

The Senate

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Economics  
Legislation Committee

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Commonwealth Registers Bill 2019 [Provisions]  
and four related bills

March 2019

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# Senate Economics Legislation Committee

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# Table of Contents

<b>Membership of the Committee .....</b>	<b>iii</b>
<b>Chapter 1.....</b>	<b>1</b>
<b>Introduction .....</b>	<b>1</b>
Overview of the bills .....	1
Schedules .....	2
Schedule one—Summary of new law .....	2
Information subject to the new regime.....	3
Registrar appointments .....	4
Functions and powers of the registrar .....	4
The registrar's powers and how they perform their functions .....	6
How information held by the registrar is protected and disclosed .....	9
Other matters that the new law provides for .....	12
Consequential amendments .....	13
The registrar is now responsible for administering registry provisions .....	13
Removal of prescriptive requirements from registry provisions.....	14
Displaced registry provisions are repealed and registry function is harmonised.	14
The registrar collects fees relating to registry functions and powers .....	14
Commencement and application provisions.....	15
Schedule two—Director identification number (DIN).....	15
Summary of new law .....	17
Detailed explanation of new law .....	18
Application of new requirements .....	18
Obligations associated with the new DIN requirement.....	21
Administration of the new DIN requirement .....	24
Consequences of contravening the new law.....	27
Consequential amendments .....	28
Commencement, application and transitional provisions.....	28
Compatibility with Human Rights .....	29

<b>Chapter 2.....</b>	<b>31</b>
<b>Views on the bills .....</b>	<b>31</b>
Support for the bills .....	31
General issues identified.....	32
Issues pertaining to the Director Identification Number .....	34
Australian Securities and Investments Commission IT systems.....	36
Committee view.....	37
<b>Additional Comments from Labor Senators.....</b>	<b>39</b>
Tying the Director Identification Number policy to the business registry modernisation project .....	39
The business case and key information about the registries modernisation project .....	41
Recommendation from the BCCM.....	42
Conclusion .....	42
<b>Appendix 1 .....</b>	<b>45</b>
<b>Submissions and answers to questions on notice .....</b>	<b>45</b>
<b>Appendix 2 .....</b>	<b>47</b>
<b>Public hearings.....</b>	<b>47</b>

# Chapter 1

## Introduction

1.1 On 14 February 2019, the Senate referred the provisions of the following bills to the Economics Legislation Committee for inquiry and report by 26 March 2019:

- Commonwealth Registers Bill 2019;
- Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019;
- Corporations (Fees) Amendment (Registries Modernisation) Bill 2019;
- National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019; and
- Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019.<sup>1</sup>

### Overview of the bills

1.2 The legislative package creates a new Act called the Commonwealth Registers Act 2019 (the new Act) and makes related amendments<sup>2</sup> to a range of existing laws to create a new Commonwealth business registry regime. It sets out:

- what information is subject to the new regime;
- who may be appointed to administer the new regime as its registrar;
- the functions and powers of the registrar;
- how the registrar performs its functions and exercises its powers;
- the charter for protecting and disclosing information held by the registrar; and
- other matters that support the new regime.<sup>3</sup>

1.3 The Explanatory Memorandum (EM) explains that the new regime's objective is to facilitate a modern registry regime that is flexible, technology neutral and governance neutral, and that facilitates timely and efficient access to information (including, where appropriate, on a real time basis) by regulators and other users.<sup>4</sup>

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1 *Journals of the Senate*, No. 140, 14 February 2019, p. 4667.

2 These related amendments fall into two categories. Firstly, amendments to the *Corporations Act*, the *Credit Act* and the *Business Names Act* replicate the new Act almost in its entirety with no substantive differences. These replications are included for constitutional reasons related to the terms upon which the states referred power to the Commonwealth for relevant matters. These terms require amendments relying on the referrals to be made to the Commonwealth Acts that were tabled in state parliaments in connection with each respective referral. All references in this memorandum to the 'new Act' include the replicated provisions in the *Corporations Act*, *Credit Act* and the *Business Names Act* unless indicated otherwise. Secondly, amendments are made to a number of Acts as a result, or in support, of the new regime. These amendments are referred to here as 'consequential amendments'.

3 *Explanatory Memorandum*, p. 5.

4 [Clauses 3 and 4 of the Commonwealth Registers Bill 2019], *Explanatory Memorandum*, p. 7.

1.4 The bill is part of the National Business Simplification Initiative, announced in 2016, which is a Commonwealth led agreement between federal, state and territory governments to work together to make it simpler to do business in Australia.

