

**TRANSFER OF LAND AMENDMENT BILL 2018**

*Second Reading*

Resumed from 21 November 2018.

**DR D.J. HONEY (Cottesloe)** [12.01 pm]: I rise to speak on the bill as the lead speaker for the opposition. At the outset, I indicate that the opposition supports this bill. I have a brief contribution to make and equally I think we will have a relatively brief consideration in detail. At first glance, the intent of the bill is fairly straightforward, and that was outlined clearly by the then minister in the explanatory memorandum and her second reading speech. In summary, this bill will modify some definitions of counterpart documents, enable electronic serving of documents and remove the requirement for duplicate certificates of title. Although this bill stands by itself, it is also a precursor to the commercialisation of Landgate. Moving to an essentially fully electronic conveyancing environment will significantly reduce the operational costs for land transfers and removing requirements for physical copies of titles—that is, the duplicate certificates of title—will also reduce operational costs.

As we have said before in this place, the opposition has considerable concerns with the privatisation of Landgate. Anyone carrying out a land transaction must use Landgate and pay the prescribed fees. During the debate on a matter of public interest on 25 September this year, the Treasurer indicated that fee increases would be limited to the consumer price index. As we pointed out, this is an extremely generous provision in the proposed privatisation, given that transactional costs for such businesses have consistently been much lower than CPI. In fact, given the consistent improvements in technology, most organisations expect year-on-year reductions in transactional costs, thus the allowed fee increase in line with CPI represents a considerable windfall profit for the new operators of Landgate, which will be paid for by Western Australian families and business owners.

The price paid by the new owner of Landgate also raises some concerns. Although we always wish to see the best value return to the government for the sale of any public asset, we are concerned that the price paid by the new Landgate operator could imply there will be additional costs on families and businesses in Western Australia. This year, Landgate will make a profit of around \$26 million. The price paid for Landgate was \$1.4 billion. Based on a forward estimate income of \$40 million and depending on the interest on debt, the estimated net present value for Landgate varies between \$600 million and \$800 million, which is considerably less than the amount paid by the new operator. The new operator of Landgate will need to bring in something like \$110 million a year to justify its investment. The minister has told us that the value for the asset was enhanced by the potential for the new operator to sell information based on data collected by Landgate. Our great concern is that the new operator will also find ways to substantially increase the costs of property transactions for Western Australian families and business. I fully appreciate that that is not the minister's intention, but it is something that we need to be alert to once that sale progresses.

For most families, the family home is their principal repository of wealth. Landownership records, managed by Landgate, are *prima facie* evidence for property ownership. The safe management of property transactions, the prevention of fraudulent property transactions and guaranteeing uncorrupted records are critical to ensuring protection of this critical asset. Proper notification of land transactions and other matters is obviously a key activity. Facsimile communication is seldom used these days, and removing the requirement for facsimile communication seems to be a reasonable modernisation of the act.

That being said, I am concerned that relying entirely on email communication may be an inadequate means of communication. For example, many people I speak with tell me that they struggle to cope with the massive volume of emails they receive each day, and some have told me that they have hundreds, even thousands of unread emails in their email account. Many people I speak with are in this position. A colleague of mine once likened sending someone an email to shouting through a closed office door and assuming that someone on the other side received the message. If someone is expecting an email, they will likely read it; however, if a critical email communication is not expected, there is a reasonable probability that it may not be read. Although this may be beyond the scope of the bill, it would be reassuring if email communication included some form of positive recognition that an email has been received and read. This could be in the form of requiring an electronic read receipt notification. Otherwise, I believe that notification by letter is still a reliable method of communication, recognising that that method also has its pitfalls.

Although I support the bill, I have concerns about the removal of the option for people to hold a duplicate certificate of title. I understand that more than half of property owners still have a duplicate certificate of title, and it is likely that this document is being held by the financial institution that has the mortgage over the property. I understand that a duplicate certificate does not guarantee against fraudulent or unauthorised property transactions; however, it provides some protection. Although I have not conducted an exhaustive survey, I will say that nearly every lawyer I have discussed this matter with has a duplicate certificate of title and is comforted by that fact. I was going to ask a question about this during the consideration in detail stage. I understand that in some communities, recent migrants engage in informal property transactions. These transactions are not registered in any way and

they use the duplicate certificate of title as consideration, if you like, in those property transactions. We will need communication around this.

