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The Secretary
Environment and Planning Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002
Via email: landusevic@parliament.vic.gov.au

Dear Secretary,

Submission to Inquiry into the Proposed Long Term Lease of Land Titles and Registry Functions of Land Use Victoria

The ACCC welcomes the opportunity to provide its views in relation to the key matters relevant to the privatisation of Land Use Victoria.

The ACCC has expressed concerns for a number of years about the impact on competition of the privatisation of public assets. The ACCC has been calling for governments to ensure competition issues are addressed in structuring privatisation arrangements and to put in place appropriate and effective regulatory arrangements before privatisation is concluded.¹

The ACCC emphasises the need for an appropriate regulatory framework to be in place prior to the commencement of the 40 year lease. The regulatory regime also needs to be sufficiently flexible to adapt over this term, particularly in light of the potential for technological innovation in registry services. The risks of not having appropriate up-front regulation include the potential for enduring unconstrained market power leading to stifled innovation, restricted access to registry services for operators in related markets, and higher prices and less efficient services for consumers. An appropriate regulatory framework should address these risks.

Privatisations

The ACCC Chair has consistently expressed the view that governments which prioritise the maximisation of sale proceeds do so at the expense of allowing for a longer-term competitive market structure or putting in place sufficient regulatory oversight.²

The ACCC has publicly and strongly advocated the need for competitive market structures and appropriate regulatory frameworks, relating specifically to access and pricing, to be in place prior to the privatisation of bottleneck infrastructure with monopoly characteristics.³

¹ See for example: <https://www.accc.gov.au/speech/ports-what-measure-of-regulation> and <https://www.accc.gov.au/media-release/privatisation-needs-smarter-regulation>

² Ibid

For example, the ACCC has advocated for this approach in relation to the privatisations of Port of Melbourne⁴ and Utah Point Bulk Handling Facility, and the proposed privatisation of Port of Fremantle. Similarly, the ACCC is advocating for appropriate regulatory oversight of privatised major airports. The ACCC has also previously advised the federal government in relation to the proposed privatisation of the ASIC registry, and the South Australian and New South Wales governments in relation to the privatisation of their respective land registries.

The ACCC considers that the privatisation of government assets, if implemented appropriately, can result in greater levels of overall economic efficiency that benefits the interests of users and the wider community. The privatisation process should therefore be focussed on achieving competitive and efficient outcomes to protect the long-term interests of users and consumers, as private owners develop operating efficiencies and innovative ways of delivering services to customers. Where there is, or is likely to be, an absence of competition due to monopoly or near monopoly characteristics, there must be appropriate structural frameworks put in place as part of the privatisation process.

Reliance on general competition law is not an acceptable alternative to regulation where there are inherent monopoly characteristics. Tailored regulatory frameworks are required to address industry-specific access and pricing issues up front.

In the ACCC's experience, three particular problems can arise when competition and regulatory issues are not adequately considered and addressed as part of the privatisation process:

- a) worsening or entrenching a market structure that is not sufficiently competitive, or impeding the development of a market structure that could yield considerable benefits if it was made more competitive
- b) selling a monopoly or near monopoly asset to a bidder with existing or potential upstream or downstream interests in related markets, without ensuring that appropriate third party access arrangements will exist, and
- c) selling monopoly or near monopoly assets without sufficient controls on pricing, to ensure that excess public monopoly returns are not merely transformed into private monopoly excess returns

While the ACCC cautions against imposing unnecessary restrictions on firms' abilities to participate in markets, the ACCC recommends governments implement a sound regime at the beginning of a privatisation process and consider the necessity of vertical separation where the sale of an asset is likely to confer enduring market power.

Attempting to impose a sound regulatory structure after the assets have been transferred to private ownership and operation is inevitably more complex and potentially impossible compared with a well thought out and implemented regime pre-transfer.

Land Registries

The ACCC understands that during the term of lease to the private operator the State will continue to perform a number of functional and oversight roles. These include the State's retention of the existing statutory role of Registrar of Titles, LUV's Subdivision and Applications and Survey branches, Strategic Land and Information branch, and various services within Land Use Victoria to support these retained functions.

