



THIRTY-EIGHTH PARLIAMENT

REPORT 70
STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW
BUSINESS NAMES (COMMONWEALTH POWERS)
BILL 2011

Presented by Hon Adele Farina MLC (Chairman)

March 2012

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

- 8.1 *A Uniform Legislation and Statutes Review Committee* is established.
- 8.2 The Committee consists of 4 Members.
- 8.3 The functions of the Committee are -
- (a) to consider and report on Bills referred under SO 230A;
 - (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to review the form and content of the statute book;
 - (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
 - (f) to consider and report on any matter referred by the House or under SO 125A.
- 8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)	Hon Liz Behjat MLC
Hon Nigel Hallett MLC (Deputy Chairman)	Hon Linda Savage MLC

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

BUSINESS NAMES (COMMONWEALTH POWERS) BILL 2011

1 REFERRAL

- 1.1 On 30 November 2011, Hon Simon O'Brien MLC, Minister for Commerce, introduced the Business Names (Commonwealth Powers) Bill 2011 (**Bill**) into the Legislative Council.
- 1.2 Following its Second Reading, the Bill stood automatically referred to the Uniform Legislation and Statutes Review Committee (**Committee**) pursuant to Standing Order 230A. Under Temporary Standing Orders of the Legislative Council which expired on 31 December, the Committee must report to the Legislative Council within 45 days of referral of a bill. Therefore, the last date for tabling the Committee's report is Saturday, 14 January 2012 or the first sitting date thereafter, which is Tuesday, 6 March 2012.

2 INQUIRY PROCEDURE

- 2.1 The Committee's inquiry was advertised in *The West Australian* on 10 December 2011. Details of the inquiry are published on the Committee's webpage.
- 2.2 The Committee wrote to stakeholders inviting submissions. The list of stakeholders is at **Appendix 1**. The Committee received two written submissions and extends its appreciation to those who made submissions.
- 2.3 The Committee held a hearing with the Department of Commerce (**Department**) on 18 January 2012, which was attended by:
- 2.3.1 Mr Gary Newcombe, Director, Strategic Policy and Development;
- 2.3.2 Mr Gerald Milford, Manager, Strategic Policy; and
- 2.3.3 Ms Felicity Bonner, Senior Policy Officer, Consumer Protection Division.
- 2.4 As in its recent experiences with the Department, it was well prepared and helpful in the assistance provided to the Committee and the Committee thanks it for its assistance.

3 UNIFORM LEGISLATION

- 3.1 In terms of structures for uniform legislation discussed in previous Committee reports, the Bill is a mixture of Structures 3 and 4. That is, it is adopted legislation and a referral of power under section 51(xxxvii) of the *Commonwealth Constitution* (**Constitution**). The structures are set out in **Appendix 2**.

4 SUPPORTING DOCUMENTS

- 4.1 On 30 November 2011, on the day the Bill was referred to the Committee, the Committee received a letter from the Minister for Commerce, Hon Simon O'Brien MLC, containing background information and supporting documentation.
- 4.2 Following correspondence by email with the Department, the following documentation was also provided.
- 4.2.1 An unsigned copy of an Intergovernmental Agreement entitled 'Intergovernmental Agreement for Business Names Agreement 2009' (**IGA**).
- 4.2.2 Copies of the *Business Names Registration Act 2011 (Commonwealth)* (**Commonwealth Act**) and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011 (Commonwealth)* (together, **Commonwealth Acts**).
- 4.2.3 The communiqué from the meeting of the Council of Australian Governments (**COAG**) on 2 July 2009.
- 4.3 When a signed copy of the IGA was requested, the Department stated:
- I have been advised that the practice is for the Department of Prime Minister and Cabinet to retain signed copies of Intergovernmental Agreements, therefore I am unable to provide a signed copy to the Committee. The official outcomes of COAG meetings, as published on the COAG website, are the public record of the agreement of jurisdictions to particular IGAs.*
- I have therefore attached the communiqué from the COAG meeting of 2 July 2009. Please refer to page 7, which refers to the signing of the Business Names IGA.¹*
- 4.4 Upon making a further request to the Department,² a signed copy of the IGA was provided on 3 January 2012.³
- 4.5 The Committee notes the following differences between the signed and unsigned copies of the IGA.
- 4.5.1 In section 5.4(2), the signed copy adds the words “*agreed in consultation with State and Territory agencies*” after “*Commission’s key performance indicators*”.
- 4.5.2 Paragraph 6.2 has been added to the signed copy.

¹ Email from Ms Felicity Bonner, Senior Policy Officer, Consumer Protection, Department of Commerce, 8 December 2011.

² Letter from Hon Adele Farina MLC to Ms Felicity Bonner, Senior Policy Officer, Consumer Protection, Department of Commerce, 20 December 2011.

³ Letter from Mr Gary Newcombe, Assistant Commissioner for Consumer Protection, Department of Commerce, to Hon Adele Farina MLC, 30 December 2011.

- 4.6 It is important, in order for the Committee to properly undertake its scrutiny function, for it to be provided with the final versions and, where relevant, signed copies of supporting documentation, especially documents that underpin national scheme legislation such as IGAs. Otherwise, its ability to scrutinise the proposed legislation is impeded.

5 BACKGROUND TO THE BILL

- 5.1 On 3 July 2008, COAG agreed to the development of a single national system for the registration and regulation of business names. The IGA was signed at a COAG meeting by all Australian jurisdictions on 2 July 2009.⁴

The legislative scheme

- 5.2 The Bill adopts the *Commonwealth Acts* and refers to the Commonwealth Parliament the power to amend the *Commonwealth Acts*. It also contains transitional and consequential provisions that are required for the implementation of the national business names reforms in Western Australia.⁵ This adoption and reference will give the Commonwealth Parliament power to legislate in regard to business names registration for the purposes of establishing a national business names register (**National Register**).
- 5.3 The referral of power to the Commonwealth is text-based in that the only powers referred are those in the text of the *Commonwealth Acts* rather than an entire subject.⁶ However, the Committee notes that the term “*continuing business names matters*” has a potential for broad interpretation (see paragraphs 6.10 to 6.18 below).
- 5.4 Currently, there is a separate business names register operating in each Australian jurisdiction. A business proprietor who trades under a business name in more than one state or territory must register this name and pay the relevant fee in each jurisdiction.
- 5.5 The establishment of the National Register will mean that a business proprietor will be required to register a business name only once to be able to trade under that name in every jurisdiction in Australia.
- 5.6 The Commonwealth legislation will effectively replace the *Business Names Act 1962 (WA)* (**WA Act**). The National Register, which is scheduled to commence operating on 28 May 2012, will be operated by the Australian Securities and Investments Commission (**ASIC**).⁷

⁴ Government of Western Australia, Department of Commerce, *Explanatory Memorandum, Business Names (Commonwealth Powers) Bill 2011*, p1.

⁵ Ibid.

⁶ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 58, *Child Support (Adoption of Laws) Amendment Bill 2009*, 15 February 2011, p6.

⁷ Hon Simon O’Brien MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 30 November 2011, p10085-10086.

6 ISSUES RAISED BY THE BILL

State and Parliamentary Sovereignty

Generally

- 6.1 An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or a provision of a uniform bill itself, derogates from the sovereignty of the State and the State Parliament.

The Intergovernmental Agreement

- 6.2 In order to ensure the Legislative Council has access to all relevant material to enable it to give fully informed consideration to the Bill and the national scheme, the signed IGA is attached as **Appendix 3**.
- 6.3 Section 4.4(1) of the IGA provides that the Commonwealth will not repeal or amend the national law without the approval of the Ministerial Council. However, “*approval of the Ministerial Council*” is defined in section 1.3(1) of the IGA as meaning a positive vote of the Commonwealth Minister plus at least three other members, at least two of whom must represent states.
- 6.4 The Department confirmed this accurately reflects the position under the IGA⁸. It also said:

Could a decision be made to amend the law contrary to the wishes of Western Australia? The answer is: yes.

*The IGA was developed as a result of unanimous agreement. But the mechanism for dealing with future amendments to the law is the ministerial council process—same for corporations, same voting arrangement for business names. So, it is not unanimous. As I say, it is the commonwealth plus three others, two of which are states. All future amendments will go through that. Normally, it is unanimous because of the issues about trying to maintain good relations, but the technical answer is that it is possible for an amendment to be put up which Western Australia does not support. But that was a policy decision and the government agreed to sign off on the IGA. The government made a conscious decision about that process.*⁹

- 6.5 The Committee notes with concern the following.
- 6.5.1 The wishes of Western Australia Government/Parliament may be overridden if the national law were to be repealed or amended by the Commonwealth on the advice of the Ministerial Council in circumstances where that advice is not supported by Western Australia.