Despite the changes in this legislation, communication will be very critical, particularly for some communities in which a duplicate certificate of title is seen as proof of ownership of property. Those who have a duplicate certificate of title, or at least have a copy of that document, would realise that the document is a very valuable repository of historical information about their property. It will be sad to see the demise of this document and its contained history, although I understand the rationale behind it. I do not believe that this change offers any greater protection or benefit for landowners. The overwhelming beneficiaries of this change are the financial institutions and the Landgate office. Financial institutions dislike the responsibility of storing and managing the documents and Landgate's work is simplified by using only e-conveyancing electronic signatures. Henceforth, only the electronic document will be valid and landowners will be totally dependent on a disembodied electronic system to prove ownership of property. This fact reinforces the considerable responsibility that the operator of Landgate has to protect the integrity of any transaction and, in particular, the integrity of the stored data showing mortgages and property ownership.

I have one concern that was raised by my colleague in the other place, Hon Tjorn Sibma, who alerted me to this. It is the issue of enduring powers of attorney, and it was raised in the final report of the Select Committee into Elder Abuse from September 2018, "I never thought it would happen to me": When trust is broken". Finding 43 on page 87 of the report states —

The system used by Landgate for registering Enduring Powers of Attorney in relation to land transfers is inadequate and leaves older people who have such documents vulnerable to financial elder abuse.

Recommendation 23 was as follows —

Landgate urgently review its processes for registering land transfers where an Enduring Power of Attorney is lodged with a view to increasing the safeguards in place to ensure that only one valid and current document may be registered against a land transfer per individual.

My colleague was unsure as to whether the government had in fact considered that matter. If so, then the minister could consider changes to the bill to ensure that that recommendation is taken into account.

As I said at the outset, the opposition supports this bill. We have concerns about the related government initiative to privatise Landgate that is enabled by this legislation. We have some concerns that emailed communication may have as many pitfalls as current communication methods, and we would like the government to consider ways to validate the receipt of such communication. However, we are not using this as a basis to oppose the bill. We need a high-level, ongoing scrutiny and certainty that purely electronic conveyancing will not expose landowners to fraud or other risks. I would greatly appreciate a response from the minister to the issue of the way enduring powers of attorney are recorded and respected.

**DR A.D. BUTI (Armadale)** [12.11 pm]: I, too, rise to contribute to this very exciting bill that is before the house—the Transfer of Land Amendment Bill 2018. As the member for Cottesloe mentioned, this legislation seeks to bring in more efficient streamlining of the conveyancing process in Western Australia, and it is good that the opposition is supportive of the legislation.

I want to briefly go through what this bill does and relate it to our system of land law, because, of course, the certificate of title is incredibly important to our system of registering land property rights. That relates to the Torrens title system. As the then Minister for Lands said when she read this bill to the house, the Transfer of Land Amendment Bill 2018 has been drafted to improve and streamline the conveyancing process in Western Australia and will further enable electronic operations of the Western Australian land title register. These amendments are part of a move towards national electronic conveyancing and will permit the Western Australian land title register to operate in an electronic environment. We are not Robinson Crusoe in this—it is happening in other jurisdictions.

The bill seeks to amend three key areas of the Transfer of Land Act 1893. It will modify the definition of "counterpart" documents to improve the processing of mortgages electronically; enable electronic service of any notices served under the Transfer of Land Act; and remove the requirement of duplicate certificates of title from the conveyancing process, resulting in greater ability to conduct land transactions in a fully electronic environment. There will also be some consequential amendments to other acts to facilitate these amendments.

A certificate of title is required under the Torrens system of legal title to land. Basically, the purpose of the Torrens system is to provide certainty of title to land. Obviously, in our system, one has to have certainty of ownership of land in order for transactions to take place. The Torrens title system is a South Australian invention. It was named after Sir Robert Richard Torrens and was first introduced in South Australia in 1858.

**Mr R.R. Whitby:** I thought it was named after the river!

**Dr A.D. BUTI:** That is right; I think the Torrens title system is in a much healthier position than the River Torrens! It was a very forward-thinking way of registering ownership of land. Sir Robert Richard Torrens was way ahead of his

time. For land ownership to take place, it is a document that secures property ownership and allows transfer of ownership of property. It is to be filed, stored or registered at the local titles office; of course, for us, that is under Landgate.

