

Chapter 4

Other issues relating to the bills

4.1 This chapter examines various other issues of concern to submitters relating to the bills. The following seven issues are of particular interest:

- probate law and jurisdictional issues relating to clause 40 of the bill;
- potential difficulties relating to the separate processes for registering a business name and a domain name;
- potential difficulties relating to trademarks;
- the risks associated with 'opportunistic registrations';
- the need for a central database containing 'unsatisfied judgments';
- the need for an education campaign to explain the changes to stakeholders; and
- the provisions and associated regulations of the Business Names Registration (Fees) Bill 2011.

Probate law and jurisdiction—clause 40 of the bill

4.2 In its evidence to the committee, the Law Council of Australia raised potential jurisdictional issues between the Commonwealth and the states and territories relating to clause 40 of the bill.¹ This clause relates to a successor in relation to a deceased estate notifying ASIC. In other words, if a business name is registered to an entity that is an individual and the individual dies, and no succession plans have been made, the entity most likely to inherit the assets may lodge with ASIC notice of that fact. Subclause 40(3) states that ASIC must register the Business Name to the estate of the deceased.

4.3 Clause 40 was inserted as a way of dealing with the transitional period from the time an individual dies to when letters of administration are granted. However, the Law Council argued that the clause interferes with state and territory probate laws and that its application may become problematic. Mr Tony Burke, representing the Law Council, told the committee:

The section is intended to provide some mechanism whereby on the death of an individual, being the proprietor of a business name, it is possible for someone claiming an interest in the business name, without having any formal grant of probate of a will or letters of administration of an estate, for example, to approach ASIC and seek to be able to deal with the business name. I also practise in the probate and estate area and I can see conflict of

1 Mr Tony Burke, Chair, SME Business Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 August 2011, pp 15–16.

jurisdiction issues arising there. I can see the potential for forum shopping and I just wonder whether that was a well-conceived inclusion in the bill.

...

For example, section 40(3) states that 'ASIC must register the business name to the estate of the deceased.' I do not know what that means. An estate is normally represented by a legal person or representative, either an executor or someone who has a grant of some formality from a court exercising probate jurisdiction. I do not know what that section means. I suspect it was an attempt to find a remedy for those who were not really keen to go to the trouble and expense of bringing an application in the state or territory courts for a grant of probate.²

4.4 In an answer to a question on notice, DIISR stated that the intent of clause 40 is to deal with the transfer of a business after the death of its owner, and the related problem of persons trading while not being registered. It noted that on the death of individuals, who own businesses, the businesses often continue to operate registered to the deceased individual. As a result, the persons who take over the operations of such businesses would essentially be running businesses that they personally have not registered. DIISR clarified that clause 40:

...seeks to obviate this problem by requiring ASIC to register a business name to "the estate of the deceased", or to consider registering the business name to someone that ASIC is satisfied on "reasonable grounds" is the successor to the deceased.³

4.5 However, the Law Council argued that if the clause is enacted, it may eventuate that in the absence of a grant of probate or letters of administration of the estate of the deceased business name proprietor, ASIC could transfer a business name (and with it the effective right to control a business) to a claimant, only to find later that a legal representative appointed by a state or territory and that person then requires the transfer of a business name.

4.6 This may be problematic for a number of reasons. First, ASIC does not have the expertise to determine who is a rightful heir of an estate. It would appear that from a constitutional perspective, this is a state and territory responsibility handled by the Supreme Courts of each separate state and territory.⁴

4.7 Second, there is no definition of 'estate' provided in the primary bill so its interpretation could be problematic.⁵ There is a great deal of law, both statute⁶ based

2 Mr Tony Burke, Chair, SME Business Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 August 2011, pp 15–16.

3 DIISR, answer to question on notice, 4 August 2011 (received 8 August 2011).

4 Law Council of Australia, answer to question on notice, 10 August 2011 (received 11 August 2011).

5 Law Council of Australia, answer to question on notice, 10 August 2011 (received 11 August 2011).

and common law, which applies in this arena. It is therefore not entirely clear whether a business name would, in the first instance, belong to the estate of the deceased.

4.8 Third, an 'estate' is not an entity in and of itself. Generally, it is represented by a natural person or a corporation such as a trustee company. The law council informed the committee that 'it is only in the taxation arena that an estate is treated as a separate entity, and then only for tracing purposes'.⁷ Therefore, a business cannot be registered to an 'estate' because it does not exist as an entity.