⁸ Mr Gary Newcombe, Director, Strategic Policy and Development, Department of Commerce, *Transcript of Evidence*, 18 January 2012, p16 (*Transcript of Evidence*).

⁹ *Transcript of Evidence*, pp10 and 11.

- 6.5.2 The positive vote referred to in paragraph 6.3 above is less than a majority of the Ministerial Council.
- 6.6 In the circumstances, when an amendment is made contrary to the wishes of Western Australia this has the potential to impact on the sovereignty of the Western Australian Parliament.
- 6.7 It is also notable that:
- 6.7.1 the approval of the Ministerial Council is not required if the amendment is minor or technical and the question of whether it is minor or technical can itself be put to the Ministerial Council for a vote¹⁰; and
- 6.7.2 there is no scope for these amendments to be communicated to, or approved by the state or territory parliaments.
- 6.8 The position of the Department is that the procedures in the IGA for the amendment or repeal of the national law arise from the referral model of the national scheme.¹¹ However, this fact does not respect parliamentary sovereignty.
- 6.9 The Committee draws these provisions of the IGA to the attention of the Legislative Council given their effect of diminishing the sovereignty of the State and the Western Australian Parliament.

Scope of the text based referral

- 6.10 Clause 4(1) of the Bill sets out all those matters, termed “*continuing business names matters*” for which power is proposed to be referred to the Commonwealth by the State.
- 6.11 The exact scope of the phrase “*continuing business names matters*” has been questioned in the Tasmanian Legislative Council. Government Administration Committee “B” of the Tasmanian Legislative Council (**Tasmanian Committee**) received evidence that:
- there was potential for a broad interpretation of matters defined as continuing business names matters under Section 5 of the Bill.*¹²
- 6.12 The Tasmanian Committee concluded that, due to this potential for broad interpretation, the referral of state power has been poorly defined.¹³
- 6.13 The Committee agrees with this view. One example appears in clause 4(1)(f) of the Bill, which provides:

¹⁰ Section 4.1(1) and (3) of the Intergovernmental Agreement for Business Names Agreement 2009, 2 July 2009.

¹¹ *Transcript of Evidence*, p16.

¹² Tasmania, Legislative Council, Government Administration Committee “B”, Report No.43, *Report on the Business Names (Commonwealth Powers) Bill 2011*, 25 August 2011, p10.

¹³ *Ibid*, p19.

the prohibition or restriction of the use of business names by an entity because the entity has engaged in unlawful conduct or a person involved in the management of the entity has engaged in unlawful conduct.

6.14 There is no definition of “*unlawful conduct*”. It was the view of the Tasmanian Committee that:

*such an open-ended referral of a State power has the potential to cause future problems in the way the Commonwealth implements this referred power.*¹⁴

6.15 When this was put to the Department it made the following points.

- It is difficult to articulate fully the sort of things that you would want captured within “*unlawful conduct*”.
- There are many offences that might legitimately warrant a person not having a business name, such as bankruptcy and insolvency.¹⁵
- It is better not to seek to define it as you run the risk of leaving things out.
- It would be very difficult to have a different test for Western Australia than nationally as it will be a national business name register.¹⁶

6.16 The Committee is concerned with the position expressed by the Department. It appears there has been no attempt to articulate the meaning of “*unlawful conduct*” for the following reasons:

- (1) that it is too difficult (the Committee notes that there are numerous Acts that define far more complex terms); and
- (2) it will impact upon the uniformity of the national scheme (the Committee notes that this would not be the case if greater clarity was incorporated in enabling legislation in each participating jurisdiction).

6.17 The failure to clearly articulate the referral power raises uncertainties about the scope of the referral power and the potential future exercise of the referral power by the Commonwealth.

6.18 This should be of concern to the Western Australian Parliament as the result may be a greater impact on Western Australia’s parliamentary sovereignty than that envisaged by the Western Australian Parliament with this referral of power.

¹⁴ Tasmania, Legislative Council, Government Administration Committee “B”, Report No.43, *Report on the Business Names (Commonwealth Powers) Bill 2011*, 25 August 2011, p11.

¹⁵ *Transcript of Evidence*, p17.

¹⁶ *Ibid.*

Recommendation 1: The Committee recommends that the Minister for Commerce explain to the Legislative Council the full scope of the power being referred to the Commonwealth by the legislation.

Recommendation 2: The Committee recommends that the Minister for Commerce provide examples to the Legislative Council to illustrate the intended scope of the term “unlawful conduct” other than bankruptcy and insolvency.

Recommendation 3: The Committee recommends that the Minister for Commerce make representations to the Ministerial Council to effect the insertion of a definition of “unlawful conduct” into the *Business Names Registration Act 2011 (Commonwealth)*.

Henry VIII clauses

Generally

6.19 The position of the Committee on Henry VIII clauses is well documented in previous Committee reports.¹⁷ A Henry VIII clause enables an Act to be amended by subordinate legislation.

Clause 8

6.20 Clause 8(1) of the Bill provides:

8. Termination of adoption and amendment reference

(1) The Governor may, at any time, by proclamation published in the Gazette, fix a day as the day on which –

(a) the adoption and the amendment reference are to terminate; or

(b) the amendment reference is to terminate; or

(c) the adoption is to terminate (if the amendment reference has been previously terminated).

6.21 The Explanatory Memorandum describes clause 8 as providing the Western Australian Parliament with the capacity to withdraw the adoption of the national business names legislation and the amendment reference at a future date if required.¹⁸

¹⁷ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 59, *Personal Properties Securities (Commonwealth Laws) Bill 2007 and Personal Properties Securities (Consequential Repeals and Amendments) Bill 2007*, 22 March 2011, p6; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 55, *Trade Measurement Legislation (Amendment and Expiry Bill) 2010*, 11 November 2010, pp10-12.

- 6.22 While this is a Henry VIII clause as it is a delegation of power from the Parliament to the Governor by way of subordinate legislation and would result in the amendment of the Bill, clause 8(6) provides:

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.

- 6.23 The use of this procedure retains the Western Australian Parliament's power to make laws which includes the power to amend laws and terminate a referral of power to another jurisdiction which safe-guards parliamentary sovereignty with regard to this limited application only.

Clause 11

- 6.24 Clause 11 of the Bill states:

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

(1) The regulations may declare a matter to be an excluded matter for the purposes of the Business Names Registration Act 2011 (Commonwealth) section 13 in relation to —

(a) the whole of the national business names legislation; or

(b) a specified provision of the national business names legislation; or

(c) the national business names legislation other than a specified provision; or

(d) the national business names legislation otherwise than to a specified extent.

(2) The regulations may declare a provision of a law of the State to be a business names legislation displacement provision for the purposes of the Business Names Registration Act 2011 (Commonwealth) section 14 (either generally or specifically in relation to a provision of the national business names legislation).

- 6.25 Clause 11 of the Bill provides that regulations may be made to exclude matters from the scope of the Commonwealth business names legislation or to displace provisions in State law from operation of the Commonwealth business names legislation.

- 6.26 Clause 11 is a Henry VIII clause as it enables the Bill to be amended by subordinate legislation. The Explanatory Memorandum, in recognising clause 11 as a Henry VIII clause, seeks to explain it as follows.

¹⁸ Government of Western Australia, Department of Commerce, *Explanatory Memorandum, Business Names (Commonwealth Powers) Bill 2011*, p10.

While it is recognised that clause 11 is a Henry VIII clause, which will enable the proposed Act to be amended by subordinate legislation, its inclusion in the proposed Act provides the State Government with a mechanism to deal with any identified inconsistencies in a timely manner.

If an amendment Act were required to declare a matter to be an excluded matter, or to declare a provision to be a business names legislation displacement provision, there will be a significantly longer period between the identification of the inconsistency and the enactment of the declaration.

Clause 11 will ensure that, in the event that an inconsistency between a State law and the national business names legislation is identified, there will only be a minimal period in which State law is invalid.¹⁹

6.27 When the Department was requested to expand upon this during the hearing, it stated:

...doing anything by regulation is always quicker than doing it by amendment act.²⁰

The view was that from a state's perspective there might be an issue that needs immediate protection. It is most likely going to affect a state's rights issue and that the state needs to be able to act immediately by way of regulation.²¹

6.28 The Department did not identify any examples of issues that may require immediate protection to justify, to the Committee's satisfaction, the operation of clause 11 as a Henry VIII clause, rather than an amendment bill.

