Transfer of Land Amendment Bill 2018

EXPLANATORY MEMORANDUM

Background

The *Transfer of Land Amendment Bill 2018* has been drafted to improve and streamline conveyancing in Western Australia, and will further enable electronic operations of the state's land titles register. These amendments are part of the move towards national electronic conveyancing and permit the Western Australian land titles register to operate in an electronic environment.

This Bill amends three key areas of the *Transfer of Land Act 1893* (TLA). It:

1. Modifies the definition of counterpart documents to improve the processing of mortgages electronically;
2. Enables electronic service of many types of notice under the TLA; and
3. Removes duplicate certificates of title from the conveyancing process, resulting in greater ability to conduct land transactions in a fully electronic environment.

Consequential amendments will be made to other Acts to facilitate these amendments.

1. Counterpart documents and improving the processing of mortgages electronically

Financial institutions have requested greater certainty around the enforceability of mortgages lodged electronically with Landgate. Currently, under the TLA there are legislative impediments to signing mortgages in an electronic format, via an Electronic Lodgement Network.

Although the legislation was amended in 2014 with the intent of enabling electronic mortgages, currently the TLA provides that the paper mortgage signed by the borrower must be exactly the same as the electronic version of the mortgage held by the financial institution and lodged at Landgate. This is because it could be interpreted as rendering a mortgage unenforceable even if there are minor, immaterial differences between the mortgage signed by the borrower in a hard copy format and the electronic version held by the lender and lodged at Landgate. This uncertainty is an unintended consequence of drafting and if not corrected has the potential to undermine industry uptake of eConveyancing.

Specifically, the provisions for counterpart documents are being amended to better account for differences in the same document, particularly where the document exists in paper and digital mediums. In addition to obvious differences such as a physical signature versus a digital signature, other subtle differences need to be accounted for,

such as differences in the approved form for paper and electronic counterparts of the same document.

2. Electronic Service of Notice

This Bill provides for electronic notice to issue in a majority of circumstances, which will streamline informal and formal notices served under the TLA.

Notices issued by the Registrar of Titles or the Commissioner of Titles may be served on registered owners or persons lodging land transaction documents at Landgate under the TLA in several circumstances. With advancements in technology and a reduction in paper-based mail as a method of service, the current notice provisions of the TLA do not provide enough flexibility for the administration of a modern land registry. This can result in an inability to serve notices and a lack of clarity as to when a notice has been delivered.

For example, if notice was unsuccessfully served by post, the current legislation gives limited flexibility to the potential actions that can be taken. Another notice can be sent, in a different format (such as email), or service of notice can be dispensed with entirely. However, these flexible provisions only apply to notices delivered by post, not email. This means that there is no clear pathway to action if an email notice is not successfully delivered. This results in email not being as useful as it might be. Changes are sought which will provide greater flexibility into the future.

Another example is that the current TLA gives several different time periods for service of notice to be deemed to have occurred – on the next business day if within the metro area, or the second business day if not in the metro area. Postal delivery dates have been changing recently, and it would provide for more flexibility if the detail about how a notice can be served and when a notice is deemed to have been served is moved to the Regulations under the TLA rather than being in the TLA itself. Putting the notice provisions that are currently in the Act into the Regulations permits a more flexible response to changes in how notices can be sent and will allow Landgate to keep pace with advances in technology.

Without these changes, claims against the Registrar of Titles could occur, as well as extended delays in processing documents.

The proposed changes relating to notices also seek to deal with notices issued under documents that are lodged at Landgate. It preserves the existing method of service of notices under existing documents registered at Landgate but provides that all documents that are lodged at Landgate after the commencement of the Bill can provide for an electronic means of service such as by email as opposed to facsimile machine.

3. Duplicate Certificates of Title removed, resulting in greater ability to conduct land transactions in a fully electronic environment

Under the land titles registration system created under the TLA, the premise that it was based upon was that Landgate as the land registry would hold the paper certificate of title and the owner of the land would hold a duplicate of that paper certificate of title.

Since 1996 the TLA was amended to permit the Registrar of Titles to hold the land title register in any media or medium. Currently the Registrar holds all certificates of title in a digital format. Persons who are entitled to a duplicate of the certificate of title can request the duplicate certificate of title to not be issued.

Duplicate certificates of title are hard copy documents which significantly limit the ability to conduct land transactions in a fully electronic environment. As more processes have become automated, the higher cost of handling paper documents has become an important issue for participants in the land registration process. Financial institutions now actively discourage the issue of duplicate certificates of title as security against a mortgage. As a result, the issue of duplicate certificates of title has been decreasing rapidly since they became optional in 1996. For example, in 2011 approximately 18% of freehold certificates of title had no duplicate issued. In 2017, this figure has risen to over 47%, and this trend appears set to continue.

Under the paper-based title system the duplicate certificate of title was incorrectly seen to be prima facie evidence of ownership of the land and of the right to transact on the land. However, the duplicate can never be relied on as showing that the person who has the duplicate certificate of title is the true owner of the land and therefore has the right to deal with the land. It is arguable that the very existence of a duplicate certificate of title increases the risk of fraud as it may enable a fraudster to perpetrate a fraud.

