

The Senate

Economics
Legislation Committee

Exposure draft of the Business Names
Registration Bill 2011 and related bills

August 2011

© Commonwealth of Australia 2011

ISBN 978-1-74229-514-5

Senate Economics Legislation Committee

Members

| | |
|------------------------------------|------------------------|
| Senator Mark Bishop, Chair | Western Australia, ALP |
| Senator David Bushby, Deputy Chair | Tasmania, LP |
| Senator Alan Eggleston | Western Australia, LP |
| Senator Doug Cameron | New South Wales, ALP |
| Senator Anne Urquhart | Tasmania, ALP |
| Senator Nick Xenophon | South Australia, IND |

Participating Member participating in this inquiry

| | |
|---------------------------------|----------------------|
| Senator the Hon Ursula Stephens | New South Wales, ALP |
|---------------------------------|----------------------|

Secretariat

Dr Richard Grant, Acting Secretary
Mrs Noemi Murphy, Research Officer
Ms Morana Kavgic, Administrative Officer

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3540
Fax: 02 6277 5719
E-mail: economics.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

TABLE OF CONTENTS

| | |
|---|------------|
| Membership of Committee | iii |
| Chapter 1 | 1 |
| Introduction and background | 1 |
| Referral of the bills | 1 |
| Overview of the bills | 2 |
| Background of the bills | 2 |
| Current business names registration processes | 8 |
| The merit of the proposed legislation | 11 |
| Conduct of the inquiry | 12 |
| Structure of the report..... | 13 |
| Chapter 2 | 15 |
| Provisions of the exposure draft bills..... | 15 |
| Provisions of the bills | 15 |
| Chapter 3 | 23 |
| Non-government entities' restriction on accessing register information | 23 |
| Relevant clauses and regulations..... | 24 |
| Entities' obligations under the AML/CTF Act | 25 |
| The current capacity of credit checking organisations to verify their data from state and territory business registers | 28 |
| The problem with draft regulation 9..... | 32 |
| Clause 77 of the bill and the difficulties in matching data..... | 36 |
| The Privacy Act and the Information Privacy Principles..... | 38 |
| Chapter 4 | 43 |
| Other issues relating to the bills | 43 |
| Probate law and jurisdiction—clause 40 of the bill | 43 |
| Domain names | 45 |

| | |
|---|-----------|
| Trademarks | 49 |
| Opportunistic registration..... | 51 |
| A database with 'unsatisfied judgments'..... | 53 |
| An education campaign | 54 |
| Fees and formulas—Business Names Registration (Fees) Bill 2011..... | 55 |
| Committee view..... | 56 |
| Chapter 5 | 59 |
| The committee's view | 59 |
| Non-government entities' ability to verify register information..... | 59 |
| Clause 40 of the bill and probate law | 62 |
| Intellectual property, trademarks and domain names..... | 62 |
| Fee provisions..... | 63 |
| Final comment | 64 |
| Coalition Senators' additional comments..... | 65 |
| APPENDIX 1 | 67 |
| Submissions Received..... | 67 |
| Additional Information Received..... | 67 |
| APPENDIX 2 | 69 |
| Public Hearing and Witnesses..... | 69 |
| APPENDIX 3 | 71 |
| Information on State, Territory and Commonwealth Business Registers..... | 71 |

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).

- 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.

Chapter 2

Provisions of the exposure draft bills

- 2.1 This chapter outlines the key provisions of the three exposure draft bills:
- the Business Names Registration Bill 2011;
 - the Business Names Registration (Transitional and Consequential Provisions) Bill 2011; and
 - the Business Names Registration (Fees) Bill.
- 2.2 The draft Business Names Registration Regulations 2011, draft Business Names Registration (Fees) Regulations 2011 and the draft Business Names Registration (Availability of Names) Determination 2011 are discussed where relevant.

Provisions of the bills

- 2.3 The bills will:
- establish a national business names register, replacing the current system of registers operating in each state and territory;
 - establish a central business names registration database to be administered by the Australian Securities and Investments Commission (ASIC), which is currently responsible for the registration of companies;
 - lower fees for registration and renewal as well as options for one or three year registration periods;
 - allow business owners to apply to register a national business name online and receive confirmation of their registration at the same time;
 - provide for joint online registration of a business name in conjunction with the Australian Business Number (ABN) registration with pre-filling from one registration to the next;
 - provide information on and links to the trade mark and domain name searches; and
 - enable businesses with an ABN to register for an AUSkey—a single key to access government online services.
- 2.4 As part of these changes, businesses will be required to:
- have an ABN or be in the process of applying for an ABN and not have been refused an ABN in order to register a business name;
 - display their entity name and ABN on all written correspondence and communication (except internal communication); and

- ensure that new business names are not identical or near identical to existing business names.

Business Names Registration Bill 2011

2.5 The Business Names Registration Bill 2011 is the primary bill outlining the new provisions for the registration of business names and for other related purposes.

2.6 Clauses 1 through to 11 (Divisions 1–3), outline the primary interpretation provisions, such as the meaning of 'referring/adopting state', the meaning of 'referred business names matter' and the constitutional basis for the legislation.

2.7 Clauses 12 to 15 outline the interaction between the new Business Names Registration Bill and state and territory laws.

2.8 Specifically, subclauses 12(1) and 12(2) explain that the bill does not exclude or limit state/territory laws as they relate to licensing and accreditation requirements; the conversion of one body into another and/or the amalgamation of bodies; permit requirements; and the permission to use certain words or expressions.

2.9 Subclauses 14(1)–(5) and clause 15 outline the legislative hierarchy and the application of the bill should a conflict occur between state/territory and Commonwealth laws.

2.10 The objectives of the legislation are listed in clauses 16 and 17. They are:

- to identify a business and how that business may be contacted;
- to simplify the registration process and to negate the need to register a business name individually in each state and territory;
- to ensure identical or near identical business names are not registered; and
- to ensure that undesirable and/or restricted names are not registered.

2.11 Offences relating to business names are outlined in clauses 18–21. Most of the offences have remained consistent with previous practice. There are a few notable additions, however:

- It is considered an offence if the name is not registered to the entity as a business name on the Business Names Register.¹
- The entity must display the registered business name on all official, non-internal, communications when corresponding with another entity.²
- The entity must prominently display their registered business name to the public.³

1 Business Names Registration Bill 2011, subclause 18(1).

2 Business Names Registration Bill 2011, subclauses 19(1)-(5).

2.12 The processes associated with registering a business name are outlined in Part 3 of the bill in clauses 22–34. ASIC's role in establishing and maintaining the register is stipulated in clause 22, while clause 23 outlines the registration process. The actual registration process is largely consistent with current state and territory requirements with two notable exceptions:

- (a) registration will be online, with manual facilities provided for those without an internet connection; and
- (b) if businesses do not already have an ABN, they will be required to register for one commensurate with registering a business name.

