Draft discussion paper

The Privatisation of Registers – Thoughts from Australasia

To make land as easily transferable as stock would be one of the greatest economical improvements that could be bestowed on a country.[1]

Introduction

There is no doubting the value of "big" data. It is becoming increasingly sought by private enterprise a source of wealth creation. Significant revenue can be obtained through control of data and, through that control, the creation of specialised applications which enhance the data beyond its existing form, enabling it to then be on-sold for (sometimes) significant commercial gain.

For a long time, it is government that has been the keeper (if not the creator) of much of that data. Examples abound and include information relating to the sale of property, statistical information obtained through measures such as censuses, as well as something as prosaic as weather data. It is only now, as we multi-generationally transition from an industrial economy to a smart information based economy, that the possibilities inherent in its commercialisation are being realised.

This conversation invariably turns to land registry information, or at least the provision of access and utilisation of that collated data, and how that can be made available to private enterprise. This is now an active debate in Europe, where currently, many details of land ownership are kept private and are not open to public scrutiny.

In jurisdictions where land registry information has always been in the public domain, such as Torrens jurisdictions, the sale of "property information" to private enterprise manifests itself in a different way. By and large, the suggestion of privatisation is occurring without significant angst from the general population, with concerns being raised mainly by professional

[1] John Stuart Mill, as possibly approved by Robert Richard Torrens and noted by Karen Strojek, 'Torrens –our land title pioneer might have approved of privatised registries' https://theconversation.com/torrens-our-land-title-pioneer-might-have-approved-of-privatised-registries-78327 (accessed 5 March 2018).

stakeholders such as academics, conveyancers, surveyors, and realtors. Privatisation of land registries has already occurred in Canadian provinces of Ontario and Manitoba. It has also commenced in two Australian states (New South Wales and South Australia).[2]

The purpose of this note is to place this issue in the context of Australasian Torrens systems. Here privatisation is occurring in tandem with automation of the registry. What model of governance will ensure that the integrity of the Torrens system is in no way undermined? Remembering that under Torrens, each issue of a new certificate of title is a fresh grant from the Crown and the State guarantees this title, with compensation from the public purse for any errors.

This paper seeks to highlight some of the relevant issues. In doing so, we concede that the dam wall has been broken and that any suggestion of a return to a purely government run functionary, at least in those privatised jurisdictions, will not occur. But lessons can be learnt from experience. As the jurisdictions fall like dominos to the "sugar hit' of privatisation, what lessons can be drawn, and what will be seen as the best practice model?

Our conclusion will be that at least initially, some form of hybrid model best suits current conditions. The current issues within this hybrid model include, amongst others, the role of the Registrar, the maintenance of the assurance fund, ownership, privacy and security.

Before considering the Australasian developments further, some more detail from the experience of Canadian Provinces is first worth noting.

Ontario initiative

The initiative to move towards automation of Ontario's land registration system commenced in 1980.[3] In 1991, Teranet, a corporation owned jointly by the Province and a private sector company obtained a licence agreement from the government to take all software and associated

[2] Victoria is also actively considering the idea.
[3] Minister of Consumer and Commercial Relations Report "Project to Automate the Land Registration System (POLARIS)" Report of the Provincial Auditor ("Ministerial Report") found at http://www.auditor.on.ca/en/content/annualreports/arreports/en00vfm/303en00vfm.pdf (accessed 6 March 2018).

intellectual property to operate the land registration system. The transfer did not include the original land registration documents, ownership of which was preserved by the government.

Teranet was granted an exclusive licence to operate the registry, paying the government a royalty of 25% for registration related revenue, and 5% for ancillary, non-search services.

Initially the project did not go well. The projected dates for full automation to be achieved were repeatedly extended out, with the cost of automation also growing significantly. Some estimated the final cost as exceeding $1 billion (CAN).[4]

However, the problems were resolved. After initial teething problems, in 2010 Teranet was given a 50-year extension, on the basis that the Provincial government received a $1 billion cash "up-front" payment, together with an assurance of royalties to be paid over the 50 year renewal period.[5] By 2016 the privatisation was heralded as a success story.[6]

Manitoba Initiative

Manitoba's Property Registry was transferred to Teranet Manitoba on 28 March 2014.[7] The impetus for this sale was Manitoba's need to find significant funds to deal with two economic challenges, namely the 2008 global financial crisis and the financial impact of floods in 2011.[8]