The whole premise behind the Torrens title system, which the proposed amendments in this bill do not change, is to provide certainty of title to land. That is the whole premise of the Torrens title system that has served us well for so long, and this bill does not change that; it provides greater efficiency in the transfer of ownership of land.

As I said, the Torrens title system was first introduced in South Australia in 1858 and named after its inventor, Sir Robert Richard Torrens. He was crucial to the implementation of this unique and very efficient system of dealing with land. Basically, it came about as a result of Sir Torrens' desire to improve on the old English land law system, which was a very complex, time consuming and expensive way of registering and transferring ownership of land.

The primary object of the Torrens title system is to make the register conclusive, which provides certainty. Once someone's name is registered on the Torrens title register, they become the owner of the property to the exclusion of all others. They therefore obtain title by registration—that is, the certificate of title. That is pivotal to the Torrens title system of land ownership and transfer.

Under the system, a certificate of title is issued for every separate piece of land, and the certificate will contain a reference that includes the volume and folio number, ownership details, easements and/or rights of way affecting the land, and any encumbrances including mortgages, leases and other interests in the land. It is a very useful system to have and will eliminate a lot of possible litigation, because it gives certainty of ownership of land, and it avoids the consequences of lost certificates, because there is a central register of who owns the certificate of title. A landowner changes ownership through the Torrens register by lodging and registering a dealing, which provides the transfer of ownership. That does not change under the amendments that we are proposing in this bill. Of course, we are trying to move to an electronic, and more efficient, system of registration and transfer of certificate of title when ownership is transferred.

This all comes to the issue of indefeasibility of the land. The concept is known as “indefeasibility of title”. The owner of the parcel has that, and their ownership remains until there is a change in the certificate of title. There are, of course, some exceptions to that. If the certificate of title was obtained through a fraudulent act, of course, that will make the certificate of title invalid, to the extent that the persons arguing that they have title to the land engaged in fraudulent behaviour.

As I have mentioned, the Transfer of Land Amendment Bill is seeking to deliver greater procedural and administrative efficiencies in the lodgement of registration of title for land transactions and dealings across Western Australia. That is broadly in conformity with systems and amendments made in other states. This bill will make changes to three key areas under the principal act. The bill will modify the definition of “counterpart documents” to improve the processing of mortgages electronically. It will enable notices served under the Transfer of Land Act to be done electronically and remove the requirement to issue and produce duplicate certificates, resulting in a greater ability to conduct land transactions in a fully electronic environment.

The legislation will have little impact on the community's dealings with Landgate about their property. The key impacts for the community will include an ability to receive notices issued under the Transfer of Land Act electronically should they opt to, and no longer having the ability to obtain a duplicate certificate of title and instead obtaining a copy of the certificate of title, which will, of course, be an accurate record of the property title as recorded under the Registrar of Titles.

The member for Cottesloe was concerned that people could not obtain a duplicate certificate. I do not think he should be too concerned about that. I do not think that will cause too much of an issue. Our Torrens system of registration of land provides certainty to the ownership of land. It means we do not have to look behind the certificate of title for more information. The certificate of title will contain the necessary information to tell us about the land—the size of the land, the folio number and who owns the land—without needing to go any further.

The amending bill before us does not address the power of attorney. That is something I should have mentioned. However, the government broadly accepts the committee's recommendation and this will be addressed in separate legislation. That is, of course, very important. I think that is what the member was referring to when he mentioned possible elder abuse. That will be attended to by the government. It broadly agrees with the committee's recommendation and that will be dealt with at another time. The Transfer of Land Amendment Bill purely seeks to improve the efficiency of the administrative procedure for dealing with the ownership of land and the transfer of ownership. Of course, the certificate of title remains the key component of that and the bill will provide a more efficient system for the registration and transfer of land by an electronic conveyancing process, which is becoming much more common. It will put us in lockstep with most jurisdictions and into the twenty-first century. As I said, most members of the public will not be impacted by this. The Torrens system of land registration remains and it is difficult to understand how anybody could oppose the purpose of the bill before us, and the content of the bill and the way it seeks to amend the Transfer of Land Act.