1.5 The EM explains that the Government is seeking to simplify its interactions with business to support growth, innovation and employment and is developing a modern approach to managing its registers to provide more user-friendly and streamlined registry services. The initial focus of this process is the registers kept by the Australian Securities and Investments Commission (ASIC) and the Australian Business Register, held by the Commissioner of Taxation (the Commissioner).<sup>5</sup>

## Schedules

- 1.6 The Commonwealth Registers bill [the main bill] provides for two schedules:
- Schedule 1—Amendments relating to the Registrar; and
  - Schedule 2—Director identification numbers.

## Schedule one—Summary of new law

1.7 Part 1 of schedule 1 of the bill facilitates the modernisation of Commonwealth business registers. Part 1 enacts the main amendments as set out in the Act. This includes updates to the *Business Names Registration Act 2011*, *Business Names Registration (Transitional and Consequential Provisions) Act 2011* the *Corporations Act 2001* and the *National Consumers Credit Protection Act 2009*.

1.8 The government registry regime will initially apply to the business registers administered by ASIC and the Australian Business Register. Additional government registers may be brought into the regime by future legislative reforms. Under the new regime, the relevant Minister will appoint an existing Commonwealth body as registrar. Different registrars can be appointed for different functions or powers.<sup>6</sup>

1.9 The EM notes that the registrar's functions and powers are largely set out in existing Commonwealth laws. In particular, most powers and functions are set out in the Commonwealth acts that contain the registers being brought into the new regime.<sup>7</sup>

1.10 The registrar will perform its functions and exercise its powers in accordance with the data standards and other Commonwealth laws. The data standards are disallowable instruments made by the registrar. They may deal with a variety of matters including what information may be collected for the purposes of performing the registrar's functions, how such information is to be given to the registrar, and how information held by the registrar is to be stored.<sup>8</sup>

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5 *Explanatory Memorandum*, pp. 5–6. Treasury conducted two consultation processes between 13 July 2018—17 August 2018 and 1 October 2018—26 October 2018.

6 *Explanatory Memorandum*, p. 6.

7 *Explanatory Memorandum*, p. 6. These acts include the: Corporations Act, the ABN Act, the Business Names Act, the Credit Act, and the SIS Act.

8 *Explanatory Memorandum*, p. 6.

1.11 The new law provides for the protection and disclosure of information held by the registrar. It is an offence for an official to disclose information held by the registrar unless the disclosure is authorised. A disclosure is authorised where:

- it is for the purposes of the new registry regime;
- it happens in the course of the performance of an official's duties;
- each person to whom the information relates consents to the disclosure;
- the information is disclosed to a government agency for the performance of its functions; or,
- the benefits associated with the disclosure outweigh the risks (including privacy risks) after those risks have been mitigated.<sup>9</sup>

1.12 Under the new Act, the Administrative Appeals Tribunal (AAT) can review the registrar decisions except those made by disallowable instrument.<sup>10</sup>

**Table 1.1 Comparison of key features of new law and current law**

New law	Current law
Registry information is held by the Government body which is appointed by the Minister to be the registrar. The information is subject to uniform rules that are flexible, technology neutral and governance neutral.	There are a series of specific registers held by ASIC and the Commissioner. The rules applying to these registers are prescriptive and are not uniform, technology neutral or governance neutral.

*Source: Explanatory Memorandum, p. 7*

1.13 As outlined in the *Overview of the bills*, in creating the new Act, the legislative package sets out:

- what information is subject to the new regime;
- who may be appointed to administer the new regime as its registrar;
- the functions and powers of the registrar;
- how the registrar performs its functions and exercises its powers;
- the framework for protecting and disclosing information held by the registrar; and
- other matters that support the new regime.

### **Information subject to the new regime**

1.14 Initially, information related to 35 existing business registers will be subject to the new regime. The existing business registers comprise 34 registers currently kept by ASIC and the Australian Business Register, which is currently kept by the

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9 *Explanatory Memorandum*, p. 6.

10 *Explanatory Memorandum*, p. 7.

Commissioner. Additional registers may be brought into the new regime by future legislative reforms.<sup>11</sup>

## Registrar appointments

1.15 Under the new regime the Minister appoints any existing Commonwealth body to be the registrar. Only a Commonwealth body can be appointed as the registrar. Other bodies, such as a state government body or a private body, cannot.<sup>12</sup>

1.16 Different Commonwealth bodies can be appointed registrar for different functions of the registrar. This enables a shared services approach to be adopted facilitating the efficient and effective administration of the new regime.<sup>13</sup>

## Functions and powers of the registrar

1.17 The new law provides that the functions of the registrar are:

- such functions as are conferred on the registrar by a law of the Commonwealth;
- such functions as may be prescribed by rules made by the Minister; and
- such functions as are incidental to the functions mentioned above.<sup>14</sup>

1.18 The powers of the registrar include:

- such powers as are conferred on the registrar in relation to its functions by a law of the Commonwealth; and
- the power to do all things necessary or convenient to be done for or in connection with the performance of those functions.<sup>15</sup>

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11 The full table can be found on pp. 8–10 of the *Explanatory Memorandum*.

