
From: Patrick Fong <[REDACTED]>
Sent: Monday, 25 June 2018 3:05 PM
To: Michael Baker
Subject: Legislative Council Environment and Planning Committee - 20 June 2018 Public Hearing
Attachments: 20170809_SUB_LP_LUVPrivatisation_FINAL.PDF

Hi Michael,

Thank you for inviting the Law Institute of Victoria (LIV) to participate in the 20 June 2018 Legislative Council Environment and Planning Committee (LCEPC) public hearing in relation to the proposed long term lease of land titles and registry functions of Land Use Victoria.

The LIV was represented at the public hearing by the Co-Chairs of its Property Law Committee, David McKenzie and Lily Tell. David and Lily have reported that the LCEPC had asked for a **copy of the LIV's submission regarding this issue, which was sent to the Victorian Premier on 21 August 2017**. Accordingly, please find attached a copy of the LIV's submission for your consideration and records, and that of the LCEPC.

Please do not hesitate to contact me if I can be of further assistance.

Kind regards,

Patrick

Patrick Fong | Paralegal

Law Institute of Victoria, 470 Bourke St, Melbourne Vic 3000, Australia

P: +61 3 [REDACTED] (Direct)

P: +61 3 9607 9311 (Switchboard)

E: [REDACTED]

W: <http://www.liv.asn.au>

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21 August 2017

The Hon. Daniel Andrews MP
Office of the Premier
1 Treasury Place
East Melbourne VIC 3002

daniel.andrews@parliament.vic.gov.au

Dear Premier

Commercialisation of Victoria's land titles registry function

The Victorian Government, as part of its 2017 – 2018 budget, announced that it will examine options to commercialise Victoria's land titles registry function. The Law Institute of Victoria (LIV) has serious concerns about the potential privatisation of the Victorian land titles registry, and is firmly opposed to the proposal. Those concerns are detailed below.

Safeguarding the integrity of the land registry in a privatised system

There is concern about how the integrity of the land registry will be maintained with reference to checking dealings, issuing requisitions, refusing lodgements or rejecting dealings. At present, if a dealing is refused, it is possible to require the Registrar of Titles to provide in writing the grounds for the refusal, and summon the Registrar to appear before the Supreme Court or the County Court to substantiate and uphold those grounds. The LIV queries whether and how this process will apply under a privatised system.

Similarly, the LIV queries who will exercise the powers, duties and functions of the Registrar of Titles as set out in the *Transfer of Land Act 1958* (Vic). If it is proposed that those powers, duties and functions be exercisable by a Chief Executive Officer of a private company, the LIV submits that the interests of the Victorian public will be compromised, given that the Chief Executive Officer has a legal duty to act in the best interests of the company shareholders.

Transparency and accountability

Presently, the Victorian Government is publicly accountable for the quality of the services provided by the Victorian land registry and for the cost of using such services. The LIV is concerned that a private operator of the registry must have regard to the responsibilities owed to its shareholders that arise from its more commercially-oriented services over and above the interests of the users of registry services and that this could result in resources being pooled into unregulated, profit-driven services and land registry services being scaled back to the bare minimum.

The LIV further submits that practitioners' level of trust held in a government entity is likely to differ significantly to that held when dealing with a private entity. The LIV considers that practitioners and customers currently trust the governmental systems in place, which is integral to the use of them.

Competition concerns

The Victorian land registry is, of necessity, a monopoly provider. A private operator of the registry may have no incentive to provide quality services at a reasonable cost when there is no competition. From

the consumer perspective, there is no option to use another land registry if the consumer is dissatisfied with the services provided or fees charged by a private operator.

