

Chapter 1

Introduction and background

1.1 The Business Names Registration Bill 2011, the Business Names Registration (Fees) Bill 2011 and the Business Names Registration (Transitional and Consequential Amendments) Bill 2011 are exposure bills which will implement a national system for registering businesses in Australia. This national system will replace the business registers currently operating in each state and territory. Businesses will no longer be required to register in each state and territory in which they trade. Rather, they will pay a flat fee to register nationally.

1.2 This chapter provides an overview of the bills, examines the background to the proposed legislation, provides an outline of the current business names registration processes, summarises the likely benefits to the business community if the bills are enacted and outlines the conduct of this inquiry.

Referral of the bills

1.3 On 6 July 2011, the Senate referred the exposure draft versions of the following bills to the Senate Economics Legislation Committee for inquiry and report by 15 August 2011:

- the Business Names Registration Bill 2011;
- the Business Names Registration (Transitional and Consequential Provisions) Bill 2011; and
- the Business Names Registration (Fees) Bill 2011.

1.4 The terms of reference for this inquiry direct the committee to consider the bills, currently in the form of a third exposure draft, before they are enacted by any of the State legislatures. Each State legislature needs to pass its own legislation conferring relevant powers to the Commonwealth (see paragraph 1.26).

1.5 The committee acknowledges that these bills are in exposure draft form and that the intent is to open discussion on their content before they are introduced into the various parliaments. It is aware that this legislation requires the agreement of all states and territories and that considerable work has already been made to reach agreement on the exposure drafts among these jurisdictions.

Overview of the bills

1.6 Currently in Australia, the registration of business names is a state and territory regulated process. A business must register a business name in the state or territory they are intending to trade in. If a business trades in more than one state or territory, they must register their business name in each jurisdiction independently. Each jurisdiction's registration fee differs in cost, although all offer the option of three year registrations and renewals (see Table 1.2).

1.7 The three bills give effect to the establishment of a National Business Names Register and form one element of the Council of Australian Governments' (COAG) Seamless National Economy Agreement, signed in 2008.

1.8 The objectives of the Business Names Registration Bill 2011 are:

- to ensure that the name of the person behind a business entity name is known;
- to identify a business and how that business may be contacted;
- to simplify the registration process and to reduce the burden on business by enabling them to register once nationally;
- to ensure identical or near identical business names are not registered; and
- to ensure that undesirable and/or restricted names are not registered.

1.9 As part of this package, the draft Business Names Registration Regulations 2011, Business Names Registration (Fees) Regulations 2011 and the Business Names Registration (Availability of Names) Determination 2011 are also being introduced, but at a later date after the states and territories have consented to their provisions. The Department of Innovation, Industry, Science and Research (DIISR) has also compiled a Frequently Asked Questions sheet, available on its website, to help explain the new arrangements to business owners.¹

1.10 The regulations have not been settled with the states and territories and have not been referred to this committee for inquiry. Nonetheless, the draft regulations warrant attention insofar as they will reflect the content and operation of the bills once passed.

Background of the bills

1.11 DIISR described to the committee the inception of COAG's business names initiative:

Five years ago, in July 2006, COAG identified this [business names] as a regulatory hot spot. This was prompted by a range of drivers, including the

1 <http://www.innovation.gov.au/SmallBusiness/Support/Pages/ABNBusinessNamesRegistrationProject.aspx> (accessed 7 July 2011).