6.29 Unlike clause 8 of the Bill, clause 11 does not require that any regulation or proclamation be first approved by both Houses of State Parliament.

6.30 Clause 11 directly impacts the sovereignty of the Parliament of Western Australia by denying the Western Australian Parliament the opportunity to consider the effects of any regulation made under the clause.

6.31 The Committee does not accept the Department's explanation that the intentional avoidance of parliamentary scrutiny because it is quicker than doing it by amendment act is, or should be an acceptable justification for the derogation of parliamentary sovereignty.

6.32 Further, section 14 of the *Business Names Registration Act 2011 (Commonwealth)* operates to remove any inconsistencies between the national business names

¹⁹ Government of Western Australia, Department of Commerce, *Explanatory Memorandum, Business Names (Commonwealth Powers) Bill 2011*, p14.

²⁰ *Transcript of Evidence*, p18.

²¹ *Ibid*, p19.

- legislation and provisions that have been declared to be business name legislation displacement provisions by a law of a State or Territory.
- 6.33 This means that it is possible for the Commonwealth Government to disallow declarations of excluded matters that have been made by the State pursuant to clause 11. This is a further assault on the sovereignty of the Parliament of Western Australia and its law-making power.
- 6.34 While it is arguable that this provision merely reflects section 109 of the *Commonwealth Constitution*, the fact that ambiguity with regards to the scope of the referral power (see paragraphs 6.10 to 6.18) necessitates clause 11, highlights the need for greater clarity as to the scope of the referral power under the Bill.
- 6.35 The purpose of clause 11 is to provide the State with a safeguard to enable the State to exclude matters from the scope of the Commonwealth business names legislation made necessary due to a potential for a very broad interpretation of “*continuing business names matters*” (see paragraph 6.11). This safeguard can be overridden by the Commonwealth which undermines the intention of the safeguard. Further, if the enabling legislation for the national scheme provided greater clarity and certainty as to the scope of the referral power, such a provision would not be required.
- 6.36 The Committee again confirms its position that legislation should provide clarity and certainty rather than place reliance on Henry VIII regulation making powers to correct inadequacies in legislation at a future time by regulation and in doing so, derogate from the sovereignty of the State Parliament.
- 6.37 The Committee considered the merits of a positive affirmation resolution procedure to enhance the Parliament’s ability to scrutinise the regulations before they come into operation.
- 6.38 Essentially, the positive affirmative resolution procedure requires that when regulations are made and gazetted, both Houses of Parliament must then approve rather than disallow the regulations before they can come into operation. During that interval they may be subject to criticism and objection.²²
- 6.39 A former Legislation Committee of the 35th Parliament inquiring into the Sentencing Matrix Bill 1999,²³ heard evidence from the then Attorney General who described the procedure in the following way:

The regulations [are] passed and laid before Parliament. It will then be up to the Government to try to get an affirmatory motion passed as the regulations will have no effect until that occurs.

²² Stephen Argument, “Leaving it to the Regs” – The pros and cons of dealing with issues in subordinate legislation”, *Paper for Australia-New Zealand Scrutiny of Legislation Conference*, Brisbane, 26-28 July 2011, p19.

²³ Western Australia, Legislative Council, Legislation Committee 1989-2001, Report 53, *Sentencing Matrix Bill 1999*, 18 October 2000, pp84-90.

The regulations ... have a legal effect as a regulation, but will have no impact until a positive resolution is achieved. No limit will apply to how long it may take to do that, in the same way that no limit applies to how long it takes to bring in and pass a Bill.

...

It may be a long process. It may be some period before a resolution is made by both Houses of Parliament.

The matter will then eventually be passed in the negative or affirmative. A negative result will repeal the regulation, and an affirmative result will bring it into effect at a fixed time or a time stipulated in the regulation.²⁴

- 6.40 Of this procedure, Mr Stephen Argument in a paper titled “Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation” said:

The obvious advantage, for the Parliament, of requiring affirmative resolution of both Houses before subordinate legislation can take effect is the capacity to amend such legislation.

Another advantage is that affirmative resolution procedures prevent subordinate legislation from operating until such time as the Parliament sits and moves to disallow the subordinate legislation (which can take several months, particularly when subordinate legislation is made in a long parliamentary recess).²⁵

- 6.41 The Committee is of the view that a positive affirmation resolution procedure applying to any regulations made under clause 11 will enhance the sovereignty of the Parliament and makes the following recommendation.

Recommendation 4: The Committee recommends clause 11 of the Business Names (Commonwealth Powers) Bill 2011 be amended to provide for greater parliamentary scrutiny of any regulations that may be made pursuant to clause 11. This may be effected in the following manner:

Page 10, after line 6 – To insert –

(3) The regulations shall not come into effect unless recommended by resolution passed by both Houses of Parliament of this State.

²⁴ Then Hon P G Foss QC, former Attorney General, Minister for Justice and former MLC, *Transcript of Evidence*, 13 September 2000, pp16 - 17.

²⁵ Stephen Argument, “Leaving it to the Regs” – The pros and cons of dealing with issues in subordinate legislation”, *Paper for Australia-New Zealand Scrutiny of Legislation Conference*, Brisbane, 26-28 July 2011, p19.

7 OTHER MATTERS ARISING FROM THE BILL AND THE NATIONAL SCHEME

Duplicated names appearing on the National Register

- 7.1 Clause 17 of the Bill proposes to insert a new section 4B into the *WA Act* providing for the State to disclose business names registration data to ASIC. This appears to be for the purposes of the migration of this data from state registers to the National Register to be administered by ASIC.²⁶
- 7.2 Some of these business names will be identical to others that have been registered by different owners in different jurisdictions. It is proposed by the Commonwealth, to overcome any confusion, that ASIC may insert a word or expression on the National Register to distinguish identically named business names. This may be a word or expression identifying the location at which a business is carried on,²⁷ which has been referred to as a ‘geographic indicator’.²⁸
- 7.3 Businesses will only be required to have a distinguishing word or expression included on the National Register and will not have to append it to their trading name. This will avoid them having to incur the cost of changing their advertising.²⁹
- 7.4 For example, ABC Trading in Perth and ABC Trading in Brisbane are registered as business names on the Western Australian and Queensland registers respectively. Both will be migrated to the National Register and ASIC will add a distinguishing word or expression (such as ABC Trading (WA)) to make it clear to anyone searching the National Register that they are different businesses. Neither business will be required to change their trading name.
- 7.5 The Committee has identified several potential issues with this approach.
- 7.5.1 Consumers will not be able to distinguish businesses with identical names without checking the National Register. This may lead them to associate incorrectly one business operating in one jurisdiction with another operating in a different jurisdiction, which could create confusion and may adversely affect a business’s goodwill.³⁰
- 7.5.2 New business names will not be able to be registered on the National Register if they are identical or “*nearly identical*” to a business on the National Register.³¹ This would appear to prevent them using a word or expression, such as a geographic indicator. The effect of this is that there will be one rule

²⁶ See also section 5.3 of the Intergovernmental Agreement for Business Names Agreement 2009, 2 July 2009.

²⁷ See section 18(5) of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

²⁸ *Transcript of Evidence*, p4. See also Tasmania, Legislative Council, Government Administration Committee “B”, Report No.43, *Report on Business Names (Commonwealth Powers) Bill 2011*, 25 August 2011, p14.

²⁹ *Transcript of Evidence*, p4.

³⁰ For example, a consumer may have a positive experience when dining at a restaurant in one state but have a negative experience when dining at another with the same name in another state.

³¹ See section 25(a)(i) of the *Business Names Registration Act 2011* (Commonwealth).

for existing business names and another rule for new business names, which is, arguably, discriminatory in nature.

7.5.3 What is ‘*nearly identical*’ is a subjective judgment.

7.6 When each of these matters was put to the Department, it responded as follows.

With respect to consumer confusion

7.7 The Department denied that consumers will be confused. It said:

*Really, I do not think there is a huge amount of consumer confusion. The reality for the consumer is that it is only at a point where you get into some dispute that you really want to find out, and the register is available. There will be geographic identifiers on the register for existing names so people will be able to clearly identify, if there is more than one, who they are; and going forward again in relation to any business name, they have 24/7 access free of charge to be able to look behind any business name. I do not think there is any reason there should be consumer confusion; and equally for other businesses, I think they benefit as well.*³²

With respect to discrimination towards new business names

7.8 While the Department acknowledged the discriminatory impact of the national scheme, it believes it to be justified on the ground that it is appropriate to distinguish between existing and new business names when establishing a national scheme, grandfathering being a very common process.³³ The Department also stated:

*What the policy position has been is that people who have had a business name and have been operating here should not be disadvantaged or required to change it by virtue of establishing a national scheme.*³⁴

7.9 Also, the Department said the Commonwealth has indicated, following feedback from stakeholders, those seeking registration of business names on the National Register after the migration of data from state and territory registers will also be able to have the benefit of being distinguished from any existing business name by the insertion of a word or expression by ASIC³⁵ (geographic indicator).