2.13 Point (b) is a potentially significant change for small business. Under current legislation, businesses are not required to register for an ABN if their gross income is less than \$75 000 per annum (\$150 000 for not-for-profit organisations). In other words, businesses are only required to register for an ABN if they have to pay Goods and Services Tax (GST). Most businesses (except for Taxi services) are not required to pay GST if they earn a gross income of less than \$75 000.⁴

2.14 Clauses 24 to 31 outline the types of business names that are registrable and the period after which unresolved applications are cancelled. It includes clauses on identical or nearly identical names, undesirable names and restricted words and expressions.

2.15 Subclauses 32(1)–(4) outline the offences that warrant the disqualification of businesses by ASIC. These relate to criminal offences committed under the Commonwealth Criminal Code by an individual or groups of individuals who registered the business name.

2.16 ASIC's role and the steps taken by the agency to register a business name are described in clauses 33 and 34. Particularly important is clause 33, which outlines the length of time business names may be registered for. According to the provisions set out in this clause, business names may be registered for a period of one or three years unless an exemption has been granted by ASIC. These exemptions are outlined in subclauses 33(2)–(4) and relate to the coordination of registration expiry dates (see paragraph 2.19 below).

2.17 Parts 4 and 5 of the bill (clauses 35–54), outline the information business owners are required to provide ASIC and the conditions under which business names may be cancelled and/or applications rejected. Of particular note is clause 54, which allows ASIC to hold business names while an application is being reviewed. This means that later applicants who apply for a near identical or identical business name to the one being reviewed will be rejected.

3 Business Names Registration Bill 2011, subclauses 20(1)-(5).

4 Details are available on the ATO's website at:
<http://www.ato.gov.au/businesses/content.aspx?doc=/content/20724.htm>

2.18 Clause 40 is also noteworthy because it appears to grant ASIC limited powers of probate, which is a state and territory issue. This issue is explored in more detail in chapter 4.

2.19 The provisions for the renewal of business names and length of registration periods are provided in Part 6 (clause 55). Most noteworthy is the provision for businesses to coordinate registration periods. This means that if an individual owns more than one business or if a business is a subsidiary of a company, registration periods can be coordinated so that each business/company will be due for renewal commensurately. Otherwise, businesses may be registered for a period of one or three years.

2.20 Part 7, containing clauses 56–59, explains reviewable decisions and ASIC's internal processes as they relate to reviews. ASIC reviews will be conducted free of charge. Should an applicant be dissatisfied with ASIC's review, they will be able to take their grievances to the Administrative Appeals Tribunal.⁵

2.21 Provisions governing access to the Business Names Register are contained in Part 8, clauses 60–62. These sections outline the application process for accessing business information and ASIC's disclosure obligations as they relate to the dissemination of information regarding business ownership.

2.22 Clause 60 brings about a large change in the ability of third parties to access information on the business register. Under current arrangements, credit and financial service providers are able to access business information for identity verification purposes. This clause denies private bodies the ability to access previously accessible information. Proposed regulation 9 of the Business Names Registration Regulations 2011 stipulates that information such as date of birth and personal address details will be excised from any copies of information provided by ASIC to private third-party entities. This is discussed in greater detail in chapter three.

2.23 Clauses 63–80 (Part 9 of the bill) describe ASIC's powers, general disclosure powers (in particular to other agencies) and the processing of fees. Specifically:

- clause 65 allows ASIC to enter into individual arrangements with states and territories, with the consent of the Commonwealth Minister, for the performance of functions or the exercise of powers by ASIC as an agent of the state or territory;
- ASIC will have the authorisation to accept fees for registration on behalf of the Commonwealth;
- ASIC will have the power to waive and/or refund fees according to the guidelines set out in paragraph 72(a) and (b); and
- clause 78 outlines a disclaimer under the heading of 'liability for damages'. Under this provision, the Minister, ASIC, members of ASIC, staff and/or

5 Business Names Registration Bill 2011, clauses 58(1)-(4).

members of an ASIC delegation and APS employees will not be liable to an action or other proceedings for damages in 'relation to an act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred or expressed to be conferred by or under this Act or the Transitional Act'.⁶

2.24 Clauses 81–90 outline the impacts of the Business Names Registration Bill 2011 on various business models, including partnerships (clause 82), trusts (clauses 85–86), joint ventures (clause 87) and unincorporated associations and bodies (clauses 83–84). Most provisions apply to these business models, with the only exception relating to offences. Under the provisions set out by clauses 81–90, punishment for offences committed will be imposed on all members of the partnership, committee of management of the association or body on behalf of the association or body and/or each trustee. Moreover, each partner and/or trustee must be signatories on the relevant registration forms.

2.25 Schedule 1 provides listings of the notified state/territory registers.

Business Names Registration (Transitional and Consequential Provisions) Bill 2011

2.26 The purpose of Business Names Registration (Transitional and Consequential Provisions) Bill 2011 is to guide transitional arrangements upon the enactment of the primary bill.

2.27 This bill has two Schedules. Schedule 1 outlines the changes that will occur to currently registered business names on 'change-over day'. The bill refers to the process of transferring business names from state/territory registers to the federal register as 'grandfathering'.

2.28 Subclauses 1(1)–(4) describe the reporting and notification obligations of states and territories to ASIC. All states and territories must notify ASIC of registered business names in the respective states and territories in electronic format prior to change-over day.

2.29 Clauses 2 and 3 outline the registration processes for various business models, including sole traders and group of persons. As part of this process, the states and territories are required to disclose identifying information to ASIC for the purposes of registration.

2.30 Clauses 4–10 relate to the holding of business names and applications in progress on change-over day. According to these provisions, ASIC is obliged to hold business names that are currently being processed and/or reviewed, according to the notifications provided by the relevant states and territories. In particular, clause 7 stipulates that ASIC must register current business names where the owners have not been disqualified (see paragraph 2.31 below). Moreover, ASIC must cease to hold a

6 Business Names Registration Bill 2011, paragraph 78(e).

business name if the relevant states and territories request that a business name be no longer held (clause 8).

2.31 Clause 11 defines the term 'disqualified'. As part of this clause, guidelines for disqualification are provided and any action that may be taken against disqualified businesses on change-over day, including the cancellation of a previously registered business name—see subclause 11(4).

2.32 Clauses 12–16 outline ASIC's disclosure powers and interaction with the Australian Business Register. Under clause 13, ASIC may disclose information to states and territories for transitional purposes as it deems necessary. ASIC may also alter and/or complete information on the Business Names Registry, where it deems business details as incomplete (clauses 16–17).

2.33 Clause 18 gives ASIC the power to add distinguishing features to grandfathered business names where they are identical or nearly identical. For example, if there is a business named Joe's Plumbing in Brisbane and a Joe's Plumbing in Melbourne, ASIC can add the relevant city to the name of the business, i.e. Joe's Plumbing (Brisbane). This will be for administrative purposes only and will not alter the actual business name. There is a provision in subclause 9, where an entity can nominate a distinguishing word or expression, which will be utilised if ASIC deems it acceptable.

