BUSINESS NAMES (COMMONWEALTH POWERS) BILL 2011

Second Reading

Resumed from an earlier stage of the sitting.

HON SIMON O'BRIEN (South Metropolitan — Minister for Commerce) [5.09 pm] — in reply: Prior to breaking for question time—a very generous question time it was, I say to the Leader of the House—I was responding to recommendation 5 of the Standing Committee on Uniform Legislation and Statutes Review report of the review into the bill. It will probably be no surprise to anyone who has been following this debate that my next proposed course of action is to respond to recommendation 6.

Hon Peter Collier: Have you done 5?

Hon SIMON O'BRIEN: I have done 5. The recommendation reads —

> The Committee recommends that the Minister for Commerce explain to the Legislative Council whether it would be appropriate for there to be a review provision in the Business Names (Commonwealth Powers) Bill 2011 and if not, why not.

The standing committee noted that not the Business Names (Commonwealth Powers) Bill, the commonwealth business names legislation or the relevant intergovernmental agreement contained a review clause that would require an assessment within a set period after the commencement of the operation of the national business names scheme. This is a perennial issue. Some people have the view that review clauses should always be mandatory in legislation. I am not so sure that they are always necessary. I expect any responsible administration—a department or whatever it might be—with the responsibility for the administration of an act of this Parliament to, as a matter of course, constantly monitor the effectiveness of the legislative mechanisms at its disposal and to work with and, in essence, be continually reviewing that and, from time to time, conduct a fuller, comprehensive review with consultation with interested parties. Sometimes review provisions in acts of Parliament can be unfortunate provisions in that they tend to dictate the use of some departmental resources and take them away from other activities that at the time we would probably prefer to prioritise differently. Nonetheless, the principle of review of a scheme such as this is a valid one. In response to the standing committee's recommendation, I have caused an amendment to the bill to be drafted, which will require the relevant minister to conduct a review of the national business names scheme after it has been operating for two years. I propose to move that amendment during the committee debate. My only concern is whether the period of two years might be a little short. We might perhaps revisit that in the committee stage.
The committee also recommended at recommendation 7 —

> … that the Minister for Commerce make representations to the Federal Minister to ensure that the Key Performance Indicators set out in the 'National Business Names Reforms Key Performance Indicators ASIC' will be articulated on a jurisdictional basis.

In her contribution to the second reading debate Hon Adele Farina drew this matter to my attention. I think it is sound policy that we do that. As part of the negotiations between the commonwealth, state and territory governments a set of KPIs have been developed in relation to ASIC's performance in administering the national business names register. The standing committee has suggested that for the purposes of allowing the WA government to monitor the impact on Western Australian businesses of the national business names legislation, it would be useful for any reporting on the key performance indicators to be broken down on a jurisdictional basis. In short, I agree with the standing committee that it would be beneficial for the WA government to review ASIC's key performance indicators on a jurisdictional basis. With that in mind, I will write to the parliamentary secretary to the federal Treasurer requesting that the key performance indicators to the national register be set out on a jurisdictional basis. I will be doubly pleased to do that because I think in the course of debate a member made the observation that sometimes national schemes can be responsive to developments in the eastern states to the extent that it appears that the scheme becomes eastern states-centric. That is a point well made. I recall that, quite recently, we finally received some regulatory impact information from the federal government about proposed workplace health and safety initiatives. Quite frankly, the assessment by that study of the impact on Western Australian businesses was peripheral at best. The analysis was not that deep. I think 50 businesses nationwide were assessed with about two of them from Western Australia. It clearly was not the sort of standard we expect in legislation being introduced here, so I think there is some merit in this. I will pursue this matter not only in writing but also actively.

The committee made some other observations and indicated that it would like a response to them. I will go through them in turn. In relation to clause 4, the committee noted that it received an unsigned copy of the IGA with the supporting documentation for the bill and then looked for signed versions of the IGA. I hope on

receiving that, the committee was able to compare the signed and the unsigned copies and found that we were not trying to fob members off with the wrong documents.

Hon Adele Farina: There were differences.