7.10 The Department stated:

³² *Transcript of Evidence*, p8.

³³ *Transcript of Evidence*, p8. See also section 18 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). A grandfathering clause or mechanism is a legal term used to describe a situation in which an old rule continues to apply to some existing situations, while a new rule will apply to all future situations.

³⁴ *Transcript of Evidence*, p5.

³⁵ *Ibid.*

...the issue of the geographic indicator has been raised as to whether, post the transfer, people will be able to add a geographic indicator onto the business name. The answer is that that will be allowed. In those cases, however, it will be part of their name. So they will have to actually advertise that. They will have to include WA in their name and on their correspondence and everything else.³⁶

- 7.11 The Committee notes that this may become an issue should the business expand in the future to operate in different states and may also lead to consumer confusion.

With respect to subjectiveness of the term “nearly identical”

- 7.12 When asked whether there were any criteria or guidelines to use in determining the term ‘nearly identical’, the Department said:

*Yes – they are being developed is the answer to that.*³⁷

- 7.13 As these criteria or guidelines were not made available to the Committee, the Committee is unable to comment on their adequacy or any impact on parliamentary sovereignty. However, the Committee expects, following on from the evidence of the Department in paragraph 7.10 above, that they will make clear that a new business name will not be “nearly identical” to an existing business name if it is accompanied by a distinguishing word or expression on the National Register.

- 7.14 The Committee is of the view that, in the development of the national scheme, there appears to have been a focus on business interests without this having been adequately balanced against the interests of consumers, which may result in consumer confusion. How consumers will be affected in practice once the National Register commences operation remains to be seen.

Access to contact data of home based businesses

- 7.15 Section 60(4)(a) of the *Commonwealth Act* requires ASIC to remove from any entry given to a person requesting information any detail which the *Business Names Registration Regulations 2011 (Commonwealth)* requires to be excised. Regulation 9 provides that the date and place of birth of an entity that is an individual as well as their home address apart from the suburb and the state in which they live, if the home address is the principal place of business, is to be excised from the entry. This information is currently available in Western Australia.³⁸

- 7.16 The Committee expressed concern about the lack of business information that will be available on the National Register. If a consumer wishes to take legal action against a home based business, contact details necessary to effect service of court documents will not be available from the National Register.

³⁶ *Transcript of Evidence*, p5.

³⁷ *Ibid*, p7.

³⁸ *Ibid*, p12.

- 7.17 Where contact details are not available from other sources, such as the electoral roll or the telephone book, this may prevent the business being located and effect service of the court documents.
- 7.18 Section 4.4(12) of the IGA provides:
- All business names data held by the Commission, whether originating in State or Territory agencies or collected directly by Commonwealth agencies, will from the commencement of the national law be subject to the Commonwealth's privacy and secrecy legislation.*
- 7.19 The Commonwealth has sought to explain the restriction on business information on the basis that it is required to restrict information, such as home address, in order to comply with the *Information Privacy Principles* outlined in section 14 of the *Privacy Act 1988 (Commonwealth)*. Principle 11(3) requires the body to whom personal information is disclosed not to use or disclose it for a purpose other than for the purpose for which the information was given.
- 7.20 The Committee is of the view ASIC can and should make it clear to business name owners, when explaining the purpose for which personal information, such as contact details, is being provided, that this may include ASIC providing contact information to those who require it for a legitimate purpose. For example, effecting service of documents. This would not necessarily be inconsistent with the *Privacy Act 1988 (Commonwealth)*.
- 7.21 While the Department acknowledged there will be a reduction in the information currently available in Western Australia, it regarded it as an appropriate balance between privacy concerns for people who run home businesses and the provision of a means of identifying who they are.³⁹ It also highlighted other methods of effecting service on a business, such as:
- 7.21.1 substituted service;⁴⁰
 - 7.21.2 subpoenaing the records on the National Register;⁴¹ and
 - 7.21.3 the ability of the Department to 'step into the shoes' of an individual consumer where it is in the public interest to do so.⁴²
- 7.22 The Committee is of the view that these methods may not provide satisfactory alternatives to contact information being made available for the following reasons.
- 7.22.1 It is not clear to whom substituted service would be made when a consumer is only given the information that will be available on the National Register.

³⁹ *Transcript of Evidence*, p11.

⁴⁰ *Ibid*, p13.

⁴¹ *Ibid*, p14.

⁴² *Ibid*, p21.

- 7.22.2 A subpoena for the records of the National Register may not be successful and may be cost prohibitive for some consumers.
- 7.22.3 The Department may decide it is not in the public interest to ‘step into the shoes’ of an individual.
- 7.23 The Committee recognises the need for the competing factors of privacy and provision of information to be appropriately balanced as part of the setting up of the national scheme. For example, the Committee recognises there may be circumstances where it would be appropriate to keep contact details of a person running a home based business private, such as where there have been apprehended violence orders arising out of domestic violence. However, this must be weighed against the right of a consumer to have sufficient information to enable them to effect service of legal documents.
- 7.24 The Committee therefore notes the following.
- 7.24.1 There should be a process in the *Commonwealth Act* for the making of an application that enables access to private information in certain circumstances, such as for the purpose of effecting service of legal documents.
- 7.24.2 The form to be completed by an applicant for a business name could contain a privacy statement as well as an option for the applicant to consent to information not otherwise available under the *Commonwealth Act* being made available in appropriate circumstances, such as effecting service of legal documents. This would provide clear information to an applicant about what information can be made available and address issues arising from the *Privacy Act 1988 (Commonwealth)*.
- 7.24.3 Further, the form could also provide for the applicant for a business name to make an application for certain persons to be excluded from obtaining access to private information together with reasons for the exclusion, such as excluding a specific person against whom an apprehended violence order has been issued, and if approved, such persons would be excluded from obtaining private information.
- 7.25 This process would overcome privacy concerns, ensuring consistency with Principle 11 of the *Information Privacy Principles*, which lists circumstances where disclosure of personal information can be made and ensure the same information available in Western Australia currently would continue to be available in most cases under the national scheme.
- 7.26 The Committee draws the issue of the reduction in information available to the consumer under the national scheme to the attention of the Legislative Council as well as the alternative process outlined above which addresses the privacy concerns while also ensuring consumers have access to private information when appropriate.

Trademarks

- 7.27 Business names and registered trademarks differ in that the registration of a business name confers no legal ownership of that name, whereas the registration of a trademark does.
- 7.28 Concerns have been raised about business names infringing trademark rights. The Senate Economics Legislation Committee (**Senate Committee**) referred to a report by the Advisory Council on Intellectual Property (**ACIP**) which stated:
- ACIP is convinced that a significant numbers of traders do not fully comprehend the legal significance or inherent differences between trade marks and business names...*⁴³
- 7.29 The Senate Committee went on to refer to a recommendation by ACIP that:
- Business names may only be registered if searches of the trade mark register shows there to be no conflict with registered or pending trade marks in the same field of business activity.*⁴⁴
- 7.30 The Department advises that as a result of the concerns raised by the Senate Committee, it is proposed ASIC will have a link on the National Register website to a trademark search tool called ‘TM Check’ to enable applicants for the registration of new business names to identify pending and registered trademarks that may be similar to a proposed business name.⁴⁵
- 7.31 The onus will be on:
- 7.31.1 businesses to ensure their business names do not infringe the rights of trademark owners;⁴⁶ and
- 7.31.2 trademark owners to identify any infringements on their trademark rights and take any appropriate legal action.⁴⁷
- 7.32 ASIC will not prevent the registration of a business name that may infringe a trademark.⁴⁸
- 7.33 When the Department was asked what its current approach was under the *WA Act* to the registration of business names that infringe trademarks, it stated:

⁴³ Commonwealth of Australia, Senate, Economics Legislation Committee, *Exposure draft of the Business Names Registration Bill 2011 and related bills*, August 2011, p50.

⁴⁴ Ibid.

⁴⁵ Commonwealth of Australia, Senate, Economics Legislation Committee, *Exposure draft of the Business Names Registration Bill 2011 and related bills*, August 2011, p49. See also answers to further questions to the Department, 23 February 2012, p1.

