

22 June 2018

The Hon. David Davis MLC
Chair
Standing Committee on the Environment and Planning
Parliament House
Spring Street
East Melbourne Vic 3002

Dear Chair,

Submission on the *Inquiry Into the Proposed Long Term Lease of Land Titles and Registry Functions of Land Use Victoria*

1. I am pleased to provide this submission to the Standing Committee on the Environment and Planning's (the **Standing Committee**) *Inquiry into the Proposed Long Term Lease of Land Titles and Registry Functions of Land Use Victoria* (the **Inquiry**).
2. As Information Commissioner, I am the primary regulator for the *Privacy and Data Protection Act 2014* (Vic) (the **PDP Act**) and the *Freedom of Information Act 1982* (Vic) (the **FOI Act**) in relation to the privacy, data protection and freedom of information (**FOI**) obligations of public sector organisations and agencies in Victoria.
3. My responsibilities under the FOI Act and the PDP Act include handling privacy and FOI complaints about agencies, reviewing FOI decisions and conducting audits, examinations and investigations on my own motion. I am also responsible for issuing protective data security standards and FOI professional standards. The functions of my role also include providing education and guidance to the public and agencies about privacy, data protection and FOI.
4. I am assisted in carrying out my functions by two Deputy Commissioners, Ms Rachel Dixon, Privacy and Data Protection Deputy Commissioner, and Ms Joanne Kummrow, Acting Public Access Deputy Commissioner, along with my staff in the Office of the Victorian Information Commissioner (**OVIC**).
5. This submission primarily addresses the Inquiry's second term of reference – the risks to privacy and data security of sensitive data held by Land Use Victoria (**LUV**) – in the context of the PDP Act. It also discusses the impact of the proposed transaction on access to information under the FOI Act, with reference to the Inquiry's first term of reference – the implications for the ongoing integrity of the land use system in Victoria.
6. As reported to the Standing Committee by representatives of the Department of Treasury and Finance (**DTF**) on 6 June 2018, OVIC has engaged with DTF in relation to the proposed transaction for the long term lease of LUV land data. This submission is informed by our discussions with DTF.

Overview and recommendations

7. Regulatory oversight mechanisms for the land titles and registry functions in relation to data protection, privacy and FOI will move from a regime under legislation passed by Parliament to a regime that is made up of a combination of legislation and contracts negotiated by the Operator and the Government. This will necessarily alter the way in which individuals can expect their information rights, currently protected under statute, to be maintained and enforced.
8. On the basis of OVIC's discussions with DTF, I understand that the Government has given significant thought to how best to preserve the information rights of Victorians in the context of commercialisation of the relevant activities. This submission comments on a number of specific issues raised by the proposed transaction, and makes suggestions for how those issues might be addressed. However, it is my view that the commercial nature of the transaction itself will necessarily and substantially change the dynamics of the land titles system, and the incentives that apply to those who participate in it. Some changes to information rights and how they can be exercised by Victorians are inevitable. This should be carefully considered, given the long term of the proposed lease.
9. The Standing Committee may wish to consider recommendations along the following lines, should the transaction proceed:
 - a. the Registrar or the Operator should be required to prepare clear communication about the new arrangements, for the benefit of community members seeking to understand and enforce their information rights;
 - b. the Operator should be subject to a data breach notification obligation, requiring it to notify OVIC of data breaches involving personal information; and
 - c. the privacy implications of any proposed new product be required to be considered by conducting an independent Privacy Impact Assessment, to assess any impacts an initiative will have on individuals' privacy, and to identify outstanding privacy issues that need to be addressed.

Application of the PDP Act and FOI Act to LUV and to the Operator

10. DTF has advised OVIC that the transaction documents incorporate measures that ensure privacy and data security underpin the proposed transaction. However, the move to a private operator will necessarily change the way in which existing information rights are accessible to the Victorian community in respect of land titles and registry functions.
11. At present, the relevant land titles and registry functions are carried out by LUV, which is a Victorian public sector organisation for the purpose of the PDP Act,¹ and an agency for the purpose of the FOI Act.² Accordingly, LUV has statutory obligations under the PDP Act and FOI Act and is subject to regulatory oversight by OVIC.
12. Under the proposed transaction, however, I understand the Operator will deliver products and services under contract with the Registrar of Titles (**Registrar**) and the State.

¹ Section 13, PDP Act.

² Section 4, FOI Act.

Privacy

13. I understand that the Operator will assume statutory obligations under the PDP Act as a 'contracted service provider'.³ This will have the effect of binding the Operator to information privacy obligations under Part 3 of the PDP Act, to the extent the Operator delivers services under a State contract. It will be required under contract to comply with the Information Privacy Principles (the **IPPs**) in Schedule 1 of the PDP Act.
14. The IPPs outline how Victorian public sector organisations must handle, use and manage personal information. 'Personal information' is, in summary, information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion. Much of the land titles and registry information that is held by LUV and the Registrar is personal information, as it relates to transactions that involve identifiable individuals, such as buyers and sellers of property.
15. As a contracted service provider, the Operator must comply with the IPPs, and individuals may make a complaint to OVIC where the Operator has interfered with their privacy. However, any activities undertaken by the Operator, other than for the purpose of the State contract, will not be subject to the PDP Act. Rather, they will be regulated under the Commonwealth *Privacy Act 1988* (Cth) (the **Commonwealth Privacy Act**).