2.34 Clauses 19 and 20 further define and explain distinguishing words or expressions and clause 21 re-iterates the requirement that identical or near identical business names cannot be registered.

2.35 Clause 22 elaborates on clause 55 of the Business Names Registration Bill 2011 that allows businesses to align registration periods.

2.36 Clauses 23 and 24 describe the various obligations of business owners to provide information to ASIC. These include details of bankruptcy and insolvency etc (subclause 23(1)) and the death of 'an entity that is an individual' (clause 24).

2.37 Clause 25 provides a list of exemptions for businesses in providing their business names and ABNs under clauses 19 and 20 of the Business Names Registration Bill 2011. This clause stipulates that if businesses were exempt from providing this information on communications under the registration laws of the relevant state or territory, then they continue to be exempt under the Business Names Registration Bill 2011.

2.38 Clause 27 provides a table of reviewable decisions and clause 28 explains the process of internal reviews and associated timeframes. Applications for a review of a decision must be lodged within 28 days of notification of rejection/registration by ASIC.

2.39 The process of appeal to the Administrative Appeals Tribunal is briefly outlined in clause 29. Subclause 29(3) allows the Minister to dispute a review decision and to make a claim to the Tribunal if the Minister wishes to pursue a matter.

2.40 Clauses 30–33 cover miscellaneous provisions. Significantly, clause 32 stipulates that ASIC may not retrospectively cancel a business registration if it later

finds that a name was not available at the time of registration. Moreover, under clause 31 ASIC may not require that an entity provide their ABN, or, if an entity is an individual, their date or place of birth.

2.41 Schedule 2 of the bill provides a list of consequential amendments that will be enacted in other Acts, where the provisions relate to business names registration.

Business Names Registration (Fees) Bill 2011

2.42 The purpose of this bill is to enact fees for things done under the Business Names Registration Bill 2011.

2.43 The clauses contained in this bill are very vague and do not seem to relate to the 'chargeable matters' definition provided in clause 3 of the Fees bill. Perhaps it would be better to simply refer to the definition already provided for chargeable matters in the primary bill.

2.44 Clauses 4 and 5 have been copied over from the *Corporations (Fees) Act 2001* and appear to be logically inconsistent within the context of the Business Names Registration Bills. Clause 5 provides a cap of \$10 000 (for a single fee) and \$50 000 (the sum of fees) for chargeable matters.

2.45 The actual fee structure and formula used to calculate the fees are not included in this bill, but instead are found in the Business Names Registration (Fees) Regulations 2011. This will be discussed in more detail in chapter four.

Chapter 3

Non-government entities' restriction on accessing register information

3.1 A key concern of many submitters with the exposure draft bills and the draft regulations is the restriction on non-government entities, such as credit checking organisations, from verifying information on the proposed National Business Names Register. Currently, third party credit providers are able to verify the identity and business details of customers seeking access to credit and financial services with the information on state and territory business register databases.

3.2 Verifying this information is a requirement of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The Australian Bankers' Association (ABA), AMEX, the Australian Retail Credit Association (ARCA), Veda Advantage and the Australian Finance Conference (AFC) have all expressed concern that the bill and regulations as currently drafted will not enable their members to verify information on the national register. They may therefore be in breach of the AML/CTF provisions.

3.3 The government has noted that the bill's restriction on allowing non-government entities to access personal information on the National Business Names Register is in accordance with the Information Privacy Principles. Under these principles, the Commonwealth must use information for the purpose for which it is being collected. As the data has not been collected for the purpose of private organisations verifying their data, it cannot be obtained by these organisations.

3.4 This chapter examines these issues. It is divided into the following sections:

- the relevant clauses of the main bill and draft regulations;
- entities' obligations under the AML/FTC Act;
- the current capacity of credit checking organisations to verify their data from state and territory business registers;
- the argument of credit checking organisations that draft regulation 9 will affect their capacity to comply with the AML/CTF;
- clause 77 of the bill and the difficulties in matching data; and
- the *Privacy Act* and Information Privacy Principles.

Relevant clauses and regulations

3.5 This section outlines the provisions that restrict non-government entities from accessing personal information on the national register: clauses 60 and 62 of the Business Names Registration Bill 2011 and draft regulation 9 of the proposed Business Names Registration Regulations 2011. These provisions are interrelated: a change to one of these provisions, as suggested by some submitters, may change the other two provisions.

3.6 Clause 60 of the main bill states:

Access to certain information in the Business Names Register by request

- (1) A person may lodge an application with ASIC for a copy of:
 - (a) the entry in the Business Names Register relating to a particular business name; or
 - (b) the entries in the Business Names Register relating to a particular entity.
- (2) The application:
 - (a) must be in the prescribed form; and
 - (b) must be lodged in the prescribed manner; and
 - (c) must be accompanied by the application fee.
- (3) If a person lodges an application under subsection (1), ASIC must give the person a copy of the entry or entries sought.
- (4) However, before a copy of an entry is given to a person, ASIC must excise from it:
 - (a) any detail which under the regulations made under subsection (5) is to be excised; and
 - (b) any detail that ASIC is prohibited from disclosing under subsection (6).
- (5) The regulations may provide that details of a kind specified in the regulations are to be excised from a copy of an entry before it is given to any person, or any person of a prescribed class.
- (6) If:
 - (a) a person lodges with ASIC an application for a detail in relation to a business name or the person not to be disclosed; and
 - (b) ASIC is satisfied that it is not appropriate to disclose the detail;

ASIC must not disclose the detail under this section.

- (7) An application mentioned in paragraph (6)(a):

- (a) must be in the prescribed form; and
- (b) must be lodged in the prescribed manner.

3.7 Draft regulation 9 of the proposed Business Names Registration Regulations 2011 states:

Accessing Register by request

For subsection 60(5) of the Act, the following details are to be excised from a copy of an entry in the Register before it is given to any person:

- (a) the date and place of birth of:
 - (i) an entity that is an individual; or
 - (ii) any other person if those details were provided in accordance with subsection 23 (6) of the Act;
- (b) any alternative contact details provided by an entity;
- (c) if a home address is provided as the principal place of business in Australia of an entity that is an individual — all of the address other than the suburb and the State or Territory in which the entity lives;
- (d) if the entry identifies a notified successor that ASIC believes is not itself an entity — the details for the notified successor mentioned in paragraphs 8 (c), (d) and (e).

3.8 Clause 62 of the main bill distinguishes between government and security agencies and private third-party organisations by providing exemptions for government bodies that are not available to private entities. It provides that ASIC must make available certain information 'of a kind prescribed by the regulations' to:

- a government body if the body has requested ASIC to make the information available for purposes of the enforcement of the criminal law, the enforcement of a law imposing a criminal penalty or the protection of public revenue (among other purposes); and
- an intelligence or security agency, if the agency has requested ASIC to provide the information for the purposes of the exercise of the agency's functions.