The Province sought to identify $75 million (CAN) from the sale of public assets. It was in this context that it approached Teranet.[9] On 13 December 2012, Teranet and Manitoba officially

[4] Ibid at 71. With the delays in the process, it was possible that the government may have terminated the project. This would have led to arbitration, which would have seen compensation payable to Teranet. This compensation may have exceeded $300ml (CAN).
[5] See https://www.theglobeandmail.com/report-on-business/streetwise/teranet-deal-with-ontario-likely-first-of-many/article1461786/ (accessed 6 March 2018). Indeed, following this, it appears Manitoba has licenced Teranet to run its registry for 30 years. See https://www.theglobeandmail.com/report-on-business/streetwise/teranet-deal-with-ontario-likely-first-of-many/article1461786/ (accessed 5 March 2018).
[6] Mayer Gainer "Breaking New Ground: Pioneering Electronic Land Registration and Ontario, 1987 - 2010" Princeton University Paper. See https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Canada%20Case%20Study%20With%20Logo%20JRG_1_30_2017.pdf (accessed 6 March 2018).
[7] Manitoba Finance, Transfer of Manitoba's Property Registry to Teranet Manitoba, 29 April 2014 found at https://www.gov.mb.ca/finance/pubs/teranet.pdf (accessed 10 March 2018).
[8] Ibid at 4.
[9] Ibid.

agreed to the terms of the sale and five legal agreements were reached with Teranet. These were:

- the Master Agreement;
- the Licence and Service Provider Agreement;
- the Asset Purchase Agreement;
- the Gain Sharing Agreement; and
- the Transitional Services Agreement.[10]

The granted licence is for a term of 30 years, with automatic renewal terms of 10 years unless either party gives the other notice of termination at least 24 months before the end of the term.[11]

Under the agreement, Manitoba maintains ownership of information in the databases, but Teranet has the exclusive right to use the official data and to operate the real property and personal property registries to provide services to the public on behalf of the government.[12]

Further, Teranet Manitoba is entitled to use the official land titles and personal property registry data for "valued-added products," which can them be commercially sold. In doing so however, it must comply with applicable laws, such as privacy laws in Manitoba.[13] In terms of these value added products, the Province must first give its approval. If this occurs, the cost and any profit is an issue for Teranet, and not subject to the Province's approval or control.[14]

During the 30-year exclusive licence agreement for the use of the land titles and personal property registry data, Manitoba receives an annual royalty. The royalty is based on transaction volumes for specified land titles registrations, searches, eligible transactions and transaction volumes for personal property registry registrations and searches.[15]

Oversight of Teranet's duties as service provider, is maintained by the Office of the Registrar-General (ORG) within the Manitoba Tourism, Culture, Sport, Heritage and Consumer Protection. [16]

[10] Ibid at 6
[11] Ibid at 7
[12] Ibid
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid at 8.

Alberta opposition

There is however an example of successful opposition to privatisation. To date, the Law Society of Alberta has opposed privatisation, holding that the best model for an Alberta Land Titles system remains a government owned and operated model.[17]

The arguments used to justify this opposition are interesting. They focus on maintaining the integrity of the Torrens system and State guarantee of title. The view was expressed that it would be "incongruent that the government would provide a guarantee of the performance of a private owner or operator of the Land Titles system." Further, that the government's need to ensure a credible title system was maintained would enable the private holder of the monopoly to hold the government captive.[18]

Australasian proposals

New South Wales

In 2017 the New South Wales State government announced it has "leased" the operation of that State land registry to Hastings Funds Management and First State Super, after accepting their bid for $2.6bn (AUS).[19] Under this arrangement, it appears existing registry staff will be employees, with their employment guaranteed for a minimum four year period.

Heralding this move the Premier of New South Wales announced:[20]

> This consortia brings to the table more efficient practices and better outcomes for customers ... and not only will the integrity of the title system be maintained but it will be actually enhanced by new provisions …

Role of the Registrar under the New South Wales model

The New South Wales Government has indicated that the role of the Registrar-General will be:

[17] Law Society of Alberta, A Report from the Law Society of Alberta with respect to the Government of Alberta's Review of the Alberta Land Titles System in its Results Based Budgeting Process, 29 August 2013 found at https://www.aupe.org/documents/6ACUG (accessed 10 March 2018).
[18] Ibid.
[19] http://www.smh.com.au/nsw/nsw-land-titles-registry-leased-for-26-billion-to-hastings-funds-management-first-state-super-20170412-gvjcfw.htm (accessed 21 Jan 2018).
[20] Above, n1.