⁴⁶ See Commonwealth Department of Innovation, Industry, Science and Research, ‘*Proposed National Business Name Registration System Frequently Asked Questions*’, pp4-5.

⁴⁷ Commonwealth of Australia, Senate, Economics Legislation Committee, *Exposure draft of the Business Names Registration Bill 2011 and related bills*, August 2011, p49.

⁴⁸ Ibid.

The Department advises applicants if a proposed business name obviously infringes upon a trademark, however it is unable to refuse an application on these grounds.⁴⁹

- 7.34 It also stated, when asked why there is no provision for ASIC to refuse to register a new business name, that infringes on a trademark:

Business name registration confers no rights of property in a business name upon the registering entity.

Trademarks fall within the responsibility of IP Australia. Trademarks are a complex area of intellectual property and that IP Australia has indicated that ASIC is not in a position to advise traders about whether their business names will infringe upon an existing trademark.⁵⁰

- 7.35 The Committee considers that the information to be made available to applicants for new business names under the national scheme is sufficient to address this issue.

Loss of future state revenue

- 7.36 The Minister cites that a key advantage to the State participating in the national scheme will be that the fee for registering a business name on the National Register will be lower than that currently charged by the State. The fee will be initially set at \$70 for registration and renewal for three years or \$30 for one year, compared to \$90 for three years and \$75 for further three year periods. The benefit will be enhanced for those having registered a business in more than one state.

- 7.37 Currently in Western Australia there is no capacity to renew for anything less than a three year period. It appears that under the national scheme there may be capacity to renew for a one year period but this is not explicit in the Business Names Registration (Fees) Regulations 2011 (Commonwealth).⁵¹ Therefore the Committee makes the following recommendation.

Recommendation 5: The Committee requests that the Minister for Commerce clarify to the Legislative Council whether a renewal of the registration for one year will be permitted under the national scheme.

- 7.38 The Minister also cites the main disadvantage to the State is that it is no longer able to raise revenue from the fees.⁵²
- 7.39 When the Committee asked the Department how much revenue the State currently raises from the registration of business names, it responded as follows.

⁴⁹ Answers to further questions to the Department, 23 February 2012, p2, which may be viewed on the Committee's webpage.

⁵⁰ Ibid.

⁵¹ See Item 2 of Schedule 1 of the Business Names Registration (Fees) Regulations 2011 (Commonwealth).

⁵² Letter from Hon Simon O'Brien MLC, Minister for Commerce, 30 November 2011, p3. See also Schedule 1 of the Business Names Registration (Fees) Regulations 2011 (Commonwealth).

*Obviously it depends on the fee level and business activity, but the figure for 2010–11 was \$4.295 million. That actually brings in revenue to the state. Obviously, by giving this up we are giving up the revenue, but we are also giving up the cost of the service. We are no longer delivering the service, but it does represent a loss of revenue to the state. That was, again, part of the conscious decision-making process.*⁵³

- 7.40 The Department also confirmed that the anticipated reward payment to the State from the Commonwealth, which is \$56.838 million, is not tied to the implementation of any one COAG reform, but all 27 reforms.⁵⁴
- 7.41 The Committee also notes clause 4(2)(h) of the Bill provides any matter relating to the imposition or payment of taxes under a State law is not a ‘*continuing business names matter*’.
- 7.42 The Committee draws the loss of revenue to the State to the attention of the Legislative Council.

Level of ASIC fees

- 7.43 Section 5 of the *Business Names Registration (Fees) Act 2011 (Commonwealth)* places a cap on a single fee for a “*chargeable matter*” of \$10,000 and on a sum of fees, \$50,000.⁵⁵
- 7.44 Unlike the situation in Western Australia, under section 4(2) of the *Business Names Registration (Fees) Act 2011 (Commonwealth)* any prescribed fees are imposed “*as taxes*” and the fees “*need not bear any relationship to the cost of providing any service*”. This means that the charges for registering a business name and other “*chargeable matters*” can be higher than the actual cost of the service.⁵⁶
- 7.45 When the Committee asked the Department why this cap does not bear any relationship to the cost of providing the service, the Department said:

*My direct answer to that is that I do not know. My understanding is that this is just a drafting device of the commonwealth. They have to put a cap in and they set it at a very high level so they do not ever have to come back to reassess it. It certainly has no relationship to the level of fees. I do not know why they have settled on those amounts.*⁵⁷

- 7.46 As to whether the cost of registration charged by ASIC can be guaranteed to be kept at a reasonable level, the Department said:

⁵³ *Transcript of Evidence*, p14.

⁵⁴ *Ibid.*

⁵⁵ Section 3(1) of the *Business Names Registration (Fees) Act 2011 (Commonwealth)*.

⁵⁶ Section 4(3) of the *Business Names Registration (Fees) Regulations 2011 (Commonwealth)*.

⁵⁷ *Transcript of Evidence*, p15.

Probably like all government fees and charges, there is no guarantee, but ASIC will be answerable to its stakeholder group. Quite a lot has been made of the fact that the ASIC fees will be lower than existing fees and that their service delivery will be more cost efficient. I think this is an area that they would be very vulnerable to a lot of lobbying about, if that proved not to be the case. They have business stakeholders on the one hand and the states and territories will also be involved in the discussions about fee increases. Clearly, if ASIC was looking to increase the fees beyond CPI, that would very quickly become a political issue between the states and the commonwealth.⁵⁸

7.47 The Committee draws this issue to the attention of the Legislative Council.

Lack of a review mechanism

7.48 Neither the WA Act, the Bill, the Commonwealth Act, nor the IGA contain a review clause.

7.49 When the Committee highlighted the lack of a review clause to the Department, it said:

In terms of the commonwealth legislation, you know, that is probably not something that can be changed.

I think the starting point is that, to be honest, nobody expects this to be wound back. But putting that to one side, the operation really will be subject to almost continuous review from the state's point of view, particularly in the early period because, not just from a policy point of view, from an administrative point of view, we know we are going to get very disgruntled people coming to us if it does not work, even though we will no longer be doing it. So, there is consistent feedback because of that. So, we believe there will be an ongoing review.

The argument is that, largely, it is reviewable all the time, there is regular reporting back to the ministerial council, there are opportunities for the state to clearly say, for stakeholders to say, "This thing is not working", and there are avenues for action, whether you need that formal tick-the-box review or not.⁵⁹

⁵⁸ Transcript of Evidence, p15. See also Commonwealth of Australia, Senate, Economics Legislation Committee, *Exposure draft of the Business Names Registration Bill 2011 and related bills*, August 2011, pp55-56, where the committee questioned the appropriateness of the cap and the Commonwealth acknowledged that 'it is not contemplated that any fees under the Business Names register would ever reach this sum.'

⁵⁹ Transcript of Evidence, p20.

Recommendation 6: 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.

- 7.50 The Department also confirmed that should any issues of a systemic nature be brought to its attention, it would take these up with ASIC and would recommend the Minister take them up as well.⁶⁰
- 7.51 The Committee notes the document entitled ‘National Business Names Reforms Key Performance Indicators – ASIC’ tabled by the Department at the hearing (**KPIs**), which ASIC is required to include in its annual report pursuant to section 5.4(2) of the IGA.
- 7.52 Due to the importance of reviewing the impact of the national legislation on Western Australian businesses and consumers, the Committee is of the view that any continuous review by the Department would be enhanced by the KPIs being broken down on a jurisdictional basis and the Department providing input to ASIC based on feedback it has received from stakeholders. This should be used by ASIC to indicate in its annual report whether the KPIs are being achieved in each state and territory.
- 7.53 The Committee makes the following recommendation.

Recommendation 7: The Committee recommends 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.

Consequences of having an Australian Business Number (ABN)

- 7.54 Section 23 of the *Commonwealth Act* requires an entity to obtain an ABN if it seeks to register a business name. This is not a requirement under the *WA Act*.
- 7.55 Also, businesses are not currently required to register for an ABN if their gross income is less than \$75,000 per annum. Businesses are only required to do so if they have to pay the Goods and Services Tax.
- 7.56 The Department outlined the following factors in support of its view that this requirement constitutes a very limited burden on businesses.
- 7.56.1 There is no cost associated with obtaining an ABN.
- 7.56.2 The application for an ABN will be built into the online registration process for a business name.

⁶⁰ *Transcript of Evidence*, p20.

