document registration to DOLA customers and the potential for productivity gains within the conveyancing, banking, finance and legal communities.

Ultimately, it is hoped that in the next 3 to 5 years DOLA will be able to develop the digital title system to permit the creation and utilisation of an electronic conveyancing system. Under that system the conveyancing community (eg banks, solicitors and settlement agents) will be able to carry out the settlement of the sale and purchase of land online and lodge the land transaction documents electronically at DOLA for registration. Once the documents are lodged at DOLA they would be checked. If the documents are correct then the ROT would change the ownership details on the title.

Once the electronic conveyancing system is built there will need to be amendments to the TLA to legally permit the electronic conveyancing system to be implemented. The reason that the amendments contained in the Bill do not cover this system is that DOLA is not sure of the precise nature of the system, because the technology is not fully developed. Therefore the nature of the amendments which will be required to the TLA are not sufficiently clear to be enacted into legislation at this time.

Based on current technology, the conversion of Western Australia's 2.3 million titles from digital to paper will take approximately 15 years. Therefore, during the conversion period it is necessary for the TLA to be amended to permit the ROT to operate a dual system of paper and digital titles and to have different rules for recording and registering dealings over land for the paper and digital titles. For example, in the case of digital titles it will be necessary to permit the recording of interests in a digital manner as opposed to what the TLA currently contemplates, which is the written endorsement on a paper title.

Dual Paper and Digital Title System

A large number of the technical amendments to the TLA contained in the Bill are directed to the operation of the dual digital and paper title system, as well as achieving a separation of the different rules relating to the recording and registration of interests on paper and digital titles.

The amendments will also provide for a fundamental shift in the definition of the land title register under the TLA, from a paper-based register of all certificates of title to one that also includes the digital title database. Digital titles will be created when a reference number has been given to it and the database is updated, as opposed to a paper title, which is created when the distinguishing number is given to it and the ROT has sealed the paper title.

The digital title system will permit the ROT to record all the interests affecting the land in their relevant primary groups. For example, under the current system a mortgage that may be the subject of many transfers between the mortgagees currently has the transfers of the mortgagees recorded on the title in between other encumbrances that have been first registered on the title. The amendments will permit the ROT to group all of the transfers of the mortgagees under the relevant mortgage. This will make the certificate of title much easier to read and interpret. The same is the case with leases, easements, and restrictive covenants so that dealings with these particular interests will be easier to read, as they will also be grouped under the primary interest.

In respect of the digital titles, a large number of the amendments to the TLA contained in the Bill provide for:

- (a) a paper duplicate title to be produced and issued from the digital register to the land owner as evidence of their land ownership;
- (b) endorsements of interests and encumbrances to be made in a digital form instead of a paper form whilst at the same time permitting the endorsement on paper title to continue;
- (c) different process to be used in the case of the loss, destruction or obliteration of a paper or digital duplicate certificate of title;
- (d) the ROT, under the direction of the Commissioner of Titles to amend titles due to errors made by the staff of the ROT in a digital form but providing for a permanent record of the amendment to be maintained as is currently the case with the amendment of paper titles;
- (e) the creation of digital titles as the first title from the Crown estate, whilst at the same time preserving the historical paper-based Crown grant system;
- (f) the recording of subleases on digital titles instead of on the headlease and removing the concept of a register of subleases, whilst at the same time retaining the existing system of recording subleases on headlease documents where there is a paper title in existence;
- (g) a new provision for inspecting and obtaining searches of the digital titles whilst at the same time preserving the searching of paper titles and instruments registered on paper titles;
- (h) the proper evidentiary effect to be given to a certified paper copy of the digital title (known as a Record of Certificate of Title), a certified copy of an instrument registered on the title and a certified title which sets out the history of the interests etc that were recorded on the title at a particular point in time for evidence in a court of law or other tribunal, as it will not be possible for a digital title in the database to be given as evidence in a court; and
- (i) the digital and paper title system to create titles for whole lots and not part lots and require that when a plan of subdivision is lodged at DOLA, the plan will show unique lot identifiers for the whole of the land which is the subject of the survey plan.

Digital Title and a Land Information Database

The digital technology will permit DOLA to have a digital certificate of title that not only has the land tenure details on the title, but will also have any type of information about the land on the title or at least the title will link to or point to where that information can be obtained.

The amendments to the TLA contained in the Bill will divide the digital title into two parts.