- Advice on land title policy and legal matters;
- Oversight of the operations of the land title registry;
- Provide independent arbitration of disputed title boundaries; and
- Undertake the role of being a "driver of economic reforms in land titling such as e-conveyancing.'[21]

How this will be advanced (and without conflict to private, profit-driven imperatives) will be a matter of some fascination. Whereas the role of the registrar under government maintained land databases was something akin to a gatekeeper and protector of the public purse (with some thinking that this was taken too far when access to the assurance fund was in question), the new role is different. It is now more akin to monitoring and supervising the private operator in terms of the running of the register.

Illustrative of what may happen can be gleaned from the Manitoba experiance. Here the Registrar maintains an audit function in terms of approving any intended commercial use proposed by Teranet.[22] Only time will tell if the New South Wales privatisation model will embed a similar role, or whether the private operators will have greater leeway to make commercial decisions which are only challenged if agreed performance standards are not met.

Other Australian registries

Following the New South Wales development, the State government for South Australia has announced that it has also entered into a commercial arrangement whereby Macquarie Infrastructure and the Public Sector Pension Investment Board have purchased the right to manage the South Australian land registry for $1.6bn.[23] The arrangements in South Australia provide that there is no change to the substantive law and that core principles within the Torrens system will be maintained. These include that indefeasibility remains as is, the continued operation of the assurance fund and without any additional need for consumers to take out title insurance. [24]

[21] http://www.registrargeneral.nsw.gov.au/about-us (accessed 23 Jan 2018).
[22] Manitoba Finance, above n7 at 7.
[23] http://www.abc.net.au/news/2017-08-10/sa-government-sells-lands-titles-office-data-for-1.6-billion/8794468 (accessed 23 Jan 2018)
[24]'Government Treatment of Stakeholder concerns' South Australian Government document accessible at https://www.treasury.sa.gov.au/__data/assets/pdf_file/0013/20623/Government-Treatment-of-Stakeholder-Concerns.pdf (accessed March 14, 2018)

Victoria is also actively considering this same issue.[25]

New Zealand

The matter is not known at this time to be under consideration in New Zealand, concerning its "Landonline," Torrens registration system.

Commentary

In terms of New South Wales, privatisation of the operation of the Torrens register has occurred notwithstanding sustained criticism from bodies such as the Law Council of Australia, the Law Society of New South Wales, the Real Estate Institute of New South Wales and the Institute of Surveyors. The critics have been reported as questioning the need for privatisation of an "efficient and reliable asset that generates $130 million (AUS) profit a year."[26]

The Victorian annual income figure has been suggested to be $300 million (AUS) revenue a year.[27] It has been suggested that sale of such a profitable asset consists of a one-off injection to obtain upfront funding for Government high profile projects. Further, that this is at the expense of a sustained, long-term and profitable income source.[28]

A counter to this is, of course, that most privatised arrangements do provide an initial one-off payment and then ongoing royalties during the period of the agreed contractual arrangements. For example in South Australia, it was an upfront payment of $1.605bn (AUS), together with a royalty stream of 12.5% on new data product revenue.[29]

Faced with active criticism, the New South Wales government has said that safeguards will be put in place including "step in and termination rights if something went wrong." It is not yet certain what these measures will consist of. To date, the inability to obtain this commercial information seems at odds with the sale of an asset which is arguably owned by the people of that jurisdiction.

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[25] http://www.theage.com.au/victoria/plans-to-sell-land-titles-registry-sparks-privacy-concerns-20170713-gxawq3.html (accessed 22 Jan 2018). It is reported that Queensland and Northern Territory governments have no plans to follow suit in terms of privatisation.
[26] Above, n 1.
[27] Above, n 1.
[28] Above, n 1 and n 2.
[29] Wockel, above 24.

Who owns the database in Australasian Torrens system?

Because the title information is in the public domain (by statutory requirement), it is probably not possible to say in Torrens jurisdictions that recorded title information is capable of claims of "individual" private ownership.

This does not mean however, that proprietary rights may not be able to be asserted over the database as a whole. It seems such a claim (if it could be advanced) would be made by the State, as the present owner of the compiled data. Under the New Zealand *Copyright Act 1994* such a claim could be asserted under s 26.[30] In Australia, Part VII of the *Copyright Act 1968* (Cmwth) provides similar protection. Furthermore, online messaging on the New Zealand Landonline database, claims copyright for the material obtained from that site.