3.9 The submitters listed in paragraph 3.2 collectively claim that these clauses, and in particular regulation 9, prohibit the use of ASIC's database for the purposes of identity verification. This restriction limits their ability to comply with the AML/CTF Act.

Entities' obligations under the AML/CTF Act

3.10 As its title suggests, the AML/CTF Act was twin objectives. The first is to address the problem of money laundering in Australia, which is estimated to have a

value of approximately \$11.5 billion per year.¹ The second objective is to mitigate the threat to national security posed by the financing of terrorism.

3.11 The AML/CTF Act, which is regulated by the Australian Transaction Reports and Analysis Centre (AUSTRAC), implements Australia's international obligations to align Australian legislation with the Financial Action Taskforce on Money Laundering (FATF).

3.12 Under the AML/CTF Act, businesses have strict identification, reporting and record keeping obligations. Section 4 of the Act requires reporting entities to verify a customer's identity before (or in special cases after) providing a designated service. As part of these requirements, credit and finance providers must be able to verify the following information:

- the name of the person (other person) who is proposed to be registered as a remittance affiliate of the applicant; and
- the business name(s) under which the other person is carrying on a business, or proposes to carry on a business, of providing a registrable designated remittance service;
- a description of whether the other person is operating as an individual, company, partnership, trust or through any other legal structure;
- if the other person is a subsidiary of another entity, the name and address of that entity;
- if applicable, the address of the registered office of the other person;
- the full street address at which the other person provides or proposes to provide registrable designated remittance services, including the full street address of each branch of the person;
- if the other person has an ACN, ABN or ARBN – that number;
- the other person's telephone number, facsimile number and email address at its principal place of business;
- the full name and address (not being a post box address) of:
 - if the other person is an individual—that individual; or
 - if the other person comprises a partnership—each partner and, where relevant, the beneficial owner(s) of those partners;
 - if the other person is a company—the beneficial owner(s) of the company;

1 Explanatory Memorandum, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006*, p. 3.

- if the other person is a trust—the individual who has effective control of the business.²

3.13 AUSTRAC states in its Explanatory Note on requirements that in respect to the authorised individual and each of the key personnel, the following details need to be verified:

- full name;
- date of birth;
- position or title;
- business telephone number;
- facsimile number;
- business email address; and
- full address (not being a post box address).³

3.14 In its submission to this inquiry, AUSTRAC elaborates on entities' obligations under the AML/CTF Act:

The AML/CTF Act embodies five key areas that are internationally recognised as best practice in deterring and detecting money laundering and terrorism financing (ML/TF). Broadly speaking, reporting entities are required to:

- conduct ML/TF risk assessments. Businesses must understand and manage the ML/TF risks they are exposed to when they provide different products and services, use different distribution channels, deal with different customers and operate in different jurisdictions.
- implement systems and governance to manage their ML/TF risks. Businesses must establish appropriate oversight of ML/TF risk by senior management, ensure there is an employee due diligence program and that staff are trained to detect ML/TF behaviour and regularly review the effectiveness of their systems and compliance with their obligations.
- know their customers. Businesses must verify the identity of their customers, monitor their customers' behaviour and keep appropriate

2 These requirements are listed in AUSTRAC's Explanatory Note for the draft rules prescribing matters required or permitted under the AML/CTF Act, available at: http://www.AUSTRAC.gov.au/files/draft_rules_spec_regist_app_info.pdf (accessed 25 July 2011).

3 AUSTRAC's Explanatory Note http://www.AUSTRAC.gov.au/files/draft_rules_spec_regist_app_info.pdf (accessed 25 July 2011)

records of these actions. Financial institutions must also appropriately identify any other financial institutions with which they do business.

- make themselves known to AUSTRAC. Most reporting entities must advise AUSTRAC that they have obligations under the AML/CTF Act, either through submission of a compliance report (CR) under section 47 or, if they are a remittance service provider, by registering under Part 6 of the AML/CTF Act. Under recently enacted cost recovery arrangements, all reporting entities will be required to enrol with AUSTRAC in 2011/12.
- report to AUSTRAC. Businesses must provide reports to AUSTRAC on cash transactions above a \$10,000 threshold, instructions for international funds transactions and suspicious matters. Most must also report regularly on their own compliance with their obligations under the AML/CTF Act through a CR. As part of a reporting entity's AML/CTF program, it must both identify and verify a customer before providing a designated service. This identification and verification process is referred to in the AML/CTF legislation framework as the "applicable customer identification procedure" (ACIP).⁴

3.15 According to the ARCA, Veda Advantage, AMEX, the AFC and the ABA, most of these identifiers will not be available on the new National Business Names Register, and these details will be excised from the business extracts issued by ASIC.⁵

The current capacity of credit checking organisations to verify their data from state and territory business registers

3.16 To evaluate the merit of these submitters' claims, the committee sought to ascertain what personal details information brokers can currently verify from the state and territory business registers. If it is not possible for these organisations to verify data currently from state business registers, how are they able to comply with the AML/CTF Act?

3.17 Currently, there are two main methods for verifying information. The first method allows a credit or financial service provider to apply to the state and territory business registers for an extract which lists the personal and business information of a particular business.

3.18 The second method allows third-party credit and financial service providers to use a match/no match system. Crucially, this system ensures that no personal information is disclosed by the states and territories. Credit providers submit

4 AUSTRAC, *Submission 9*, p. 2.

5 See clause 60 of the main bill and draft regulation 9 of the proposed Business Names Registration Regulations 2011.

information received from the credit applicants to the relevant bodies. They then check the information provided and notify the credit provider whether there is a match or no match on their database.

3.19 The detail of information credit and financial service providers have access to may vary from state to state and other sources are used to cross-check and/or complete missing bits of information. In an answer to a question on notice, Veda Advantage informed the committee that:

...where a satisfactory match cannot be achieved, the information is not included. At present, the various state based registers provide a wide breadth of information which can potentially be used to enable matching; for instance, except for the Northern Territory, all jurisdictions can provide current address.

Additionally, other data listed can potentially be used to provide matching capability eg address of other businesses is available except for Queensland and the Northern Territory. This will not be the case under the new Register, which will hold just seven data fields.

Veda notes that these other data fields can be of assistance to matching, particularly when used in conjunction with information held on other databases. These other databases include public records, such as court defaults judgements, bankruptcies and ASIC extracts, as well as commercial inquiries for credit and default listings collected by commercial credit reporting agencies.

Together, these data sources are used to create a trading history report, containing information on the business, its proprietors and the business relationships of the proprietors.⁶

3.20 On sourcing and verifying data, the ABA notes that:

The aim of verification is to independently confirm relevant information that has been collected from the customer. Where members are unable to verify collected data via a State or Territory register, alternative methods of verification are sought, such as collecting and retaining on file passport or driver license details where there is a need to verify personal details, or a full company (ASIC) search from a subscriber service such as Veda.