12 Commonwealth body is a defined term. It is defined as meaning:

- an Agency (within the meaning of the *Public Service Act 1999*) ;
- a body, whether incorporated or not, established for a public purpose by or under a law of the Commonwealth; and
- a person: holding or performing the duties of an office established by or under a law of the Commonwealth; or holding an appointment made under a law of the Commonwealth.  
[Definition of ‘Commonwealth body’, Clause 5, and subclause 6(1) of the Commonwealth Registers Bill 2019, items 1,5, 8, 10, 14 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 3, paragraph 6A(a) and subsection 62A(1) of the Business Names Act, section 9, paragraph 9C(a) and subsection 1270(1) of the Corporations Act, and section 5, paragraph 16A(a) and subsection 212A(1) of the Credit Act], *Explanatory Memorandum*, p. 11.

13 [Subclauses 6(2) and 6(3) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, paragraph 6A(b) and subsection 62A(2) of the Business Names Act, paragraph 9C(b) and subsection 1270(2) of the Corporations Act, and paragraph 16A(b) and subsection 212A(2) of the Credit Act], *Explanatory Memorandum*, p. 11.

14 [Clause 7 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62B of the Business Names Act, section 1270A of the Corporations Act and section 212B of the Credit Act], *Explanatory Memorandum*, pp. 11—12.

### ***Most functions and powers are set out in existing laws***

1.19 The EM notes that most functions and powers of the registrar are largely set out in existing Commonwealth laws and most are in the existing provisions of legislation that relate to the registers being brought into the new regime.<sup>16</sup>

1.20 It is not practical to comprehensively list all of the functions and the powers that have been transferred to the registrar through amendments to existing legislation. However, the amended functions and powers relate to registry matters such as:

- the subject matters for which the registrar can collect information;
- how persons make applications to the registrar for certain things (for example, the allocation of an Australian Business Number);
- the ability of the registrar to assess those applications; and
- the ability of the registrar to hold information.<sup>17</sup>

1.21 The consequential amendments do not create new functions and powers but transfer existing functions and powers, which are currently allocated to specific regulators, to the registrar.<sup>18</sup>

### ***Core functions and powers are set out in the new Act***

1.22 Functions and powers of the registrar are also set out in the new Act which contains the core provisions of the new regime and apply to all information subject to the new regime. They are designed to enable the regime to apply in a holistic, consistent and flexible manner regardless of the information it contains.<sup>19</sup>

1.23 According to the EM, the functions and powers contained in the new Act overcome several undesirable features of the current regime. These features include:

- registers being maintained separately from each other despite sometimes holding similar information—resulting in clients having to provide the same information several times in relation to different registers;
- regulators having limited abilities to determine what information is required for each register—resulting in registers becoming outdated;
- regulators having varying abilities to determine the manner and form in which registry information is collected and the business rules associated with such collections—resulting in inefficiencies, including an inability to make full use

15 [Clause 8 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62C of the Business Names Act, section 1270B of the Corporations Act and section 212C of the Credit Act], *Explanatory Memorandum*, p. 12.

16 See Table 1.1 in the EM. These provisions are contained in various parts of the Corporations Act, the Corporations Regulations, the ABN Act, the Business Names Act, the Credit Act, the Credit Regulations, and the SIS Act. *Explanatory Memorandum*, p. 12.

17 *Explanatory Memorandum*, p. 13.

18 *Explanatory Memorandum*, p. 13.

19 *Explanatory Memorandum*, p. 13.

- of technology (for example, email and the internet) and to consistently and flexibly deal with incomplete or defective applications; and
- different rules applying to the management and use of registers—resulting in Government failing to make best use of registry data.<sup>20</sup>

### ***Additional functions may be prescribed by the rules***

1.24 The Minister may prescribe additional functions for the registrar. This enables the Minister, by legislative instrument, to make rules prescribing matters: required or permitted by the new Act to be prescribed by the rules; or, necessary or convenient to be prescribed for carrying out or giving effect to the new Act. The intention is to provide flexibility, particularly with respect to the registrar's functions. These legislative instruments are subject to parliamentary oversight through the *Legislation Act 2003*.<sup>21</sup>

## **The registrar's powers and how they perform their functions**

### ***Data standards***

1.25 The registrar performs its functions and powers in accordance with the data standards and other Commonwealth laws.<sup>22</sup> The new law allows the registrar to make data standards on the performance of their functions and the exercise of their powers. The data standards may deal with a variety of registry related matters that are currently dealt with by prescriptive rules in primary legislation that are not uniform, technology neutral or governance neutral.<sup>23</sup>

1.26 The EM notes the examples of what the data standards may cover:

- what information may be collected for the purposes of the performance of the registrar's functions and the exercise of the registrar's powers;
- how such information may be collected;
- the manner and form in which such information is given to the registrar;
- when information is to be given to the registrar;

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20 *Explanatory Memorandum*, p. 14.