**MR R.R. WHITBY (Baldivis — Parliamentary Secretary)** [12.23 pm]: I also would like to speak on the Transfer of Land Amendment Bill. This is a bill to modernise and streamline, and increase security, of the conveyancing system in Western Australia. As the member for Armadale pointed out, the fundamental system of titles based on the Torrens system will not change. That is a well-respected role and well-tested system that Western Australia and other Australian states have had for many years. It is one of the great Australian inventions in a way because it has also been exported for use internationally. If my memory serves me correctly, nations in South-East Asia have adopted the Torrens system.

We live in a digital world in which our banking, shopping, tax, mail and many others things that we have and enjoy are delivered and maintained digitally. This bill is about dragging the issue of conveyancing and land titles into the twenty-first century. It has three chief aims. The first deals with counterpart documents to provide certainty around the enforceability of mortgages that are lodged electronically so there is full confidence in and full use of the electronic system. Currently, the act insists that the paper version of the mortgage must be exactly the same as the electronic version. The concern is that if it does not match up, there could be a claim that the mortgage loses effect, even if there is a minor or inconsequential difference between the document signed by the borrower and the electronic version lodged at Landgate by the lender. The difference could be as simple as one having a physical signature and the other a digital signature. This was identified as an unintended consequence when Parliament wanted to encourage electronic conveyancing back in 2014.

The second part of this legislation deals with the serving of notices. This will streamline the serving of formal and informal notices under the act. There has been a reduction in paper-based mail and the volume of regular mail has plunged in recent years. We have only to look at the issues confronting Australia Post as people are not sending letters anymore. In fact, more and more of the profits of Australia Post are derived from parcels and there is not a lot of business in old-fashioned snail mail.

**Dr D.J. Honey:** Parcels ordered by teenagers on smartphones!

**Mr R.R. WHITBY:** That is right. I have a couple of those as well!

There needs to be clarity in the title system about when notices are served. With mail, we cannot be sure when and if that mail has been received. With the issue of periods of notice, notices are deemed under the act to have occurred after a certain date. Again, there is a lack of certainty if we rely solely on paper documents going through the mail system. There is also the issue of the lodgement of documents that can occur electronically as well as on paper with Landgate.

The third matter relates to the end of the duplicate certificate title. I think both previous speakers raised this issue. At the moment, Landgate holds a paper certificate of title and a duplicate certificate of title can be issued to the owner to prove ownership. In the electronic age, those duplicates can be outdated and not reflect the document held at Landgate. Landgate holds all its original titles in electronic form. Banks have actively discouraged the issuing of duplicates as security. The number of duplicates not issued against property is increasing. In 2011, 18 per cent of freehold titles had no duplicates. By 2017, that figure was 47 per cent. Almost half of freehold titles in Western Australia have no duplicate certificates of title on issue. Under the paper-based system, the duplicate was seen as evidence of ownership of land and the right to transact and borrow. However, a duplicate cannot be relied on to show who the true owner is because it may not be up to date. It is a duplicate of a title at a particular time. Once that duplicate, which is on paper, is out there, there is no way of updating it to reflect what is held at Landgate in an electronic version on the original title.

Some instances of fraud have occurred in Western Australia. This move towards e-conveyancing and the embracement of electronic titles more fully will reduce the risk of fraud and the risk of property being sold by someone who does not own it. This has happened in Western Australia in the past. I will go back to some rather famous examples. The first known example was in 2010, when a house in Karrinyup was sold for \$485 000 by a Nigerian gentleman. He did not own that property. The property was owned by a gentleman who was not resident in Perth but lived in South Africa. The scammer in Nigeria managed to pull a swiftie. This rings a bell with me, because I was the journalist at Channel Seven who covered the story, and I went to see the house that had been sold by that fraudster. The house had been rented. The Nigerian gentleman contacted the real estate agent who was managing the lease and purported to be the owner. He said that he wanted to change his details, and asked the agent to send all the accounts to a new email address. Several months down the track, he said that he wanted to sell the house. He was seen to be a legitimate owner who was seeking to sell his property. A document was signed with a signature that was purported to be from the owner of the home, and a passport was provided that was purported to be from the owner, and of course they were fraudulent, but the sale went ahead. That was the first major breach in history of the Western Australian title system. The good news is that the owner's loss was covered by the Real Estate and Business Agents Supervisory Board. However, that rang an alarm bell in Western Australia at the time that our title system was not as secure as it could be.