4.9 Finally, the bill does not outline the steps ASIC will take in determining who is a rightful heir. Nor does the bill outline the ways ASIC will account for the various business structures.⁸ For example, just because an individual appears to be the logical heir, such as a wife or child, this does not mean that they ought to inherit the business. Various business structures, such as partnerships, trusts and joint ventures, have highly complex constitutions and therefore, the rightful heir of a business may indeed be a less obvious individual, such as a partner in a trust.

4.10 The Law Council advised the committee that to avoid such problems, ASIC would have to:

... first check with State and Territory probate registries and establish that no application had been made. Given that it can take years before probate applications are lodged, this makes for obvious administrative difficulty. The draft Bill is altogether silent about such matters.⁹

Domain names

4.11 Although the Business Name Registration Bill 2011 does not mention the issue of domain names, some evidence provided to the committee suggests that the interaction of domain names and business names should be addressed in the bill.

4.12 Domain names are urls or 'addresses' that internet users use to reach a business online. A domain presence is increasingly important for businesses to reach target markets and to provide alternative modes of interaction with consumers.

6 The primary state and territory laws governing probate and letters of administration are: South Australia—*Administration and Probate Act 1919 & Wills Act 1936*; New South Wales—*Probate and Administration Act 1898 & Succession Act 2006*; Victoria—*Wills Act 1997 & Administration and Probate Act 1958*; Queensland—*Succession Act 1981*; Tasmania—*Administration and Probate Act 1935 & Wills Act 2008*; Western Australia—*Wills Act 1970 & Administration Act 1903*; Northern Territory—*Wills Act & Administration and Probate Act*; ACT—*Wills Act 1968 & Administration and Probate Act 1969*.

7 Law Council of Australia, answer to question on notice, 10 August 2011 (received 11 August 2011).

8 Law Council of Australia, answer to question on notice, 10 August 2011 (received 11 August 2011).

9 Law Council of Australia, answer to question on notice, 10 August 2011 (received 11 August 2011).

4.13 There are two categories of domain names. The first category is commonly referred to as top-level domain names. These include:

- urls that end most commonly in .com, .co, org or .net. To register a general higher-level domain name that ends in .com (etc), registrants can go to various domestic and international companies and register a name instantly;¹⁰ and
- country specific domain names that are generally administered by a sanctioned government or private organisation. In Australia, the country-code url addresses end in .com.au or net.au and are administered by the .au Domain Administration, commonly referred to as the .auDA. To register a country-code domain name in Australia, registrants need to go to an Australian domain registrar, accredited by the .auDA and supply an ABN. This information is then processed by the .auDA, which then notifies registrants of the success or failure of their domain name registration.

4.14 The second category of domain name refers to lower-level domain names. Lower-level domain names refer to the words that precede the top-level suffixes. For example, in the url www.web.com, the lower-level domain name is the word 'web' and the higher-level domain name is the .com.

4.15 According to Australian regulations set by .auDA, businesses, companies or individuals have no proprietary rights over a domain name—they are merely leased for a specified period of time and subject to the licence terms and conditions.¹¹ However, a business can use a .com.au name as its business name.

A link between domain names and business names

4.16 Currently, the process of registering a domain name is separate from registering a business name. There is no convenient way that a prospective business name registrant can check whether an appropriate domain name is currently in use. The registrant may not even be aware that there may be an issue in sourcing their desired url at a later date. This raises the prospect that a business wanting to use a domain name that is consistent with their business name may not be able to, or if they choose to register a domain name which only slightly differs from a current domain name, they may be unwittingly exposed to litigation and loss of business.

4.17 For example, an individual may wish to register the business name Squires Consulting. The business later seeks to register a website, but finds that the url

10 Domain registrars include companies such as Fat Cow, Go Daddy, Netregistry and Crazy Domains.

11 This ruling was made by the Australian Domain Name Administrator in 'Clarification of Domain Name Licence—Prohibition on Sale of Domain Name (2005–05)', 22 July 2005, para. 2. For more information on this ruling and its implication for Australian businesses, see M. Bender, 'What's in Name: Domain Name Disputes Involving Trademarks in Australia,' *Monash Business Review*, Volume 3, No. 3, 2007; Sharon Givoni, 'Alternatives to the auDRP: cost effective means of quashing cybersquatters', *Internet Law Bulletin*, Vol. 9 No. 9, 2007, p. 107.

www.squiresconsulting.com is already taken by another business. The other business may only be trading under this url and is registered under a different business name. Given the most appropriate url is taken, the proprietor decides to register www.squiresconsultingsydney.com.