The significance of how competition may be impacted by proposals to privatise land registry functions has been a driving factor internationally in maintaining such functions within the public domain, as demonstrated by recent events in the United Kingdom. During Easter 2016, the United Kingdom Government announced a £1 billion sale of the Land Registry, which maintains records on property ownership in England and Wales and is a natural monopoly. The proposal, which was ultimately abandoned in late 2016, attracted criticism from a range of groups, including lawyers, media firms, and the United Kingdom's competition watchdog, the Competition and Markets Authority (CMA). In relation to competition issues in particular, the CMA argued that permitting a private firm to obtain possession of property ownership information of the likes held by the Land Registry may cause significant problems for other businesses. The CMA warned that selling off the Land Registry would provide the new owner with a monopoly on commercially valuable data with no incentive to improve access to it. The CMA further argued that consumers and the economy would be best served by a model that promotes wide access to Land Registry data at cost reflective prices, encouraging its use and commercial exploitation by a range of individuals and businesses. The CMA considered that a privatised, vertically integrated Land Registry would be unlikely to deliver this outcome, despite the best efforts of oversight bodies to regulate prices and write safeguards into a contract or licence.

Consolidated Fund

The LIV queries what will happen to the State guarantee of title and payment of compensation for loss or damage (subject to some exceptions) under a privatised system. The LIV is concerned that use of private title insurance could be both expensive and ineffective based on experience with privatised domestic building contract insurance and title insurance as it operates in jurisdictions such as the USA.

Alternatively, if the State Government will continue to provide a State guarantee of title, the LIV queries how this will be funded and how errors in the register can be guarded against. Historically, the Registrar of Titles has been most diligent in minimising claims on the Consolidated Fund. The LIV is concerned that there may be a larger number of errors if a private operator has insufficient expertise or fails to be diligent, therefore incurring expenses that will ultimately fall to be met by Victorian taxpayers.

Consultation regarding changes

At present, there is a level of consultation regarding land registry process changes before they are implemented. The LIV is concerned that a private operator will not undertake any or adequate consultation regarding any process changes, and will not invite or accept submissions even if the proposed changes have an adverse impact.

The LIV also queries how processes regarding electronic conveyancing (which are continually evolving) can be updated or modified, if necessary, if the State Government ceases to have an adequate level of control over these in the hands of a private operator. For example, from a software development perspective, the LIV submits that with eight separate registries it will be practically impossible for coordinated software development to occur between the revenue offices, the registries, and PEXA. Moreover, the LIV considers that there will be little, or no, incentive for the privatised bodies to develop software in any case.

Data security, privacy and fraud

The Victorian land registry houses a significant volume of highly sensitive personal data relating to property titles. The privatisation of the land registry may compromise the security, accuracy, and privacy of this data, as governmental oversight controls may no longer be applicable, resulting in it being exploited for corrupt or fraudulent means. This issue appears to be even more pertinent with the transition to 100% digital lodgement announced by the Victorian land registry earlier this year.

Loss of staff expertise and jobs

The Victorian land registry employs highly-trained staff who possess the technical abilities and knowledge required to efficiently and effectively operate the land titling system. A private operator of

the registry may, with a view to making a greater profit, decide not to employ staff of a similar standard, resulting in a loss of technical expertise and an increase in the potential for errors to be made in legally complex transactions. Staff may also lose their jobs if functions are outsourced interstate or overseas.

The LIV further considers that, whilst a private operator is likely to deal with standard, straightforward transactions to the expected standard, it may not devote the necessary resources required with respect to processing complex transactions, adverse possession, and so forth (which are not likely to be profitable).

Increased consumer costs and GST

The LIV queries if the fees that can be charged by a private operator of the Victorian land registry will be regulated by the State Government to prevent price gouging. If only some of the services provided by the registry are regulated, the LIV is concerned that fees for unregulated services could be substantially increased as appears to have been the case in the Canadian provinces of Ontario and Manitoba. The Canadian experience has reportedly quadrupled costs to consumers and has led to other Canadian provincial governments calling a halt to their own privatisation plans. Public confidence in, and the integrity of, the land titles system are also likely to be undermined if the private operator attempts to profit from the sale of data relating to property titles.

It is questionable how effective governmental attempts at controlling the fees for services provided by a private operator of the land registry would be.