In 2013, there was another incident. It was reported on ABC News online that another Nigerian gentleman had been arrested and charged with the attempted fraudulent sale of a home in Western Australia. The owner of the home was not resident in Western Australia, and the home had been managed by a real estate agent, and the same approach was taken to try to sell that property. In 2014, three people in South Africa were charged over another real estate scam involving the attempted sale of a unit in Mandurah.

These issues arose during the time of the previous government. To pay the previous government its due, it did act. In 2012, it introduced a verification of identity system. That required a person who wanted to sell their property to go to a post office and prove their identity with a number of documents. Last year, this government changed the verification of identity system to make it more thorough and comprehensive. Thankfully, in recent years we have not had a recurrence of fraudulent and scam real estate deals. This legislation is in line with past experience. It contains important protections to enhance the security of the conveyancing system, and provides certainty that the titles of a property reflect the true owner and that people are purchasing a property that the owner is entitled to sell.

The member for Armadale referred to duplicate certificates of title. As I said earlier, a duplicate certificate of title does not guarantee that the purported owner is actually the owner. It is only a record of the original title at a particular time. The member for Armadale pointed out that Queensland and South Australia have done away with duplicate certificates of title. This is an important change. However, it needs to be introduced sensitively, along with a public education campaign and a grace period to enable people to be up to date and aware that the system is changing. It is a change for the better. It is about further enhancing security and certainty.

This has been an ongoing process. Not many years ago, this state still had manual transfers of titles. I am not sure, Treasurer, whether paper-based transfers still occur. Would there still be manual transfers of title at settlement time?

**Mr B.S. Wyatt** interjected.

**Mr R.R. WHITBY:** Until recently, manual transfers still took place. The parties to a property transaction would need to get a settlement date that everyone could agree upon. Two settlement agents, and two representatives from the banks—so at least four people, and sometimes more—would need to physically get together, on an allotted day and at an allotted time, and papers would be shuffled around in a circle, titles would be exchanged, cheques would be handed over, balances would be paid out for mortgages and any equity that the owner had in the property. Everyone would make sure that they had the right documents in their hand and all the cheques had been made out correctly. It was quite a complicated process.

**Mr B.S. Wyatt** interjected.

**Mr R.R. WHITBY:** It was a rather quaint and anachronistic practice. It still happens in some way today, as the Treasurer pointed out. Until recently, it certainly happened for fairly routine residential property transactions. That raised some real concerns. Sometimes, the settlement would be delayed because the cheques were not right, or someone could not make it to the allotted venue at the allotted time. Sometimes, the settlement would fall over because not all the paperwork was in order. It is estimated that as many as one-quarter of all settlements failed because of human error in processing work.

Another issue was getting everyone physically to the same place. It was often not only impractical, but also a waste of time and money to get people to take hours out of their day to go to a certain venue. Therefore, the advent of e-conveyancing, whereby everything is done electronically and documents are transferred at the push of a button, makes a lot of sense. Research by Deloitte Access Economics has found that electronic processing has reduced the incidence of delayed or postponed settlements. We also need to think of the cost to the people involved if a settlement falls over and they have a bridging loan and need to keep paying interest, or they are renting a property before they get settlement to move into their new property and have to pay rent for longer than they want to. This is another step in the journey of improving a system that we have relied upon for a number of decades—maybe 100 years, or longer. We live in an electronic world, in which almost everything is based online. We entrust banks to look after the money we have invested and we know how much money we have in any one account at a particular time. Banks would never fail to remember how much we might have borrowed from them either! We put our trust in all sorts of things involving money and things that are worth a considerable amount of money. This is another way to ensure that there is certainty and security, but equal to that is the streamlining and the efficiency that will come to a whole range of industries, whether it is finance or real estate, and making life easier for the consumer, which is also important and should not be forgotten. It is a valuable change. It is a good piece of legislation. I acknowledge the member for Cottesloe who said that the opposition will support this bill. I also commend the bill to the house.

**MR C.J. TALLENTIRE (Thornlie — Parliamentary Secretary)** [12.40 pm]: I am very pleased to rise to speak about the Transfer of Land Amendment Bill 2018. I begin by saying that it is part of continuing the “electronification” of the conveyancing process. The creation of PEXA—Property Exchange Australia—has enabled more and more of the transfer system to go online. Indeed, this is part of a national commitment. The Council of Australian

Governments sought to make this consistent across the nation. There is some interesting discussion around who is the actual owner of PEXA and the various shares. Who owns that is also part of this discussion.