4.18 This situation may be problematic for a number of reasons:

- the owner of the original domain www.squiresconsulting.com may claim that the later business is infringing on their intellectual property by using a near identical name and thereby stealing their established clientele;
- the original owner may claim that www.squiresconsultingsydney.com was registered in bad faith; and
- the already established online business, operating lawfully under current legislative provisions, may be required to take their webpage down due to the fact that the proprietor of Squires Consulting has legitimately registered that business name.

4.19 These scenarios are particularly pertinent to the Business Names Registration Bill. For the first time, businesses will be restricted in the names they may use. Under current arrangements, a business called *Squires Consulting* may quite comfortably operate in Sydney, while another business by the same name may operate in Brisbane. With central registration of business names, competition for names will intensify given the imperative of brand recognition under a desired name.

4.20 The committee queried whether DIISR had considered the issue of domain names infringing on business names. It asked the department whether there should be a link between business names and domain names to prevent domain names being taken and thereby precluding a business from using it. The Department responded:

You can register the domain name as a name. But if Ann Bray Consulting is already there, the www gets ignored. The domain name is something that is very important for people. It is an address rather than an ownership thing. It is not a trademark; it is an internet address. For .com.au addresses, there must be some relationship between a registered business name, a trademark and the com.au address that you register. That is my understanding. That is not the case for .com addresses.¹²

4.21 On notice, the committee asked the Department to clarify whether under the new system, there will be a link between registering a business name and registering for an Australian domain name. DIISR's response was that the proposed ASIC service 'will provide information about domain name registration prior to, and after, business name registration'. It added that there will be 'prominent online links to the Australian Domain Name Administrator site'.¹³

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

13 DIISR, *Answer to questions on notice*, 4 August 2011 (received 8 August 2011).

4.22 The committee notes that this 'link' between applying for a business name and a domain name is not as direct as in other jurisdictions. In the United Kingdom, for example, a single website operated by a private company, the National Business Registry, allows for the registration of a business name, a domain name and a trademark.¹⁴

Domain names and intellectual property rights

4.23 In terms of the bill, the issues stem from the requirements to register a business name and ABN and the provision that no identical or near identical business names may be registered. Many businesses do not trade under their registered business name, but under their domain name so as to foster brand recognition. Therefore, if a business registers a name and an ABN, problems may arise if it trades under a domain name that is identical or almost identical to another business' name or domain name. This would cause confusion for consumers, particularly if two different businesses have names and/or domain names in common.

4.24 A dispute between the University of Melbourne and a student union organisation Union Melb, settled by World Intellectual Property Organisation (WIPO) in 2004, exemplifies the problem.¹⁵ The University of Melbourne had been using the domain name www.unimelb.edu.au for the previous 10 years, while Union Melb was using the domain name www.unimelb.com.au. The University claimed that Union Melb's domain name was too similar and that traffic was being diverted from their website to the Union's website. Moreover, since the Union dealt with post-secondary education issues, the University claimed that the Union was using the disputed domain name in bad faith, trying to capitalise on the services that the university was providing to gain customers/users. Upon being notified of the University's concerns, it is alleged that the Union attempted to sell the University the website, which was also deemed to be a sign of bad faith, raising the issue of cybersquatting. The ruling was in favour of the University and Union Melb was ordered to either deregister their website, or transfer ownership of the disputed domain name to the University.

4.25 In their submission to this inquiry, lawyers Gilbert & Tobin emphasised the importance of addressing issues surrounding intellectual property rights and the registration of domain names:

We further suggest that a similar mechanism to the domain name registration scheme is introduced in relation to business names. Registrants should be required to warrant that they are entitled to use a trading name and that use does not breach any third party rights.¹⁶

14 UK National Business Register, <http://www.start.biz/home.htm> (accessed 10 August 2011).

15 *University of Melbourne v. union melb*. A record of proceedings is available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AUDND/2004/4.html?stem=0&synonyms=0&query=domain%20name*%20AND%20business%20name*%20AND%20registration.