January 2006 report of the Taskforce on Reducing the Regulatory Burden on Business, the Banks report. It was also informed by some of the issues raised in the Advisory Council on Intellectual Property's review on trademarks, company names, business names and domain names.²

1.12 The implementation timeline of the national business names registry is summarised below. Following the Banks Report:

The Small Business Ministerial Council (SBMC) was tasked with progressing this [the national business names register] and a submission was provided to COAG in early 2007. Following consideration, COAG gave a further directive to consider the proposal in terms of strengthening the cost-benefit assessment, and considering related initiatives in business-to-government interaction (including information discovery and business client account management), and to do this in consultation with the Ministerial Council of Consumer Affairs (MCCA).³

1.13 The Small Business Ministerial Council then provided its recommendations to COAG:

A business case was completed in April 2008 and recommendations from the Steering Committee were provided to the SBMC in May 2008. In June 2008 the SBMC wrote to the Chair and Co-chair of the COAG Working Group - Business Regulation and Competition Working Group (BRCWG) with its recommendations.⁴

The COAG Agreement

1.14 In its submission, DIISR states that:

A model was agreed to by COAG at its July 2008 meeting:

COAG notes the Small Business Ministerial Council considered this matter on 23 May 2008 and agreed in principle support for a business model to develop a seamless, single online registration system for both Australian Business Numbers and business names, including trademark searching. COAG has approved the establishment of a national registration system which will also deliver online business information services and improve ongoing interactions between government and business, through such innovations as automatic form filling. COAG has approved the establishment of a national registration system and agrees to the necessary referral of power to the Commonwealth to enable it to implement the

2 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 1.

3 DIISR, *Submission 11*, p. 2.

4 DIISR, *Submission 11*, p. 2.

system. COAG has asked that BRCWG bring forward an implementation strategy to its meeting in October 2008.⁵

1.15 In October 2008, COAG agreed to an Implementation Plan for the Australian Business Number (ABN) and Business Names Project. Importantly, this plan stated:

[A]s previously agreed, the financial impacts of the reforms related to the seamless national economy, including on States' revenue and costs will be calculated and incorporated in the overall finalisation of financial arrangements between the Commonwealth and the States.⁶

Table 1.1: COAG reform agenda: list of completed and upcoming reforms

Reforms completed	Reforms to be completed in 2011 and 2012
Develop model national occupational health and safety Streamlined environmental assessment and approvals © Harmonisation payroll tax arrangements© Establish Health Practitioner Regulation Agency© A single national system of trade measurement© Nationally consistent rail safety regulation© A national consumer protection framework© A national consistent product safety framework© Agreement to a national oil and gas regulator© National regulation of trustee corporations© National regulation of mortgage broking© National regulation of margin lending© National regulation of non-deposit lending institutions© Code-based assessment for single residential dwellings Agreement to develop a national construction code Developed model national mine safety regulations Nationally consistent approach to food regulation Standard Business Reporting© Wine labelling© Established the National Occupational Licensing Authority Review of parallel import restrictions on books© Agreement to national voc education and training regulator Agreement to legal professional reform	Regulation of chemicals and plastics Personal property securities National Electronic Conveyancing System National system for consumer credit Review of Australia's anti-dumping and countervailing system Energy reforms Infrastructure access regulation Infrastructure access and regulation regimes Transport regulators, including maritime regulation Road reform plan Occupational licences Registering business names Director's liability Not for profit sector Retail tenancy

Source: Council of Australian Governments, *Communiqué*, 13 February 2011: Attachment B.

The completion date of the Seamless National Economy reforms has been brought forward by 6 months from June 2013 to December 2012.

© Identified by COAG reform Council as completed by 30 September 2010 or completed subsequently.

5 DIISR, *Submission 11*, p. 2.

6 DIISR, *Submission 11*, p. 2.

1.16 DIISR further notes:

As part of the COAG agreement, the States agreed to refer their business names registration powers to the Australian Government to allow the national system. An Intergovernmental Agreement (IGA) for Business Names was signed by First Ministers in July 2009. The national system will not be able to commence if any State does not refer or adopt the legislation. ... It is proposed that the new national system for business names registration will start in the first half of 2012.⁷

1.17 DIISR informed the committee that the planned commencement date for the National Business Names Register is May 2012.⁸

1.18 As part of the Seamless National Economy Agreement, COAG has agreed to a number of reforms to ease compliance for business and increase protection for consumers, of which the National Business Names Register forms one part (see Table 1.1)

1.19 According to the *Intergovernmental Agreement for Business Names Agreement*, the purpose of the legislation 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; and
- (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.⁹

1.20 The Agreement further states that:

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.¹⁰

7 DIISR, *Submission 11*, p. 1.

8 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 2.