21 [Paragraph 7(c) and subclause 25(1) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, paragraph 62B(b) and subsection 62U(1) of the Business Names Act, paragraph 1270A(b) and subsection 1270T(1) of the Corporations Act and paragraph 212B(b) and subsection 212U(1) of the Credit Act], *Explanatory Memorandum*, p. 14.

22 [Clause 15 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62K of the Business Names Act, section 1270J of the Corporations Act and section 212K of the Credit Act], *Explanatory Memorandum*, p. 14.

23 [Subclause 13(1) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62H(1) of the Business Names Act, subsection 1270G(1) of the Corporations Act and subsection 212H(1) of the Credit Act], *Explanatory Memorandum*, p. 15.

- how information held by the registrar is to be authenticated, verified or validated;
- how information held by the registrar is to be stored;
- the correction of information held by the registrar;
- the manner and form of communication between the registrar and persons who give information to the registrar or seek to access to information held by the registrar; and
- integrating or linking information held by the registrar.<sup>24</sup>

1.27 Data standards may include different provisions relating to different functions or powers of the registrar. This ensures that the data standards do not need to adopt a 'one size fits all' approach to the administration of registry functions and powers. The variety of functions and powers means that the registrar should be able to tailor data standards so that they are appropriate for the purposes for which they may be made.<sup>25</sup>

1.28 Data standards can be readily amended to accommodate change. This facilitates the efficient and effective administration of registry services which also enables a 'tell us once' approach to the collection of information, minimising the number of interactions clients have with the registrar. Currently, an entity may have to provide the same information to multiple registers.<sup>26</sup>

1.29 To ensure these benefits can be realised, the new law includes provisions that ensure the data standards may request information in a wide variety of ways that make best use of available technology. In particular, the new law expressly clarifies that:

- the data standards may provide that information is to be given to the registrar in electronic form, or any other specified form; and
- a requirement under a law that information is to be provided to the registrar in a particular form or manner including a requirement that information is to be

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24 [Subclause 13(2) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62H(2) of the Business Names Act, subsection 1270G(2) of the Corporations Act and subsection 212H(2) of the Credit Act], *Explanatory Memorandum*, p. 15.

25 [Subclause 13(3) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62H(3) of the Business Names Act, subsection 1270G(3) of the Corporations Act and subsection 212H(3) of the Credit Act], *Explanatory Memorandum*, p. 16.

26 Data standards are disallowable instruments under the *Legislation Act 2003*. Under that Act, legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within six sitting days after the date of registration on the Federal Register of Legislation. The instruments will be subject to the same level of parliamentary scrutiny as regulations and notice of a motion to disallow the instruments may be given in either House within 15 sitting days after the instruments are tabled. *Explanatory Memorandum*, pp. 16—17.

'lodged' or 'furnished', is not taken to restrict by implication what the data standards may provide in relation to that information.<sup>27</sup>

1.30 The new law includes provisions to promote the smooth transition of registry functions and powers from one registrar to another. Should a new registrar be appointed, the new law provides that any existing data standards continue to apply until the new registrar has prepared replacement standards.<sup>28</sup>

1.31 In accordance with the requirements of the *Legislation Act 2003*, the registrar must be satisfied that appropriate consultation has been undertaken prior to making the data standards. This would include consultation with industry.<sup>29</sup>

### ***Other Commonwealth laws***

1.32 The registrar must also perform its functions and exercise its powers in compliance with applicable Commonwealth laws. These fall into two categories.<sup>30</sup> The first category relates to current laws governing the registers. These laws will continue to apply in relation to functions and powers assigned to the registrar until new data standards are made. This avoids a situation arising where there is an absence of law in relation to how registry functions and powers are performed.<sup>31</sup> The second category relates to other laws of the Commonwealth that apply to the registrar. These include laws of general application such as freedom of information, archiving of commonwealth records, and the management of financial resources.<sup>32</sup>

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27 [Clause 14 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62J of the Business Names Act, section 1270H of the Corporations Act and section 212J of the Credit Act], *Explanatory Memorandum*, p. 16.