³ See for example: <https://www.accc.gov.au/speech/ports-what-measure-of-regulation>

⁴ <https://www.accc.gov.au/about-us/consultations-submissions/accc-submissions#privatisations>

The need for appropriate regulatory arrangements applies equally to traditional physical assets and digital assets and related services. The ACCC has previously considered this issue in its engagement with the South Australian and New South Wales governments in relation to the privatisation of their respective land registries. Several key principles are important to establishing a successful framework. These key principles are:

- market structure;
- regulatory structure; and
- transparency.

Market structure

Complete vertical separation is the ACCC's preferred outcome for privatised monopolies. This is because it removes the motivation for the private registry business operator to favour its own operations in related markets, such as the information brokering or electronic lodgement network operator (ELNO) markets, at the expense of others. Even if a private operator has no upstream or downstream interests at the time of sale, the transaction may provide them with incentives to vertically integrate into related markets in future and potentially hinder new entrants.

The ACCC's position is that regulatory arrangements such as detailed ring-fencing or functional separation of resources are an inferior option compared to complete vertical separation. Ring fencing arrangements do not remove an operator's incentive to discriminate, even though they may constrain the operator's ability to do so. If ring fencing rules are adopted, the ACCC also notes the importance of governments consulting, to identify and address any potential industry-specific discriminatory behaviour and ensure that effective ring fencing provisions are drafted to mitigate such behaviour.

Information barriers separating operators from related entities (whether ELNOs or entities in the retail and wholesale markets) are necessary to ensure that the related entities do not obtain an advantage over competitors, and so that competition is not hindered in these markets.

The ACCC has also considered how the privatisation of a land registry business may affect future competition in the ELNO market. In particular, Property Exchange Australia (PEXA) is currently the only approved ELNO operating in the market. The Committee is no doubt aware of the potential for the future IPO or trade sale of PEXA. This issue is important and should be considered in the commercialisation of Land Use Victoria.

Given the infancy of the ELNO market in Australia there are also as yet unidentified consequences for competition emerging in this market. ARNECC has a key role in determining the operating requirements & participation rules for ELNOs and the ACCC has been engaging with ARNECC in relation to the future regulatory structure for e-conveyancing.

Overall, the ACCC notes it is difficult to forecast how competition will emerge in the area of digital assets and related services, noting that yet unidentified platforms may be developed. Given the 40 year duration of the proposed land registry concession it is important the arrangements do not foreclose the prospect of further competition emerging, or stifle innovation in land registry services or related markets. Such an outcome would be to the detriment of consumers.

Regulatory structure

The ACCC's examination of previous land registry privatisations highlighted that a carefully designed structure to ensure effective regulatory oversight and a framework that encourages investment and a sharing of returns between operators and users is paramount.

Pricing constraints

The ACCC understands that the proposed pricing regime will enable the successful private operator of Land Use Victoria to adjust fees for non-statutory services capped at Melbourne CPI for the 40 year term of the lease.

The ACCC calls for consideration of the appropriateness of the price metric over the life of the concession. A CPI annual price cap can go some way to address concerns about monopoly pricing. However, such prices may not reflect efficient costs over the duration of the concession. The initial prices (at the time of privatisation) may not reflect efficient costs. Over time, increasing volumes and efficiencies could mean that the average cost of providing land registry services decreases while revenues increase due to both higher volumes and prices. This could increase the gap between costs and revenues and result in monopoly rents. The ACCC recommends the State include periodic price reviews in the concession deed to ensure cost-reflective pricing outcomes.

Non-discrimination

The ACCC considers it is necessary for the private operator to have obligations to provide non-discriminatory access to both ELNOs and the downstream information service providers. This would require the private operator to provide equal opportunity access to its wholesale competitors and downstream resellers, rather than allowing the private operator an advantage in accessing registry services.

State enforced non-discrimination provisions are important to prevent the private operator from being able to leverage its market power.