Other members have talked about the underpinning system—the Torrens system of land title. That continues to serve us very well. We are seeing it in an electronic format now. It is a central registry. It is upon that that all property titles are issued, and it is there to be consulted. Other members have touched on how it is a system that came out of South Australia. It is fair to say that it has been adopted in a number of other jurisdictions around the world. I am advised that New Zealand has adopted the Torrens system, and so has the UK and 11 states in the United States. The indefeasibility of title is really at the core of the Torrens system. Other members have highlighted the effectiveness of our current system. There is generally a fairly smooth process that goes on. Cases of fraud have very rarely occurred. I would hope that the way we are developing things will reduce the amount of fraud. I will return to that point in a moment.

I want to talk about the cases of property title transfer that have extra layers of complexity. It occurs more often than we might imagine, often when dealing with estates of people who have passed away intestate. There have been some problems with the appointment of executors of the estate. Complications can arise simply because someone has not left a will. Someone wanting to plague the lives of their heirs and successors can fail to leave a will because that will complicate their lives enormously! That way, they will remember the deceased and work out what their intentions were. It brings into play people who the deceased might not have wanted to be involved. The Public Trustee will be involved, which can lead to all kinds of complications. That is just one area.

This day and age there are other areas, including when people separate and divorce. Properties are purchased on a joint tenancy arrangement. I think probably the most common form of ownership registered on a certificate of title is that the property is owned by two people as joint tenants. It has certainly been my understanding for a very long time that if one of the two owners dies—if there are two—the ownership of that property automatically passes to the surviving person. That should be fairly straightforward. Some people use that understanding as an excuse for not drawing up a will. They think: “Oh well, this house is our only real asset and the transfer will happen in a fairly straightforward fashion.” I have come across cases in which that is not so. Some really problematic situations have arisen. A person came into my office only this week. A series of memorials and caveats had been placed on a certificate of title. There is such a complexity now. I wonder how this legislation will deal with this case, or cases like it in the future. The remaining person in what was a joint tenancy arrangement is currently unable to sell the property. We are often dealing with elderly people as well and the liquidation of the asset needs to be done to pay for some sort of care—nursing home accommodation or the like. Time is often pressing for people as well. The last thing people need when they are, say, in their 80s and going through a bereavement—even though in this particular case it was the bereavement of someone the gentleman had divorced some years prior—nevertheless there is an emotional bond and emotional upheaval. The difficulty arose because his ex-wife, who had died, had had dementia. There was a question about her capacity to have signed any documents relating to guardianship. These cases can become enormously complicated. Now that the ex-wife has passed, the gentleman in question has to deal with a property that has a series of limitation interests and encumbrances on it. He cannot liquidate it to pay for his own care needs. I believe he is in his mid-80s. He has to deal with a complex legal situation. That would be straightforward perhaps if he were able to pay for legal advice. He is in a situation in which even paying for legal advice to resolve this matter is beyond his current cash reserves. Some very difficult situations can arise. In designing this kind of legislation, we have to be mindful of how people will be treated and how they will be able to negotiate those sorts of situations in the future.

Another matter I want to touch on is how blockchain technology will be used in the future. I have read some commentary about how PEXA is up and running, which is great news. It is very good that we have all the efficiencies that come from the electronic exchange of property. Allowing a buyer and a vendor, and their representatives and their banks, to operate in an electronic format is very good, but perhaps PEXA could convert to a blockchain format in the future. I understand that at the moment, all the data for the Western Australian land registry, albeit through PEXA, is held within a single computer system owned by the land titles office. I dare say that it is well backed up and that all those normal information technology security practices are well done. There are advantages in having a blockchain system; it would enable us to avoid any fraudulent transactions. That is probably where we will need to go in the future. I am keen to hear from the Minister for Lands about the thoughts on using blockchain technology in the future to protect us and ensure that the certificate of title registry system is robust and backed up. I will be interested to know whether this blockchain system is, in fact, a logical progression from the original Torrens system.

Debate interrupted, pursuant to standing orders.

[Continued on page 8754.]