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2014



FDA RESPONSE TO BIS CONSULTATION ON THE INTRODUCTION OF A LAND REGISTRY SERVICE DELIVERY COMPANY

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BIS CONSULTATION ON THE INTRODUCTION OF A LAND REGISTRY SERVICE DELIVERY COMPANY

FDA RESPONSE

1. The FDA is the trade union and professional association dedicated to representing the interests of senior managers and professionals in public service. Our 19,000 members include civil service administrators, policy advisers, tax inspectors, schools' inspectors, NHS managers, lawyers, economists, diplomats, senior museum staff and statisticians.
2. This is the formal response from the FDA to the BIS consultation on the introduction of a Land Registry service delivery company launched on 23 January 2014 (BIS/14/510).
3. The FDA is one of the two recognised unions in Land Registry and predominantly represents the lawyers and senior managers in the organisation. We have proven experience of looking at and implementing changes to Land Registry's way of working including earlier discussions on proposals such as the Accelerated Transformation Programme.
4. We are not opposed to change and recognise the need to maximise the use of technology, where appropriate. We endeavour to maintain a constructive dialogue and relationship when change is proposed.

5. However, the proposal set out in the consultation to create a Land Registry service delivery company is not only misconceived but (if introduced) would seriously threaten the current levels of customer service Land Registry provides and undermine confidence in the integrity of the register and the independence of the decision making that determines the entries made in the register.
6. We also have serious concerns that the consultation document lacks transparency and is, in several important respects, misleading.
7. For the reasons we detail below, our position is summarised as follows:
 - i. **It is not accepted that a business case has been made in the first place for a change of model from the current status as a trading fund under the Trading Fund Act 1973.**
 - ii. **If, in spite of this, the decision is ultimately taken to change commercial model for Land Registry, we believe that the appropriate model would be a 100% Government-owned "Gov Co" delivering the day to day operations to the customer. Importantly, the requirement for the Gov Co to remain under 100% Government ownership must be enshrined in primary legislation in order to ensure public confidence in the continuing impartiality and independence of Land Registry and to safeguard against possible future private sector involvement in Land Registry's core functions.**

8. This response contains an executive summary and two sections. The first outlines our significant issues with the text and context of the consultation as published. The second contains the FDA's specific answers to the questions raised in that consultation.

9. Despite our serious and fundamental reservations about, and objections to, what is proposed; BIS should be aware that we continue to engage with the department, shareholder executive and Land Registry management and we expect this to be reciprocated.

EXECUTIVE SUMMARY

10. In this response we set out our concerns about the proposals and the serious impact they will have on Land Registry and, by extension, the UK property market and wider economy.
11. We contend that the consultation is fundamentally flawed and misleading and therefore is an inappropriate basis from which to derive conclusions requiring radical changes to the Land Registry's structure and operation.
12. The consultation:
 - i. does not allow a sufficient timescale for responses, particularly bearing in mind the important consequences of the proposals;
 - ii. makes numerous assertions unsubstantiated by any evidence;
 - iii. omits extremely relevant information – in particular it does not refer to Land Registry's proposed future operating model;
 - iv. does not provide sufficient detail of the proposals;
 - v. misunderstands the nature of the work carried out by Land Registry and the changes that Land Registry has been implementing;
 - vi. does not sufficiently appreciate the importance of Land Registry to the UK property market and the wider UK economy and so crucially underestimates the significant risks posed by the proposals;
 - vii. grossly exaggerates the extent of the control that an OCLR would be able to exert over the service delivery company;

- viii. fails to identify the extent of the core casework functions that will be taken by the service delivery company and are quasi-judicial in nature;
 - ix. does not set out any business case for a change of model from Land Registry's current status as a trading fund;
 - x. sets out three options, all of which, would severely degrade Land Registry's justified reputation for impartiality, professionalism and extremely high quality customer service;
 - xi. does not give any assurance that even a 100% Government-owned company (in our view the least-worst option of those proposed) would actually remain 100% Government-owned for long; and
 - xii. does not offer the status quo as an option for the future.
13. Whilst we recognise that some changes will inevitably be made to Land Registry's operating model regardless of whether there is a change in commercial model, we are convinced that the creation of a service delivery company operating outside of Government will:
 - make inappropriate change more difficult for stakeholders and customers to resist;
 - markedly reduce political accountability for such changes; and
 - increase the likelihood of change merely in order to cut costs and maximise investor return.
14. It is difficult, in view of the above, to avoid the conclusion that the decision has already been made to change Land Registry's commercial model whatever the outcome of the consultation. We strongly hope that this is not the case, and urge that the points raised in this response be taken into consideration before damaging changes are made to Land Registry.

SECTION ONE

FDA'S ISSUES WITH THE CONSULTATION DOCUMENT

The Nature Of The Consultation Is Flawed

15. Before responding to the specific questions raised in the consultation the FDA wishes to make clear our serious concerns regarding the lack of transparency in this consultation exercise and potentially misleading assertions contained in the document.
16. We understand that the proposals for a new commercial model and the proposals for a new "Target Operating Model" were presented for joint consideration by the Minister at BIS. However, there is no information provided at all in the consultation regarding the very significant changes that may flow from such a new operating model that are, we believe, directly relevant to the consideration of the questions posed in this consultation.
17. We have no doubt that although some changes will be made to Land Registry's operating model regardless of whether there is a change in commercial model; the creation of a service delivery company operating outside of Government will make inappropriate change harder for stakeholders and customers to resist, markedly reduce political accountability and increase the likelihood of change merely in order to cut costs and (potentially) maximise investor return. We find the decision taken not to reveal details of what is proposed under the new operating model at this time all the more

disturbing given the purported commitment of BIS to a transparency agenda.