28 [Subclauses 13(4) of the Commonwealth Registers Bill 2019, items 5, 10, 18, 359, 1318, 1416 and 1469 of Schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62H(4) of the Business Names Act, schedule 3 of the Business Names Registration (Transitional and Consequential Provisions) Act 2011, subsection 1270G(4) and Part 10.34 of the Corporations Act, subsection 212H(4) of the Credit Act and Schedule 7 of the National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009], *Explanatory Memorandum*, p. 17.

29 *Explanatory Memorandum*, p. 17.

30 [Clause 15 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62K of the Business Names Act, section 1270J of the Corporations Act and section 212K of the Credit Act], *Explanatory Memorandum*, p. 17.

31 [Subclause 15(1) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62K(1) of the Business Names Act, subsection 1270J(1) of the Corporations Act and subsection 212K(1) of the Credit Act], *Explanatory Memorandum*, p. 18.

32 [Subclause 15(2) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62K(2) of the Business Names Act, subsection 1270J(2) of the Corporations Act and subsection 212K(2) of the Credit Act], *Explanatory Memorandum*, p. 18.

## How information held by the registrar is protected and disclosed

### *Protection of registry information*

1.33 The new law provides for the protection and disclosure of information held by the registrar, including disclosure via a disclosure framework made by the registrar. It is an offence for an official to record or disclose information held by the registrar unless the recording or disclosure is authorised. For example if:

- the person is, or has been, in official employment;
- the person makes a record of information, or discloses information to another person; and
- the information is protected information that was obtained by the person in the course of their official employment.<sup>33</sup>

1.34 The maximum penalty for disclosing registry information in breach of this offence provision is imprisonment for two years. The penalty is consistent with comparable provisions in other Acts.<sup>34</sup>

### *Disclosure of registry information*

1.35 Prohibition against recording and disclosing registry information does not apply where this has been authorised. A recording or disclosure is authorised if:

- the recording or disclosure is for the purposes of the new Act or happens in the course of the performance of the duties of a person's official employment;
- the disclosure is to another person for use, in the course of the performance of the duties of the other person's official employment, in relation to the performance of the functions of a government entity;
- each person to whom the information relates consents to the disclosure; or
- the disclosure is in accordance with the disclosure framework.<sup>35</sup>

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33 [Clause 5, definitions of ‘official employment’ and ‘protected information’, and subclause 17(1) of the Commonwealth Registers Bill 2019, items 1,5, 8, 10, 14, 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 3 and subsection 62M(1) of the Business Names Act, section 9 and subsection 1270L(1) of the Corporations Act, and section 5 and subsection 212M(1) of the Credit Act], *Explanatory Memorandum*, pp.18-19.

34 [Subclause 17(1) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsections 62M(1) and 62M(2) of the Business Names Act, subsections 1270L(2) and 1270L(3) of the Corporations Act and subsection 212M(1) and 212M(2) of the Credit Act], *Explanatory Memorandum*, p.19.

35 [Clause 5, definition of ‘government entity’, and subclauses 17(2) and 17(3) of the Commonwealth Registers Bill 2019, items 1,5, 8, 10, 14, 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 3 and subsections 62M(2) and 62M(3) of the Business Names Act, section 9 and subsections 1270L(2) and 1270L(3) of the Corporations Act, and section 5 and subsections 212M(2) and 212M(3) of the Credit Act], *Explanatory Memorandum*, p. 20.

1.36 A defendant carries an evidential burden for establishing that a recording or disclosure of registry information was authorised. To satisfy this evidential burden the defendant must point to evidence that suggests a reasonable possibility that the action was authorised. Once this is done, the prosecution bears the burden of proof.<sup>36</sup>

1.37 The new law expressly authorises disclosure to a government entity in relation to the performance or exercise of its functions or powers,<sup>37</sup> and the new law clarifies how its protection and disclosure regime relates to other secrecy provisions in Commonwealth law. The following provisions have been designated for this purpose:

- sections 18 to 18B and 92 of the *Australian Security Intelligence Organisation Act 1979*;
- section 34 of the *Inspector-General of Intelligence and Security Act 1986*;
- sections 39 to 41 of the *Intelligence Services Act 2001*;
- a provision of a law of the Commonwealth prescribed by the rules;
- a provision of a Commonwealth law of a kind prescribed by the rules; and
- section 8WB of the *Taxation Administration Act 1953* (which contains special rules relating to the disclosure of tax file numbers).<sup>38</sup>

1.38 The new law's intent is to avoid unnecessary overlap in the secrecy provisions' operation in relation to registry information. Similarly, the new regime's disclosure framework is expressly authorised for paragraph 6.2(b) of the *Privacy Act 1988* which allows disclosure of personal information where it is authorised by Australian law.<sup>39</sup>

1.39 The new regime exempts a person from being required to provide registry information to a court except where the disclosure is necessary for giving effect to Australian taxation or business law. The new law in this respect is based on existing

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36 [Subclause 17(3) of the Commonwealth Registers Bill 2019], *Explanatory Memorandum*, p. 20.