Members would prefer that the verification of customer details be obtained from the one source of truth rather than having to refer to multiple sources of data.⁷

3.21 In relation to providing a service that is consistent with current practices, DIISR informed the committee that this is not the intent of the database and it will not

6 Veda Advantage, answer to questions on notice, 4 August 2011 (received 8 August 2011).

7 Australian Bankers' Association, answer to questions on notice, 3 August 2011 (received 9 August 2011).

provide business information that third-party credit and financial service providers have historically used. In an answer to a question on notice, the Department of Innovation, Industry, Science and Research (DIISR) informed the committee that:

The Branch advised that it could not support making such information available under the provisions of the current Bills because the Privacy Act 1988 requires agencies to only collect personal information that is for a lawful purpose directly related to a function of activity of the collector and, in their view, the Bills do not provide for personal information to be collected for information broker purposes.

It should be noted that Clause 4.3 (b) of the Intergovernmental Agreement which underpins the national law that the Bills establish outlines the purpose of the law, namely the registration and use of business names. The purpose of the national law does not include provision of data for authentication and verification purposes (for example through “match/no match” functionality).⁸

3.22 Veda took issue with the Department's position not to allow private bodies access to information on the national register. It noted that:

...this appears to conflict with the Intergovernmental agreement for business names agreement, which provided for “an extract service for brokers on commercial terms agreed with individual brokers” [5.1(g)] and that the purposes of the national BNR included “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 [1.1 (2)].⁹

3.23 Moreover, DIISR told the committee that 'only three states collect date of birth; the other five do not'. The Department later clarified that all states and territories collect date of birth information, but only three give out the date of birth of adults: these states are Queensland, New South Wales and South Australia.¹⁰ Only Queensland verifies date of birth data. In this context, DIISR asked:

...I suppose the question is whether this sort of information should be used when it is currently not checked and will not be in the future either—apart from in Queensland.¹¹

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

9 Veda Advantage, *Letter to committee*, 8 August 2011, p. 3.

10 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Clarification of Hansard record*, 5 August 2011.

11 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 3.

3.24 Upon further investigation, the committee has found that all states and territories collect residential address data in their business registers. The committee remains unclear which states and territories verify this data.

3.25 Veda Advantage provided Table 3.1¹² to the committee to demonstrate the large variety of information to which they currently have access. They compare this information to that which will be available under the proposed National Business Names Register. Veda is concerned that a reduction in available information would make it difficult to verify the identity of individuals behind businesses for the purposes of credit and finance checks, as required under the AML/CTF Act and its associated KYC requirements.¹³

3.26 DIISR has contested Veda's claims that the business registers are a primary source of information for information brokers. In an answer to a question on notice, the Department challenged the claim that they even use the state and territory registries to verify information:

DIISR also notes that one of the private entities seeking the additional data (in particular, date of birth and home address) is Veda Advantage, and draws to the attention of the Committee that Veda's privacy policy (included on the Veda Advantage web site) does not include state/territory business names registers as a source of personal information.¹⁴

3.27 However, the committee notes that DIISR only quoted an extract of Veda's privacy policy. On the same webpage quoted by DIISR, Veda states that it collects information from publicly available sources.

3.28 Further, Veda Advantage has informed the committee that the website quoted by DIISR is dedicated to the Consumer Credit Bureau Section of Veda and does not relate to their Commercial Branch. Veda states that in relation to their commercial practices, they have individual commercial arrangements with states and territories that provide access to the various business names registries.¹⁵ In their Trading History Product Guide, Veda stipulates that in providing business trading history reports, Veda refers to business names extracts and the credit reports of each proprietor.¹⁶

3.29 Veda also objected to a statement made by DIISR in relation to the use of personal information by information brokers. In an answer to a question on notice,

12 See Appendix 3.

13 Veda Advantage, *Submission 5*, pp 2–3.

14 DIISR, answer to questions on notice, 4 August 2011 (8 August 2011).

15 Veda Advantage, answer to question on notice, 9 August 2011 (9 August 2011).

16 Veda Advantage, *Trading History Product Guide*, p 6.

Veda dispute the claim made by DIISR that '[o]nce data is provided to private bodies there is no control over what they might do with it'. It responded:

This statement is not correct. Not only are there the obligations of the National Privacy Principles, but in addition, contractual terms and conditions can be imposed by agencies for private bodies seeking access.¹⁷

The problem with draft regulation 9

3.30 The AFC, AMEX and the ABA each submitted that the provisions in draft regulation 9—which excises residential addresses and date of birth from business extracts—will make it very difficult to fulfil their obligations under the *AML/CTF Act*. The AFC was direct in its criticism of the proposed arrangements:

We have recently been made aware that the draft Regulations for the Business Names Register make using it to verify the identity of the proprietor behind the business name more difficult. This is a bizarre outcome when taken in the context of the Government's AML/CTF laws which place considerable responsibilities, backed up by severe penalties, on financial institutions to verify the identity of their clients.

We understand that contrary to the pre-existing ability to verify the details of the business proprietor (e.g. date of birth, address) via the state registers, the draft Regulations propose only to have the national register confirm the proprietor's name. This is hardly an improvement to the seamless national economy! Moreover it would mean that if a director applies to open an account with a financial institution in the company name, it would be able to verify against an ASIC register the name, address, date and place of birth details that had been provided for the account, but if the application is made by a proprietor in the business name, the ASIC register will only be able to confirm the proprietor's name. This anomalous result falls well short of the financial institution's legal requirement for customer verification and due diligence.

3.31 The AFC correctly presumed that the policy intent behind the regulation lay with the purpose imperative of the Privacy Principles. However, it argued that in present circumstances, this position is 'confused' and 'contrary to the Government's AML/CTF policy purpose'.¹⁸

3.32 AMEX highlighted the Know Your Customer (KYC) requirements of the AML/CTF Act and 'associated Rules and Regulations'.¹⁹ It emphasised that these AML/CTF obligations:

17 Veda Advantage, answer to questions on notice, 8 August 2011.

18 Australian Finance Conference, *Submission 4*, pp 1–2.

19 AMEX, *Submission 7*, p. 2.

...often cannot be met without recourse to external data sources to obtain the necessary information sets. The proposed structure of the Business Names Register is of immense concern to us, not only because of the likely impact on our business but the potential risk of intervention by regulators should we fail to meet our regulatory obligations due to the absence of a critical data set.

Whilst this may not have been the intended consequence, we urge the Committee to consider the regulatory impact of preventing access to an independent and reliable data set.²⁰

3.33 In its submission to the inquiry, DIISR argued that non-government entities are restricted from accessing information on the national register given the Commonwealth's obligations under the *Privacy Act 1988* and the National Privacy Principles. Compliance with the Privacy Act is a requirement under the Intergovernmental Agreement on the National Business Register.²¹ In particular, DIISR noted that:

For our Commonwealth legislation, we need to comply with the privacy laws and that means that under a number of the privacy principles we need to use information for the purposes for which it is being collected, and it has not been collected for purposes for private organisations to verify their data.²²

3.34 DIISR also argued that ASIC has no control over the data it provides to third parties.²³

3.35 However, the committee notes that ASIC would not be supplying information, because credit and financial service providers already have personal details, they would be merely checking these details against information held by ASIC; no personal details will be disclosed by ASIC to third-party organisations.²⁴ Therefore, ASIC would not be responsible in any way for what credit and financial service providers do with the information because they have attained personal information through lawful means without the help of ASIC, they are merely attempting verify personal details that business owners have provided.