7.56.3 The ABN will be an additional point of identification of businesses.

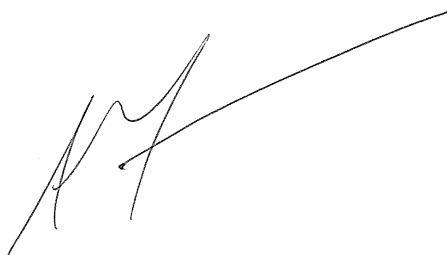
7.56.4 The ABN will not need to be added to business documentation.⁶¹

7.57 The Committee is of the view the Department, having consulted with businesses and based on the factors outlined in paragraph 7.56 above, has adequately addressed this issue.

8 CONCLUSION

8.1 The Committee finds the Bill, subject to its recommendations, adequately facilitates the coming into effect of the national scheme legislation as contemplated under the IGA, thereby carrying into effect the intention of the IGA.

Recommendation 8: The Committee recommends that, subject to the recommendations made in this report, the Business Names (Commonwealth Powers) Bill 2011 be passed by the Legislative Council.



Hon Adele Farina MLC
Chairman

6 March 2012

⁶¹ *Transcript of Evidence*, pp20-21.

APPENDIX 1
LIST OF STAKEHOLDERS AND SUBMISSIONS

APPENDIX 1

LIST OF STAKEHOLDERS AND SUBMISSIONS

List of Stakeholders
Mr John Atkins, Chairman, Chamber of Commerce and Industry
Mr Graham Glasson, President, Australian Institute of Conveyancers, WA Division
Mr Ray Mountney, Chairman, Small Business Development Corporation
Mr Tony Shepherd, President, Business Council of Australia
Mr Greg Medcraft, Chairman, Australian Securities and Investment Commission
Mr Oliver Moon, Chief Executive Officer, Combined Small Business Alliance of WA (Inc), Small Business Retailers Association
Dr Christopher Kendall, President, The Law Society of WA
Mr Anthony Burke, Chair, Small and Medium Enterprise Business Law Committee of the Law Council of Australia
Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner
Dr Roger Clarke, Chair, Australian Privacy Foundation
Ms Anne Driscoll, Commissioner for Consumer Protection, Department of Commerce
Mr Graham Cowin, President, The Institute of Patent and Trade Mark Attorneys of Australia
Professor Stuart Kaye, Dean , Faculty of Law, University of Western Australia

Associate Professor Jane Power , Executive Dean, Schools of Law, Fremantle and Sydney Campuses, University of Notre Dame

Dr Pamela Henry, Head of School, School of Law and Justice, Edith Cowan University

Professor Gabriel Moens, Dean of Law, School of Law, Murdoch University

Mr Luke Merrick, Secretary, The Intellectual Property Society of Australia and New Zealand Inc

Mr Mike Smith, Chairman, The Australian Bankers' Association Inc

Winthrop Professor Phillip Dolan, Dean, University of Western Australia Business School

Mr Patrick Cullen, Executive Director, Australian Institute of Management

List of Submissions

Ms Ann Bray, Acting Head of Division, Industry and Small Business Policy Division, Department of Industry, Innovation, Science, Research and Tertiary Education (**Submission No 1**)

Mr Sven Bluemmel, Information Commissioner, Office of the Information Commissioner (**Submission No 2**)

APPENDIX 2
IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

APPENDIX 2

IDENTIFIED STRUCTURES OF UNIFORM LEGISLATION

The Committee has adapted the following five structures from the Protocol on Drafting National Uniform Legislation by the national Parliamentary Counsel's Committee, 2008 Third Edition. Further detail of these structures may be found at: <http://www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf> or in the Committee's sixty fourth report titled Information Report on Uniform Scheme Structures tabled in August 2011.

Structure 1 - Applied laws. Also known as template, cooperative and complementary legislation, here legislation is enacted in one jurisdiction and applied (as in force from time to time) by other participating jurisdictions as a law of those other jurisdictions.

Structure 2 - Model legislation. Also known as mirror legislation, this legislation is enacted in participating jurisdictions with any local variations that are necessary to achieve the agreed uniform national policy when the legislation forms part of the local law. It is drafted in either non-jurisdictional specific terms, or as the law of a particular jurisdiction.

Structure 3 - Legislation of the States referring legislative power to the Commonwealth. Legislation can either confer general authority to legislate with respect to a general matter described in the referral legislation or confer specific authority to legislate in the terms set out in the referral legislation.

Structure 4 - Legislation of the States adopting a Commonwealth law. The *Commonwealth Constitution* at paragraph 51 (xxxvii) enables a State, as an alternative to referral, to "adopt" a Commonwealth law enacted in reliance on a referral by other States. A referral of power gives the Commonwealth greater flexibility to make future changes and to ensure that those changes commence at the same time in all jurisdictions.

Structure 5 - A combination of structures. Here some provisions of a legislative project may be dealt with by way of an applied law scheme and other provisions by way of national model scheme. Those jurisdictions that are currently prepared to use an applied law model to achieve future consistency by delegation of legislative changes to the Parliament of another jurisdiction (the template jurisdiction) may also be prepared to enact national model legislation and delegate legislative changes that are agreed by government nationally to the executive of their own jurisdiction, subject to a power of the local Parliament to disallow the changes in the same way as they may disallow subordinate legislation made by the executive.

APPENDIX 3
INTERGOVERNMENTAL AGREEMENT FOR BUSINESS
NAMES AGREEMENT 2009

APPENDIX 3
INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES
AGREEMENT 2009

INTERGOVERNMENTAL
AGREEMENT FOR
BUSINESS NAMES
AGREEMENT

 Council of
Australian
Governments

An agreement made among the following parties:

THE COMMONWEALTH OF AUSTRALIA
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF WESTERN AUSTRALIA
THE STATE OF SOUTH AUSTRALIA
THE STATE OF TASMANIA
THE AUSTRALIAN CAPITAL TERRITORY
THE NORTHERN TERRITORY OF AUSTRALIA

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT

RECITALS:

- A. The parties agree to establish a national system for business name registration to be implemented by Commonwealth legislation, supported by State text-based referrals of certain matters to the Commonwealth Parliament, in accordance with paragraph 51(xxxvii) of the Commonwealth Constitution.
- B. The Legislative Assembly of the Australian Capital Territory and the Legislative Assembly of the Northern Territory have legislative powers in relation to business names and the registration of business names under Commonwealth self-government legislation, and therefore the Australian Capital Territory and the Northern Territory are parties to this agreement, but, having regard to paragraph 51(xxxvii) and section 122 of the Commonwealth Constitution, they will not make a referral.
- C. The Commonwealth will introduce legislation to establish a national system for the registration of business names.

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT

PART 1 — PRELIMINARY

- 1.1. Purpose
- 1.2. Citation
- 1.3. Definitions

PART 2 — EFFECT AND OPERATION OF AGREEMENT

- 2.1. Commencement
- 2.2. Amendment of Agreement

PART 3 — COMMISSION'S RESPONSIBILITIES

- 3.1. Commission's responsibilities

PART 4 — LEGISLATION

DIVISION 1 — THE NATIONAL LAW

- 4.1. Purpose of this Part
- 4.2. Use of referred power
- 4.3. Basic nature of the legislative scheme
- 4.4. Commonwealth legislation relating to the national law
- 4.5. Operation of continuing State and Territory legislation

DIVISION 2 — STATE REFERRAL LEGISLATION

- 4.6. State referral legislation

PART 5 — ADMINISTRATION

- 5.1. Services to be provided nationally
- 5.2. Data
- 5.3. Provision of data
- 5.4. Levels of service
- 5.5. Access to information
- 5.6. Reviews

PART 6 — FINANCE

- 6.1. Funding

PART 7 — CEASING TO BE A PARTY

- 7.1. Withdrawal and cessation
- 7.2. Agreement continues with remaining parties

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT

PART 1 — PRELIMINARY

PURPOSE

- 1.1. (1) The purpose of business names registration is to:
- (a) allow consumers and traders to identify and locate those trading under a business name through a Register of Business Names, thereby facilitating consumer protection;
 - (b) attempt to prevent the registration of business names which are inappropriate, and business names that are likely to offend, mislead or deceive consumers and traders.
- (2) The purpose of this Agreement is to endorse a national business names registration scheme that will allow businesses to register once, regardless of how many State/Territory jurisdictions those businesses operate in. The national business names registration scheme will form part of a range of measures that will, in addition to business names registration, provide a variety of on-line services to businesses. The parties agree that the levels of service provided by the Commonwealth's national business names registration scheme will not be less than the levels of service currently provided in the State/Territory systems.
- (3) This Agreement is entered into on the basis that the national business names registration scheme established by the Commonwealth will be the primary vehicle for business names registration.