9 *Intergovernmental Agreement for Business Names Agreement*, para. 1.1 (1).

10 *Intergovernmental Agreement for Business Names Agreement*, subpara. 1.1 (2).

1.21 Therefore, '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'.¹¹

DIISR and the consultation process

1.22 DIISR informed the committee that the key agencies involved in the implementation of COAG's plan 'are the Department of Innovation, Industry, Science and Research, the Australian Taxation Office through the Australian Business Register, IP Australia, the Australian Securities and Investments Commission and the Department of the Treasury, plus each of the state and territory agencies for small businesses, fair trading and consumer affairs'.¹²

1.23 Prior to this inquiry, DIISR held a series of public consultations on the three draft bills and the draft regulations. In its submission, DIISR provided a detailed overview of this process:

There has been extensive consultation for this initiative since it commenced in 2006. Early consultation activities on the initiative included:

- Stakeholder consultation with key industry associations (September-October 2006)
- Market testing of concept (October 2006)
- Release of discussion paper and consultation with industry associations (September-October 2007)
- Market testing to review key project assumptions and inform project design (May 2009)
- Public consultation forums on the proposed business name registration system were held in capital cities (April 2010).

The first exposure draft of the Business Name Registration Bill 2010 and its related fees bill were exposed for public comments from 28 May to 28 August 2010 (a period of three months) following consideration by States and Territories. The draft Bill was revised as a result of comments received and it, and the draft Transitional Bill, were forwarded to State/Territory officials for further comment in November 2010.

The second exposure draft of all the primary legislation was released for public consultation on 14 March 2011. The closing date for submissions was 24 April 2011. (This was in accordance with the Ministerial Council on Corporations' agreement to truncate the consultation period.)

Public consultation sessions on the second exposure draft of the Business Names Registration Bills ran from March until April 2011. A significant

11 *Intergovernmental Agreement for Business Names Agreement*, subpara. 1.1 (3).

12 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 2.

effort was made to ensure parties interested in the initiative were aware of the second exposure. Firstly, advertisements on the public consultation appeared in *The Australian* and the *Australian Financial Review* on 14 March 2011. 717 emails went to those who had expressed an interest in the initiative after previous consultations. A news item was sent to 3680 email subscribers to the *business.gov.au* website. A notification was sent to 1109 relevant Business Consultation Website email subscribers. The Business Consultation Website had an additional 105 hits. Finally 131 industry associations were invited to meet face to face with officials from [DIISR] in six capital cities in early to mid April 2011.¹³

1.24 Following these public consultations and further discussions with state and territory officials, third exposure drafts of the bills were released. The third exposure drafts are the subject of this inquiry.

1.25 The committee commends Senator the Hon. Nick Sherry, Minister for Small Business, and DIISR for the extensive community consultations. Of the submissions received by the committee, none were critical of the consultation process.

Enactment of the bills

1.26 In order that the Business Names Registration Bills to be enacted, each state and territory needs to enact their own legislation, conferring power to the Commonwealth. DIISR explained the process to the committee secretariat:

A state, and it only has to be one state, should enact the legislation before the Commonwealth enacts. By enacts I mean the relevant state parliament must pass the legislation, gain Royal Assent for it. Then the Commonwealth can enact its legislation, which will rely in part on a referral of state powers to the Commonwealth (paragraph 7(1)(b) of the Business Names Registration Bill 2011). If there were no state referral enacted by a state before the Commonwealth enacted, then paragraph 7(1)(b) would be void.