18. Furthermore, there is no mention whatsoever in the consultation document of the fact that the Land Registry Board ("LRB") were specifically asked to consider and report to the Minister on the merits of various alternative commercial models for Land Registry. The FDA understands that the Board strongly recommended that a 100% Government-owned Gov Co was the best way forward, identifying several areas where a service delivery company operated as a joint venture or through contracting out would do significantly less than a 100% Government-owned company to maintain stakeholder trust and confidence in the register.
19. The LRB recognised the potential conflict between underpinning economic growth and private sector involvement, and that this becomes more relevant the further you move towards privatisation.
20. The LRB also acknowledged the tension that exists between delivering the business strategy and private sector investment, but suggest that this is lessened in some ways with a direction of travel towards a Gov Co when compared with a Joint Venture or privatisation. We are surprised that there is no mention of the LRB's recommendation and analysis in the consultation document. We also believe the concerns identified by the LRB should (of themselves) have given BIS pause for thought when presenting the option of a service delivery company for Land Registry operating outside Government.

21. The only real argument in support of creating a service delivery company that has been put forward is that so doing will allow Land Registry more “flexibility” and freedom from central Government control. As we explain below, the business case has not been made to show that any such additional “flexibility” is actually required. Even if this additional “flexibility” could be shown to be needed, it would of course be entirely possible for central Government to allow additional “flexibility” without having to create a service delivery company, with all the attendant risks that so doing will bring. Other trading funds such as the Intellectual Property Office have analogous issues to those raised in relation to the Land Registry but are able to execute their business strategy without radically altering their operating framework.
22. As we explain in our response to question 3 below, the consultation document crucially fails to identify that the core casework function that Land Registry performs is quasi-judicial in nature. The register is not like other Government registers, in that it is not merely a register of rights and interests but determinative of title itself; the very act of registration vests title in a proprietor, even where the legal estate would not otherwise have so vested.
23. The core casework function that would be exercised outside of the OCLR and within the service delivery company will involve the careful balancing of competing third party interests and complex legal decision making. The retention of some very limited functions within the OCLR (coupled with an Independent Complaints Reviewer and the possibility of some objections being referred to the Property Chamber, Land Registration Division First-tier Tribunal) will give customers a level of protection that would be wholly inadequate.

24. We deeply regret, therefore, that not only does the consultation document lack transparency but is, in our view, actively misleading in several important respects.

Assertions In The Consultation As To The Desirability Of Introducing A Service Delivery Company Are Simply Incorrect

Assertion 1: "A separation of the policy and delivery functions is desirable"

25. No explanation has been provided in the consultation document as to why this is considered to be necessary.
26. Far from bringing advantages, it appears clear that any attempt to create such an artificial distinction will result in double-handling, confused accountability and a poorer service for customers.
27. Land Registry achieves excellent customer satisfaction scores through the existing model where with all parts of the organisation are customer-facing and working together. This should not be disturbed, as it has worked well for a number of years and continues to do so.
28. Division of the organisation between delivery and policy branches will create double-handling. The delivery arm of the organisation will not have the authority to deliver confident timely key decisions on casework. Based on what we know of the proposed set up, they

will be constantly looking over their shoulder at the OCLR who will not have adequate resource to respond in a timely fashion. This will be to the detriment of customers, whose day-to-day dealings will not be with those empowered to make the ultimate administrative decision.

29. There is no need for a clearer relationship with Government. At present, it is entirely clear, Land Registry is a government function and that status should remain. The proposals will create a delivery service with a less clearly defined function. It will also reduce the extent of Government accountability for land registration decisions which are likely to have a significant impact on what (for most people) is both their home and most valuable asset.
30. It is unclear what the impact of public procurement rules and EU competition law will be. It should be the case that if a joint venture or contracted out service is chosen, full public procurement rules would apply and a competitive tendering processes would be necessary. There would therefore be little control over the identity of the ultimate service provider, who would have (no matter how carefully any service delivery contract may be drafted) de facto control (as a monopoly provider) of the granting validation and adjudication of title. This would be highly undesirable and unlikely to be acceptable to stakeholders.
31. No matter how carefully drafted the provisions of any service delivery contract might be, it is inevitable that there will be conflict and grey areas over the remit of the service delivery company. Additionally, subject to Government pressure to demonstrate that the decision to introduce a Land Registry service delivery company

was not misguided and with very limited resource, the OCLR is likely to prove toothless in preventing the service delivery company from operating to its best commercial advantage, rather than in the interests of stakeholders and customers.

32. Even if the 100% Gov Co option were to be pursued, the nature of the proposed Gov Co as a largely independent body with considerable freedom of operation, means that is questionable whether competition rules would allow it to be exempt from a full procurement process. This position needs to be clarified.

Assertion 2: "A greater focus on service delivery is required"

33. It is not clear what is meant by a greater focus on service delivery. What does seem clear though, is that this does not mean a greater focus on customer service. As stated above, Land Registry has already achieved excellent customer satisfaction scores over many years through the existing model.
34. We have concerns that the establishment of a service delivery company (particularly if it involved private investment) would lead to offices being closed and jobs lost, to the marked detriment of customer service.
35. If BIS was truly interested in putting the customer at the heart of everything that Land Registry does it would have sought the views of external customers and stakeholders, rather than looking inwards to seek only the views of others within Government, the majority of

whom have little grasp of the complexities of property transactions or the role that Land Registry plays.