CITATION

- 1.2. This Agreement may be referred to as the Business Names Agreement 2009.

DEFINITIONS

- 1.3. (1) In this Agreement, unless the contrary intention appears:

'approval of the Ministerial Council' means an affirmative vote of the Commonwealth Minister who is a member of the Ministerial Council, or the Commonwealth Minister's delegate; plus the affirmative vote of at least three of the remaining members of the Ministerial Council, or their delegates, at least two of whom must represent States. Any State or Territory may notify the Ministerial Council that it wishes to abstain from voting until further notice.

'Commission' means the Australian Securities and Investments Commission.

'draft legislation' means bills and draft regulations.

'legislation' means acts and regulations.

'Minister' means:

- (a) until the commencement of the national law, each party's Minister responsible for business names registration; and

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT

(b) upon commencement of the national law, a Minister appointed to the Ministerial Council.

'Ministerial Council' means the Ministerial Council for Corporations which is responsible for the Commonwealth's business names registration system.

'national law' means the Commonwealth Act relating to business names and for related purposes, which is the subject of referrals under this Agreement.

'national system' means the system for the national registration and use of business names mentioned at recital (1) to this Agreement.

'party' means the Commonwealth, a Territory that is a signatory to this Agreement and a referring State which is a signatory to this Agreement and has not terminated its referral of matters to the Commonwealth.

'referring State' means a State which:

- (a) in accordance with paragraph 51(xxxvii) of the Commonwealth Constitution, has referred matters to the Commonwealth Parliament sufficient to enable the following to extend, of its own force, to the State:-
 - (i) the national law as first enacted by the Commonwealth Parliament, and
 - (ii) later amendments to the national law; and
- (b) has not withdrawn either or both of the referred matters covered by subparagraphs (a)(i) and (ii).

'State' means a State of the Commonwealth of Australia.

'State referral' means a referral made by a referring State.

'Territory' means the Australian Capital Territory or the Northern Territory.

- (2) In this Agreement, a reference to legislation (whether of the Commonwealth or a State or Territory) includes a reference to:
 - (a) that legislation as amended and in force for the time being; and
 - (b) legislation passed in substitution for other legislation.

PART 2 — EFFECT AND OPERATION OF AGREEMENT**COMMENCEMENT**

- 2.1. (1) This Agreement comes into operation on the first day of September 2009.
- (2) A party which signs this Agreement after this date, becomes bound by this Agreement from the date it signs.

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT

AMENDMENT OF AGREEMENT

- 2.2. This Agreement may be amended at any time only by the unanimous decision of all parties to it at that time.

PART 3 — COMMISSION'S RESPONSIBILITIES

COMMISSION'S RESPONSIBILITIES

- 3.1. The Commission will have sole responsibility for the general administration of the national law and will have the functions and powers in relation to business names registration set by the national law and subject to this Agreement.

PART 4 — LEGISLATION

DIVISION 1 — THE NATIONAL LAW

PURPOSE OF THIS PART

- 4.1. This Part establishes procedures, involving both agreement and consultation among the parties, on development of the national law and subsequent amendments of the national law, and a commitment by the Commonwealth not to support amendments of the national law without the approval of, or consultation with, the Ministerial Council in accordance with this Agreement.

USE OF REFERRED POWER

- 4.2. (1) The Commonwealth will not introduce a Bill that depends, in whole or in part, on a State referral, for a purpose other than the registration and/or use of business names.
- (2) The Commonwealth will oppose any proposed amendment of the national law that relies, in whole or in part, on a State referral and is for a purpose other than the registration and/or use of business names.

BASIC NATURE OF THE LEGISLATIVE SCHEME

- 4.3. The legislative scheme agreed to by the parties involves:
- (a) the enactment by State Parliaments of legislation referring certain matters to the Commonwealth Parliament in accordance with paragraph 51(xxvii) of the Commonwealth Constitution;
 - (b) the enactment of the national law, partly in reliance on State referrals mentioned in paragraph (a), for the purposes of the registration and use of business names; and
 - (c) the amendment from time to time of the laws mentioned in paragraph (b) in accordance with this Agreement.

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT**COMMONWEALTH LEGISLATION RELATING TO THE NATIONAL LAW**

- 4.4. (1) Subject to this clause, the Commonwealth will not repeal or amend the national law without the approval of the Ministerial Council.
- (2) The approval of the Ministerial Council is not required if the amendment is of a minor or technical nature or could be made without reliance on State referrals.
- (3) If any member of the Ministerial Council considers that a legislative proposal is not of a minor or technical nature (notwithstanding any advice to the contrary) and writes to all other parties accordingly, the question whether the legislative proposal is of a minor or technical nature will be put to the Ministerial Council for a determination of the matter.
- (4) Commonwealth draft legislation that would amend the national law, and which would require the approval of the Ministerial Council, must be approved by the Ministerial Council substantially in the form in which it is to be introduced or made.
- (5) If amendments are proposed in the Commonwealth Parliament that would amend draft legislation that has been approved by the Ministerial Council, the Commonwealth will use its best endeavours to consult the Ministerial Council and, in relevant cases, seek the approval of the Ministerial Council.
- (6) If the approval of the Ministerial Council is sought under subclause (5), then members of the Ministerial Council, except those representing jurisdictions that have notified the Ministerial Council that they intend to abstain from voting, will use their best endeavours to vote within the timeframe nominated by the Commonwealth.
- (7) If the Commonwealth seeks the approval of the Ministerial Council for an amendment of the national law, a statement of the amendment (including commentary) will be provided to the Ministerial Council as soon as practicable and not later than the day by which the approval of the Ministerial Council is sought.
- (8) All Commonwealth legislation relating to the national law will be exposed for public comment for at least three months before its introduction or making, unless:
- a) the Ministerial Council approves otherwise; or
 - b) it is of a minor or technical nature; or
 - c) the legislation relates exclusively to the imposition or alteration of fees or taxes, in which case the Commonwealth may expose the legislation for public comment for any period it considers appropriate or may decide not to expose it for public comment at all (the Commonwealth will advise the Ministerial Council if the legislation is to be exposed with a statement regarding the period of exposure, or reasons for the regulation not being exposed).
- (9) When introducing into the Commonwealth Parliament any Bill to amend the national law, a Minister will inform the house of the outcome of any consultation with the Ministerial Council and, in the case of matters requiring the approval of the Ministerial Council, the outcome of the Ministerial Council's vote.

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- (10) If a State or Territory requests the Commonwealth to amend the national law, the Commonwealth must determine that request within six weeks of receiving a written request, unless the approval of the Ministerial Council is given for a longer period. The Commonwealth must not refuse any such request without reasonable cause, and must inform the Ministerial Council of any refusal, and the reasons for it, in writing.
- (11) If the Commonwealth agrees to proceed with an amendment requested by a State or Territory under subclause (10), that amendment must be submitted, unless it is an amendment covered by subclause (2), to the Ministerial Council for the approval of the Ministerial Council.
- (12) All business names data held by the Commission, whether originating in State or Territory agencies or collected directly by Commonwealth agencies, will from the commencement of the national law be subject to the Commonwealth's privacy and secrecy legislation.
- (13) The Commonwealth will notify the Ministerial Council of all Commonwealth legislative proposals that would alter the effect, scope or operation of the national law.
- (14) The notification required by subclause (13) should ordinarily occur at the earliest practicable time after the development of a legislative proposal and preferably before the introduction of any Bill concerned, or the submission of any subordinate legislation concerned to the Governor-General in Council, to maximise the opportunity for members of the Ministerial Council to comment on the proposed legislation.

OPERATION OF CONTINUING STATE AND TERRITORY LEGISLATION

- 4.5. (1) The national law will provide for the operation of existing and new State/Territory legislation relating to business names that is outside the State referrals. For the avoidance of doubt, State and Territory acts and subordinate legislation, where they relate to matters covered by the national law, will have no effect. The continuing operation of existing and new State and Territory legislation will require that:
 - (a) States and Territories notify the Commission of any names which are to be protected or restricted from time to time under such legislation, in which case the Commission will, without charge, add such names to its business names register or restrict the use of the relevant words;
 - (b) the Commission will, without charge, provide to relevant State and Territory agencies direct, on-line access to relevant data bases and search engines in order to facilitate the registration by State and Territory agencies of associations, co-operatives, limited partnerships and other registered entities as agreed between the Commission and relevant State and Territory agencies; and

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- (c) States and Territories will notify the Commission of names which, from time to time, are allocated to associations, co-operatives, limited partnerships and other registered entities, in the various States and Territories, for the purpose of the Commission, without charge, keeping lists of such names and/or restricting the use of relevant words.