The same comments cannot be made for the registrar's correspondence records, and for notes made by the registrar in terms of undertaking work on problematic title issues. For New Zealand, these correspondence files would be open to public search, subject to any retained or claimed privacy rights. Claims for information from these records in the New Zealand context would be made under the *Official Information Act 1982*. The Australian jurisdictions have similar statutory entitlements enabling the public to have access to government originated information.

Guarantee of title

The State governments (and New Zealand) presently provide a guarantee of title and compensation when something goes awry. By all accounts, the States will continue to provide this guarantee of title under a privatised model.[31]

[30] Section 26 **Crown copyright**
(1)Where a work is made by a person employed or engaged by the Crown under a contract of service, a contract of apprenticeship, or a contract for services,—
(a) the work qualifies for copyright …; and
(b) the Crown is the first owner of any copyright in the work.

[31] Described as the greatest advantage of the Torrens title: http://www.nswlrs.com.au/land_titles/land_ownership/torrens_title (accessed March 10, 2018).

This gives pause for reflection. Under a privatisation model, the role of the State must change to being the guarantor of the actions of another, rather than being responsible for its own misdeeds.

While Torrens' systems supposedly exist without this guarantee, or at least an assurance fund (e.g. Malaysia), it is our view that a guarantee and assurance fund is a natural corollary of the State issuing a new certificate of title upon each transaction. One may assume there will be an ability for the State to recoup the loss from the private contractor, where the claim has arisen from the direct or negligent act or omission of the private entity - although this could be subject to the licence agreement between the State and the private entity. This surely is an incentive for the contractor to rebut all allegations of casual or inept performance, invariably leading to litigation in order to fix liability for any registry "error or omission."

Security of the database

Security of the database unfolds into two issues. The first concerns the issue of the physical security of the database against external hacking and abuse. Second, it is an assurance the users of the register will not abuse or misuse the system.[32] For this latter issue, under a system such as the New Zealand Landonline system, the security of the database is largely in the hands of conveyancers who undertake to the registrar they will not abuse the system as a condition of being granted access to alter the register.[33]

To date, Australasian automation proposals (contrary to the New Zealand model) have not been based on conveyancers being granted direct access to alter the register without registry staff involvement. This may change however. In terms of the efficiency that the private entity may well seek, access to the register may be given to a broader range of people. Indeed, we should reflect further on this, and recall that maintaining the security of the register was one of the reasons given by the Law Society of Alberta for retaining government control and ownership of the registry.[34]

[32] See generally, Thomas, Rod, Rouhshi Low & Lynden Griggs (2017) "Automating State Guarantee of Title Systems: System Design, and Possible Outcomes from a Torrens Perspective." In Dixon, Martin, Goymour, Amy, & Watterson, Stephen (Eds.) *New Perspectives on Land Registration: Contemporary Problems and Solutions.* Hart Publishing; Rod Thomas, Rouhshi Low and Lynden Griggs "Australasian Torrens Automation, Its Integrity, and the Three Proof Requirements" [2013] New Zealand Law Review 715 (Thomas, Low and Griggs).
[33] Ibid.
[34] Law Society of Alberta, above n 17

Importance of registry policing function

It should not be forgotten that under a Torrens system of registration, the result is final and ultimately attracts the protection of indefeasibility. Thus there is a real need these functions be responsibly undertaken and openly transparent to ensure public confidence in the register is maintained.

For example, what is often overlooked is the policing function often undertaken by registrars in terms of ensuring there is no contravention of subdivisional constraints on land and other measures which limit or restrict alienation of land interests.

In the New Zealand automated registry context, the existing protection against abuse or misuse by conveyancers would appear to be twofold. First, it is possible sensitive land may be flagged by the registrar checking proposed dealings. Thus, in some sense, the register may be policed before any registration takes place. Secondly, the Registrar undertakes to audit the files of the conveyancers' post, and sometimes a significant time after, the registration exercise has taken place.[35]

Such functions are critical. They should not be able to be compromised in terms of any set key performance indicators set under any privatisation model.

Privacy issues

In terms of Australasian land registries, all registered Torrens information is open to public search.[36] There could thus be no legal impediment to a private commercial entity searching the recorded data to compile a database of registered material to then sell it off to, and for, commercial enterprise. This compiled information could consist of existing mortgage securities, the market share of the financiers, apparent levels of indebtedness of individual owners, what companies own what, apparent ethnicity of owners and such.

