



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:MTgl1198503

20 September 2016

The Hon. Gladys Berejikian, MP
Treasurer and Minister for Industrial Relations
GPO Box 5341
SYDNEY NSW 2001

Dear Treasurer,

Land and Property Information NSW (Authorised Transaction) Bill 2016 (“Bill”)

The Law Society has previously expressed its in principle opposition to the proposed privatisation of Land and Property Information (LPI). It remains our view that the titling and registry functions of LPI should continue as core government functions.

The Law Society has appreciated Treasury briefings concerning the proposed privatisation, as well as Treasury’s follow up on the various issues which we have raised.

1. Privatisation of the titling and registry functions of LPI

It is a core function of government to deliver an effective and reliable land titling service to protect the real property rights of the people of NSW. By its nature, the Torrens title register is a monopoly for the creation, grant and disposal of interests in real property and belongs wholly within government.

The hallmark of the Torrens title system is the guarantee of title. In NSW, this State guarantee is supported by the operation of the Torrens Assurance Fund. The Law Society has difficulty in reconciling the continued effective operation of the Torrens Assurance Fund in the event the land titling service is run by a private operator.

The justifications for the privatisation of public assets usually lie in the need for a large scale injection of capital into an industry or to address significant underperformance by a government agency. Neither rationale appears to apply in this instance. In fact, the NSW land titling system serves as a model, both nationally and internationally, for best practice and innovation. LPI’s land titling service arm operates profitably and is at the forefront of digital developments, such as the implementation of electronic conveyancing.

The sole justification for the privatisation of the LPI appears to be a one-off injection of funds into consolidated revenue. The risk for the people and economy of NSW is that a failure by the private operator to maintain the reliability and integrity of the Torrens register could have much wider consequences, including a loss of public confidence in

the land titling system. If reliability is under threat or lost, remedial action by the Government will be required. However the damage may be irreparable, and over time, the skills required to maintain and operate the system may have been lost.

If privatisation proceeds, real regulatory oversight of any private operator will be critical. This new regulatory oversight must be sufficiently resourced; otherwise this poses a further unacceptable risk.

The Law Society is also concerned at the lack of public consultation and transparency in relation to the privatisation of the titling and registry functions of LPI. No public consultation has occurred to date and very few details of the proposed model have been made public.

2. General comments on the Bill

We note that the Bill is only part of the privatisation documentation, making it difficult to fully understand how the privatisation model will operate. The other key documents include:

- the concession agreement with the private operator;
- the delegation instrument;
- the operator service standards; and
- the regulations to be made under the Bill.

The Bill appears to have been drafted from a minimalist perspective – too much of the detail has been left to the other key documents which are likely not to be scrutinised by the Parliament or the public. In our view it is unacceptable for Parliament to be asked to authorise the transaction when much of the key information will be contained in other documentation which will most likely be *commercial-in-confidence*.

As much as possible, this Bill needs to contain the guiding principles that underpin the terms of the concession agreement. While we appreciate that the Government will require some degree of flexibility for commercial negotiations with any potential private operator, the Bill should reflect all of the essential non-negotiable aspects of the privatisation model to facilitate appropriate Parliamentary oversight and to better protect the people of NSW. At present too much of the detail appears to have been left to the concession agreement, leaving open the unacceptable possibility that essential public protections may be lost in the commercial negotiation process.

Clause 13 of the Bill contains some broad references indicating some of the proposed safeguards. However the necessary detail will appear in the concession agreement which is likely not to be scrutinised by the Parliament or the public.

While we support subclause 13(2)(a), this provision should be drawn more widely to protect the data supplied in connection with the Register, not just the Register itself.

We understand that part of the Government's rationale to privatise the titling and registry functions of the LPI is that a private operator is better placed than the Government to invest in technology and infrastructure. Yet the Bill does not contain any mention of an obligation on the private operator to make such investment. The concession agreement may contain such an obligation, but Parliament and the public are unlikely to see the concession agreement.