Assertion 3: "Greater flexibilities are required around pay, recruitment and the provision of other services"

36. As we explain above, if Government wanted to allow Land Registry greater freedom around pay and recruitment it would be within their power to do so, without any change in the commercial model. That BIS has decided not to do this raises concerns that (as suggested in the Law Society Gazette) that "the whole programme is less about innovation and more about cutting the civil service payroll by 4,000 posts (notwithstanding that Land Registry currently provides the required return on capital employed and the payment of a substantial dividend)" [Michael Cross, "Land Registry not for Meddling" Law Society Gazette 27 January 2014].
37. We suspect that more "flexibility" in pay will simply mean that the most senior members of the service delivery company will be paid substantially more, whilst the jobs of those actually involved in providing core land registration services are drastically cut and the terms and conditions of those who do remain significantly eroded. Again, it is in our view this will prove highly detrimental to the level of service provided.
38. In relation to providing further services, what appears to be intended is the creation of a favoured service delivery monopoly. This is not what stakeholders want or customers require. The historical difficulties with Local Authority searches have been

addressed by private sector companies competing with each other and with public sector providers to drive down prices and to improve turn-around times. No such element of competition is intended for the service delivery company that the consultation envisages.

39. Land Registry should concentrate upon the provision of core land registration functions as a Government Agency and act so as to promote economic growth by maximising the provision of Land Registry data to all businesses operating on an equal footing. This will allow private competing businesses to innovate and find new uses for the vast amounts of data that Land Registry holds and generates as a byproduct of its' core casework functions, whilst leaving the exercise of those core statutory casework functions (which clearly demand absolute impartiality and independence in decision taking) within Government.

Assertion 4: "A more clearly defined relationship with Government is needed"

40. No real explanation is provided as to why this is necessary or desirable. At present, all of Land Registry is bound by the same statutory duty, to provide registration services. Land registration is recognised throughout Europe as being a necessary function of the State, with decisions that significantly affect individuals' lives and taken by civil servants (who are bound by the civil service code) operating with transparent impartiality.

41. If private sector investment in the service delivery company were to be introduced, this would result in an obligation to maximize investor return. This would create an obvious risk to impartiality (perceived or real) as casework decisions were taken and procedures introduced in order to cut costs.
42. The notion that a service contract administered by the OCLR would be sufficient to protect the interests of customers and stakeholders is naïve; a tiny office of the Chief Land Registrar could at best only regulate the activities of the service delivery company with the lightest of touches and would have no day to day control of decision making or practice within the delivery company.
43. For most people, their home is their most valuable financial asset and it is vital that Ministers remain directly accountable for the practice and casework decisions taken by those delivering the core land registration statutory function. Far from bringing a more clearly defined relationship with Government, the proposals confuse accountability.

SECTION TWO

RESPONSE TO CONSULTATION QUESTIONS

Question 1

Do you agree that by creating a more delivery-focused organisation at arm's length from Government, Land Registry would be able to carry out its operations more efficiently and effectively for its customers?

45. No. No evidence whatsoever has been produced to show that any new organisation operating at arms-length from Government would be able to carry out its functions more efficiently and effectively for its customers.
46. Since it became a trading fund, Land Registry has:
- consistently reduced staffing levels (from around 12,000 to approaching a third of that number now);
 - reduced fees in real terms every year;
 - enabled faster processing times for searches, registration applications and enquiries;
 - increased electronic delivery of services;
 - achieved consistently high customer satisfaction levels, running at around 97-98% of customers being either satisfied or very satisfied with Land Registry's services;
 - provided the year on year return on capital employed required and in most years a significant additional surplus; and

- adapted to change and the speed of change to continue to deliver services to a high standard.
47. The new organisation, especially if it involved private investment, would be likely to result in a worse service for customers as the focus would be on maximizing investor return, most likely by seeking to cut costs to the detriment of customer service.
48. It is understood that the proposals for a new commercial model for Land Registry went to the Minister for sign off at the same time as proposals for a new “operating model” which is likely to bring significant changes for customers. The decision not to consult on both elements of Land Registry reform at the same time raises serious concerns as to the implications of proposed changes and the transparency of the consultation process. The assertion that the customer should see little or no change as a result of the OCLR/service delivery split seems completely disingenuous.
49. Although it is claimed in the introduction to the consultation document that the views of Land Registry’s stakeholders and customers have been carefully considered and attempts made to mitigate concerns expressed, it is remarkable that no external stakeholders are listed in Annex B to the consultation. We are not aware of any major stakeholder who supports the proposals and understand that a number of the most significant stakeholders are completely opposed to the proposals. In addition, our experience of the consultation to date with the trade unions and employees affected is not one where our concerns have been mitigated or views properly considered.

50. Despite no consideration of this point in the consultation, a number of stakeholders have identified that retaining the status quo would be most likely to maintain stakeholder confidence in the integrity of the register and that such confidence would be significantly reduced by the introduction of either contracting out or a joint venture arrangement.
51. If BIS is really interested in customer service and in putting the customer at the heart of everything that Land Registry does, it must consider carefully the responses that are made to this consultation by the principal customer stakeholders. It would be shameful to create a business strategy allegedly around customer needs and then to ignore the views of customers on this consultation. Both the Minister and Chief Land Registrar should be well aware from past experience of the folly in trying to introduce significant change that does not enjoy the confidence and support of customers and stakeholders.

Question 2

Do you agree that the OCLR should retain exclusive responsibility for the functions set out in paragraph 49?

52. No. There should be no separation of Land Registry between an OCLR and a service delivery company. This will create double-handling and such a split will be to the detriment of customers, creating delay and additional bureaucracy. The OCLR will be too small and insufficiently independent to exercise proper control of the service delivery company. The functions for which the OCLR will

retain exclusive responsibility are extremely limited and esoteric and will leave a huge amount of what should be properly regarded as quasi-judicial functions to be exercised by the service delivery company.

53. The proposals to involve the OCLR in certain objections recognise the need for land registration to be carried out by the State, but shows inadequate understanding of other aspects of Land Registry's work.
54. If an initial casework decision is taken, such that no objection is actually received (for example, the decision is taken not to serve a discretionary notice) registration may be completed. The would-be objector's substantive legal rights have been affected, as the applicant may have become a registered proprietor in possession. The would-be objector's right to apply for alteration of the register is not therefore an adequate remedy.
55. Similarly, if a decision was taken within the service delivery company that an objection was groundless, the application would be completed without the possibility of recourse to the OCLR. A subsequent complaint to the OCLR in relation to the decision to treat the objection as groundless would only be entertained if the service delivery company considered that there was a serious risk of judicial review and even then (and even if the OCLR agreed with the complainant) the title may not be capable of subsequent alteration in the complainant's favour. Substantive land registration decisions need to be taken by civil servants employed by the State to ensure transparency, impartiality, and confidence in the system.