Hon SIMON O'BRIEN: Were there? That is telling. I am told that the standard practice is that the signed versions of IGAs are to be retained by the COAG secretariat, so they are not immediately available, which seems peculiar to me and to the committee. Obviously, it is appropriate that the state have a signed copy of instruments to which it is a party. For that reason I have undertaken to write to Hon Colin Barnett as Premier, suggesting that a process be established whereby the Department of the Premier and Cabinet obtains a copy of any IGA that has been signed on behalf of the Western Australian government. I think a response to that letter will be interesting to find out what has been going on.

The standing committee raised the question of state and parliamentary sovereignty in clause 6 of the bill in relation to the Western Australian Parliament's role and future amendments to the commonwealth business names legislation. The intergovernmental agreement requires that the commonwealth government cannot amend the business names legislation—its legislation—without the approval of the Ministerial Council for Corporations. Approval by the ministerial council will require a positive vote by the commonwealth and at least three other members, two of which must be states. The standing committee is critical of these voting arrangements. It points out that it is possible, technically, for the business names legislation to be repealed or amended by the commonwealth Parliament contrary to the wishes of the Western Australian government or Parliament of the day. A couple of points are pertinent here. One is that we need to understand that this is a referral of power; that is, we are handing over the power to make laws and implement them. As we have seen, we have some qualifications that we can apply to that, but members should have no doubt that the first thing that we have to decide as a Parliament when considering this bill is: do we want to refer this power?

Hon Kate Doust: You are the government. You made the decision. About half an hour ago you had us all. We're supporting the bill. It is up to you how long you want to delay it.

Hon SIMON O'BRIEN: Stick with me; do not weaken! It is a rhetorical question. Once we refer it —

Hon Ken Travers: There are not enough clichés in this speech for us to support it!

Hon SIMON O'BRIEN: I will try to introduce a few more in the fullness of time. At the end of the day—I might still be on my feet at the end of the day —

Hon Kate Doust: If you keep going, we might change our mind.

Hon SIMON O'BRIEN: I am not trying to talk members out of it, but I am trying to respond to the —

Several members interjected.

Hon SIMON O'BRIEN: Mr President, the voting arrangements —

The DEPUTY PRESIDENT: I note the interjections and I am sure that you wish to move on.

Hon Sue Ellery: He has got himself in a pickle.

Hon SIMON O'BRIEN: I am not in a pickle. The voting arrangements contained in the IGA were agreed to by the various governments. They are not dissimilar to other arrangements established by other IGAs. In response to the committee, I point out that the requirement for the ministerial council to agree is probably more than what might be expected on other occasions when powers have been referred. I have been a member of a few ministerial councils and I have found that in practice there is a genuine search for unanimity and certainly consensus; I have not seen an occasion when strident objections are not taken on board. Let us face it; this is about a business names register and not about the division of GST or income tax. I do not anticipate that there should be great problems. The legislation also retains the option for this Parliament to withdraw from any part or the totality of the scheme if it wishes to in the future. Again, that is a safeguard against an unconscionable unilateral action by a future commonwealth government.

I have taken a bit of time to respond because I want to respond fully to the matters members raised. Members have asked me to go through these recommendations, and I am doing so; we are almost there.

Hon Adele Farina: Minister, while you are finding your place, will you take an interjection?

Hon SIMON O'BRIEN: The member can go for her life.

Hon Adele Farina: I failed to put on record the committee's appreciation of the assistance provided by the officers of the Department for Commerce. As always, the officers were right across their brief. They understand the committee's terms of reference and they provided great assistance to the committee. I apologise to those

officers for not putting that on the record when I rose to speak. I thank the minister and the Deputy President for indulging me in putting that on the record at this time.

Hon SIMON O'BRIEN: That was a very helpful interjection, unlike some we hear. I think the member is indicating that the briefings and the other in-person information given by the department has rounded out the committee's understanding of these matters and, therefore, there is probably a limited requirement for me to give any further detail. I will do that; I am here to serve the house.