[35] See Rod Thomas, Rouhshi Low and Lynden Griggs above n 32.

[36] Subject to a court order or practice restricting access – for example some jurisdictions will limit access to information of prominent individuals, or where there is a court order to suppress the public information.

Nevertheless, a contractor's control of the database, enables ready access to a breadth of "big data" information a third party having mere access to search the data would struggle to produce. There is an underlying concern that the incentive of a private corporate to run a register must be to obtain information to be packaged and sold for private use (and at a profit). Indeed, what other incentive would be present for private enterprise to become involved?

Thus any licence agreement enabling private operation of a public register needs to contain some form of mechanism for oversight and control in relation to data usage, legislative compliance of data usage and production and distribution of value added products developed by the private entity.

This is a significant aspect of the "big data" debate and well beyond the scope of this preliminary paper.[37]

Is commercialisation of Australasian databases legal?

Pre-privatisation, information provided to the registrar was for a particular statutory purpose. That was invariably to safely record (and store) title dealings in terms of the Torrens registry concept.[38] This appears accepted for New Zealand, with Land Information New Zealand recording on its "online" registry site, a statement that the registrar preserves the right to disclose the registered material to entities having a "purpose" related to the registry's role and function.[39]

In Australia, the purpose of the legislation is generally stated to be something along the lines of, "[a]n Act to consolidate the Acts relating to the declaration of titles to land and the facilitation of its transfer."[40] Accordingly, anything done pursuant to the legislation should be related to this.

It is therefore arguable, that for the registry operator to use that same information for commercial purposes could be *ultra vires* the statutory purpose and intent of the legislation,

[37] Some disclosed may well be beneficial and in the public interest.
[38] The Land Transfer Act 2007 (NZ) s 2 contains the statutory "Purpose" of the legislation. The stated objectives (which are not repeated here) relate to the retention of accurate date to (d) "[maintain] the integrity of title to estates and interests in land."
[39] https://www.linz.govt.nz/linz-copyright (accessed 13 March 2018).
[40] *Real Property Act 1900* (NSW).

which is to provide for secure registration of title. This is not to say that such a commercial outcome cannot be achieved, but (if this argument can be sustained) it may require appropriate legislation expressly enabling the registry operator to use the compiled information for private, and commercial purposes. This would appear to require a "purpose" of making a profit, or to selling the stored data to third parties for profit.

Government need to control of database

With the move to "big data" it is also in any government's interest to retain control of the extensive material available through an automated land registration system. This will enable the government to cross-pollinate information between government departments dealing with issues such as land tax and personal tax cross checks together with compliance with regulatory regimes for transfer or control of the use of sensitive land.

As noted by the Law Society of Alberta "preservation of the operating system and software licenses to operate the Land Titles data is essential. Once these systems are privatized or outsourced, even if the data remains the property of the government, the data is useless unless the operating systems recording that data are retained and protected.[41]

Opportunities for commercialisation

Lawyers are prone to think of privatisation of registries in terms of unauthorised intrusion on privacy. At the same time, it is unquestionably the case that private enterprise is prepared to spend a considerable amount of money to buy the rights to use and commercially distribute information available from property databases. It cannot be a "given" that development of this database, and the distribution of information available from the database is necessarily a bad thing. An illustration (taken from another area of privatisation) may be the commercialisation of the sale of car licence plates.

This activity in New Zealand and Australia has moved from a mundane routine task to a commercially valuable business. Members of the public are prepared to spend considerable amounts of money for personalised number plates both as a form of personal identity and for investment purposes.[42] It is not easy to think that this initiative would have occurred if the

[41] Law Society of Alberta, above n 17.

[42] https://kiwiplates.nz/get-a-plate?gclid=EAIaIQobChMI1NvHnMrb2QIVVI-PCh0NPgOYEAAYASAAEgJ0mPD_BwE#choose-combination (accessed 8 March 2018). For the

issuing of license plates had remained a function of the New Zealand Post Office. At least in Australia government agencies are still involved with the commercialisation of this

Equally, there may be business opportunities that can be grown from the distribution and use of land registration data. Government departments are not formed for, nor are they entrepreneurial enough to either foresee, harness or develop such opportunities.

Revenue stimulant

Viewed in this light, the income stream that may result from such commercialisation could be re-invested back into the registry to better protect it from abuse or misuse. Indeed the injection of such capital (and the associated free-market spirit) could enable the registry services to remain fresh and relevant. It could also grow employment.

