
From: Patrick Fong
Sent: Wednesday, 8 August 2018 11:41 AM
To: Michael Baker
Subject: For Your Attention - Letter from the Law Institute of Victoria's President - 'Commercialisation of Victoria's Land Titles Registry and the Mandated Use of PEXA'
Attachments: 20180808_LET_LP_PEXAandPrivatisationofLandUseVictoria_FINAL.PDF

Dear Mr Baker,

Please find attached a letter from the Law Institute of Victoria's President for your attention.

Kind regards,

Patrick

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Property and Environmental Law Section (PELS) | Technology and the Law Committee

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8 August 2018

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

By email: daniel.andrews@parliament.vic.gov.au

Dear Premier

Commercialisation of Victoria's land titles registry and the mandated use of PEXA

Introduction

The Law Institute of Victoria (LIV) is concerned by the most recent cyber security incident involving theft of money being paid as part of property transfers transacted using PEXA, in which a family lost \$250,000 from the settlement of their Melbourne property. The LIV considers that this incident, in addition to a variety of ongoing operational issues that practitioners have experienced with their use of PEXA, brings into question the merits of mandating PEXA's use by 1 October 2018 in the absence of PEXA guaranteeing the integrity of its systems from a security and service perspective. The LIV is also concerned that this cyber security incident is only one of multiple similar instances involving the redirection of settlement funds involved in the property transfer process under PEXA that have previously occurred.

The LIV further submits that the recent publicity of the security and service issues with PEXA intersects with the broader issue of the proposed privatisation of the Victorian land titles registry. The LIV is concerned that the owners of PEXA are effectively the same entities that are benefiting from, and responsible for, its mandated use. The LIV suggests that a privatised land titles registry would undo all of the checks and balances associated with the Torrens system of title which, when coupled with PEXA's security and service shortcomings, will result in serious consequences for practitioners and consumers. The LIV considers that it is now appropriate to revisit its opposition to the proposal.

The proposed privatisation of the land titles registry

In a letter dated 21 August 2017 (enclosed), the LIV detailed its primary concerns with the proposed privatisation of the land titles registry to you. On the basis of these concerns, which are summarised below, the LIV reiterates that it has serious objections to the proposal. The LIV repeats that it implores the Victorian Government to reconsider the proposal, given:

- It is questionable how the integrity of the land titles registry will be maintained under a privatised model;
- A privatised land titles registry will result in a loss of transparency and accountability;
- Consumers may suffer adverse effects from a competition and consumer law perspective if the land titles registry is privately operated;

- It is unclear what will happen to the State guarantee of title and payment of compensation for loss or damage (subject to some exceptions) under a privatised land titles registry;
- A private operator of the land titles registry may not engage in sufficient, or indeed any, consultation regarding matters such as process changes before they are implemented;
- The privatisation of the land titles registry may compromise the security, accuracy, and privacy of highly sensitive personal data relating to property titles that is held by the land titles registry;
- A privatised land titles registry is likely to result in a significant loss of relevant staff expertise and jobs;
- There may be a substantial increase in the level of consumer costs and GST if the land titles registry is privatised;
- The core services offered by the land titles registry may diminish in scope, availability, and/or quality under a privatised model;
- The private sector may not necessarily be more efficient and effective at delivering public services as the public sector;
- The adverse consequences associated with the proposal to privatise the land titles registry are unlikely to be offset by the short-term financial gain which the Victorian Government will experience from the sale of the land titles registry; and
- A move to privatise the land titles registry would ignore the heritage of the land titles registry as a bedrock of the Victorian economy and a central component within the Torrens system of title.

PEXA and electronic conveyancing

The LIV's broad comments above in relation to the proposed privatisation of the land titles registry are made against the backdrop of the most recent, and highly publicised, cyber security incident involving PEXA in June 2018.