The introduction of the Registrar and Commissioner of Titles 'Verification of Identity' practice now operates as a safer mechanism to transact land where the parties to the transaction are required to be verified as to their identity and their right to deal with the land. This critical precondition to transact in land is independent of the possession of the paper duplicate certificate of title.

Queensland and South Australia have already removed duplicate certificates of title. The issue of removing duplicate certificates of title has been consulted on over many years as part of the national electronic conveyancing initiative. Financial institutions, consumer groups, conveyancers and lawyers are aware of the future goal of removing these hard copy documents to further promote electronic conveyancing. Financial institutions have indicated a keenness to remove the currently optional requirement to issue a duplicate. The proposal is not to immediately create this change, but rather to provide in drafting for a Proclamation date in the future. It is intended that a further community awareness campaign be run to prepare industry for the change.

The Bill

Part 1 – Preliminary

Clause 1 Short Title

This is the *Transfer of Land Amendment Act 2018*.

Clause 2 Commencement

This Act is to come into operation as follows —
(a) Part 1 — on the day on which this Act receives the Royal Assent;
(b) the rest of the Act — on a day fixed by proclamation,
and different days may be fixed for different provisions.

Part 2 – *Transfer of Land Act 1893* amended

Clause 3 Act amended

Provides that Part 2 amends the *Transfer of Land Act 1893*.

Clause 4 Section 4 amended

The definition of a ***counterpart*** document is amended to more accurately reflect what is required for counterpart versions of the same document.

Clause 5 Section 4A

Reference to section 71B in section 4A of the TLA is removed, because section 71B provides for duplicate certificates of title.

Clause 6 Section 9 amended

A new subsection 9(3) is inserted to remove the status of judicial notice from duplicate certificates of title.

Clause 7 Section 10 amended

References to duplicate certificates of title are removed from section 10 of the TLA.

Clause 8 Section 23 amended

A requirement to display certain notices at Landgate is removed.

Clause 9 Section 30 amended

For new caveats lodged under section 30 of the TLA, facsimile numbers will no longer be able to be used to serve notices. A facsimile number contained in a caveat lodged before this provision comes into operation can still be used to serve notice on the caveator.

Clause 10 Section 48B amended

The existing Section 48B of the TLA, under which duplicate certificates of title are created, is removed. A prohibition preventing the Registrar of Titles from issuing a duplicate certificate of title will be inserted in its place.

Clause 11 Section 57 deleted

As this provision relates exclusively to duplicate certificates of title, it is being removed.

Clause 12 Section 59 amended

Reference to duplicate certificates of title in section 59 of the TLA is removed.

Clause 13 Section 69 amended

Reference to duplicate certificates of title in section 69 of the TLA is removed.

Clause 14 Section 71 amended

Reference to duplicate certificates of title in section 71 of the TLA is removed.

Clause 15 Section 71A amended

Reference to duplicate certificate of title in subsection 71A(2) of the TLA is removed.

Clause 16 Section 71B deleted

As this provision relates exclusively to duplicate certificates of title, it is being removed.

Clause 17 Section 74 deleted

As this provision relates exclusively to duplicate certificates of title, it is being removed.

Clause 18 Section 74A amended

Reference to duplicate certificate of title in section 74A of the TLA is removed.

Clause 19 Sections 74 to 79 deleted

As these provisions relate exclusively to duplicate certificates of title, they are being removed.

Clause 20 Section 81W amended

For new caveats referred to in section 81W of the TLA, facsimile numbers will no longer be able to be used to serve notices. A facsimile number contained in a caveat

lodged before this provision comes into operation can still be used to serve notice on the caveator.

Clause 21 Section 86 amended

Reference to duplicate certificates of title in section 86 of the TLA is removed. The heading of this section is amended to remove reference to duplicate certificates of title.

Clause 22 Section 87 amended

Reference to a duplicate certificate of title in section 87 of the TLA is removed by deleting the existing subsections (1) and (2) and inserting new provisions.

Clause 23 Section 105AA inserted

A new section is inserted to confirm key requirements to registration of a mortgage lodged electronically, clarifying a counterpart

Clause 24 Section 106 amended

When notice is served under section 106 of the TLA, facsimile numbers will no longer be able to be used. A facsimile number contained in a mortgage registered before this provision comes into operation can still be used to serve notice on a mortgagor.

Clause 25 Section 121 amended

When notice is served under section 121 of the TLA, facsimile numbers will no longer be able to be used. A facsimile number contained in a mortgage registered before this provision comes into operation can still be used to serve notices.

Clause 26 Section 123 amended

Reference to duplicate certificates of title in section 123 of the TLA is removed.

Clause 27 Section 125 amended

Reference to duplicate certificates of title in section 125 of the TLA is removed.

