

Chapter 5

The committee's view

5.1 The final chapter of this report considers each of the key issues raised during this inquiry:

- clause 60 of the main bill and draft regulation 9 which limits the access of non-government entities to register information on privacy grounds;
- clause 40 of the main bill relating to notification by a successor in relation to a deceased estate, and possible jurisdictional issues relating to state probate laws;
- the capacity to allow registrants to comply with trademark and intellectual property requirements; and
- the appropriateness of fee caps specified in clause 5 of the Business Names Registration (Fees) Bill and, following this, the placement of the formula for determining registration fees in the draft regulations rather than in the bill.

5.2 In commenting on these issues, the committee is mindful of the proposed May 2012 starting date for the National Business Names Register.

Non-government entities' ability to verify register information

5.3 As discussed in chapter three, the committee heard the concerns of the Australian Finance Conference (AFC), the Australian Bankers' Association (ABA), AMEX, Veda Advantage and the Australian Retail Credit Association (ARCA) relating to their ability under the proposed legislation to comply with obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The financial organisations argue that clause 60 of the main bill and draft regulation 9 will unnecessarily restrict their ability to verify the identity of credit applicants through the national business names register.

5.4 Credit providers must comply with strict identity verification guidelines outlined by the AML/CTF Act. Specifically, credit providers are required to 'know your customer' (KYC) before providing credit; a process which involves checking their personal details. When verifying business identity, credit providers have argued that business registries are an important source of verification.

5.5 Chapter three noted the Department of Innovation, Industry, Science and Research's (DIISR) explanation that Commonwealth legislation must comply with the *Privacy Act 1988*. In this context, the Commonwealth must ensure that a body does not release information that is not used for the purpose for which it is collected. DIISR argued that as identity verification is not the purpose of the register, it cannot release register information to third-party credit and financial service providers.

5.6 However, the committee notes that business name registrants provide consent for their information to be used for various lawful purposes at the time of registering a business name. Registrants also provide consent for their identity to be verified at the time of a credit or finance application. On this basis, it is difficult to see how the Information Privacy Principles under the Privacy Act could be breached by allowing non-government entities to access the national register to verify customers' identity.

5.7 DIISR also contends that the Inter-Governmental Agreement (IGA) signed by the states and territories prohibits the use of ASIC's database for identity verification purposes. In this context, the committee highlights subparagraph 5.1(f)(g) of the IGA which explicitly permits identity verification by information brokers. It also provides a clause whereby information brokers may arrange individual agreements with ASIC to help cater to their requirements.

5.8 The committee makes the following four comments:

- first, it queries whether there is a conflict between Commonwealth privacy laws, the IGA and the requirements of information brokers to access information through the proposed national register;
- second, it queries the distinction the bill makes between providing register information to government and non-government entities, particularly where the non-government entities are seeking to comply with Commonwealth legislation that will directly assist those government agencies that are able to access the register;
- third, the committee is not aware of any complaints by the departments of consumer affairs or business groups in the states and territories, nor any complaints from the Privacy Commissioner concerning accessing or use of business register information; and
- fourth, the committee is concerned that the bills as currently drafted will place a greater burden on businesses to provide hard copies of extracts and other particulars, and on information brokers to meet national and international standards of identity verification and credit reporting.

5.9 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. The committee suggests that the government give further consideration to its decision to deny information brokers the same level of access to the business names register that they currently have. Should the government decide to introduce the bill in its current form, the committee offers the following suggestions:

- new section 62(1)(c) be inserted into the Business Names Registration Bill 2011 to allow information brokers to verify certain additional information against the National Business Names Register; and
- clause 77 of the Business Names Registration Bill 2011 be amended to include a provision that permits ASIC to use the information on the National Business Names Register for identity verification purposes; and

- paragraphs 1(a) and 1(c) of draft regulation 9 of the proposed Business Names Registration Regulations 2011 be amended to allow business extracts from the National Business Names Register to include date of birth and residential information.

5.10 Further, the committee suggests that if the bill is introduced in its current form, the Explanatory Memorandum to the bill should clearly state the following:

- the government's responsibilities to gather and use information in relation to the *Privacy Act 1988* and its specific provisions; and
- the purpose(s) of the Business Names Registration Act and its limitations, the ways this relates to the *Privacy Act 1988* and any impact specific sections have on the stated purpose.

The views of police commissioners and intelligence agencies

5.11 Several prominent financial organisations cited their concern to the committee that they may not be able to comply with the AML/CTF Act. The committee is interested in whether the police and intelligence agencies shared these concerns that financial organisations may not be able to comply with the Act. As chapter one noted, the committee sent invitations to the Australian Federal Police (AFP), the state and territory police commissioners and the various intelligence agencies to comment on the bill's restrictions on access to the register.

5.12 At the time of tabling, the committee had received responses from the NSW, Western Australian, Tasmanian and Australian Federal Police as well as the Defence Intelligence Organisation. These bodies did not have any concerns with the Business Names Registration Bill.

5.13 However, the AFP and NSW Police had some reservations. AFP informed the committee that while they saw no operational difficulties, it noted that they are not sure how the bill would affect the capacity of information brokers to comply with their AML/CTF obligations.¹ NSW Police was concerned that ASIC will not verify the identity of ABN holders. It suggested that consideration be given to ASIC conducting its own proof of identity process (such as the 100 points system) during registration.²

5.14 The committee suggests that DIISR and AUSTRAC consult with police and intelligence agencies to clarify the possible effect of the bill's provisions on financial organisations' compliance with the AML/CTF Act. In particular, it should be made clear to these agencies that financial organisations will not have the fast and cheap online mechanism of the National Business Names Register to verify information, but will instead have to rely on other sources such as the electoral roll, driver's licences and passports.