Question 3

Are there additional functions that should be retained in the OCLR? Please explain what and why.

56. As for question 2 above, there should be no separation of Land Registry into a service delivery company and an OCLR. The proposals would mean that almost all of Land Registry's current functions would be carried out by the service delivery company. This would include the exercise of quasi-judicial functions. This is wrong in principle and in practice will result in a loss of confidence in the integrity and independence of the register. The nature of Land Registry's core casework makes it a State function that should (as with almost all other European jurisdictions) be exercised within Government.
57. It is not sufficient safeguard to rely on notice procedures, the objections process and referral to the First-tier Tribunal as a guarantor of independence and impartiality. There are numerous other decisions made on a daily basis by skilled Land Registry technicians and lawyers in which the judicial process is not likely to be invoked. Absolute impartiality, independence and transparency at the front end of decision making are essential in these cases.
58. Some examples of these types of decisions are as follows:
- i. determining what class of title should be granted;
 - ii. determining whether a person should be registered as proprietor (conclusiveness of s.58);

- iii. adverse possession applications (of registered and unregistered land);
- iv. prescriptive easements applications;
- v. whether a disponent is entitled to exercise owners powers;
- vi. indemnity;
- vii. whether an application for rectification can proceed against a registered proprietor in possession;
- viii. whether a lease has been determined (on forfeiture or surrender by operation of law);
- ix. what amounts to rectification rather than just alteration;
- x. whether an order should be made to disapply a restriction;
- xi. whether an order should be made to alter a document under rule 130;
- xii. whether a notice or restriction should be entered or removed;
- xiii. whether a restrictive covenant is void for want of registration as a land charge;
- xiv. whether a restrictive covenant or easement has been validly released;
- xv. whether a restrictive covenant or easement has been extinguished by unity of seisin;
- xvi. whether an easement has been extinguished;
- xvii. whether the registrar should serve a discretionary notice on a third party in respect of a registration (such that an objection may be triggered as a result); and
- xviii. determining the respective priority of competing applications.

59. Many of these decisions allow Land Registry to facilitate land transactions or create cleaner titles, for example on large amalgamations of registered land for development, sometimes the view can be taken that restrictive covenants can be left off the new

title because unity of seisin has extinguished them. Loss of transparency and impartiality may hinder this process, to the detriment of the property market and land owners and users. Other decisions (serving notice, for example) are crucial in ensuring that all possible third party interests have been considered and assessed. Impartiality and transparency are essential.

60. As a number of stakeholder have identified, involving the private sector in any service delivery company would risk the independence of decision making in the exercise of core casework functions.

Question 4

What are your views in respect of the proposals for shared functions set out in paragraphs 50-51?

61. As for questions 2 and 3 above, there should be no separation of Land Registry between an OCLR and a service delivery company.
62. The consultation document argues there is a distinction between keeping the register, and maintaining it. The former, it says, would be the responsibility of the OCLR, the latter, the service delivery company. This is an artificial and unworkable distinction. Keeping the register is not distinguishable from maintaining it in any meaningful way. If keeping the register is to have any significance, it must involve retaining detailed knowledge of the day to day business of land registration, including how the substantive law is applied through a complex range of mainly electronic systems used by the customer-facing parts of the organisation. This knowledge

and experience of how registration systems work at a granular level is best maintained by retaining “one Land Registry”, in which all staff, at Head Office and Local Office level, work together to keep the register. A separate OCLR, distanced from the delivery arm, will have increasing difficulty in providing workable and high quality input on the provision of the fast changing registration services. There is no meaningful distinction between keeping and maintaining the register, they are bound up together and best done by a single State body run by civil servants as at present.

Question 5

What are your views on the proposed approach to service delivery company functions in paragraph 52?

63. As for questions 2, 3 and 4 above, there should be no separation of Land Registry between an OCLR and a service delivery company.
64. The consultation document states paragraph 52 that “*the vast majority of functions in relation to land registration are administrative in nature*”. This is a fundamental misunderstanding.
65. The process of approving and registering title for the first time, and also approving and registering subsequent dealings with a registered title, is a quasi-judicial one, whether carried out at the simplest level by a junior member of Land Registry staff or as part of a legally and technically complex or difficult transaction by a senior lawyer. Under the Land Registration Act 2002, the process of registration confers legal title and the right to exercise “owner’s

powers” in relation to the registered land. By virtue of s.58 Land Registration Act 2002, title is vested upon registration even if in fact the person registered would not be entitled (for example, where registration is based on a forged or otherwise fraudulent disposition), and State-backed indemnity is available where title is registered in error, even if the registrar or his staff are not at fault.

66. The registrar has to balance the interests of an applicant with those of the property owner and those of third parties who may also have an interest in the property or, alternatively, may be affected by his actions; he must therefore act impartially and fairly in order to balance those competing interests within a legal framework. The consultation confuses the processes involved in land registration (the “*how*”) with the legal nature of the act of title registration (the “*what*”). Because registration is now, in the majority of cases, a quick and straightforward process, it is easy to lose sight of the fact that it is a legal, not simply an administrative, process.

Question 6

Do you agree that the overall design provides the right checks and balances to protect the integrity of the Register and safeguard the provision of indemnities and state title guarantee? If not, please state your reasons why not.

67. No.

68. It is not entirely clear what is meant by “the overall design”. In so far as this refers to the separation of Land Registry between a

service delivery company and an OCLR (and the division of functions referred to in the questions above) the proposals are wholly inadequate to protect the integrity of the register.