16 Gilbert & Tobin, *Submission 3*, p. 6.

4.26 There appears to be an opportunity to address the issue of domain names in the Business Names Registration Bill, either through a clause that stipulates they will not be taken into account should a dispute arise (where disputes are not related to trademarks), or by legislating that domain names be a part of the registration process and searchable, so that future business owners can take precautionary measures against registering near identical domains and thus avoiding potential cause for litigation. If domain name issues are left unaddressed, business owners may become subject to litigation, potential fines, and in the worst case scenario, lose business and/or internet presence due to an order to take webpages down.

Trademarks

4.27 A number of submitters noted anticipated problems searching for trademarks under the new system.¹⁷ Under the proposed new arrangements, ASIC will have a link on their website which will take users to *TM Check*. *TM Check* is an online database where business owners can check trademark information. However, this database is not comprehensive. Moreover, the onus is on the owner of the trademark to identify any infringements upon their trademark rights and to pursue the matter in a court of law. ASIC will not prevent the registration of a business name that may impinge upon another individual's trademark.

4.28 The issue of registering trademarks arose during DIISR's March–April 2011 consultation process on the proposed bills.¹⁸ In its submission to the DIISR consultation, Woolworths wrote:

... a business will have details of its principal address suppressed (with the exception of the suburb and State) if that principal address is a private home address. In this context, it is not clear to Woolworths how another business or individual wishing to protect their legal rights (such as intellectual property etc) will be able to do so if they cannot identify the principal place of business of a home based company that is infringing those rights. That is, if a home based business is undertaking illegal activity, it is not clear how an individual or business wishing to stop that activity will be able to identify an address of service to serve legal documents on that infringing business (in the same way they could to a non-home based business). This, to Woolworths, runs counter to the objective of the Business Names registration framework which is to ensure that individuals and business are able to accurately identify the location of a business. Woolworths therefore suggests that a mechanism be put in place which enables a business to

17 Gilbert & Tobin, *Submission 3*, p. 6; Law Council of Australia, *Submission to DIISR*, April 2011; Woolworths, *Submission to DIISR*, April 2011; Master Builders Association, *Submission to DIISR*, April 2011.

18 <http://www.innovation.gov.au/SmallBusiness/Support/Pages/PublicSubmissions.aspx> (accessed 5 August 2011) (accessed 7 July 2011).

easily identify an address for service for all businesses regardless of whether a business is a home based or otherwise.¹⁹

4.29 During the same consultation, the Master Builders Association raised the issue of intellectual property rights:

Master Builders considers that there is already uncertainty within the construction sector about the legal affect of acquiring an ABN and that the risk that businesses will confuse business name registration under the Bill with exclusive ownership is high. We urge that an education campaign be funded and developed by the Government which clearly distinguishes between the legal implications (in terms of use and ownership) of registration of a business name under the Bill and registration of a trade mark under the *Trade Marks Act 1995* (Cth). In particular, we consider that it is necessary to emphasise that business name registration under the Bill does not necessary [sic] prevent other businesses from using it. This could perhaps be alerted to registrants during the application process.²⁰

4.30 The Advisory Council on Intellectual Property (ACIP) identified these issues in a 2006 report. The report stated:

ACIP is convinced that a significant number of traders do not fully comprehend the legal significance or inherent differences between trade marks and business names, company names and domain names. Compounding this is the resulting confusion that exists in the business community as to the nature of the rights, if any, associated with each identifier. ACIP believes the lack of overall understanding of these identifiers leads to expensive legal disputes, gross misconceptions and commercial uncertainty. In order to address the problems faced by traders who use these identifiers a number of significant structural and procedural changes will be required. Without such reforms the problems identified in this Report will continue to affect a growing number of traders.²¹

4.31 In its first recommendation, ACIP suggested the following:

Mandate 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. Where the field of business activity does not match, or where comparing business activities is not possible, the trade mark search results should be provided to the business name owner for information purposes. This option would greatly help to protect business name owners from infringing prior rights.²²

19 Woolworths, *Submission to DIISR*, pp 1-2.

20 Master Builders Association, *Submission to DIISR*, March 2011, pp 7-8.

21 ACIP, *Review of the relationship between Trade Marks, Business Names, Company Names and Domain Names*, March 2006, p. 1.