1 Correspondence from the Australian Federal Police, 12 August 2011.

2 Correspondence from New South Wales Police, 12 August 2011.

Clause 40 of the bill and probate law

5.15 The committee acknowledges DIISR's intent in inserting clause 40 of the main bill. It is important that in transferring a business following the death of its owner, a person does not trade while unregistered.

5.16 However, the Law Council's objections to this clause are concerning. As chapter 4 noted, there may potentially be jurisdictional conflicts between clause 40 and state and territory probate laws. Moreover, the term 'estate' is not defined in the bill. There are no procedures in the bills as to how ASIC will determine who is a rightful heir and the measures they will take should a new and different heir—as appointed by the state Supreme Courts—make claim to a business registration. There may be added difficulties in cases of more complicated business structures, such as partnerships, trusts and joint ventures. Further, the bill contains no dispute resolution mechanism in the event that multiple claimants approach ASIC to register a business name in their name.

5.17 The committee has no reason to question the Law Council's advice. Further, current state and territory probate laws seem to deal adequately with the transitional period that clause 40 seeks to address and with probate issues generally.

5.18 With the proposed shift from state and territory based business registers to a national register, it is important that the states and territories are aware of probate law matters relating to businesses. The committee does not believe that the state and territory governments were aware of the probate law matters raised in clause 40 prior to this inquiry.

5.19 Accordingly, the committee suggests that DIISR and the state and territory governments consult on clause 40 of the main bill and that the Minister be advised of the outcome of these consultations. If clause 40 remains in its current form, the Explanatory Memorandum to the bill should state the rationale for inserting this section in a Commonwealth statute given existing state and territory probate laws.

Intellectual property, trademarks and domain names

5.20 The committee recognises that intellectual property, trademarks and domain names are important elements of a successful business. It understands that intellectual property is the subject of global disputes and is an ongoing problem for businesses.

5.21 The importance of trademarks and domain names to a business makes it desirable to maintain a central database to provide the necessary information on intellectual property to business owners so as to lessen the compliance burden. The committee believes that information on the National Business Names Register on trademarks, business names, domain names and company names would be highly valuable for Australian businesses.

5.22 The committee believes that in the medium-term, the National Business Names Register should incorporate trademark, business/company names and domain names data. The intent should be to enable individuals when applying to register a business name to concurrently search the database for similar or identical domain names and trademarks. The committee commends this system on the basis that it will:

- limit the possibility of businesses unintentionally transgressing an entity's trade mark rights;
- minimise the extent to which individuals and/or entities are required to pursue intellectual property matters in a court of law; and
- make searching relevant information more efficient and centralised, consistent with the intent of COAG's national seamless economy initiative.

5.23 The committee draws attention to the international development of business names registers, in particular the National Business Register in the UK, and their apparent simplicity and comprehensiveness in enabling a search for domain names and trademarks. The committee commends this format for the consideration of the Department of Innovation, Industry, Science and Research and the Australian Securities and Investments Commission.

Fee provisions

5.24 Chapter 4 identified two issues of concern with the Business Names Registration (Fees) Bill 2011. The first relates to the \$10 000 and \$50 000 caps for a chargeable matter in clause 5. The committee acknowledges the ease and consistency of transplanting these schedules, but questions the relevance of these caps. As Treasury noted to the committee: 'it is not contemplated that any fees under the Business Names regime would ever approach this sum'. The bill's caps are copied from schedules 4 and 6 of the *Corporations (Fees) Act 2001*, where they are more appropriate.

5.25 While the committee has no major issue with clause 5 of the fees bill, it suggests that the Senate Scrutiny of Bills Committee could usefully consider whether the caps are appropriate and whether they should be lowered.

5.26 The second issue relating to the fees bill is the inclusion of the formula and fee schedule in the regulations to the bill rather than the actual bill. The committee notes that the formula for determining fees for corporations is in the regulations to the *Corporations Act 2001* rather than in the Act itself. In examining the provisions of the Corporations Bill in 2001, the Senate Scrutiny of Bills Committee raised no issue with the formula being inserted into the regulations.

5.27 Further, in 2009, the Senate Scrutiny of Bills Committee considered the provisions of the National Consumer Credit Protection (Fees) Bill 2009. Among other matters, the committee sought clarification from the Minister on the bill imposing a tax on chargeable matters and the regulations determining the quantum of the tax. The Minister noted that the approach taken in the Fees Bill is generally consistent with the

Corporations (Fees) Act 2001. In response, the Scrutiny of Bills Committee raised no objection. Accordingly, the committee is comfortable with the government's decision to place the formula for determining registration fees in a disallowable regulation rather than in the bill.

Final comment

5.28 The committee strongly supports a national system for registering businesses. It is an important plank in the COAG deregulation and competition agenda. The committee foresees several benefits from the new system in the form it has been proposed:

- consumers and those dealing with businesses will be able to find out the entity name behind a business name;
- businesses that trade in multiple states and territories will only need to register once;
- the cost of registering a business under the national system will be lower than is currently the case in each state and territory;
- the state and territory governments will be compensated for lost revenue; and
- a national online system will be more efficient than the current setup within many states and territories.

5.29 The committee supports the Commonwealth Government's plan to commence the new scheme in May 2012. It is important, however, that in meeting this timeframe, DIISR and ASIC implement an effective communication campaign to explain the benefits of the new system and how it will operate.

Recommendation 1

5.30 The committee recommends that the exposure draft bills be introduced into the Parliament.

Senator Mark Bishop
Chair