37 [Subclauses 17(2) and 17(3) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62M(2) of the Business Names Act, subsection 1270L(2) of the Corporations Act and subsection 212M(2) of the Credit Act], *Explanatory Memorandum*, p. 20.

38 [Clause 18 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62N of the Business Names Act, section 1270M of the Corporations Act and section 212N of the Credit Act], *Explanatory Memorandum*, p. 21.

39 [Clause 20 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62Q of the Business Names Act, section 1270P of the Corporations Act and section 212Q of the Credit Act], *Explanatory Memorandum*, p. 21.

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subsection 30(5) of the New Tax System (Australian Business Number) Act 1999 (ABN Act), which is being repealed by the new law.<sup>40</sup>

### ***The disclosure framework***

1.40 Under the disclosure framework the registrar may authorise the disclosure of registry information where it is satisfied that the benefits of disclosure outweigh the risks, after those risks have been mitigated.<sup>41</sup>

1.41 The disclosure framework may provide for any matter related to the disclosure of registry information. For example, the disclosure framework may provide for matters such as:

- the circumstances in which information must not be disclosed without the consent of the person to whom it relates;
- the circumstances in which de-identified information may be disclosed;
- the circumstances in which information may be disclosed to the general public;
- the circumstances in which confidentiality agreements are required for the disclosure of information; and
- the imposition of conditions on disclosure of information.<sup>42</sup>

1.42 The new law also clarifies that the disclosure framework may include different provisions relating to different functions or powers of the registrar.<sup>43</sup>

1.43 To support the disclosure framework's effectiveness in relation to circumstances in which confidentiality agreements are required for the disclosure of registry information, penalties can apply to a person who breaches such an agreement.

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40 [Clause 21 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62R of the Business Names Act, section 1270Q of the Corporations Act and section 212R of the Credit Act], *Explanatory Memorandum*, p. 22.

41 [Subclauses 16(1) and 16(5) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsections 62L(1) and 62L(5) of the Business Names Act, subsections 1270K(1) and 1270K(5) of the Corporations Act and subsections 212L(1) and 212L(5) of the Credit Act], *Explanatory Memorandum*, p. 22.

42 [Subclause 16(2) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62L(2) of the Business Names Act, subsection 1270K(2) of the Corporations Act and subsection 212L(2) of the Credit Act], *Explanatory Memorandum*, p. 23.

43 [Subclause 16(3) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62L(3) of the Business Names Act, subsection 1270K(3) of the Corporations Act and subsection 212L(3) of the Credit Act], *Explanatory Memorandum*, p. 23.

The maximum penalty for the offence is 100 penalty units or imprisonment for two years, or both. The penalty is consistent with comparable provisions in other Acts.<sup>44</sup>

1.44 This aligns with the Productivity Commission's 2017 recommendation to take a more principled approach to the release of Government data. In particular, the Commission recommended that Government data be able to be released publically where the benefits of the release outweigh the risks involved. This recommendation's intention was to capture the benefits of 'big data' while managing all disclosure risks, not just those relating to personal information. It is expected that this will provide the registrar with flexibility regarding the release of registry information.<sup>45</sup>

1.45 As with data standards, the new law is designed to promote the smooth transition of registry functions and powers from one registrar to another by providing that any existing disclosure framework applies until the new registrar has prepared a replacement framework.<sup>46</sup> The new law also allows a person to apply to the registrar to prevent an inappropriate disclosure of registry information that relates to them.<sup>47</sup>

1.46 The disclosure framework is a disallowable instrument for the purposes of the *Legislation Act 2003* and it subject to its consultation requirements and parliamentary oversight as well as the privacy impact assessment in the *Privacy Act 1988*.<sup>48</sup>

### **Other matters that the new law provides for**

1.47 The new law also provides for other matters designed to support the effectiveness and efficiency of the registry regime. The new regime provides for:

- when the Minister can direct the registrar;
- the circumstances in which, and to whom, the registrar may delegate its functions and powers;
- the use of assisted decision making processes by the registrar;
- review rights with respect to decisions made by the registrar;

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44 [Subclause 16(4) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62L(4) of the Business Names Act, subsection 1270K(4) of the Corporations Act and subsection 212L(4) of the Credit Act], *Explanatory Memorandum*, p. 23.