Data protection

16. With respect to data security, Part 4 of the PDP Act provides for the Victorian Protective Data Security Standards (the **Standards**), which are a set of criteria for the consistent application of risk-managed data security practices across Victorian government information.
17. DTF has advised that the Operator will be required to comply with the Standards, both under specific terms in the contract and through the Operator's obligations under the PDP Act. We understand that it is intended that the Operator will be prescribed as a 'body' to which Part 4 of the PDP Act applies, by way of an Order of the Governor in Council.⁴ This would have the effect of binding the Operator to Part 4 of the PDP Act. However, certain regulatory mechanisms in the PDP Act will not apply to the Operator, as discussed below.

Freedom of information

18. The FOI Act provides a right to access a 'document of an agency', which is defined in the FOI Act as a document in the possession of an agency, whether created in the agency or received by the agency. According to case law, 'possession' includes not only actual or physical possession, but 'constructive possession', which is 'the right and power to deal with a document in question'.⁵
19. The FOI Act will not apply directly to the Operator. However, although a document held by the Operator could not be obtained via an FOI request made to the Operator directly, it could be sought via an FOI request made to the Registrar, so long as the Registrar has constructive possession of the document.
20. Based on OVIC's discussions with DTF, I understand the Registrar will have a right of immediate access to many documents held by the Operator, and the Operator will be required to assist the Registrar in responding to any FOI requests the Registrar may receive.

³ Section 4(3), PDP Act.

⁴ Section 84(3), PDP Act.

⁵ *Guide Dog Owners' and Friends Association and Commissioner for Corporate Affairs* (1982) 2 VAR 205, [408].

Implications of the move from a public to a private model

Reduced Parliamentary scrutiny over changes to information rights

21. At present, privacy and data protection obligations are imposed on LUV by the PDP Act. These obligations can only be modified by the passage of legislation through the Victorian Parliament. In contrast, under the proposed transaction, the Operator will be bound by a combination of legislation and contract. Contracts can be modified by agreement between contracting parties. It is possible that the obligations placed on the Operator could be modified by agreement between the Operator, the State and the Registrar without direct Parliamentary oversight.

Risk of public confusion due to increased complexity

22. DTF has advised OVIC that, in practice, the contractual arrangements are intended to provide for a seamless transition from statute-based rights to a combination of statute-based and contract-based rights. The current statutory and non-statutory services offered by LUV will be delivered by the operator, under LUV branding.
23. However, as outlined above, the underlying legal rights and obligations will change if the commercialisation proceeds. As a contracted service provider, the Operator will be bound by Part 3 of the PDP Act only to the extent that it is acting under the State contract. Any future services the Operator offers that fall outside the scope of the contract would most likely not be subject to the IPPs and other information privacy obligations under the PDP Act, but would be subject to the Commonwealth Privacy Act.
24. Although the privacy protections in the Commonwealth Privacy Act are largely equivalent to those in the PDP Act, there is a possibility that the potential applicability of two different regimes with two different government regulators and complaint handling bodies will cause confusion for community members seeking to understand or enforce their information rights. I consider it is important that steps are taken to ensure the regulatory oversight framework is effectively communicated.
25. Accordingly, I suggest the Standing Committee consider making a recommendation that the Registrar or the Operator prepare clear communication about how information rights will be maintained and how they can be enforced by community members should the proposed transaction proceed. By way of example (and not limited to):
 - a. where and by whom the personal information of Victorians affected by this transaction will be held;
 - b. how the personal information of Victorians affected by this transaction will be handled and used;
 - c. whether the Operator or the Registrar is to receive privacy complaints and under which Act (the PDP Act or the Commonwealth Privacy Act);
 - d. whether the right to access under the FOI Act, IPP 6 in the PDP Act, and APP 12 in the Commonwealth Privacy Act is available; and
 - e. how members of the public can seek assistance in the event that a person seeks review of a decision to refuse access to documents under the FOI Act, or cannot resolve a privacy complaint with either Registrar or the Operator.

Certain regulatory and coercive powers of OVIC will not apply directly to the operator

26. Should the proposed transaction proceed, the current privacy obligations of LUV will apply to the Operator, as a contracted service provider, in respect of the transferred statutory and non-statutory functions. Similarly, the Operator is intended to be bound by Part 4 of the PDP Act, by way of an order of the Governor in Council. However, it will not be subject to the full oversight and assurance scheme under the PDP Act.
27. Certain powers in Part 6 of the PDP Act, which allow me to seek assurance from public sector organisations of their compliance with the PDP Act, will not apply to the Operator following the proposed transaction. These powers include the ability to request access to public sector data and data systems,⁶ which operate for all other bodies subject to Part 4 of the PDP Act.
28. Based on OVIC's discussions with DTF, I understand that the Registrar will have the right to compel the assistance of the Operator, and the Operator will be required to assist the Registrar in responding to any PDP-related issues that may arise. Although this does provide a mechanism for OVIC to scrutinise the privacy and data protection practices of the Operator, the absence of a requirement for the Operator to assist OVIC directly may make it more difficult for OVIC to ensure the Operator is complying with its PDP Act obligations.