The LIV also notes that all registry fees will be liable to GST in the hands of a private company. This alone will result in a substantial increase in the costs paid for registration services, notably in relation to the maximum fees to lodge a transfer of land and the costs of registering larger plans of subdivision. As this is likely to be unpopular with the electorate, the LIV queries whether the State Government will require the private operator to absorb the GST initially, as happened in NSW. The LIV understands that, as a result of changing the GST treatment, the projected bids for the NSW sale were reduced by several hundred million.

Issues regarding core services

A private operator of the Victorian land registry might prioritise the input of resources into unregulated, profit-motivated services over the use of those same resources for the maintenance and improvement of the registry's core services. The property market, and the economy more broadly, may suffer from a reduction in the quality of services provided.

The LIV notes that Land Use Victoria provides additional services that promote more efficient and accurate use of the registry, free of charge. These include:

- guides to matters such as how to apply for a title by adverse possession and how to complete forms;
- Customer Information Bulletins; and
- SPEAR (Surveying and Planning through Electronic Applications and Referrals).

The SPEAR system has resulted in much faster processing of plans of subdivision by planning, subdivisional and referral authorities. The LIV queries whether:

- the proposed privatisation will impact on the SPEAR system; and
- other governmental authorities, such as Councils, who participate in SPEAR have been consulted regarding any practical issues that need to be resolved if privatisation takes place. In particular, statutory bodies may have concerns about data within SPEAR being available to a private operator.

The LIV wishes to know whether services such as those above will continue under a privatised land registry and, if so, whether they are likely to cease to be available free of charge.

Effectiveness of the private sector

It is not always strictly the case that the private sector is more efficient and effective at delivering public services as the public sector. A private operator of the land registry may not necessarily be able to deliver further efficiencies in the operation of the land titling system over and above the Victorian Government's current operation of the registry.

Scope for buy back

The LIV queries whether the Government will ensure that it has the right to either terminate the relevant agreement with the private operator or buy back any licence to operate the registry if this becomes necessary. Termination of the privatised arrangements could become necessary if the private operator went into liquidation or other issues that severely compromised the operation of the registry arose in future. The LIV is concerned that, even if there is such scope, it is likely to be at a significant cost to taxpayers.

Short term financial gain

The LIV submits that it is debatable whether the potential significant consequences of privatising the land registry are in any way offset by the short term financial gain that the Victorian Government will experience from the sale of the land registry. The privatisation of Government services, especially involving monopoly structures, has not, in the eyes of many, historically delivered the anticipated savings but, instead, heightened the costs for consumers. It is arguable whether the one-off short term capital receipt the Victorian Government will receive from sale of the land registry will provide greater value to the average Victorian than any future revenues from a land registry that remained in the public sector.

Heritage of Victorian land registry

The Torrens system of title has been operating in Australia for more than 150 years. The Victorian land registry is a bedrock of the Victorian economy; many regard it as innovative, efficient, secure, and able to provide high quality services to users as well as return significant revenue to the Victorian Government. In this context, the LIV queries the rationale underpinning proposed commercialisation of the Victorian land registry.

In light of the above, the LIV urges the Government to reconsider its proposed privatisation of the Victorian land registry.

We would welcome the opportunity to meet with you to discuss the above issues. In the meantime, please do not hesitate to contact me, Karen Cheng at kcheng@liv.asn.au or Patrick Fong at pfong@liv.asn.au.

Yours sincerely



Belinda Wilson
President
Law Institute of Victoria

CC. The Hon. Tim Pallas MP, Treasurer
tim.pallas@parliament.vic.gov.au

The Hon. Richard Wynne MP, Minister for Planning
richard.wynne@parliament.vic.gov.au

The Hon. Matthew Guy MLC, Leader of the Opposition
matthew.guy@parliament.vic.gov.au

The Hon. Michael O'Brien MP, Shadow Treasurer
michael.obrien@parliament.vic.gov.au

The Hon. David Davis MLC, Shadow Minister for Planning
david.davis@parliament.vic.gov.au