Thus the sequence of events is:

- a state, in this case probably Tasmania, enacts the legislation and thereby refers powers to the Commonwealth (other states may also enact the legislation and refer their powers);
- the Commonwealth enacts its legislation; and
- remaining states adopt the business names referral legislation

Tasmania has introduced the relevant legislation, and must enact it before the Commonwealth does.¹⁴

13 DIISR, *Submission 11*, p. 4.

14 DIISR, *Correspondence to Secretariat*, 4 August 2011.

1.27 DIISR noted in its submission that:

The Registration Bill establishes the National Business Names Registration System. This involves the States either referring powers to regulate business names to the Commonwealth or adopting the Commonwealth law. The law will apply in all Territories except Norfolk Island (however Norfolk Island could be brought into the scheme at a later date). The Registration Bill and the Transitional Bill are not intended to exclude the concurrent operation of most State or Territory laws. Subject to displacement provisions, the law will not apply to provisions that are capable of concurrent operation.¹⁵

1.28 The Australian Securities and Investments Commission (ASIC) explained its role in the transition process for the national register:

We will have one date where the whole new national register goes online, and in the few months prior to that we will be working with each department in the states and territories to migrate their current registers across. Then we will have one go-live date and various transitional arrangements to facilitate any impacts that occur around the go-live date.¹⁶

Current business names registration processes

1.29 Currently, businesses are required to register names in the state and/or territory where they intend to trade.¹⁷ If a business wants to trade in more than one state/territory, they have to register the business in each of the relevant jurisdictions. For example, if Joe starts up a lawn mowing business and calls it Joe's Mowing, and he wants to trade in Brisbane, Melbourne and Sydney, he would have to register his business separately in each state. This means that Joe would need to undergo three different registration processes and pay three different registration fees.

1.30 As mentioned above, business owners are required to register business names with the relevant state and/or territory authorities. Each state and territory has a designated agency that registers business names with different associated charges:

- Western Australia—the Department of Commerce. An application form for the registration of a business name can be downloaded from the department's website and lodged at an office of Consumer Protection or by mail. A registration fee of \$90 is payable upon lodgement (three year registration).¹⁸

15 DIISR, *Submission 11*, p. 7.

16 Ms Rosanne Bell, Acting Senior Executive Leader, Real Economy, ASIC, *Proof Committee Hansard*, 2 August 2011, p. 13.

17 Regulated by the *Business Names Act 1962* (Cth), and the various business names acts and consumer protection acts enacted by the states and territories.

18 https://bizline.commerce.wa.gov.au/bnonline/misc/register_bn.jsp (accessed 10 July 2011).

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- South Australia—the Office of Consumer and Business Affairs (OCBA). Applications may be completed online via the Department of Justice website. Alternatively, an application form can be downloaded from OCBA's website and lodged with the office in person, by mail or by facsimile. A registration fee of \$159 is payable at the time of lodgement (three year registration).¹⁹
 - Victoria—Consumer Affairs Victoria. Victorian applicants may lodge their business name registration online. The online system has the capacity to automatically accept or reject an application. The forms may also be downloaded from the Department's website and lodged via post, fax, email or in person at the Victorian Consumer and Business Centre or a local Victorian Business Centre. The registration fee is \$85.50 for three years.²⁰
 - New South Wales—Fair Trading NSW. Applicants may download a registration form from the Fair Trading website and lodge it in person or via mail; the option to register a business name online is not available. A three year registration fee for a new business name is \$160 and the renewal fee is \$120.²¹
 - Queensland—the Office of Fair Trading. At the time of application, business owners are required to provide certified copies of identification, such as a passport, driver's licence or birth certificate. Forms can be downloaded from the Office of Fair Trading website and lodged by mail or in person at the nearest Fair Trading Office, a Magistrates Court or Queensland Government Agent Program office. Registration for one year is \$133.60 or \$255.60 for three years.²²
 - Tasmania—the Department of Consumer Affairs and Fair Trading. Registration forms can be downloaded from the department's website and lodged via mail or in person at Service Tasmania. A three year registration fee of \$140 is payable at the time of application.²³
 - the Australian Capital Territory—the Office of Regulatory Services. Registration forms are available from the office's website and may be lodged in person or by mail. Registration fees are \$151 for three years or \$221 for a five year registration.²⁴

19 <http://www.ocba.sa.gov.au/businessadvice/businessnames/howtoregister.html> (accessed 10 July 2011).