The only other point that I make before concluding—I seek the assistance of the house in this—is that the scheme is intended to be nationally implemented on 28 May this year. The exchange of information by computers is targeted to occur on that date. So, if we work back from there, there are some requirements to progress this legislation. Even though I introduced this legislation back in November, there has not been a lot of sitting time. We did not sit until 6 March and we will not sit —

Hon Kate Doust: We tried to keep our comments really brief today to help you.

Hon SIMON O'BRIEN: I also appreciate that. I am trying to give proper responses so that we can keep the committee stage brief. This bill has to go to another place and I think it would place in jeopardy the passage of the bill if we do not expedite it. Although I intend to move some amendments, I will seek to bring the third reading forward to tomorrow if members are —

Hon Kate Doust: You can do it today.

Hon SIMON O'BRIEN: When one moves amendments, I think it might be prudent to wait overnight, just to make sure that we got it right. I will seek to bring the third reading forward to tomorrow. With that in mind, I again thank everyone for their support of the second reading. I hope that I have not been too brief in my response!

I commend the second reading to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Brian Ellis) in the chair; Hon Simon O'Brien (Minister for Commerce) in charge of the bill.

Clauses 1 to 10 put and passed.

Clause 11: Regulations for purposes of *Business Names Registration Act 2011* (Commonwealth) s. 13 and 14 —

Hon SIMON O'BRIEN: I thank the Chair of the Standing Committee on Uniform Legislation and Statutes Review for deferring to allow me to move the amendment standing in my name on the supplementary notice paper at 2/11. I move —

> Page 10, after line 6 — To insert —
>
> (3) Regulations cannot be made in accordance with subsection (1) or (2) unless a draft of the regulations has first been approved by a resolution passed by both Houses of the Parliament of the State.

I indicated during the course of my response to the second reading debate that I would move this amendment to deal with a specific and, indeed, perennial concern of the uniform legislation committee—that is, Henry VIII clauses. I indicated that I had had some discussions out of session in other quarters with one or two people who held the view that this was not really a Henry VIII clause and could be justified. I do not take that view; I based it on long observation of the conduct of this place and its attitude towards these matters, and I feel constrained to respect and observe what has basically become a convention in this place. It is my view that the arguments that might insist on this amendment remaining as drafted have all been dealt with in the past during debate in this place and I do not intend to carry on at any length about that. I said in my response to the second reading debate that we already had a model contained within this bill that proposes a way for a similar issue to be dealt with. We have already passed over clause 8, so I refer to it as a clause that has already been accepted by this committee. That clause provides for the Governor, by proclamation, to do a number of things, including amend or terminate this reference or power. On its own, that would be one big Henry VIII clause; but, of course, its saving aspect is that at subclause (6) there is the requirement that a proclamation cannot be made under subsection (1) unless a draft of the proclamation has first been approved by a resolution passed by both houses of the Parliament of the state. If it is convenient to do that in that situation, and this place, through one of our standing committees

applying our established standards, says that that is the way to do it, I do not see why we should not be able to apply the same procedure three clauses later in relation to the making of regulations.

This is a matter of some significance; that is the reason I am taking a few minutes to explain why I am going down this path. I think it is important that we put it on the record because it is the sort of thing we should do whenever a like situation presents. I hope that the amendment I have moved deals with the chamber's concerns and that it will be accepted unanimously.

Hon KATE DOUST: On behalf of the opposition I thank the minister for moving this amendment after picking up on the comments and recommendations of the committee. We will support his amendment.

Hon ADELE FARINA: I just have a procedural question: do I need to formally withdraw the committee recommendation? I assume I do not because it has not been formally moved, but I just thought I would double-check.

The DEPUTY CHAIR (Hon Brian Ellis): That is correct; it has not been formally moved so there is no need for a withdrawal.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 12 put and passed.

New clause 13A —

Hon SIMON O'BRIEN: I move —

Page 11, after line 5 — To insert —

> **13A. Review of Act**
>
> (1) The Minister must carry out a review of the operation and effectiveness of this Act as soon as is practicable after the end of the period of 2 years beginning on the commencement day (as defined in section 12(1)).
>
> (2) The Minister must prepare a report based on the review and, as soon as is practicable after the report is prepared, cause it to be laid before both Houses of the Parliament of the State.