69. The concern of the service delivery company is almost certain to concentrate on maximising investor return, not on protecting the integrity of (and confidence in) the register.
70. The OCLR would not have a sufficient degree of independence, not least because it would be funded by fee income generated by the service delivery company. With only approximately 30 full time equivalent employees, it would not have the resource or critical mass to influence and control the day to day work of the service delivery company. Such auditing and validation as it carried out of the service delivery company to ensure that provisions in any service delivery contract were being adhered to would be necessarily "light touch".
71. In practice, the OCLR would be likely to prove toothless in the event of dispute between the OCLR and the service delivery company as to whether the terms of the contract were being properly performed.
72. Currently the registrar and his staff are required, under the Civil Service Code, to carry out their duties impartially. Land Registry's lawyers and any other professionally qualified staff (such as financial officers) are additionally bound by professional codes of conduct. Land Registry has to balance the needs of the "immediate" customer (the applicant) with those of the "unseen" customer (third parties who may be affected by any decision the registrar makes)

and the public at large (in the shape of a consistent, accurate and assured land registration function).

73. Private sector organisations are under no comparable obligations, and the Code would cease to apply to Land Registry staff transferred into the service delivery company. The potential for conflict of interest and partiality is considerable, particularly when the service becomes profit driven. There is risk of high value, high volume or high influence customers being able to demand preferential treatment, with disadvantages to others.
74. There is an obvious concern that any new design that involved private sector investment would result in steps being taken to inappropriately cut costs to maximize investor return and that this would be at the expense of the integrity of the register. Any move to reduce the extent of the investigation and evaluation of applications presently carried out by Land Registry for example (if a new arms-length organisation were created) would inevitably reduce the quality of the register and confidence in the integrity of the register. The same would apply if the service delivery company were not to retain Land Registry's highly experienced and well trained casework staff to evaluate and decide upon applications.

Question 7

Would you be comfortable with non-civil servants processing land registration information provided they do so within the framework set out by the OCLR through the service contract? If not, please explain your reasons why not.

75. No. As stated in the response to question 6 above, the registrar and his staff are required to carry out their duties impartially as members of the Civil Service. Employees of a service delivery company would not be bound by the same obligations as Civil Servants and may be more exposed to outside pressures to use the information inappropriately.
76. It is simply not the case that sufficient protection would be provided by “the framework set out by the OCLR”, as any such framework could not in practice be adequately policed. As stated in the reply to question 6 above, the OCLR would in practice be far too small (and potentially insufficiently independent) to exert any real control over the day-to-day activities of the service delivery company and any protection offered by the OCLR to prevent misuse of land registration information is likely to be largely illusory.
77. Many of Land Registry’s customers will, perfectly legitimately, be concerned that important land registration information could be used for the commercial benefit of the service delivery company, which will prove highly corrosive to the current high levels of trust in Land Registry by its customers.
78. It is also very difficult to see how it is possible to properly consult on this question without providing detailed particulars of what the service contract may provide for in this respect and of what auditing requirements and enforcement powers and obligations will be placed on the OCLR.

79. In addition to the current data protection constraints on release of Land Registry's data, there is also internal scrutiny via the Information Management Committee to ensure that the data would not be likely to be used to facilitate fraudulent purposes. Neither stakeholders nor consumers will have the same level of confidence in a private sector partner or company to be as scrupulous about such internal filters before releasing data, particularly if there was money to be made from it.
80. If the service delivery company was an independent corporate vehicle, it is not entirely clear whether it would be subject to the Freedom of Information Act 2000. If it were not, this would seriously affect the transparency of its dealings and governance and the ability to hold the service delivery to account for improper use of data or other information.

Question 8

Are there any situations, other than those set out in this consultation, in which you would want to see an escalation process to the OCLR? Please explain what and why.

81. As stated in the replies to the above questions, the proposed fragmentation of Land Registry into a large service delivery company and a very small OCLR is fundamentally misguided and will cause many more problems to the smooth running of the registration process.

82. If there were no such separation, it would not be necessary to have to consider how issues should be “escalated” from the service delivery company to the separate OCLR. The proposed arrangement cannot be anything other than inefficient and ineffective when compared with Land Registry’s current structure.

Question 9

Do you agree with the proposed approach for handling complaints, as set out in paragraph 56? If not, please explain your reasons why not.

83. No. As stated in the replies to the above questions, there should be not be any separation of Land Registry into a service delivery company and an OCLR.
84. Land Registry’s existing procedures for dealing with complaints are demonstrably effective as only a tiny proportion of complaints received by Land Registry actually need to be referred to external bodies (such as the Independent Complaints Reviewer) for resolution. Land Registry’s customer satisfaction levels are extremely high and no evidence has been lodged that the proposals will do anything other than affect them adversely.
85. In the diagram in paragraph 56, it is proposed that “certain complaints” (which are not specified) relating to a “registration decision” would have to be referred to the OCLR. This clearly would create an additional level of bureaucracy and delay, directly contradicting the final bullet point in paragraph 55.

86. Currently complaints about a “registration decision” are simply referred to the local office Land Registrar who makes a final “registrar’s decision” which can only be challenged by judicial review. No evidence has been lodged as to how having to refer such matters to the OCLR would be an improvement. Indeed, the opposite will be the case, as any decision of the OCLR would almost certainly take longer to make and would be likely to be made by a more junior lawyer than the local office Land Registrar. In short, the proposals are likely to create unnecessary delay and result in worse decisions being made.
87. It not entirely clear when and in what circumstances a complaint relating to a registration decision will be referred to the OCLR. If, for example, it is in fact only those complaints where there is a serious prospect of judicial review that will be referred to the OCLR then the consultation is flawed, as it appears that the function that the OCLR will actually have in relation to complaints will have been misrepresented. Given the risk to customers that arises from the “new design” (reflected in the need for an OCLR itself) it is essential for customers who are unhappy with what the service delivery company has done to have ready, direct and unrestricted access to the OCLR and for the service delivery company’s complaint process material to make this clear.