3. Concerns with specific provisions of the Bill

Clause 15 *Liability of authorised operator for compensation:*

A provision that the operator will have no liability for the loss or damage referred to in section 120 of the *Real Property Act 1900* is surprising and concerning. Presently, parties are compensated for such loss or damage by payment out of the Torrens Assurance Fund (effectively, the Consolidated Fund).

We anticipate that the concession agreement will contain an indemnity from the operator in relation to loss or damage caused by the operator, including loss or damage referred to in section 120 of the *Real Property Act 1900*. This is not reflected in the Bill, but should be, due to its importance.

Clause 16 *Penalty provision in authorised concession arrangements*

We note that the concession agreement may include a penalty regime for failure to meet the operator service standards. This would appear appropriate for service level agreement and key performance indicator ("KPI") type requirements but without knowing the operator service standards it is difficult to comment further. We are also concerned that the Bill allows for a cap to be put on the penalties. If there is to be a cap, it should be public.

Clause 18 *Further authorised concession on termination of authorised concession:*

We note that if the original concession agreement is terminated, a further concession is authorised for a new term of 35 years. In our view the re-tender concession must be limited to the **remaining term** of the original authorised term. For example, if there is a termination in year 20, the re-tender concession should be limited to 15 years. For appropriate Parliamentary oversight, the re-tender concession must be limited to the remainder of the original authorised term. If the concession arrangement has broken down such that a termination has occurred, it is appropriate for the arrangement to be reviewed by Parliament sooner. The Bill should be amended so that any further authorised concession must only be for the residual years remaining of the original 35 year term.

It is not beyond contemplation that a consensual termination could be sought to facilitate a re-tender. If the Bill retains the ability to re-tender for a new term of 35 years, which we strongly oppose, it must be limited to circumstances where the concession is terminated for the operator's breach.

Clause 40 *Revenues of authorised operator*

The intent of subclause (2) seems to be to entrench payment into the Torrens Assurance Fund of an amount from fees paid to the operator. This is welcome, but should also be supported by appropriate audit and recovery processes and reflected in other key documentation.

Sch 4 Amendment of Acts

4.3 Government Information (Public Access) Act 2009 No 52

15 Information about authorised transaction under Land and Property Information NSW (Authorised Transaction) Act 2016

The Law Society has strong concerns with the breadth of the exclusion from public access of information contained in *any* document prepared *for the purposes of or in connection with the transaction* that is the subject of the Bill, unless disclosure has been approved by the Treasurer. These concerns are exacerbated by the lack of public disclosure that has occurred to date, and the fact that significant information of public interest will be contained in the concession agreement and associated documents.

We believe that the private operator should be subject to the *Government Information (Public Access) Act 2009* ("GIPA Act"). We request that the Bill and the concession agreement make clear that the private operator must comply with any requests received from the Registrar-General under the GIPA Act, even if it is not itself subject to the GIPA Act. This obligation to comply with requests for information should be in addition to the Registrar-General's ability to require such information from the private operator as it deems fit.

4. Additions to the Bill

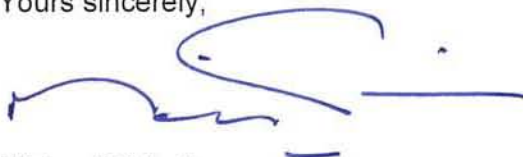
We suggest that provisions be added to the Bill in relation to the following matters:

- Periodic independent review of the operator service standards and fees. We suggest every five years would be appropriate;
- Additional provisions in respect of the oversight by the Registrar-General of the operator. Oversight via a set of KPIs to be set out in the concession agreement is not sufficient;
- Minimum provisions/requirements of the concession agreement by expanding clause 13 of the Bill or some other means.

We continue to oppose the privatisation of the titling and registry functions of LPI. If the privatisation does proceed, we wish to ensure that sufficient safeguards and the critical obligations of the private operator are enshrined in the legislation to better protect the integrity of the register and the people of NSW.

Please do not hesitate to contact my office on (02) 9926 0215 should you wish to discuss this letter.

Yours sincerely,



Michael Tidball
Chief Executive Officer