22 ACIP, *Review of the relationship between Trade Marks, Business Names, Company Names and Domain Names*, March 2006, p. 2.

4.32 The Advisory Council argued that the most efficient way of dealing with intellectual property issues is to integrate the various systems into one centrally administered database. Recommendation 3 in the ACIP report noted:

Better integration would greatly facilitate the provision of the above two IP solutions, as well as reduce the regulatory burden on the business community. ACIP is not in a position to recommend what form of integration is most appropriate, but some options are:

- a single national system, similar to the company name system administered by one authority;
- a single national system similar to that for domain names, where competing registrars are administered by a federal authority; or
- a combination of State and Territory registers accessed as one integrated system.²³

4.33 The UK appears to have successfully implemented a system that incorporates ACIP's recommendations. As mentioned above, the UK National Business Registry provides a list of registered company names, domain names and trademarks. When an individual or entity searches for an available business name, trademarks also appear in the search results. Therefore, if a proposed business name is identical to a trademark, the business name is rejected.²⁴

Opportunistic registration

4.34 In its submission to this inquiry, the law firm Gilbert & Tobin identified the problem of opportunistic registration. It noted that given the prospect of the registers for companies and businesses both being at a national level and both administered by ASIC:

...we advocate the introduction in Australia of a system to deal with the "opportunistic registration" of business names and company names. We refer to the introduction in 2010 in the United Kingdom of the Company Names Tribunal: see <http://www.ipa.gov.uk/cna/cna-factsheet.htm>.

An example of "opportunistic registration" would be when someone registers one or more variations of the name of a well-known company in order to force that company to buy the registration(s). Another example would be where a registrant knows that a merger is about to take place between two companies and so registers one or more variations of the name that the newly formed commercial entity is likely to require.²⁵

23 ACIP, *Review of the relationship between Trade Marks, Business Names, Company Names and Domain Names*, March 2006, p. 3.

24 ACIP utilises Canada's NUANS system as an example, which also prohibits the registration of business names that are identical to trade marks, pgs 1 and 3.

25 Gilbert & Tobin Lawyers, *Submission 3*, p. 6.

4.35 The 2006 ACIP report noted that opportunistic registrations or 'name squatting' is not a significant issue for company names because registrants appear to be more aware of IP issues. However, it noted that 'name squatting' will be a more significant issue for business names.²⁶

4.36 The committee raised the issue of opportunistic registration with DIISR. The following exchange gives the sense that the Department believes that with trademark protections, opportunistic registration will not be problematic:

Senator Bushby: ... the apparent lack of dealing with opportunistic registration and requiring those who register to make some sort of statement or certification that they have a right to the business name. Opportunistic registration is when you might see that McDonald's is a big thing in America and you go off and register 'McDonald's' before it gets here and try to sell it for a big whack of money down the track. There are ways of dealing with that by requiring certification in advance. You say, 'Yes, I have a right to this name,' and make it cancellable if they cannot prove that they had that right at a later date when somebody asserts that it was an opportunistic registration. That sort of thing does not appear to have been dealt with in this.

Ms Bray: The mere fact of registering a name does not give you any proprietary rights over a name at all.

Senator BUSHBY: It doesn't, but it might mean that the company that is using it elsewhere cannot register it here because it is already registered. An example of that, to continue with the hamburger thing, is Burger King. Many years ago 'Burger King' was registered in the WA business names register before Burger King came to Australia. When Burger King did come to Australia they could not use 'Burger King' in Western Australia, so they set up with the name 'Hungry Jack's'. As you mentioned, there is no intellectual property right in it, but there are ways you can deal with that if government considers it the appropriate thing to do. I was wondering whether it was considered and, if not, why not?

Ms Bray: In the application process we are going to explain to businesses that there are not any proprietary rights. You do not have a right to use this name just because it is registered—

...

We will alert them to the fact that trademarks are the only way of protecting their property and that they should register a trademark. Then we will send them off to that link. Also, under the law we allow for a deregistration process when a court order is provided. So if people have battled out who owns a particular trademark it can be deregistered.²⁷

26 ACIP, *Review of the relationship between Trade Marks, Business Names, Company Names and Domain Names*, March 2006, p. 3.