20 AMEX, *Submission 7*, p. 2.

21 DIISR, *Submission 11*, p. 14.

22 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 5.

23 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 6.

24 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 6.

3.36 Veda Advantage argued that credit providers would only need a match/no match facility, which is a system whereby credit providers submit information to ASIC. ASIC would then notify the credit provider if there is a match or no match on their database. According to Veda, this system would protect identity, but at the same time provide the necessary information credit and financial service providers rely on:

That avoids problems with disclosure and it is a solution that is available which we would be urging should be taken up.²⁵

3.37 Veda Advantage stated that:

The remedy we would suggest is the ability to use a name, a date of birth and an address, preferably a residential address, during the matching process to ensure that we match accurately to the person being inquired about.²⁶

3.38 In an answer to a question on notice, the ABA wrote:

The verification requirements are those defined in the AML/CTF Act and Rules. A definite match/no match service could meet these requirements however the question of whether the AML/CTF obligations could be fully satisfied by that service alone depends on the quality and accuracy of the data.

A database that is overseen by a State, Territory or Federal body could provide a higher level of confidence to AUSTRAC and banks in relation to quality and accuracy of data.²⁷

3.39 According to Veda, there is nothing in the draft legislation that would prevent a match/no match service being provided by ASIC; it appears to be an operational decision on the part of DIISR. Notably, the company argued that there is nothing in the legislation that dictates the manner of search of the register and as such, there is nothing preventing a search of the register based on match/no match. Rather, Veda's concern is with how the Department and ASIC will put the provisions into operation.²⁸

3.40 The necessity for online verification of identity, as opposed to relying on other sources such as face to face verification, was also raised by Mr Graeme Alexander, Head of Compliance and Ethics, Australia and New Zealand, with AMEX:

25 Mr Strassberg, External Relations, Veda Advantage, *Proof Committee Hansard*, 2 August 2011, p. 26.

26 Mr Strassberg, External Relations, Veda Advantage, *Proof Committee Hansard*, 2 August 2011, p. 28.

27 Australian Bankers' Association, answer to question on notice, 4 August 2011 (received 9 August 2011).

28 Mr Strassberg, External Relations, Veda Advantage, *Proof Committee Hansard*, 2 August, p. 28.

I think, from a competition perspective, whilst our colleagues here from banks have bricks and mortar, there are a range of financial players out there that operate in a branchless environment. It is increasingly difficult to rely on face-to-face verification in that sort of 24/7 online channel.²⁹

3.41 Moreover, Mr Hardaker, Executive Director of the AFC, remarked on the need to verify business registration details:

CHAIR: In that case, explain to me why access to the name, date of birth and home address of the proposed business registrant is so critical.

Mr Hardaker: We have to verify who is behind the business name to meet our AML-CTF obligations. Just getting a person's name without being able to verify that they are that Ron Hardaker born on 7 February and living at that address means that we have not gone as far as we need to go to meet the AUSTRAC requirements.

CHAIR: If Ron Hardaker of ABC Enterprises in New South Wales comes to the NAB branch seeking a loan of a quarter of a million dollars, there are other ways that the officers in the NAB branch would be able to check that he is indeed Ron Hardaker and does live at 16 Smith Street in a particular suburb and his birthday is what he says it is, are there not?

Mr Hardaker: There are, but behind the business name you have to also verify him. It is one thing sitting in front of him with a drivers licence, but when you have got the business name there it provides that additional verification to say that is the proprietor of the business name.³⁰

3.42 The ABA supported the AFC's views on the importance of accessing business names registers:

Senator BUSHBY: As I asked about before, the challenge we had with people is that even if they can prove that they are a person of a particular name they may not be the person of that name who is behind the business, and current arrangements, at least within three states, enable you to at least find some corroborating evidence using other details like home address or date of birth that that person appears to be the same person.

Mr AJ Burke: Yes.³¹

3.43 The AFC later argued the very purpose of a business register is to be able to verify business details:

29 Mr Graeme Alexander, Head of Compliance and Ethics, American Express, *Proof Committee Hansard*, 2 August 2011, p. 22.

30 Mr Ron Hardaker, Executive Director, Australian Finance Conference, *Proof Committee Hansard*, 2 August 2011, p. 22.

31 Mr A.J. Burke, Policy Director, Australian Bankers' Association, *Proof Committee Hansard*, 2 August 2011, p. 23.

Senator BUSHBY: We have sought a copy of the legal advice the department have received. I do not know whether they have looked at that issue from that perspective or not. If we can get hold of that legal advice, I think it would be very interesting. It seems to me that the purpose for which you want that information is consistent with the purpose for which it was provided, and that is so those who interact with a business running under an alias know who is behind it.

Mr Hardaker: Yes. It is hard to think of a more consistent use.³²

3.44 This issue of intent and the purpose of the database was also raised with DIISR. The Department argued that the requirement to mandate an ABN with the registration of a business name provides greater proof of identity. The process of gaining an ABN requires a 100 point check. DIISR noted that through this process, ASIC can verify the name and the entity name.³³

Clause 77 of the bill and the difficulties in matching data

3.45 As discussed in paragraph 3.42, it was suggested to the committee that nothing in the legislation prevents a match/no match system. However upon closer scrutiny of the bills and regulations it would appear that a number of changes would need to be made to clause 77 of the Business Names Registration Bill.

3.46 Clause 77 of the bill relates to the use of private information obtained by ASIC. It stipulates that:

Protection of confidentiality of information

(1) A person who obtains information in the course of performing functions or exercising powers under this Act or the Transitional Act must not:

- (a) make a record of the information; or
- (b) use the information; or
- (c) disclose the information.

Penalty: Imprisonment for 1 year.

(2) Subsection (1) does not apply if:

- (a) the information is recorded, used or disclosed for the purposes of performing functions or exercising powers under this Act or the Transitional Act; or

32 Mr Ron Hardaker, Executive Director, Australian Finance Conference, *Proof Committee Hansard*, 2 August 2011, p. 24.

33 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, 2 August 2011, p. 7.

(b) the information is recorded, used or disclosed in accordance with a provision of this Act or the Transitional Act; or

(c) the information is recorded, used or disclosed with the consent of the entity that provided the information; or

(d) the information is given to a court or tribunal.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

(3) A person commits an offence if:

(a) information is made available to a government body or to an intelligence or security agency under section 62; and

(b) a person obtains the information in the course of performing functions or exercising powers for the body or agency; and

(c) the person would not have had access to the information if it had not been made available to the body or agency under section 62; and

(d) the person records, uses or discloses the information for a purpose other than that for which it was made available; and

(e) the person is reckless as to whether the purpose for which the information is recorded, used or disclosed is that for which it was made available.