DIVISION 2 – ALTERATION OF STATE REFERRAL LEGISLATION**STATE REFERRAL LEGISLATION**

- 4.6. (1) The States shall enact State referrals.
- (2) A State shall not introduce a Bill that would amend its State referral unless the Ministerial Council has been informed of the proposed amendment.
- (3) A State referral may include provision for termination of its referral.
- (4) If an amendment of a State referral is, or is to be, moved in a State Parliament, that State will use its best endeavours to ensure adequate notice is given to the Ministerial Council.

PART 5 — ADMINISTRATION**SERVICES TO BE PROVIDED NATIONALLY**

- 5.1. The Commission will use its best endeavours to provide the following services as part of the national system:
- (a) business name registration services via the Internet;
 - (b) on-line business name registration point at the Commission's Services Centres in capital cities;
 - (c) on-line business name registration points via appropriate agents and networks;
 - (d) paper forms, in an electronic format, which may be printed at the various service points and, after completion, lodged with the Commission;
 - (e) a telephone support system for those registering, or considering registering, a business name;
 - (f) an online service for the searching of the business names register by the public, States and Territories, and information brokers; and
 - (g) an extract service for brokers on commercial terms agreed with individual brokers.

DATA

- 5.2. (1) The Commission will maintain a national business names database and register, portions of which will be accessible to the public, and a document imaging system.

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- (2) The Commission will have responsibility under the national law for:
 - (a) keeping a public register of business names registrations;
 - (b) all documents, or copies of documents, in electronic or other formats, relevant to national business names registrations; and
 - (c) other material identified by the Commission as necessary for the ongoing activities of the Commission with regard to national business names registration.

PROVISION OF DATA

- 5.3 (1) Where registers of business names exist currently in the States and Territories, these registers, and associated documentation, will be made available without charge to the Commission.
- (2) Each State and Territory may, subject to its privacy and secrecy legislation, and subject also to the Commission's business needs, provide the Commission with business names registration data, on or before the commencement of the national law.
- (3) Each State and Territory will use its best endeavours to transform the data in its electronic business names register into a format acceptable to the Commission and make such electronic registry data available for transfer to the Commission. The Commission will use its best endeavours to minimise the costs incurred in transforming data into the form determined by the Commission.
- (4) Each State and Territory may give the Commission, subject to the Commission's business needs, other business names records additional to electronic registry data, in their current form, electronic or other, or conclude an agreement with the Commission to transform such records into an electronic format acceptable to the Commission.
- (5) The Commission may copy and/or transform business names records, subject to the Commission's business needs and subject also to the agreement of the relevant States and Territories, which are held by the States and Territories into an electronic format acceptable to the Commission, leaving the originals with the relevant State or Territory.

LEVELS OF SERVICE

- 5.4. (1) The Commission will use its best endeavours to, at least, maintain existing service levels provided by States and Territories agencies in relation to business names registration, and strive to enhance progressively existing levels of service in each referring State and Territory.
- (2) The Commission will, in its annual report, include a statement on the performance of the Commission, in relation to the registration and use of business names, with regard to the Commission's service charter and a number of the Commission's key performance indicators agreed in consultation with State and Territory agencies.

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- (3) Any party may query the levels of service provided by the Commission at meetings of the Ministerial Council and, if the Ministerial Council so resolves, the Commonwealth Minister will provide written responses to such queries to all parties within three months or 21 Commonwealth parliamentary sitting days (whichever is the shorter) from the date of the relevant Ministerial Council meeting.

ACCESS TO INFORMATION

- 5.5. (1) The parties recognise that many agencies currently may receive information without charge from State or Territory business names registration databases. The parties agree that such arrangements will continue and agencies will be able to obtain, directly from the Commission, without charge, information (not limited to publicly available information) from the national business names registration database for law enforcement, regulatory and administrative purposes. Relevant agencies include, but are not limited to:
- Commonwealth/State/Territory police agencies, other law enforcement agencies, and agencies dealing with terrorism, crime and misconduct matters;
 - Commonwealth/State/Territory directors of public prosecutions and officers of the various Crown Solicitors;
 - agencies dealing with anti-discrimination matters;
 - Australian Taxation Office and the various State/Territory revenue offices;
 - Centrelink;
 - State/Territory fair trading agencies;
 - Insolvency and Trustee Service Australia;
 - Commonwealth/State/Territory licensing authorities;
 - Department of Veterans' Affairs; and
 - Workcover and similar government agencies.
- (2) The Commission will provide to State/Territory fair trading agencies direct, free, on-line access to its names databases, as well as access to the documents stored on its document imaging systems and access to documents stored elsewhere. This will include records transferred to the Commission by States and Territories.
- (3) The Commission will provide to each referring State and Territory, without charge, certification of documents produced from its public national business names database.
- (4) After the commencement of the national law, the Commission will be able to obtain archived or stored records relating to business names from the States and Territories. Any costs incurred by the States or Territories for the retrieval of such records (other than their own administrative costs) will be borne by the Commission.
- (5) State and Territory Ministers may request information regarding the administration and enforcement of the national law, and information that is not available on the public national database of business names registrations, from the Commission. In relation to such requests:
- (a) the Commission will provide the information requested by State/Territory Ministers unless the Commission determines that it is not reasonable or practicable to provide such information; and

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- (b) where the information requested is not provided by the Commission the requesting State/Territory Minister may raise the matter with the Commonwealth Minister.

REVIEWS

- 5.6. The Commission will have an internal review procedure to deal with decisions made about the business names registration process. The Commission will respond to requests for review within one month of the Commission receiving a written request. Where interested parties still remain dissatisfied, they may lodge a request for review with the Commonwealth Administrative Appeals Tribunal.

PART 6 — FINANCE

FUNDING

- 6.1. The Commonwealth will levy fees on private individuals and non-government corporate entities for registering a business name. These fees will be commensurate with the total costs involved in setting up and administering the national business names registration system.
- 6.2. Consistent with the objective of full cost recovery, the Commonwealth will seek to ensure that any new fee for national business name registrations will not be higher than the lowest business name registration fee currently paid by any State or Territory, taking account of the consumer price index increases. ASIC will consult with the States and Territories prior to recommending the level of registration fees or any change in the level of registration fees, to the Government.

PART 7 — CEASING TO BE A PARTY

WITHDRAWAL AND CESSATION

- 7.1. A party may withdraw from this Agreement on giving at least six months notice to the Ministerial Council.

AGREEMENT CONTINUES WITH REMAINING PARTIES

- 7.2. (1) The failure of a State to remain a party does not terminate this Agreement, which will remain in force in relation to the remaining parties.
- (2) If a State ceases to be a party, the Commonwealth will, within three months of the ceasing becoming effective, convene a meeting of the remaining parties for the purpose of negotiating such amendments to this Agreement as might be necessary (including amendments relating to the voting arrangements for the Ministerial Council).

INTERGOVERNMENTAL AGREEMENT FOR BUSINESS NAMES AGREEMENT

The Parties have confirmed their commitment to this agreement as follows:

Signed for and on behalf of the Commonwealth of Australia by



The Honourable Kevin Rudd MP
Prime Minister of the Commonwealth of Australia

2 July 2009


Signed for and on behalf of the State of New South Wales by



The Honourable Nathan Rees MP
Premier of the State of New South Wales

2 July 2009

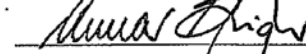
Signed for and on behalf of the State of Victoria by



The Honourable John Brumby MP
Premier of the State of Victoria

2 July 2009

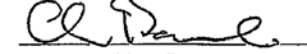
Signed for and on behalf of the State of Queensland by



The Honourable Anna Bligh MP
Premier of the State of Queensland

2 July 2009

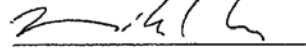
Signed for and on behalf of the State of Western Australia by



The Honourable Colin Barnett MLA
Premier of the State of Western Australia

2 July 2009


Signed for and on behalf of the State of South Australia by



The Honourable Mike Rann MP
Premier of the State of South Australia

2 July 2009

Signed for and on behalf of the State of Tasmania by



The Honourable David Bartlett MHA
Premier of the State of Tasmania

2 July 2009

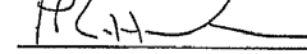
Signed for and on behalf of the Australian Capital Territory by



Jon Stanhope MLA
Chief Minister of the Australian Capital Territory

2 July 2009

Signed for and on behalf of the Northern Territory by



The Honourable Paul Henderson MLA
Chief Minister of the Northern Territory of Australia

2 July 2009