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

4.37 However, if an individual owns a trademark and seeks to register a business that has already been registered by someone else, the owner of the trademark will still face issues and costly court battles. For example, if a business name was registered before a trademark, it is unlikely that an individual could have foreseen the trademark registration and therefore may retain the right to keep the business name. This has been seen in a number of cases relating to domain name registrations, where a domain name was registered before a trade mark, therefore bad faith could not be demonstrated because there was no way of knowing that the domain name may in the future impinge upon a trademark.²⁸

4.38 Moreover, if a person does not have a trademark and seeks to open a business under a name which is already registered but not in use, then they may have no option but to change their name (as per the Burger King case) or buy the business name from the registered individual. Therefore, trade marking a name is not necessarily an adequate protection against opportunistic registrations.

A database with 'unsatisfied judgments'

4.39 The Law Council of Australia has suggested that ASIC should maintain a record of 'unsatisfied judgements' on the proposed National Business Names Register. It argued that small businesses have to regularly contend with unscrupulous companies and that court judgements and proceedings should be included in the database and be accessible by the public. As Mr Tony Burke, representing the Law Council, told the committee:

If one thinks, for example, of phoenix companies, which have been a challenging issue for a number of years, those of us in practice often know that the victims of phoenix companies find themselves in that position, because they do not have a ready mechanism of identifying the serially delinquent players in commerce. If it were possible, by means of a single publicly accessible portal, for people in business to identify those who abuse the social licence which they have either as a limited liability company or as a proprietor of a business name, it should be easy to identify them, and that makes possible some degree of citizen advocacy in their own interest, if you like. It is the nature of the data revolution that ultimately over time these sorts of developments can converge so as to make possible things which were previously not possible. Knowing that the party with whom you propose to contract may have one or more unsatisfied judgments is useful intelligence before you proceed further.²⁹

28 Alan Limbury, 'Domain name disputes: when must trade mark rights exist?' *Internet Law Bulletin*, vol. 8, 1 (2005); Debrett Lyons, 'What's in a name? Bad faith in domain name disputes', *Internet Law Bulletin*, vol. 10, 6 (2007).

29 Mr Tony Burke, Chair, SME Business Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 August, p. 15.

An education campaign

4.40 Another issue of note concerns the task of informing stakeholders—existing businesses, prospective registrants and consumers—about the role and operation of the National Business Register. ASIC emphasised that educating stakeholders about the register will be crucial to the implementation of the program:

A communications plan and strategy has been developed at the whole-of-program level. That is a collaboration between DSRA [DIISR], the Australian business register, ASIC and the states and territories, each of which will need to engage with these stakeholders. There will be a number of mechanisms that we will use, including information on ASIC's website. I envisage we will have a series of road shows, or speeches of some sort, around regional centres. We are liaising with our business advisory committee. Importantly, as renewals of business names occur, we will be using targeted correspondence to our new constituents to inform them on how to interact with ASIC. ASIC also has a well-established call centre and various other established channels of communication, so we believe there will be a significant effort prior to going live.

...

...with our new service we will not only have [letters of] renewals going out but, because it is online, we will have access to email addresses and we will be able to have much more proactive alerts and reminders both to people who are due to renew and people who have failed to renew.³⁰

4.41 These consultations are necessary. The Law Council has noted that most of the 2.7 million small businesses in Australia have never had an encounter with ASIC. In this context, Mr Burke told the committee:

One of our concerns at the Law Council is that ASIC may be overwhelmed by the demand and that they will encounter a client base that is daunted by legislation that goes well beyond that with which they may have had some passing experience. For example, the Victorian legislation runs to some 34 sections and the new bill runs to some 90 sections, not including the transitional provisions. So there will be a significant cohort of business proprietors who will be somewhat daunted by the process, and perhaps at another time in another committee issues of resourcing will need to be addressed.³¹

4.42 The committee recognises that confusion could arise from businesses needing to register through ASIC, which has primary oversight for corporations. DIISR was asked on notice whether the bills give ASIC oversight for small businesses and

30 Ms Rosanne Bell, Acting Senior Executive Leader, Real Economy, ASIC, *Proof Committee Hansard*, 2 August 2011, pp 12–13.