20 <http://www.consumer.vic.gov.au> (accessed 10 July 2011).

21 http://www.fairtrading.nsw.gov.au/Businesses/Business_names.html (accessed 10 July 2011).

22 <http://www.fairtrading.qld.gov.au/register-business-name.htm> (accessed 10 July 2011).

23 <http://www.consumer.tas.gov.au/forms#Name> (accessed 10 July 2011).

24 http://www.ors.act.gov.au/business/business_names (accessed 10 July 2011).

- Northern Territory—the Department of Business and Employment. Registration forms may be downloaded from the department's website and lodged electronically via the Department of Justice, by mail or in person at a Territory Business Centre. Registration fees for a three year period are \$66 for a new business and \$56 for renewals.²⁵

Table 1.2: State and Territory business registration fees

	One Year Fee (\$)	Three Year Fee (\$)	Five Year Fee (\$)	Three Year Renewal (\$)
Western Australia		90.00		75.00
South Australia		159.00		128.00
Victoria		85.50		61.10
New South Wales		160.00		115.00
Queensland	133.60	255.60		206.85
Tasmania		140.00		140.00
ACT		151.00	221.00	127.00
Northern Territory		66.00		56.00

Source: Secretariat survey of state/territory registration fees (website listed in footnotes 15–22)

1.31 While a national names availability search is free in most states and territories, the Tasmanian Consumer Affairs and Fair Trading charges \$15.40 for this service.

1.32 This state and territory based system means that an identical business name might be in use by multiple businesses in different regions.

Company and business registrations

1.33 Registering business names is very different to registering a company name. Company registrations are managed by the Australian Securities and Investments Commission (ASIC), under the *Corporations Act 2001* and are administered using a central registration system. Companies are therefore not restricted in trade and may conduct business throughout Australia, without being required to register the company name in each state. Company names are also unique; business owners may not register identical or almost identical company names.

1.34 Registering a company is much more expensive than registering a business, costing from \$500 to many thousands of dollars, depending on registered agent fees and company structure. A business owner may register the company themselves via the ASIC website, which costs between \$351–\$2137 depending on company structure.

25 http://www.nt.gov.au/justice/licenreg/baal/register_business_name.shtml (accessed 10 July 2011).

However, there is a large checklist that needs to be completed for incorporation and many business owners find it easier to use a registered agent (ASIC provides a list of these on their website) to complete this process.

1.35 Most companies are also protected by limited liability (unless they choose not to be), which unincorporated businesses are not. This protects company owners from being personally sued and/or fined, whereas small business owners are not subject to this same protection.

The merit of the proposed legislation

1.36 The bills offer four key benefits to small business in Australia. First, the process of registering business names will be simplified by providing a central online facility that allows businesses to check the availability of business names and to register business names on the one website.

1.37 Second, businesses will only have to register a business name once with ASIC, which will be valid nationwide. This provides a substantially more efficient system for small businesses, than the current system requiring registration in each state and territory in which a business trades.²⁶

1.38 Third, the ABN registration process will be simplified. Businesses will no longer be required to register for an ABN separately via the Australian Taxation Office (ATO) website. Instead, business owners will be able to register business names and register for an ABN at the same time via the online facilities provided by ASIC.

1.39 Fourth, the fee schedules enacted by the Business Names Registration (Fees) Bill 2011 and the proposed Business Names Registration (Fees) Regulations 2011 will provide substantial financial savings for businesses by providing a one off fee (\$30 for a one year registration and \$70 for three years) for nationwide business registration, as opposed to the current system under which businesses may be required to pay up to eight different registration fees depending on the number of states and territories they wish to trade in.