45 *Explanatory Memorandum*, pp. 23—24.

46 [Subclause 16(7) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62L(7) of the Business Names Act, subsection 1270K(7) of the Corporations Act and subsection 212L(7) of the Credit Act], *Explanatory Memorandum*, p. 24.

47 [Clause 19 of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, section 62P of the Business Names Act, section 1270N of the Corporations Act and section 212P of the Credit Act], *Explanatory Memorandum*, p. 25.

48 [Subclause 16(1) of the Commonwealth Registers Bill 2019, items 5, 10 and 18 of schedule 1 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, subsection 62L(1) of the Business Names Act, subsection 1270K(1) of the Corporations Act and subsection 212L(1) of the Credit Act], *Explanatory Memorandum*, p. 24.

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- the extent to which the registrar and associated persons may be liable for damages in connection with the new regime;
  - the admissibility of registry information in court proceedings;
  - the information that must be included in the registrar's annual report about the operation of the new regime; and
  - what rules may be made by the Minister for the purposes of the new regime.<sup>49</sup>

### **Consequential amendments**

1.48 Part 2 of schedule 1 provides for a range of other amendments. The 35 business registers are brought into the modernised regime through these consequential amendments to the individual legislation under which those registers are administered. These amendments:

- make the registrar responsible for administering the functions and powers that make up the registers;
- replace prescription of various matters with the requirements of the data standards and disclosure framework;
- remove other aspects of the registers that are displaced by the new regime; and
- allow the registrar to collect fees relating to the registers.<sup>50</sup>

1.49 The EM notes that only 'registry' aspects of the current law are brought into the new registry regime and therefore affected by the present amendments. 'Regulatory' functions and powers are not affected by the new law and continue to be administered by the body that currently administers those functions and powers.<sup>51</sup>

1.50 Whether a provision of the relevant law is 'registry' or 'regulatory' depends on its nature. Relevant factors include the purpose of the provision and the extent to which it involves the exercise of discretion or regulatory powers.<sup>52</sup>

### **The registrar is now responsible for administering registry provisions**

1.51 The consequential amendments change the registry provisions of 34 of the business registers transferred into the new regime so that they are administered by the registrar rather than by ASIC. Equivalent amendments are not required to transfer functions and powers from the Commissioner to the registrar under the ABN Act. That Act already allocates relevant functions and powers to a registrar, which is separately defined to be the Commissioner.<sup>53</sup>

1.52 Key registry functions and powers that are being transferred to the registrar under this category of consequential amendments include:

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49 *Explanatory Memorandum*, p. 25.

50 *Explanatory Memorandum*, p. 33.

51 *Explanatory Memorandum*, p. 33.

52 *Explanatory Memorandum*, pp. 33—34.

53 *Explanatory Memorandum*, p. 34.

- receiving registry information (including information contained in applications for registration) from registrants;
- recording that information (and telling the registrant when that record has been made);
- receiving updates of registry information from registrants, including through the initiation of processes, such as annual reviews, to update registry information; and
- making decisions about registry information, including the removing of records, and associated internal review of those decisions.<sup>54</sup>

### **Removal of prescriptive requirements from registry provisions**

1.53 The consequential amendments repeal prescriptive requirements in registry provisions that relate to matters that are dealt with by the new data standards<sup>55</sup> and remove such prescriptive requirements from registry provisions and replace them with an obligation to meet the requirements of the data standards. This provides flexibility as to what information the registrar needs in relation to its functions and powers and how that information is to be provided.<sup>56</sup>

### **Displaced registry provisions are repealed and registry function is harmonised**

1.54 These consequential amendments repeal registry provisions that are made redundant by, or are inconsistent or duplicative of, provisions in the new law. They ensure that where the new law deals with a matter it applies exclusively and uniformly to all functions and powers transferred to the registrar.<sup>57</sup>

1.55 The matters the new law is intended to cover exclusively, and apply uniformly across registry functions and powers, include:

- the use of assisted decision making processes by the registrar;
- the extent to which the registrar and associated persons may be liable for damages in connection with the new regime;
- the admissibility of registry information in court proceedings;
- how registry information is to be collected and maintained; and
- the protection and disclosure of registry information.<sup>58</sup>

### **The registrar collects fees relating to registry functions and powers**

1.56 These consequential amendments makes the registrar the entity responsible for collecting fees relating to its functions and powers under the new law. Currently,

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54 *Explanatory Memorandum*, p. 34. Appendix table A1 in the EM provides further information.

55 *Explanatory Memorandum*, pp. 34—35.

56 *Explanatory Memorandum*, p. 35. See Appendix table A2 in the EM.

57 *Explanatory Memorandum*, p. 35.