In this scenario, a scammer obtained access to a conveyancer's email account and was able to fraudulently alter the destination account details for a settlement transaction. The practitioner then unknowingly inputted the fraudulent account details through PEXA to transfer the money into a newly opened bank account in the scammer's name, which resulted in a family losing \$250,000 from the settlement of their Melbourne property. Whilst the family was able to recover \$138,000 of the funds after the bank placed a freeze on the account, the scammer was able to escape with the remaining funds.

Whilst PEXA has publicly stated that, technically, its own system was not compromised, this incident demonstrates that there are substantial security weaknesses within the electronic conveyancing system and that it is not sufficiently robust. Further, whilst PEXA has indicated that it will be implementing changes to increase security in its system, it is questionable why these measures were not introduced much earlier, particularly given that:

- All combinations of transactions available in PEXA are to be lodged electronically by 1 October 2018 (that is, PEXA's use will be mandatory by this date);

- PEXA is reliant upon email that is fundamentally insecure for its communications;
- There is no verification process in PEXA to ensure that funds are directed to the correct account and there is no means of stopping a transfer once it has been made; and
- As at the time of the cyber security incident, PEXA only employed a simple password reset process that involved no verification and, further, there was the ability for significant changes to be made, such as creating a new user and changing the Financial Settlement Schedule, without any verification.

Most worryingly, the LIV understands that there have been multiple incidents involving settlement funds being diverted to bank accounts set-up by cyber criminals as part of the property transfer process within PEXA. The LIV is troubled that the June 2018 cyber security incident was not strictly an isolated event and that there is a distinct possibility of recurrences if appropriate and adequate action is not taken immediately by PEXA.

From a consumer protection perspective, the LIV is concerned that events such as the June 2018 cyber security incident involving PEXA described above are most likely not protected by the statutory compensation scheme, the Fidelity Fund. The LIV understands that if the funds in this incident had, instead, been hacked in a solicitor's trust account, the consumer may have had the benefit of making a claim against the Fidelity Fund for compensation.

In addition to the recent cyber security incident cited above, the LIV has also received feedback on a number of operational issues that have caused considerable concern for practitioners regarding PEXA. These include, for example:

- Users of PEXA's helpline are often forced to endure significant waiting times before receiving assistance, which suggests that the PEXA helpline may be understaffed;
- There have been instances where settlements have been delayed because practitioners could not access PEXA's helpline to receive assistance with time-critical problems;
- Many practitioners have found PEXA to be expensive to set-up, laborious to use, and costly to continue maintain and run. This is particularly the case for practitioners who do not use PEXA on a regular basis;
- Successfully using PEXA involves a steep learning curve; and
- PEXA has experienced system outages due to, for example, server overload, which has interfered with the finalisation of settlements.

Given the repeated security weaknesses that have been demonstrated by PEXA, in addition to its operational shortcomings, the LIV considers that the Victorian Government's mandate that all combinations of transactions available in PEXA be lodged electronically by 1 October 2018 should be postponed until all issues with PEXA are rectified and that there is at least one competitor to PEXA present within the electronic conveyancing market.

In addition, the LIV suggests that the broader mandated use of electronic conveyancing should not be fully implemented and enforced until sufficient public consultation has occurred with a range of relevant bodies, such as the Victorian Legal Services Board + Commissioner, the Legal Practitioners' Liability Committee, the Australian Institute of Conveyancers, and the Real Estate Institute of Victoria.

Conclusion

The LIV remains a strong advocate for robust safeguards to be implemented to protect consumers and practitioners in the use of electronic conveyancing and for the land titles registry to remain within the public sector.

We would welcome the opportunity to meet with you to discuss the above issues. In the interim, please do not hesitate to contact me or Patrick Fong of the LIV's Property and Environmental Law Section at PFong@liv.asn.au

Yours sincerely



Belinda Wilson
President
Law Institute of Victoria

cc. Michael Baker, Secretary, Parliament of Victoria Legislative Council Environment and Planning Committee

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Encl.

21 August 2017

The Hon. Daniel Andrews MP
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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

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