Question 10

Do you agree with the escalation process set out for objections in paragraph 56? If not, please state your reasons why not.

88. No. As stated in the replies to the above questions, there should be not be any separation of Land Registry into a service delivery company and an OCLR. No evidence whatsoever has been provided that fragmenting Land Registry in this way will improve the service given to Land Registry's customers when there has been an objection to an application.
89. The result of the "objections process" shown in the diagram at paragraph 56 will simply be to cause unnecessary delay and cost without any benefit whatsoever.
90. Currently a case summary is prepared by a Land Registry lawyer and must be approved by the local office Land Registrar before the case is referred to the First-tier Tribunal. It appears that under the proposals this would still be the case, but that the document would then need to go for a further approval by a member of the OCLR. It is clear this will add bureaucracy, as by the time it reaches the OCLR the case summary will already have been scrutinised by two lawyers, and any lawyer reviewing the document at the OCLR is likely to be more junior than the local office Land Registrar. The amount of double-handling and delay that this arrangement will create is obvious.
91. No evidence has been produced that currently cases are being referred to the Tribunal inappropriately or that further scrutiny of case summaries is required.
92. Equally, it must be appreciated that the most important decision of all (as to whether or not an objection is "groundless") will be taken

by staff employed by the service delivery company and will only be capable of challenge by way of judicial review. If the First-tier Tribunal is to continue to be funded by fee income, there will be an obvious incentive for the service delivery company to look to restrict the referrals made to the Tribunal.

93. The reality is that the limited resources of the OCLR will mean that case summaries referred to the OCLR will receive only the briefest, most cursory, check before the matter is referred to the Tribunal. The OCLR will be, in reality, little more than a post box. This arrangement appears more suited to being seen to meet the procedural demands of the First-tier Tribunal than of protecting the rights of those involved in a third party land registration dispute.

Question 11

Do you think the Rule Committee should include a representative from the service delivery company? Please explain why or why not.

94. As stated above, the OCLR should not be split from the remainder of Land Registry, in which case, this issue would simply not arise.
95. The presence (or otherwise) of a representative from the service delivery company on the Rules committee is an irrelevance, as for the reasons detailed above the OCLR would lack the necessary independence from the delivery company to resist rules changes that the service delivery company wanted to see happen.

Question 12

The Data Protection Act would protect personal data that is provided to the service delivery company. Would you like to see any protections beyond this? If so please explain what and why?

96. The FDA does not concur with the view in the question that the Data Protection Act alone is sufficient to protect personal data to the standard the public have a right to expect. Personal data should be protected by Land Registry remaining an executive agency and a non-ministerial Government department, staffed exclusively by civil servants.
97. It is a mistake to think that Land Registry only holds information as to which individual owns which piece of land. Land Registry receives on a daily basis information relating to mortgages (including in some instances the amount of the money borrowed), bank account details, evidence of identity, personal financial details, financial problems (for example in respect of charging order related applications), marital and other relationship breakdowns, mental incapacity, alleged fraud and other wrongdoing, personal insolvency and trust arrangements.
98. All the above personal data has a clear commercial value, which a service delivery company involving private investment would be likely to look to fully exploit.

99. Such information should remain within the control of Government, managed by civil servants, with Ministers directly responsible and accountable for the use of such information.

Question 13

What are your views on the proposed system for safeguarding customer service issues and the continued role of the Independent Complaints Reviewer?

100. As stated at the answer to question 1 above, the case for change has not been made out. In that context, the following comments are put forward but should not be taken to be an implied acceptance that the proposals to change the commercial model are appropriate.

Integrity/Independence

101. The wording of paragraph 8 is significant:
102. "The OCLR would primarily perform regulatory and fee-setting functions *to ensure that customers' interests continue to be protected*, [emphasis added] ..." The OCLR, a Government civil service body, is therefore rightly seen as having an essential role in protecting customer interests.
103. The service delivery company will be delivering registration services in which legal rights are created, extinguished or transferred. It is equally necessary for these services to be delivered by a government body, which is transparent and free from outside

influence, actual or perceived. Paragraph 52 is wrong in saying that the vast majority of Land Registry functions are administrative. They are quasi-judicial and even the simplest routine transaction creates substantive legal rights, and (for legal estates) confers protection on a registered proprietor in possession.

104. For instance, when an adverse possession application is received, the registrar has to assess the evidence and apply the law. This includes deciding whether the acts of possession relied on are those which an owner of land would normally be expected to do, taking into account the nature of the land concerned, in the context of the very diverse situations which are encountered. A high degree of judgement and expertise has to be applied.
105. There is considerable risk involved in terms of customer confidence in taking this decision making process away from a Government department employing independent civil servants guaranteeing transparency, and it would be entirely unacceptable for it to be carried out by a wholly or partially privatised organisation.

Visibility of Changes

106. It is not accepted that the customer will see nothing of the changes. It would not be desirable to privatise Land Registry in whole or in part, but if this was done, what would the tax consequences be? Would VAT be payable on fees? Would corporation tax be payable? How would the inevitable private sector profit element be built into the system? None of this is even referred to in the consultation document making it impossible to assess the impact on the customer of these issues. If we look overseas for examples, to

Canadian land registration systems where the private sector is involved, the effect appears to be year-on-year fee increases. This contrasts to Land Registry's record of fee reductions over many years.