In order to enable equal opportunity access for customers of wholesale data, the ACCC considers it necessary for standard customer terms and pricing to be available to all customers. The ACCC notes the provision of such terms would not preclude parties negotiating alternative mutually acceptable access arrangements.

Dispute resolution

Concession terms must contain recourse to independent dispute resolution and arbitration mechanisms for price and terms, and conditions of access for both downstream resellers and ELNOs.

The types of matters that may give rise to disputes include the timeliness, format and delivery method for data provision. Disputes could also occur due to the private operator's ability to place obligations on the downstream resellers regarding privacy protection, data security, and any sub-contracting arrangements where data would be provided to third parties.

It is important that all parties requiring access to registry services, including operators in related markets and consumers, have access to independent dispute resolution. If a private operator has control over dispute resolution proceedings, customers are unlikely to have sufficient recourse to resolve disputes when their dispute is against the private operator. Independent dispute resolution (e.g. by the State) provides a backstop to commercial negotiation to ensure that access is provided on reasonable terms.

Compensation arrangements

The ACCC has previously considered the use of compensation arrangements and clauses that provide the incumbent with preference ahead of potential new entrants, for example first right of refusal clauses. The ACCC notes that such arrangements have been used to provide certainty for investors in past asset sales. Efficient cost recovery principles are enshrined in established regulatory frameworks, such as the National Electricity Rules and National Gas Rules. However, that is different to providing open ended or unclear compensation arrangements or mechanisms that may impede future competition.

While the ACCC appreciates that governments have a range of interests to consider, the ACCC has consistently said that it is important that privatisation does not create or maintain a market structure that will hinder future competition. If the proposed lease is to contain any compensation arrangements, such as monetary compensation in the event of the entry of a competitor, then any expected benefits should be considered against the potential detriment. This is particularly important for land registry privatisations, where there is potential for disruptive technologies to provide scope for competition to emerge in new ways, to the benefit of end users and the wider community. The ACCC is concerned compensation or preference arrangements could undermine such technological innovation by new entrants. The scope of any compensation or preference arrangements should be carefully formulated and include time limitations shorter than the 40 years of the arrangement.

Compliance monitoring and enforcement

Appropriate regulatory arrangements must be supported by effective monitoring and compliance tools. The ACCC notes an independent entity is best placed to monitor and enforce the private operator's compliance with regulation.

Transparency

It is important for any future privatisation or long-term lease arrangement to be transparent regarding its regulatory framework, scope for entry and processes for review.

Clarity surrounding these processes, and any subsequent adjustments, provides all parties - including consumers, wholesale parties, and potential new entrants of related markets - with assurances regarding the protections afforded to them by the regulatory regime. Transparency increases the effectiveness of dispute resolution arrangements and also boosts operator accountability.

The ACCC recommends the publication of regulatory functions and obligations, including key aspects of the regulatory regime along with any access policies and complaint processes.

Conclusion

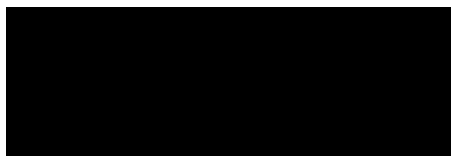
The ACCC reiterates that it is not opposed to privatisation of infrastructure assets and considers that there are many economic benefits that can be realised through this process. However, for the longer-term benefits of privatisation to be realised, governments must give appropriate prioritisation to the need to allow the development of future competitive markets. The ACCC is strongly of the view that ex-ante regulatory and market structure arrangements that form part of the privatisation process are preferable to relying on ex post initiatives.

The ACCC also notes the importance of consulting with industry representatives when developing regulatory arrangements to determine the specific competition issues and types of discriminatory behaviour that may arise. Routine reviews of the framework are also an important measure due to the potential for future innovation and technological advancements in respect to information and data services.

The ACCC strongly encourages the implementation of fit for purpose regulatory arrangements that are clearly communicated to potential operators, relevant users and customers of land registry services.

If you would like to discuss any aspects of this submission, please contact Michael Cosgrave on 03 [REDACTED].

Yours sincerely

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Cristina Cifuentes
Commissioner