Penalty: Imprisonment for 6 months.

Note: Where a fault element for a physical element of an offence is not stated, see section 5.6 of the *Criminal Code* for the appropriate fault element.

(4) Subsection (3) does not apply if:

(a) the person discloses the information to another person; and

(b) the disclosure is reasonably necessary for:

(i) the enforcement of the criminal law; or

(ii) the enforcement of a law imposing a pecuniary penalty; or

(iii) the protection of the public revenue.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4): see subsection 13.3(3) of the *Criminal Code*.

(5) Subsections (1) and (3) are not intended to have an operation that would infringe an implied constitutional immunity of a referring/adopting State.

3.47 The permitted uses of information under subclause 77(2) may prohibit the use of information by ASIC to verify identity for credit lending purposes. However, this is

not clear cut because subparagraph 77(2)(c) states that information can be used or disclosed in different ways if ASIC has consent.

3.48 If the courts deem that consent is not enough to enable ASIC to match data, then clause 77 would need to be amended.

3.49 However, ASIC could issue extracts to third party credit providers with the necessary information if regulation 9, which restricts the information available on extracts, was amended. In this way, the main bills need not be changed, only the regulations which are still in consultation draft phase and have not yet been settled with the states and territories.

The Privacy Act and the Information Privacy Principles

3.50 As mentioned earlier in the chapter, the government's key rationale for the drafting of regulation 9 is to ensure that the Commonwealth complies with the Information Privacy Principles outlined in section 14 of the *Privacy Act 1988*. In its answer to a question on notice, DIISR informed the committee that:

...section 14 of the Privacy Act 1988, and in particular IPP 1, limits the collections of personal information by agencies to lawful purposes directly related to a function or activity of the collector (and the BNR Bills do not provide for collection for credit provider/agency related purposes). IPP 11 prohibits disclosure of such information, without consent, for purposes other than that collected, to, in summary, circumstances where:

- there is an imminent threat to life or health of an individual;
- authorised or required by law; and
- it is reasonably necessary for enforcement of criminal law or law imposing a pecuniary penalty or for the protection of public revenue.³⁴

3.51 As noted above, DIISR has emphasised the need for Commonwealth legislation to comply with privacy laws and in particular, the tenet that information is used for the purposes for which it is being collected. It argues that the purpose for collecting information on the business names register is not for private organisations to verify their data.³⁵

3.52 However, the committee notes that government agencies are treated differently to private agencies in respects to identity verification. Government agencies verify identity for a number of reasons, including but not limited to:

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

35 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, p 5.

- the investigation and/or prevention of crime;
- the investigation of fraud and white collar crime;
- regulatory functions; and
- administrative purposes.

3.53 Private information brokers, such as Veda Advantage and members of the ABA, verify identity in an effort to achieve similar outcomes. As credit and financial service providers, they are at the cold-front of preventing fraud and white collar crime. Through their verification services, fraud can be detected and stopped before incidents are escalated to involve the police and other government agencies.

3.54 Therefore, in light of this evidence, the committee believes that the distinction between government agencies and private third-party information brokers warrants further consideration.

3.55 In rationalising this distinction between government and private bodies, the department also maintains that the Inter-Governmental Agreement (IGA) signed by the states and territories would prohibit the sharing of personal information for the purposes of identity verification. DIISR states that:

It should be noted that Clause 4.3 (b) of the Intergovernmental Agreement which underpins the national law that the Bills establish outlines the purpose of the law, namely the registration and use of business names. The purpose of the national law does not include provision of data for authentication and verification purposes (for example through “match/no match” functionality).³⁶

Furthermore, Clause 4.4 (12) of the Intergovernmental Agreement states that “All business names data held by the Commission [ASIC], 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.”

3.56 However, the committee notes that the IGA specifically permits credit providers access to ASIC's database in subparagraphs 5.1(f)(g) of the agreement:

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;

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

- 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.

3.57 If the interpretation of 'extract service' is consistent with that of the Corporations Regulations 2001,³⁷ then information such as date of birth and residential address could be provided to credit and financial service providers:

For section 346B of the Act, the following particulars are prescribed for a company:

- a) ACN;
- b) name;
- c) address of registered office;
- d) address of principal place of business in this jurisdiction;
- e) for each director and company secretary:
 - (i) the person's name; and
 - (ii) the person's usual residential address, or, if the person is entitled to have an alternative address under subsection 205D (2) of the Act, that alternative address; and
 - (iii) the person's date and place of birth.³⁸

3.58 Additionally, in paragraph 5.4(1), the IGA states that ASIC will use 'its best endeavours' to provide the same levels of service as is currently provided by the states and territories, and that ASIC 'strive to enhance progressively existing levels of service in each referring state and territory.' This statement is also made in paragraph 1.1(2) of the Agreement, which stipulates that levels of service provided by the new national business names register will not be any less than that currently provided by state and territory systems.

37 Regulation 2N.2.01 which relates to Part 2N.2 of the *Corporations Act 2001* dealing with extracts.

38 The regulations quoted represent just a small section of other particulars, which are not relevant for businesses.

3.59 Moreover, the committee understands that the Information Privacy Principles are not breached because third-party credit and financial service providers use personal information for purposes consistent with the nature of their business and they obtain consent from clients/credit applicants who are business owners to verify their identity, thereby satisfying Information Privacy Principle 11 of the Act. It is reasonable to assume that credit providers would use the business register to verify business and associated personal details provided to them.

3.60 Consequently, the committee notes that there appears to be no conflict between ASIC's obligations under the IGA and the Information Privacy Principles of the Privacy Act and its ability to verify personal and business details.

3.61 Additionally, when a business name is registered, applicants typically provide consent for their information to be used for a variety of unspecified purposes. For example, the ACT Business Names Registration Form stipulates the following:

The Act authorises the Registrar-General to collect the information required by this form for the purpose of establishing and maintaining the public register of business names registered under the Act. The public register is available for search pursuant to Section 22 and 23 of the Act, and is also made available to government agencies for statistical and administrative purposes, and to non-government persons and organisations.³⁹

3.62 Therefore, by including a Privacy Statement on the application to register a business name, as exemplified by the states and territories, ASIC would not be in breach of its obligations under the Privacy Act.

3.63 Furthermore, during the public hearing, DIISR argued that the ASIC database cannot be used to verify identity because, firstly, the information it contains will not be verified data and secondly, identity verification is not the purpose of the register.⁴⁰ However, on the first issue, the committee notes that unverified information has been utilised successfully by credit providers for decades, with no complaints or issues. On the second issue raised by DIISR, business registration databases are provided for the purposes of verifying the identity of a business owner. Therefore, it can be argued that the business names registers are designed for the very specific purpose of identity verification, whether this verification is made by the public or by credit providers.