107. The intention is to make the service delivery company the "primary point of contact" but customers know their rights and will find their way through the service delivery company to the OCLR. For instance with complaints, a customer will in many cases be able to argue that the decision is a registration decision and therefore that the case should be referred to the OCLR, if the decision by the service delivery company is not to their liking. It is rarely the case that a customer complaint can be said not to have an aspect relating to registration decisions. This will create double handling, delay and extra cost to the detriment of the customer, and the OCLR will be too small to absorb extra work.
108. More importantly, it will mean that the service delivery company with whom the customer has day to day contact will be disempowered; no longer the final decision maker in registration decisions, and its ability to deal in a robust and confident way with the day to day business of land registration will be lost. This will be very strongly felt by customers to be detrimental to the service.

The Independent Complaints Reviewer

109. This is only very briefly referred to in the document. It is appropriate to retain the Independent Complaints Reviewer.

110. However, if the proposals were to be implemented, no doubt it should also deal with customer service complaints relating to dealings by the OCLR, for instance the OCLR's handling of a complaint. This may mean however that a customer might complain twice to the Independent Complaints Reviewer on a single case. For instance a customer has a complaint about service delivery and the consequential registration decision by the delivery company. The registration decision is handled by the OCLR, not to the customer's satisfaction, so a further referral is made to the ICR about the OCLR. This will mean extra cost, more time and resources devoted to the same matter, and more bureaucracy.

Question 14

Do you think there is a difference between the opportunities and risks depending on whether operational control over the service delivery company is entrusted to Government or a private sector company? If yes, what?

111. As stated at the answer to question 1 above, the case for change has not been made. In that context, the following comments are put forward but should not be taken to be an implied acceptance that the proposals to change the commercial model are appropriate.

Competition Law Issues

112. It is not clear, or addressed in any way in the consultation document, how any competition law requirements would affect the proposals.

- i. If the decision was to use a private sector operator to deliver the service, would there be a competitive tendering process?
 - ii. If so, how would you ensure the right body took on the job of operating registration services?
 - iii. How would control be exercised to ensure the operator was acceptable to customers, stakeholders and the public?
 - iv. Why are these issues not dealt with in the consultation document, with indications as to how any risks would be mitigated?
113. If the 100% Government-owned company were to be the option identified, it is by no means certain that, given the degree of autonomy the Gov Co would be intended to have, this would not fall outside the “Teckal exemption” (requiring the Government to exercise over the person carrying out the function a control which is similar to that which it exercises over its own departments) and therefore vulnerable to legal challenge and potentially exposed to a full public sector procurement exercise. Such a result would no doubt be considered undesirable, so we contend it is preferable to ensure the legislation specifically requires any corporate body carrying out registration services to be 100% owned by Government.

Risk of Judicial Review Undermining Integrity of Decision Making

114. If land registration services are controlled or operated by a private sector body this will render decisions taken by the delivery company vulnerable to judicial review in a significant number of cases. This does not appear to have been considered as a risk to the viability of

the proposals. If it has then the response has not been seen by the FDA.

115. One of the grounds for judicial review is that there has been a breach of natural justice. It is a fundamental rule, often expressed in the maxim *nemo iudex in causa sua*, that, in the absence of statutory authority, agreement or necessity, no man may be a judge in his own cause. If a fair minded or informed observer would conclude there was a possibility of bias, then the decision will be overturned. The principle extends not only to courts and tribunals, but also to other bodies, including public authorities, determining questions affecting the civil rights of individuals. (see Halsbury's Laws para 631 vol 61).
116. Therefore, if the land registration services (which are quasi-judicial and determine the rights of individuals and entities) are delivered by a body owned or controlled/operated by Company A, we are not satisfied that it will be lawful for decisions to be made for instance on acceptance of adverse possession applications, prescriptive rights claims, whether or not to serve discretionary notices etc. in respect of applications by Company B, who may be a competitor of Company A.
117. The consultation, either as demonstrated by the consultation document or discussions with the trade unions does not seem to understand the true nature of land registration services. It is not merely an administrative function, it is quasi-judicial and determinative of the rights of individuals.

Relationship with Government, Sharing Data, Data Security

118. At present Land Registry enjoys close working relationships with other parts of Government, including for example the police in dealing with fraud. Moving the delivery arm further away from Government will jeopardise this. Government bodies may be less willing to share data and information with Land Registry.
119. A move further from Government means customers, stakeholders and citizens may have less confidence in the security of Land Registry's data.
120. The increased risk of fraud is referred to in the answer to question 17 below.

Question 15

Do you think there is a difference between the opportunities or risks depending on whether the service delivery company is owned by the Government or a private sector company or both? If yes, please explain your reasons.

121. Yes. The risks identified above will be exacerbated if the service delivery company is not wholly owned by Government.
122. However, as stated at the answer to question 1 above, the case for any change in the commercial model has not been made.

123. In that context, the following comments are put forward but should not be taken to be an implied acceptance that the proposals to change the commercial model are appropriate.
124. See the points relating to the risk of vulnerability to judicial review above.
125. See the points relating to competition law and competitive tendering above.

Monopoly Service, with Ultimate Unlimited Liability Backing by the State

126. Land Registration is a monopoly service. This state of affairs does not appear to be challenged by the consultation document and it is probably fair to say that the vast majority of commentators accept that a monopoly is appropriate. Furthermore, indemnity liability is backed up by the State in an unlimited amount.
127. We do not believe this will continue to be acceptable to the public. It will look, and to a large extent actually be a “licence to print money” for whichever private sector operator takes on the service with the taxpayer both being liable for increased charges for land registration services and the resultant cost if/when something goes wrong. Although the delivery company may be expected to manage the indemnity budget on a day to day basis, there is no doubt a huge value and benefit in having an unlimited State-backed guarantee of all indemnity liabilities funded ultimately by the taxpayer. Although the document does mention that the service may be brought back within government if it fails, it is far from

clear that this would be viable or practical in reality, there is also no quantification of the potential costs that might be incurred. The consultation document gives no details of what measures would be applied to ensure this option remained available to the OCLR/Government.

Question 16

What do you think are the constraints and dependencies for Land Registry's successful delivery of the business strategy?