The first part of the title will be the traditional land tenure, interests and encumbrances recorded on the title such as the ownership of the land, mortgages, charges, leases, memorials, easements, restrictive covenants, caveats, warrants and notifications of factors affecting the use and enjoyment of land. All of the tenure and interests will be subject to the usual State guarantee under the indefeasibility of title provisions of the TLA.

The second part of the title will contain information about the land, which will not be subject to the State guarantee, but will be a very useful addition to the title and give a greater degree of relevant information about the land. For example, the information will include the street address of the land and the name of the relevant local government in whose district the land is situated. There are endless possibilities in relation to the amount and nature of information about the land that can be included on the digital title. It can even permit the linking of information contained in other datasets held by DOLA, other State agencies and Local Government. Ultimately, the digital title could become the 'one stop shop' for all information about land and thereby greatly assist the Government's policy of having 'joined up government'.

Digital Title to Display Current Registered or Recorded Interests Affecting Land

Currently, the paper title has all of the interests that previously affected the land recorded on it. This can often make the title difficult to read and ascertain what interests currently affect the land. The industry rarely requires the historical information of who previously owned the land and what encumbrances previously affected the land. The industry predominantly focuses on the interests and encumbrances that currently affect the title for the land.

The amendments to the TLA contained in the Bill will permit the ROT to create and register digital titles, which show only the current interests and encumbrances recorded and registered on the title.

The history of the previous dealings and interests that affected the certificate of title will be retained as part of the history of the land and will still be part of the title, but will be kept in a digital database behind the current title. It will not be displayed on the certificate of title. However, people will still be able to search that history if required.

Digital Titles to refer to Digital Survey

Under *SmartRegister*, the digital title will refer to the survey plan or a sketch of the land on the superseded paper title for a spatial representation (picture) of the land and its dimensions.

Under the current *Smartplan* initiative, all new surveys are lodged in both a paper and digital format, and all paper surveys lodged are held as a computer image, facilitating retrieval and delivery. Over time as the digital title and digital plan system develop and all titles and plans are captured in a digital format, there will only be a direct reference to a digital survey plan rather than the sketch on the Title. A survey plan is a more accurate representation of the spatial dimensions of the land and puts the land into context with the wider subdivision.

The amendments to the TLA contained in the Bill will permit the creation of digital titles, which refer to the legal survey plan (whether in a digital form or not) rather than the sketch of the relevant land on the certificate of title. This approach is consistent with the approach adopted in all other States of Australia that have a digital title system.

However, a large number of the amendments to the TLA contained in the Bill deal with the issue of the digital title referring, when required in different circumstances, to either sketches of the land on the superseded paper title or paper or digital plans or “*graphics*” as they are defined in the Bill for a depiction of the dimensions of the land.

The following are examples of where the digital title is required to refer to the sketches on the superseded paper title.

There are some situations where the detailed picture of the dimensions of a road widening or truncation is only recorded on the superseded paper title. The digital title will be required to refer to the sketch on the paper title. The amendments contained in the Bill preserve the sketch on the superseded paper title and enable the digital title to link back to that sketch.

There are also situations where a picture of the extent of statutory easements, such as water and electricity easements, are only referred to on the sketch of the land contained on the paper title. Here the digital title will need to refer to the sketch on the superseded paper title and the amendments permit this to occur.

The amendments contained in the Bill again preserve the sketch on the superseded paper title to show the easement.

In both the above examples, amendments have already been made to the relevant survey regulations to require that road widening will be recorded on digital survey plans and that easements will be the subject of their own digital easement plan. As a result, in the future, it will not be necessary to refer to the sketch on the title for the easement.

Alternative Method of Subdivision Using Disposition Statements

The amendments contained in the Bill also provide for an alternative method of subdivision under the TLA using disposition statements to facilitate and expedite the issue of new titles for a new subdivision. Similar provisions already exist in the *Strata Titles Act 1985* and have been very effective. These amendments will permit the use of this method of subdivision to apply to freehold land.

This alternative method of subdivision will assist both small and large developers of property alike. The main advantage is that there does not need to be the usual transfers signed, transferring the newly created lots to the subdividers. However, any person having an interest or encumbrance over the land, such as a mortgage or caveat will still be required to sign the disposition statement consenting to the subdivision before it can be lodged at DOLA.