Clause 28 Section 126 amended

Reference to duplicate certificates of title in section 126 of the TLA is removed.

Clause 29 Section 127 deleted

Section 127 of the TLA relates to duplicate certificates of title and is removed.

Clause 30 Section 133 amended

Subsection 133(10) of the TLA is removed as it relates to duplicate certificates of title.

Clause 31 Section 137 amended

When notice is served under section 137 of the TLA, facsimile numbers will no longer be able to be used. A facsimile number contained in a caveat noted before this provision comes into operation can still be used to serve notices.

Clause 32 Section 171 amended

Reference to duplicate certificates of title is removed.

Clause 33 Section 173 deleted

Requirements to display and advertise notice of an application under section 170 or 171 of the TLA are removed.

Clause 34 Section 178 amended

Reference to duplicate certificates of title is removed.

Clause 35 Section 181 amended

Subsection 181(1)(bd) of the TLA is removed as it relates to duplicate certificates of title. Subsection 181(1)(bj) of the TLA is amended to clarify electronic service of notice.

Clause 36 Section 182A amended

Section 182A(1)(b) of the TLA is removed as it relates to duplicate certificates of title.

Clause 37 Section 182 amended

Reference to duplicate certificates of title is removed.

Clause 38 Section 188 amended

Reference to duplicate certificates of title is removed.

Clause 39 Section 196 amended

Reference to an application for a new duplicate certificate of title under section 75 of the TLA is removed from section 196 of the TLA.

Clause 40 Section 214 amended

Within subsection 214(3), paragraphs (h) and (j) are removed from the TLA as they relate to duplicate certificates of title. A reference to "registered;" is removed and "registered" inserted into section 214(3)(i)(iii), removing a semi-colon.

Clause 41 Section 219 amended

Reference to duplicate certificates of title is removed by deleting subsection 219(3).

Clause 42 Section 229B amended

Reference to duplicate certificates of title is removed.

Clause 43 Section 232A deleted

Section 232A of the TLA is removed as it relates to duplicate certificates of title.

Clause 44 Section 240 replaced

Provision for the service of notices under the TLA is to be replaced by a new regime. Much of the detail for service of notice is to be addressed by regulation. If notice is not able to be served, it may be served in a different manner, or the matter may proceed without service.

Clause 45 Section 240A amended

The ability to elect to receive service by facsimile is removed from future change of address applications.

Clause 46 Section 243 replaced

Cancelling a certificate of title where land is revested to the Crown will be simpler because duplicate certificates of title will be removed from the process.

Clause 47 New Part 16 inserted into the TLA

A new part containing transitional provisions is inserted into the TLA, comprising two sections. Section 248 of the TLA is a transitional provision for removing duplicate certificates of title. Section 249 of the TLA is a transitional provision for the changes to service of notices under the TLA.

Part 3 – Amendments to other Acts

Division 1 *Criminal Property Confiscation Act 2000* amended

Clause 48 Act amended

Criminal Property Confiscation Act 2000 is amended.

Clause 49 Section 113 amended

Reference to duplicate certificates of title in section 113 of the *Criminal Property Confiscation Act 2000* is removed.

Division 2 – *Escheat (Procedure) Act 1940* amended

Clause 50 Act amended

The *Escheat (Procedure) Act 1940* is amended.

Clause 51 Section 10 amended

Reference to a duplicate certificate of title is removed.

Division 3 – *Fire and Emergency Services Act 1998* amended

Clause 52 Act amended

The *Fire and Emergency Services Act 1998* is amended.

Clause 53 Section 36ZC amended

Reference to a duplicate certificate of title is removed.

Division 4 – *First Home Owners Grant Act 2000* amended

Clause 54 Act amended

The *First Home Owners Grant Act 2000* is amended.

Clause 55 Section 58 amended

Reference to a duplicate certificate of title is removed.

Division 5 – *Local Government Act 1995* amended

Clause 56 Act amended

The *Local Government Act 1995* is amended.

Clause 57 Schedule 6.2 amended

In Schedule 6.2, clause 1(2) is to be removed, and a new subsection (2) inserted to remove reference to duplicate certificates of title.

Clause 58 Schedule 6.3 amended

In Schedule 6.3, clauses 4(3) and 8(2) are to be removed because they relate exclusively to duplicate certificates of title.

Division 6 – *Strata Titles Act 1985* amended

Clause 59 Act amended

The *Strata Titles Act 1985* is amended.

Clause 60 Section 21Z amended

Section 21Z(2) is to be removed as it relates to duplicate certificates of title.

Clause 61 Section 30 amended

Section 30(5) is to be removed as it relates to duplicate certificates of title. A new subsection 5 is to be inserted in its place.

Clause 62 Section 31E amended

Section 31E(2) is to be removed as it relates to duplicate certificates of title.

Clause 63 Section 31K amended

Section 31K(2) is to be removed as it relates to duplicate certificates of title.

Clause 64 Section 35A amended

Reference to a duplicate certificate of title is to be removed from section 35A(5)(a)(ii).