3.64 Veda contests DIISR's policy stance on the issue of privacy and the purpose of ASIC's business names registry. It argued that it is not possible to limit the use of databases to the extent that the bill proposes:

39 The *Particulars of Business Names* form is available at:
http://www.ors.act.gov.au/business/business_names/forms_and_fees.

40 Ms Ann Bray, Acting Head, Industry and Small Business Policy Division, *Proof Committee Hansard*, p. 3.

The reality is that datasets do have a life greater than what might originally have been intended. That has been the case with business names, where there is substantial information on the state registers. If you look at something even as simple as a driver's licence, does anyone really still believe the notion that a driver's licence is simply an authority to drive? The reality is that people produce and are required to produce their driver's licence in a whole range of situations that relate to the verification of their identity. Similarly, the passport is very often asked for as a form of identity not just as an authority to travel.⁴¹

3.65 Veda added that:

...the insistence of the department that business names be ascribed a solitary purpose is to take a bonsai approach to information. It is an artificial constraint. It is one that will inhibit the ability to detect potential fraud, which will hurt those small and medium enterprises that need to do much more diligent trading history report checks than in fact what larger businesses do.⁴²

3.66 Therefore, in light of the foregoing discussion, 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.

41 Mr Strassberg, External Relations, Veda Advantage, *Proof Committee Hansard*, p. 28.

42 Mr Strassberg, External Relations, Veda Advantage, *Proof Committee Hansard*, 2 August 2011, p. 28.

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.

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 more than mindful of the proposed May 2012 starting date for the National Business Names Register. Urgent passage of these bills has been the most important consideration of the committee. The government has repeatedly expressed the view that urgent passage of the bill is arguably the most important consideration facing the committee. Accordingly, amendments have the capacity to delay passage of the bill in the Commonwealth Parliament. In the committee's view, this would be an unwelcome development.

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

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

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

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.

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 and passed.

Senator Mark Bishop
Chair

**Coalition Senators' additional comments to the report of the Economics
Legislation Committee on its inquiry on the drafts settled with
state/territory officials, of the Business Names Registration Bill 2011
and related bills**

1.1 Whilst the Coalition broadly supports the intent behind the bills and to a significant extent, the way the Government seeks to implement that intent through these bills, the Coalition does consider that the evidence presented to the committee during this inquiry has highlighted a number of shortcomings in the exposure drafts, most of which have been comprehensively discussed in the Chair's report.

1.2 These issues include:

- the introduction as part of the national business name register of new and harsher restrictions on non-government entities accessing register information for purposes that such information is currently available in most if not all states and territories;
- probate law and jurisdictional issues relating to clause 40 of the bill;
- potential difficulties relating to trademarks;
- the failure to address the risks associated with 'opportunistic registrations';
- the failure to address the potential positive outcomes available from adding 'unsatisfied judgments' to the database;
- 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.

1.3 Not considered in the Chair's report, but highlighted by the evidence, was a further issue related to the 'grandfathering' of existing business names where identical or very similar names currently exist in different states and the manner in which they would be transferred onto a new single national database. This issue also presents potential real issues that should be addressed prior to the enactment of the bills.

1.4 Although the Chair's report effectively discussed these issues (other than the grandfathering issue) and did recommend the Government consider these issues, the Coalition does not support the Chair's conclusions as to the relative priority that should be attached to solving these problems prior to the legislation being enacted.

1.5 It is the view of the Coalition that it is better to take a little longer to ensure that proposed legislation is the best that it can possibly be and that unintended consequences are eliminated so far as possible, prior to its enactment. The priority provided by the Chair to the timelines arbitrarily imposed by COAG agreement (which can be changed by agreement) should not override the principle that the legislation should be the best it possibly can.

1.6 Accordingly, as the Inquiry process has highlighted a number of shortcomings in the Bills, it is the view of Coalition Senators that these shortcomings should be addressed as a matter of priority prior to the bills being introduced for the consideration of Parliament.

Senator David Bushby
Deputy Chair, Senator for Tasmania

Senator Alan Eggleston
Senator for Western Australia

APPENDIX 1

Submissions Received

| Submission Number | Submitter |
|--------------------------|---|
| 1 | Mr Jeremy Gordon |
| 2 | Motor Trades Association of Queensland |
| 3 | Gilbert and Tobin |
| 4 | Australian Finance Conference |
| 5 | Veda Advantage <ul style="list-style-type: none">• Supplementary Submission |
| 6 | Queensland Law Society |
| 7 | American Express Australia Limited |
| 8 | Australian Bankers' Association Inc. |
| 9 | Australian Transaction Reports and Analysis Centre (AUSTRAC) |
| 10 | Australasian Retail Credit Association (ARCA) |
| 11 | Department of Innovation, Industry, Science and Research |
| 12 | Australian Securities and Investments Commission (ASIC) |
| 13 | The Hon Tom Koutsantonis MP, Minister for Small Business, Government of South Australia |
| 14 | Ministry for Police and Emergency Services |
| 15 | Canberra Business Council Ltd |

Additional Information Received

- Received from the Department of Innovation, Industry, Science and Research on 5 August 2011; a clarification letter concerning the evidence given at a public hearing in Canberra on 2 August 2011
- Received from the Department of Innovation, Industry, Science and Research on 8 August 2011; answers to Questions on Notice taken at a public hearing in Canberra on 2 August 2011

- Received from the Department of Innovation, Industry, Science and Research on 9 August 2011; answers to Questions on Notice taken at a public hearing in Canberra on 2 August 2011
- Received from the Australian Bankers' Association on 9 August 2011; answers to Questions on Notice taken at a public hearing in Canberra on 2 August 2011
- Received from the Australian Securities and Investments Commission on 11 August 2011; answers to Questions on Notice taken at a public hearing in Canberra on 2 August 2011
- Correspondence received from the Australian Federal Police on 12 August 2011.
- Correspondence received from the Defence Intelligence Organisation.
- Correspondence received from Western Australia Police.
- Correspondence received from Tasmania Police on 10 August 2011.

APPENDIX 2

Public Hearing and Witnesses

CANBERRA, 2 AUGUST 2011

ALEXANDER, Mr Graeme, Head of Compliance and Ethics,
Australia and New Zealand, American Express Australia

ALLISON, Mr Matthew, Head of Data Management, Veda Advantage

BELL, Ms Rosanne, Acting Senior Executive Leader, Real Economy,
Australian Securities and Investments Commission

BRAY, Ms Ann, Acting Head of Division, Industry and Small Business
Policy Division, Department of Innovation, Industry, Science and Research

BURKE, Mr Anthony Gerard, Chair, SME Business Law Committee,
Law Council of Australia

BURKE, Mr Anthony John (Tony), Policy Director, Australian Bankers' Association

COWLEY, Ms Deborah (Debbie), Business Names Project Director,
Australian Securities and Investments Commission

HARDAKER, Mr Ron, Executive Director, Australian Finance Conference

STRASSBERG, Mr Matthew, Senior Adviser, External Relations, Veda Advantage