As stated by De Saulles:[43]

> The primary economic argument for this approach to encouraging the exploitation of public information resources centres on stimulating commercial activity and innovation in the services and products that the private sector is able to create from these resources. The companies that create these new products and services, it is argued, employ people who will increase tax receipts for the government at a personal and corporate level.

While this may be an argument in favour of privatisation, an important consideration that is perhaps unique to land titles is that in a government owned Torrens system the government is the gatekeeper and custodian of the land register.

The fundamental role of a Torrens registry is to record title dealings safety to enable the State guarantee of title to operate. Will privatisation undermine the integrity of the Torrens system? Will it pit the profit driven motives of private enterprise against what is in the public interest? As noted by the Law Society of Alberta, "the decision as to whether to register an instrument

New South Wales equivalent, see https://www.service.nsw.gov.au/transaction/order-personalised-or-custom-number-plates (accessed March 13 2018).

[43] Martin De Saulles "When public meets private: conflicts in information policy." See http://eprints.brighton.ac.uk/3165/ at 12 (accessed 8 March 2020),

that creates or destroys property rights properly rests with government and not with a private entity whose motive is profit and who may not necessarily act in the public interest".[44]

Where this goes wrong

Although in a different field of endeavour, the privatisation of prisons in New Zealand led to significant problems. These included lack of prisoner supervision in prisons, increased prisoner suicides and drug use, and suggestions of prisoner manipulation of guards and increased smuggling of contraband into prisons. These arose through lack of supervision of prisoners, due to cost-cutting measures by the private operator. The extent of some of the abuses led to the New Zealand government to taking back the control of prisons as well as terminating or not renewing private contracts to run prisons.[45]

Although this example is in a different field of endeavour, it indicates the needs for setting appropriate targets for any private operator, as well as a responsible and workable supervisory role for continuing government involvement.

Appropriate measures of performance

What is presently unknown to us, are the indicators of performance that have been imposed by contractual agreement on the private operators of Australian registries. We are also unaware of how these would be policed and how well funded the audit function of the registrar will be to allow it to monitor and supervise the ensuing activities.

Using Manitoba as an example, under s 3.4 of that Province's Real Property Act, the service provider must ensure that any person employed by it to provide land registry services, fulfils his or her obligations under this Act. Section 12(2) then provides that the Registrar-General must exercise general oversight of the land registration systems.[46]

With regards to performance standards and general contract administration, it appears from the Manitoba experience that two joint committees will meet regularly to discuss these issues. It

[44] Law Society of Alberta, above n 17.
[45] http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11486363 (accessed 22 Jan 2018). See also http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11486363 (accessed 22 Jan 2018)
[46] The Real Property Act is available at this website - http://web2.gov.mb.ca/laws/statutes/ccsm/_pdf.php?cap=r30 (accessed 10 March 2018).

would also appear that performance triggers have been established in relation to land titles document registration focused on turnaround time.

If, under the Manitoba model, the trigger levels are exceeded, Teranet Manitoba must initiate action plans, then up to three remedial plans. That company may be fined for any lapses. In the event of unresolved issues, the imposed fines increase on a "per day" basis. Further, Teranet must retain an independent performance expert. A comprehensive performance framework and performance triggers must be agreed upon within the first five years of the agreement and reviewed and renegotiated every five years thereafter.[47]

Control of software

While most privatisation efforts expressly retain control of the information in the Crown, with the private enterprise having the opportunity to access and "value-add" to this information. However, the relationship of ownership between the original information and the developed software (and products that flow from this) remains somewhat unclear.

Should the government wish to terminate the contract, it would surely want the contractual right to take over any enhanced software or new applications, subject to any just compensation being paid? Any other result seems to lead to an incomprehensible mess.

Registry staff issue

The operators of the register (including registry staff with institutional experience) will be made employees of the private operator. How then, could the State regain control of the operation of the register, if any licence to terminate the register is cancelled?

Are hybrid registries the answer?

The preceding discussion makes clear that privatisation of registries carries the inherent risk of bad system design, lack of control and the opportunities for abuses to occur.[48]

[47] Manitoba Finance, above n7 at 8.