1.40 In summarising these potential benefits, DIISR writes:

The 2009 cost/benefit analysis by Ernst & Young to undertake a cost/benefit analysis of the ABN Business Names Registration Project found that this part of the initiative will provide around \$500 million in savings to business over eight years through the reduction of time and cost spent registering a national business name and ABN. Savings include (but are not limited to):

26 According to DIISR's submission, businesses that operate in each state and territory face a cost of more than \$1000 to register a business name for three years; DIISR, *Submission 11*, p. 3.

- \$203 million over eight years in savings through reduced costs to business from standardised national fees; and
- \$116 million over eight years through the online 24/7 combined ABN/business names registration forms.

Consumers will also benefit from the new national system. Consumers will be able to search online free of charge for business contact details, business address and the entity to which the business name is registered in Australia. Further information (current and historical) will be provided for a small fee.²⁷

Conduct of the inquiry

1.41 The committee received 18 submissions to this inquiry, which are listed in Appendix 1. It invited witnesses to attend a public hearing at Parliament House in Canberra on 2 August 2011. At the hearing, the committee took evidence from DIISR, ASIC and the Law Council of Australia among others. Witnesses who gave evidence at the hearing are listed in Appendix 2.

1.42 During the course of the inquiry, various financial organisations gave evidence to the committee raising their concern that the bills' provisions would restrict their ability to comply with the *Anti-Money Laundering and Counter-Terrorism Act 2006* (AML-CTF Act).²⁸ However, the committee did not receive any evidence from police forces or intelligence agencies. Accordingly, the committee asked the state and territory Commissioners of Police and the Director-Generals of the various intelligence agencies for comment on the capacity of third-party credit providers to comply with the AML/CTF Act under the proposed legislation. Chapter five makes comment on this matter.

1.43 Following the public hearing, the committee submitted a number of questions on notice to DIISR, ASIC, the credit checking firm Veda Solutions, the Law Council of Australia and the Australian Bankers' Association (ABA). The committee thanks all these agencies for their timely responses.

1.44 The secretariat also had regular verbal correspondence with DIISR and ASIC seeking clarification on issues that arose and received written correspondence from Treasury and the Law Council of Australia.

1.45 The committee and the secretariat thank DIISR, ASIC and all participants in this inquiry for their cooperation. It also acknowledges that DIISR and the Minister for Small Business, Senator the Hon. Nick Sherry, approached the secretariat to refer the draft exposure bills to the committee for inquiry and comment.

27 DIISR, *Submission 11*, p. 3.

28 This Act is discussed in Chapter 3 of this report.

Clarification of DIISR's evidence

1.46 Following the public hearing, the secretariat sent DIISR the Proof Hansard. DIISR subsequently sent the secretariat several pages of 'corrections' that it wanted to make to the evidence. In total, there were 18 'corrections'; many of these fundamentally changed the meaning of what was said. Further, some of the subsequently corrected statements were used by the committee during the hearing as the basis for further questioning of DIISR and other witnesses. The following correction is a case in point:

I would like to correct the record on page 4:

I stated: "Only three states collect date of birth; the other five do not."

My answer should have been: "Only three states give out date of birth of adults; the other five do not."

1.47 The committee is concerned, therefore, that it may have been misled—albeit unintentionally—and that these corrections now cast the evidence of other witnesses in a different light.

1.48 Having received DIISR's corrections, the secretariat notified the Department that the substantive corrections could not be made to the record but would need to be clarified through a letter of clarification to the committee. DIISR subsequently provided this letter of clarification, although several of the original 'corrections' had been omitted.

Structure of the report

1.49 This report is divided into five chapters:

- chapter two outlines the main provisions of the three draft bills;
- chapter three discusses submitters' concerns that the proposed legislation limits their ability to comply with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act);
- chapter four canvasses various other issues raised by submitters in relation to the bills; and
- chapter five presents the committee's view.