31 Mr Tony Burke, Chair, SME Business Law Committee, Law Council of Australia, *Proof Committee Hansard*, 2 August 2011, p. 15.

franchises and if not, whether the bill will create confusion in the business community regarding ASIC's role. It responded:

The bills do not give ASIC general oversight for small businesses and franchises. To avoid confusion, ASIC will communicate widely with stakeholders about its new responsibilities for business names registration, as part of a wider program communications strategy. ASIC's online Business Name registration service will include links to the websites of agencies including Franchise Australia, the Australian Business Account (a DIISR initiative), IP Australia (trade mark check) and the Australian Domain Name Administrator (.auDA).³²

4.43 The committee emphasises that a thorough, well-constructed and targeted education campaign will be crucial for transition to, and implementation of, the National Business Names Register.

Fees and formulas—Business Names Registration (Fees) Bill 2011

4.44 As briefly discussed in Chapter 2, the fees outlined in the Business Names Registration (Fees) Bill appear to be inconsistent with the intent and administration of the primary bill. A cap of \$10 000 (for a single fee) and \$50 000 (the sum of fees) for chargeable matters appear to be very high amounts, particularly given the significantly lower registration fees currently charged by the states and territories (see Table 1.2 in Chapter 1).

4.45 Moreover, copying sections 5 and 6 of the *Corporations (Fees) Act 2001* into the Business Names Registration (Fees) Bill 2011 may be problematic because it appears to blur the distinction between ASIC's database management role for business names and ASIC's regulatory role in monitoring companies.

4.46 Treasury has written to the committee explaining the reasons they incorporated sections 5 and 6 of the *Corporations (Fees) Act 2001* into the bill. They wrote that:

The Business Names Registration (Fees) Bill utilises the model for imposing fees that is provided for in the *Corporations (Fees) Act 2001* [Corporations (Fees) Act]. This model for fee imposition has previously been adopted in other contexts, for example, the *National Consumer Credit Protection (Fees) Act 2009*. These Fees Bills establish a comprehensive set of provisions concerning the imposition of fees and charges in the form of taxation legislation that complies with Commonwealth constitutional requirements.³³

32 DIISR, answer to question on notice, 4 August 2011 (received 8 August).

33 Treasury, answer to questions on notice, 15 July 2011 (received 29 July 2011).

4.47 However, as to the large caps assigned to the bill, Treasury acknowledged that 'it is not contemplated that any fees under the Business Names register would ever reach this sum.'³⁴

4.48 On notice, the committee asked for further clarification as to why Treasury decided to incorporate the formula and fees into regulations, to which Treasury advised:

Treasury believes that the transfer of the indexing mechanism to the Fees Bill would impede the timely amendment of the provisions to address any possible problems that may be identified in the future, in relation to what are basic machinery provisions.³⁵

4.49 Clause 3 of the Business Names Registration Bill 2011 directs readers to the Business Names Registration (Fees) Bill 2011 for details of chargeable fees; however, this detail is not provided in this bill. Instead, Business Names Registration (Fees) Regulations 2011 provides the formula for calculating fee rates, while an itemised list of chargeable fees is provided in Schedule 1.

4.50 Flexibility is needed for fee structures, hence their usual inclusion in regulations. However, there has been a tendency to include too much in regulations and not enough detail in primary Acts. The Senate Standing Committee for the Scrutiny of Bills has stated its view that excessive use of regulation-making power diminishes the ability of Parliament to scrutinise legislation and increases the reliance on the disallowance process in the Senate. Of relevance to this issue, the Senate Standing Committee for the Scrutiny of Bills has written:

Where the rate of a charge is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the charge, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.³⁶

4.51 By including a cap on the fees, the bill appears to fulfil this expectation. The bill also defines the matters for which a fee may be charged (chargeable matters) and is generally consistent with the *Corporations (Fees) Act 2001*, which has previously been passed by Parliament.

Committee view

4.52 The committee believes that the Business Names Registration Bill 2011 is a worthwhile initiative and will produce both cost and time savings for businesses

34 Treasury, answer to questions on notice, 15 July 2011 (received 29 July 2011).

35 Treasury, answer to questions on notice, 4 August 2011 (received 8 August 2011).

36 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest 11 of 2011*, p. 13.

across Australia. However, the issues raised in this chapter and chapter 3 indicate the need for further consideration by government.