[48] It is reported as at 2016 that the British Government have abandoned plans to privatise the "UK Land Registry" See https://uk.reuters.com/article/uk-landrights-policy/uk-abandons-plans-to-privatise-land-registry-government-source-idUKKCN11E27F (accessed 6 March 2018). It was reported that concerns were raised that the privatisation would result in a private monopoly that would not operate in the interest of users." However, it now appears the issue is again being reconsidered. See https://theconversation.com/amid-brexit-chaos-the-government-pushes-ahead-with-plans-to-privatise-the-land-registry-60684 (accessed 5 March 2018).

A hybrid solution may then be best where a registry is run mostly by a private entity and controlled by both government and the private operator, working in tandem. As noted by the United Nations, the public/private partnerships approach "recognises that responsibility and accountability remain within government whilst service delivery can be enhanced through engaging private sector expertise."[49]

A hybrid model may be a way of ensuring market incentives operate well whilst ensuring some form of overriding State control and audit function is maintained. The solution may not be clear of risk, but may be the best way forward, at least initially. There has been some academic discussion on this.

Faults of Government measures of judging success

Arruñada and Hansen[50] have focused on the shortcomings of any government run "commercial enterprise." They have provided sustained criticism of such a model.

In terms of the operation of government departments, Arruñada and Hansen argue performance success is often determined by the extent set procedures are followed, rather than measurement tools being honed to be sensitive to what the best outcomes for enhancing public good. In highlighting the English Government's National Health Service,[51] and quoting from Enthoven,[52] they note the issue:[53]

> …in a manner typical of the public sector, producers are held accountable for the use of inputs by budget-line items, such as nurses' salaries, building repairs, and disposable services. Then the focus of accountability is not, "Did you produce the greatest output possible with these resources?" but rather, "Did you operate within these budget limits?"

[49] United Nations Economic and Social Council, Economic Commission for Europe, 6 July 2005, at [33]. See http://www.unece.org/fileadmin/DAM/hlm/documents/2005/hbp/wp.7/hbp.wp.7.2005.8.e.pdf(accessed 10 March 2018).
[50] Benito Arruñada and Stephen Hansen. "Organizing public good provision: Lessons from Managerial Accounting" (2015) 42 *International Review of Law and Economics* 185.
[51] Ibid, 186.
[52] AC Enthoven "Internal market reform of the British National Health Service. (1991) 10(3) *Health Affairs* 60–70.
[53] Arruñada and Hansen, above n 50 186.

They accept that incentives in terms of providing measure for a better service for the public are difficult to measure. But realistically they suggest that where the organisation designer (such as government) cannot properly evaluate the cost of producing outputs or the value to users, a natural response is to eliminate all incentives.[54] This leads to "the most likely outcome of expense centres [which is] is overproduction of low quality output. Indeed, this description fits well with the associations many people have of [the] very word bureaucracy."[55]

Government shortcomings

Arruñada and Hansen's central thesis is that government lack the knowledge about economically relevant variables and incentives measures creates unplanned opportunities and risks. Thus clumsy performance and measurement tools simply invite gaming of the system.[56]

In general terms, managers running expense centres with a directive to make a profit may seek to maximise profit (and therefore their measurement of success) by reducing costs and perhaps, indirectly, competency.[57] Consequentially, offices may be closed, and redundancies take place.[58]

De Saulles argues in a similar vein. He holds that that under present operating conditions, the focus on short-term financial interests in terms of operational public sector, restrict innovation within the private sector.[59] His view is that this constitutes a barrier to innovation, and the wider dissemination of information useful to society.[60]

Registry opportunities

Arruñada and Hansen reflect that land registries, unlike other government services, can be perceived as "profit" centres as the cost of registration may be less than charged fees. Consequently, they are seen as an often reliable source of revenue for the government.

[54] Ibid.
[55] Ibid.
[56] Ibid, 187.
[57] Ibid, 188.
[58] Ibid, 190. They give the past history of HM Registry after 1990 as a prime example of this.
[59] De Saulles, above n 43at 11.
[60] De Saulles, above n 43.

Indeed this perception of revenue benefits may lead to a further perception that a land registry can be configured as a simple data-processing system which is simple to operate, and used for revenue gathering purposes.[61] This is an especially valid comment to make for deeds registers which are nothing more than a repository of title information.

Example of HM Registry

Arruñada and Hansen discuss the moves to turn HM Registry from 1990 onwards into a revenue gathering centre. They hold that there has been little improvement in value, following redundancies and closing offices, with nearly all workers receiving a fixed salary. Given liability for registration mistakes are covered by a State guarantee, with individual registrars not facing any personal liability for their actions, there is no incentive to provide for better social outcomes.[62]

Benefits of hybrid models

Arruñada and Hansen suggest the privatisation of land registries accompanied by ongoing government involvement, may maintain the best elements of a system whilst allowing for significant gains.