128. As stated at the answer to question 1 above, the case for change has not been made. In that context, the following comments are put forward but should not be taken to be an implied acceptance that the proposals to change the commercial model are appropriate.
129. So far, Land Registry is a success story, it has embraced change, it has adopted electronic services and processes successfully and achieved year on year strong customer satisfaction scores. It provides excellent value for money, costs nothing to the Exchequer, produces a large surplus, has a modest indemnity budget (for a liability worth billions), keeps reducing fees and only imposes a small overall cost on the conveyancing process in return for a huge economic and practical benefit. Its consultancy and advisory services are sought after abroad on a regular basis.
130. The Business Strategy requires Land Registry to produce efficiency in land and property services, to promote re-use of data and ensure effective assurance and compliance. The organisation in its current

state would seem ideally placed to achieve all these things in future, if the Government simply trusts it to get on with the job and work towards these aims, and introduces appropriate rules to allow it to employ its reserves in order to achieve specific aims, including enabling economic stimulus by release of reliable data and other appropriate measures.

131. The proposals in the consultation document appear likely to run counter to the claimed benefits of delivering the business strategy (paragraph 26). It will push up costs (profit margins, double handling, tax and VAT etc.) not reduce costs. It will also slow the process down by creating extra bureaucracy, double handling and a culture in which customers become increasingly adept at ensuring their case is referred to the OCLR which will be too small to handle the increasing workload effectively.

Question 17

Do you have any other comments on the proposals contained in this consultation?

132. As stated at the answer to question 1 above, the case for change has not been made.
133. In that context, the following comments are put forward but should not be taken to be an implied acceptance that the proposals to change the commercial model are appropriate.

134. The case has not been made for any change of commercial model at all. There is nothing inherently wrong with the current model, so there is no need to change it. The priority must be to protect and preserve the core land registration function, which provides the principal economic benefit of land registration. Taking this as the starting point will ensure the value and integrity of the data which is produced, which can then be exploited as required for the purposes set out in the business strategy.
135. Paragraph 70 states that the wider responsibilities of Land Registry would be protected and maintained. There is no detail or even a high level summary whatsoever of how this would be done in practice. The functions listed are largely ones which are done more easily and effectively within Government, which begs the question of why the proposals have been put forward to take Land Registry further from Government in the first place.

Other Areas Of Concern Arising From The Proposals

The State Title Guarantee

136. The retention of a State title guarantee is only of real value if that guarantee continues to operate as it does at present. A service delivery company would appear to only be able to maximise investor return by (a) cutting costs and (b) reducing the level of work and investigation carried out by Land Registry. Any transfer of work (and risk) from Land Registry to customers or their agents would necessarily fundamentally alter the nature of the State title guarantee currently provided. As a monopoly provider and with a captive customer base, Land Registry is ill suited to whole or partial

privatisation as previous considerations of this course of action have concluded.

Possible Implications for Customers in Relation to Indemnity Payments

137. It also seems inevitable that if indemnity payments will reduce the level of profit for private investors, indemnity claims will be resisted more robustly than is the case at present. At the moment, Land Registry does not seek to avoid paying indemnity where it concludes indemnity is properly payable. However, the reality is that it would simply not be cost-effective for customers to pursue many proper indemnity claims if they were more aggressively resisted. Similarly, where maximising the return on investment becomes the primary consideration, it seems inevitable that rights of recourse will be more aggressively pursued where indemnity is paid.

No Financial Benefits of Privatisation

138. No evidence has been provided (or even a suggestion made) that privatisation in the form of a joint venture or contracting out would bring any additional financial benefit. In fact, it is clearly the case that any private investor would understandably want to see the maximum possible return on their investment, to the disadvantage of Government, stakeholders, employees and customers.

An Increased Risk of Fraud

139. If Land Registry moves outside of the Civil Service (and more particularly outside of Government) it will make it more difficult for information to be shared between the Police, other Government Departments and Agencies and Land Registry. This can only have an adverse effect on Land Registry's ability to help to fight fraud. Furthermore, fraud prevention is an expensive business and, save where registration fraud may result in indemnity payments, there would appear little incentive for a service delivery company looking to maximise profit to focus upon it.

140. It is not clear that the Proceeds of Crime Act exemption that currently applies to civil servants working for the Land Registry will continue to apply to employees of the service delivery company, creating serious difficulties in relation to money laundering for all working within the service delivery company.

Question 18

Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments you may have. Comments on the layout of this consultation would also be welcome.

141. Please see section one for our key concerns on the context and manner of this consultation.

142. As stated at the answer to question 1 above, the case for change has not been made. In that context, the following comments are put forward but should not be taken to be an implied acceptance

that the proposals to change the commercial model are appropriate. The consultation document leaves a lot of areas of uncertainty.

143. The consultation does not discuss the tax treatment of each model nor the potential effects on customers and finances. Stakeholders, politicians and the public should be sighted on these issues as a fundamental part of this consultation in order for it to be a genuine consultation. This is a serious omission that the FDA believes should be rectified before any decisions are taken.
144. Paragraph 59 suggests that this consultation is only about a transformation phase for Land Registry. This is not mentioned earlier in the document and it is unclear what it means. Even if it is intended, there is no explicit commitment to a further consultation after this "transformation phase". Presumably this is intended as there would be little to be gained by consulting about the transformation phase and not consulting about the permanent end state, but nothing is stated. Further, there is no discussion of how long the "transformation phase" is likely to last and how it will be assessed and evaluated.
145. The possibility of maintaining the status quo is not referred to in any meaningful way, implying that the decision to create the service delivery company and split Land Registry has already been taken. In this context, we do not believe this can be said to be real, meaningful consultation. Consultation must be made at a time when proposals are still at a formative stage. There is a legitimate expectation for staff and the public to be properly consulted on the proposals to change the business model and this has not been fulfilled.