This proposed new clause is for a review of the operation and effectiveness of this legislation. This was discussed by a couple of members, including me, during the course of the second reading debate and I indicated on behalf of the government that I agreed with the principle that the act should be reviewed.

What I might ask, though, is whether this is correctly numbered as 13A, or whether it should be 12A? I ask that question only because it is probably important to clarify which part of the bill it actually sits in. We are referring, of course, to a review of the legislation, being the Business Names (Commonwealth Powers) Bill 2011, not the Business Names Act 1962. I just seek your advice, Mr Deputy Chair.

Hon Adele Farina interjected.

Hon SIMON O'BRIEN: Well, everyone understood what used to happen, and now it has been changed. I do not know whether this would be a Clerk's amendment as required, having raised it on the record, but I will wait for some advice.

The DEPUTY CHAIR: For members' information, I have been advised that the wording is correct for the Council's procedure. But just to make it clear, the new clause will go in on page 11, after line 5, and when the bill is printed it will be renumbered sequentially.

Hon SIMON O'BRIEN: Having put that explanation on the record, it is now clear, so I thank the Deputy Chair for that and hope that members support this amendment. The only outstanding matter is that Hon Adele Farina indicated that she felt that two years was perhaps a bit short a time; she may be right. I do not know whether she wants to move something else at this stage.

Hon ADELE FARINA: It was actually the minister, in his response to the second reading debate, who suggested that two years might be a bit short, and I indicated across the chamber that I tended to agree with him. By the time the transfer occurs and the processes are in place, two years will probably be a little short to conduct a review, and I would be happy to see something like five years, which is normally the standard period for a review to be conducted. I would be interested to hear the views of Hon Kate Doust, who has carriage of this bill for the opposition. There may be some businesses that think five years is too long; however, I think five years is fairly standard.

Hon KATE DOUST: I acknowledge that the minister has responded to the comments made in the committee report about the lack of capacity for review in the state legislation, the commonwealth legislation and the intergovernmental agreement. I note that a number of members made remarks about the need for a review and picked up on the comments that have just been made by the minister and Hon Adele Farina. By the time this all gets started and work commences, two years will probably be too short. I imagine that the minister will feel quite comfortable if the proposition was that the period of two years be changed to a period of, perhaps, five years. That might give everyone ample opportunity to settle into this new scheme of arrangements, to see what does and does not work, and to come back and have a good look at how it has operated. I do not know whether the minister would like to move the amendment, but we will support it.

Hon SIMON O'BRIEN: I thank honourable members for their input. I have just signed an instrument for the Deputy Clerk indicating that I would like to change the figure from two years to five years. I therefore move —

Page 11, line 8 — To delete "2" and substitute —

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Amendment put and passed.

New clause, as amended, put and passed.

Clauses 13 to 27 put and passed.

Clause 28: Section 19 amended —

Hon SIMON O'BRIEN: I move —

Page 26, lines 3 to 5 — To delete the lines.

The effect of moving this amendment is to remove proposed section 19(2C) of the Business Names Act 1962. The proposed section provides that the Commissioner for Consumer Protection cannot exercise her power to cancel a business name more than one month after the national business name register commences in situations in which a notice of proposed cancellation has been sent before the national register commenced. However, the holder of a business name, on receiving notice of a proposed cancellation, has one month in which to satisfy the commissioner that the name should not be cancelled. Proposed section 19(2B) provides that on the expiration of the one-month period the commissioner may decide whether the business name should be cancelled. If the commissioner determines that the business name should be cancelled, the Australian Securities and Investments Commission will be instructed to effect the cancellation under transitional arrangements. Proposed section 19(2C) was drafted to ensure that the commissioner's power to cancel a business name did not continue for an indefinite period after the national register commences operation. However, since the introduction of the bill, it has been identified that this power is already limited by proposed section 19(2B), making proposed section 19(2C) an unnecessary amendment to the act. I want to delete these lines only to finetune the bill.

Hon KATE DOUST: The opposition will agree to the amendment.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 29 to 44 put and passed.

Title put and passed.

Report

Bill reported, with amendments, and, by leave, the report adopted.