Freedom of Information rights

29. The Standing Committee may also wish to consider the implications of the transaction for the public's right to access information under the FOI Act.
30. Currently, we understand that information relating to the relevant land titles and registry functions are documents of LUV, and are subject to the general right of access in s 13. As outlined above, although FOI requests cannot be made directly to the Operator, I understand that many documents held by the Operator will be a document of an agency, because they will be in the Registrar's constructive possession. As such, individuals will be able to seek access to information held by the Operator (to the extent the information is in the constructive possession of the Registrar and is not exempt) through an FOI request to the Registrar.
31. However, corporate and other documents that relate to the general activities of the Operator may not be subject to FOI, or may be subject to exemption claims because of commercial sensitivities that did not previously exist. Although the law on constructive possession is relatively clear, there may be scope for dispute over which documents of the Operator are in the constructive possession of LUV. This is likely to result in a practical reduction in the scope of material that will be accessible to FOI applicants as a result of the commercialisation. For example, in the event prices were to rise for currently available products and services provided by LUV, it may be difficult or impossible for the public to obtain commercial information substantiating the need for price rises.

Protection of privacy rights into the future

32. It is important that over the life of the long-term lease, individuals' privacy rights are maintained. Based on our discussions with DTF, OVIC has three suggestions for how privacy outcomes can be improved.

Privacy governance

33. As would be expected of a transaction of this nature, OVIC understands that the arrangement will be overseen by some form of consultative body to provide ongoing monitoring and review of the commercialisation arrangements. Such a body could have a role in overseeing the privacy impacts of

⁶ Section 106, PDP Act.

the arrangement. This may include appointing a suitably qualified person to the body or drawing on the expertise of an independent privacy professional from time to time as required. I would like to stress, in encouraging this attention, that privacy and security are not the same things, and that this would not be resolved by appointing a data security expert to the consultation committee.

Consideration of privacy issues when approving new products

34. In addition to performing statutory and non-statutory functions currently performed by LUV, I understand the Operator may propose new products that make use of land titles data in a different way, subject to State approval.
35. OVIC recommends that the privacy implications of any proposed new product could best be considered by conducting an independent Privacy Impact Assessment (PIA). A PIA is a tool that assesses any impacts an initiative will have on individuals' privacy and can identify outstanding privacy issues that need to be addressed.
36. Given the significance of the data held by the operator, and the number of individuals whose personal information is likely to be involved in delivering new products, PIAs should be conducted by a third party with appropriate expertise. The State should be satisfied that the privacy protections the Operator will build into any new products are of a high standard prior to approving any new offering.
37. While I acknowledge there may be commercial sensitivities associated with publishing information about new products, I suggest the process for approving new products should be made as transparent as possible. This would assist in maintaining community trust in the land titles system.

Requirement to notify OVIC of data breaches

38. Given the nature of the data that will be handled by the Operator, the impact of a data breach on individuals could be significant.
39. To ensure that any issues in information handling practices can be quickly identified, remedied and learnt from, I recommend the Operator be subject to a data breach notification obligation, requiring it to notify my office directly of data breaches involving personal information.
40. After being notified of a data breach, my office works with an affected organisation to ensure that any impact on individuals' privacy is minimised, and that the organisation amends its practices to avoid any further breaches.
41. Although there is no requirement under the PDP Act for LUV to report data breaches to my office currently, I consider such a mechanism would provide an added level of transparency on the Operator that may also assist in addressing any concerns about its accountability under the proposed transaction.
42. Many of the Operator's activities will not be subject to the Federal notifiable data breaches (NDB) scheme in the Commonwealth Privacy Act, which requires certain data breaches to be reported to the OAIC. The NDB scheme does not apply to the activities of organisations acting under State contract. Therefore, any acts or practices of the Operator that are carried out under State contract are exempt for the purposes of the Commonwealth Privacy Act,⁷ meaning the NDB scheme will not apply.

⁷ Section 7B, Commonwealth Privacy Act.

Concluding remarks

43. OVIC would be pleased to assist the Standing Committee further with its Inquiry.
44. We will also continue to engage with DTF with a view to assisting it to ensure privacy and data security underpin the proposed transaction.
45. Finally, should the proposed transaction proceed, I and my Deputy Commissioners will offer to work with the Operator and the Registrar closely to ensure that the information rights of Victorians continue to be protected under the new arrangements.

Yours faithfully

Sven Bluemmel[✓]
Information Commissioner