The disposition statement will set out in one document how all the existing interests in the land subdivided will be adjusted or varied over the new lots, in many cases eliminating the need for a multitude of different documents from different sources. In the new system, a developer may lodge a disposition statement at the same time that the new survey is lodged in DOLA.

Modernisation Provisions

The Bill also contains provisions that modernise practices under the TLA providing for:

- (a) the repeal of the discriminatory provisions of the TLA which apply to married women;

- (b) more efficient methods of dealing with applications to rectify certificates of title resulting in less costs to the applicant;
- (c) the appointment of more than one Deputy Commissioner of Titles;
- (d) a prescribed amount of the document lodgement fee to be retained by the Registrar in circumstances where documents are lodged at DOLA and contain errors which are not corrected within the relevant notice period;
- (e) the amendment of the *Evidence Act 1906* to correct errors relating to the evidentiary effect of DOLA officer's signatures (the consent of the Hon Attorney General to these minor amendments has been obtained);
- (f) repeal of section 239A of the TLA to enable the utilisation of the more flexible regime established in the regulations under the *State Trading Concerns Act 1916* (STCA) and permit DOLA to achieve a better return from the sale of its land information data.

Detail of the proposed amendments to the TLA are as follows:

- (a) Repeal of the outdated provisions of the *Married Women's Property Act* as it applies to the TLA together with other provisions in the TLA. These provisions require, in some circumstances, the consent of the husband before a woman can bring land under the TLA or obtain or deal with interests in land under the TLA. These provisions are anachronistic, discriminatory and irrelevant for today's society. The practices and procedures of the TLA as administered by the ROT do not discriminate between men and women when they wish to deal with interests in land.
- (b) In the case of an application under the TLA by a proprietor for rectification of title, the amendments provides the Commissioner of Titles with a discretion to require the applicant to either:
 - lodge a survey plan showing the applicant's land and only showing the adjoining land affected by application, together with showing any other information required by the Commissioner; or
 - to provide a survey plan of all the land that will be affected by the application.

The amendments repeal the existing provision in the TLA, which require the applicant to provide a survey plan of all the land affected by the application. This could be a very costly exercise with no real benefit to the applicant. This may be the case where the rectification is a result of a water body or watercourse having receded. All the adjoining titles next to that water body or watercourse and adjoining the applicant's land, would be affected by the applicant's application to rectify his or her title.

- (c) The amendments provide for the appointment of more than one Deputy Commissioner of Titles. Currently, the TLA permits only one Deputy Commissioner of Titles to be appointed at any one time. Given the large volumes of land transactions that now occur in WA, (326,000 per annum), as opposed to the numbers that existed in 1893 when the TLA was first enacted, there is a real need for more than one Deputy to be appointed. These amendments also permit the more efficient disposal of actions under the TLA, as well as providing management with greater flexibility to provide for annual and long

service leave of both the Commissioner and Deputy Commissioner of Titles, without adversely affecting the work flow of the matters dealt with by them. The TLA provides that the Deputy is to be appointed by the Governor. This fact makes it very difficult to appoint a deputy for short periods of leave such as a month or less. The result is that the work is not done during leave periods which is unacceptable to DOLA and Customers alike. These amendments will enable the work to be completed during leave periods by other Deputy Commissioners.

- (d) Section 192 of the TLA is being amended to permit a prescribed amount of the document lodgement fee to be retained by the Registrar in circumstances where documents are lodged at DOLA which contain errors which are not corrected within the relevant notice period.
- (e) The amendments amend the *Evidence Act 1906* to:
 - (i) Add the Deputy Commissioner of Titles as a person of whose signature judicial notice can be taken;
 - (ii) Remove a reference in the Evidence Act 1906 to a “Deputy Registrar of Titles” as there is no such position and replace it with an “Assistant Registrar of Titles” which is the correct position under the TLA. This will mean that Courts can take judicial notice of signatures of “Assistant Registrars of Title”.
- (f) Repeal section 239A of the TLA. Section 239A currently provides the Registrar of Titles with a legal power for setting fees for information derived from records and dealings in relation to land registered under the TLA. However, regulations have now been made under the *State Trading Concerns Act 1916* (STCA), which empowers DOLA to charge fees for land information and derived data. That power under the STCA is much wider and more flexible than section 239A of the TLA. Furthermore, there would appear to be a conflict between section 239A and the regulations enacted under the STCA. DOLA would prefer to remove the conflict by repealing section 239A of the TLA and utilise the more flexible regime established in the regulations under the STCA.