They suggest existing government-run registries are not sensitive to "real life" outcomes and efficiencies. Thus "parties outside a market transaction experience positive or negative payoff from its execution."[63] These are outcomes not intended by the government. In this regard, too much delegation of delivery of services can be equally as bad as devolution of too little discretion. A balance is required.

A need for change is argued not from the position of whether the government <u>should</u> deliver the service, but how to <u>best</u> deliver it.[64] The question that is ever present, is how this can be done without having the private operators "game" the system to ensure maximum profit at the expense of mere word of mouth compliance with mandated performance standards.

[61] Arruñada and Hansen, above n 50, 188.
[62] Ibid, 190.
[63] Ibid, 185.
[64] Ibid, 185.

Arruñada and Hansen suggest that a hybrid structure with both the State and a private enterprise as operators, may give rise to better outcomes. They reflect as follows. "The key point here … is that setting up efficient cost and revenue centres [still] requires the government to monitor and control the quality of output."[65]

Possible enhancements

As to what enhancement of the stored data are possible, this is a further issue. Indeed it is one of some further fascination. Only time will tell, but reflecting on this, some opportunities that occur to us appear to be various "low hanging" fruit:

- Enabling a "one-stop shop" for title survey details, council issued planning consents for constructed improvements on site, council planning restrictions affecting the site, and associated drainage plans.

- Providing a 3D modelling service for visualisation of data recording title boundary definitions, building plans (available from council records), and topography (available from recorded mapping).

- Providing an enhanced CAD service which enables the owner (or a third party), to conceptualise 3D modelling of proposed extensions to existing improvements on the land, without offending current planning restrictions.

- Providing recorded data of title boundaries useful to ensure flight programming for commercial drones delivering produce in a manner that does not trespass onto individual titles.

- Providing copies of recorded title "genealogy" for the property back to the "root title." This could be a source of some fascination for any owner where the root title may be (say) 1,000 years ago.

- Providing opportunities for better and more direct marketing of the needs of people transacting in property (e.g. mortgage broking services, title insurance, removalists)

[65] Ibid, 189.

It is possible that with proper design constrains some (or all of these) may be developed, without causing undue intrusion on privacy of an individual owner.

The future for Australasian Torrens

What remains to be seen in Australia is whether, and if so how, the various State governments may adopt a hybrid model. As stated, privatisation of the register is presently an issue under consideration in Victoria and has already occurred in New South Wales and South Australia.

It must never be forgotten that for Australasia, the Torrens register is not merely the recorder of title, but the creator of the title. And this title is guaranteed by the State. Selling off the information that leads to the guarantee, but retaining responsibility for the guarantee, creates a conceptual confusion that may be difficult to manage.

Then what will be the flow on effect of any such adoption? To what extent, will we see (if any) a rise in claims on the assurance fund, increased selling of title insurance to consumers, or increased costs within conveyancing practice?

Tentative conclusion on presented material

It seems to us, in symmetry with the comments made by Arruñada and Hansen, that the best development of registries may be some form of hybrid operation, between a private service provider and the government. The nature of this, and what it provides (and to whom) will vary, jurisdiction to jurisdiction.

Indeed, this development may even be inevitable.

> It is a general trend in Europe and worldwide that the private sector has increasingly been invited to take part in different activities in the field of land cadastre, land registry, land consolidation and provision of land information. The aim is to bring together the experience and skills of different partners in a way that guarantees maximum benefit with the best practical and financial outcomes".[66]

[66] United Nations Economic and Social Council, Economic Commission for Europe, above n50 at [33].

This is not necessarily a bad thing. Registries need to be nimble enough to keep up with software development, and the constant risk of third parties looking to "game" the register, or abuse or misuse it. Unquestionably, technology is becoming more sophisticated, and at an increasingly fast rate. This need requires ongoing financial investment in terms of updates and initiatives to ensure the register remains "current" and a credible service is maintained.

In creating such models, the key point that must be kept in view however, is that a Torrens register delivers something far more than just information. It is the creator of legal rights and responsibilities. In any country where the Rule of Law prevails, that aspect should never be undermined. Governments need to walk with suitable caution.

Rod Thomas
Lynden Griggs
Rouhshi Low*

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