58 *Explanatory Memorandum*, p. 35. See Appendix table A3 in the EM provides further information.

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the Fees Acts provide for the recovery of fees by ASIC for various activities related to administering the present regime of business registers. The Fees Acts currently permit fees to be charged on certain registry services. Common fees include:

- fees for applying for the registration of an entity;
- fees for applying to deregister an entity;
- annual review fees;
- business name registration and renewal fees; and
- late fees.<sup>59</sup>

1.57 These consequential amendments do not affect how the fee regime operates or the amount payable for particular fees.<sup>60</sup>

### **Commencement and application provisions**

1.58 The Commonwealth Registers Bill 2019 commences the day after Royal Assent. The remainder of the new registry regime commences on a date to be set by proclamation. However, if any provisions do not commence within 24 months of the day that the Bill receives Royal Assent, they will automatically commence the day after that period.<sup>61</sup>

1.59 There are application rules that apply in relation to the consequential amendments made in support of the new registry regime. This ensures that a registry function or power continues to be administered under the current law until it is allocated by the Minister to the registrar under the new law.<sup>62</sup>

### **Schedule two—Director identification number (DIN)**

1.60 Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 amends the Corporations Act and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) to introduce a director identification number (DIN) requirement. It sets out:

- the persons to which the new requirement applies;
- the obligations associated with the new requirement;
- how the new requirement is administered; and
- the consequences of contravening the new law.<sup>63</sup>

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59 *Explanatory Memorandum*, p. 36.

60 [Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019; Corporations (Fees) Amendment (Registries Modernisation) Bill 2019; and the National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019. See also Appendix table A4, *Explanatory Memorandum*, p. 36.]

61 [Section 2 of the Commonwealth Registers Bill, section 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019], *Explanatory Memorandum*, p. 37.

62 [Schedule 1, items 359 1318, 1467 and 1468 of the of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019], *Explanatory Memorandum*, p. 37.

63 *Explanatory Memorandum*, p. 39.

1.61 The introduction of a DIN was recommended by the Productivity Commission in its September 2015 final report into Business Set-up, Transfer and Closure.<sup>64</sup>

1.62 The 'Insolvency in the Australian Construction Industry' inquiry<sup>65</sup> had as one of its primary recommendations that the *Corporations Act 2001* be amended to require that at the time of company registration, directors must also provide a DIN as a critical reform to address illegal phoenixing activity.

1.63 Phoenixing occurs when the controllers of a company deliberately avoid paying liabilities by shutting down an indebted company and transferring its assets to another company. This impacts on creditors who fail to receive payments for goods and services, employees through lost wages and/or superannuation entitlements and the general public through lost revenue to the Government. The total cost of phoenixing is estimated to be between \$2.9–\$5.1 billion annually.<sup>66</sup>

1.64 The DIN will assist in deterring and penalising phoenix activity.<sup>67</sup> It will require all directors to confirm their identity and it will be a unique identifier for each person who consents to being a director. The person will keep that unique identifier permanently, even if they cease to be a director. As such, the DIN will provide traceability of a director's relationships across companies, enabling better tracking of directors of failed companies and will prevent the use of fictitious identities. This will assist regulators and external administrators to investigate a director's involvement in what may be repeated unlawful activity including illegal phoenix activity.<sup>68</sup>

1.65 To date, although the law has required that directors' details be lodged with ASIC, it has not required the regulator to verify the identity of directors. This verification aspect of the DIN will improve the integrity of the data and help with enforcement action associated with phoenixing.<sup>69</sup>

1.66 Apart from combating phoenixing, the DIN will assist the effective tracking of directors and their corporate history reducing time and cost for administrators and liquidators, and it will also improve data integrity and security.<sup>70</sup>

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64 Recommendation 15.6: 'In addition to existing requirements for directors, section 117 of the Corporations Act 2001 (Cth) should be amended to require that, at the time of company registration, directors must also provide a Director Identity Number (DIN)...', p. 40. <https://www.pc.gov.au/inquiries/completed/business/report> (accessed 26 March 2019).

65 Details of Senate Economics Committee's inquiry can be found at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Insolvency\\_construction](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction) (accessed 18 March 2018).

66 *Explanatory Memorandum*, p. 39.

67 *Explanatory Memorandum*, p. 39.

68 *Explanatory Memorandum*, pp. 39–40.

69 *Explanatory Memorandum*, p. 40.

70 *Explanatory Memorandum*, p. 40.

## Summary of new law

1.67 The new law amends the Corporations and CATSI Acts to introduce a DIN requirement.<sup>71</sup> Under the new requirement a person appointed as a director of a body corporate registered under the Corporations or CATSI Acts must apply to the registrar for a DIN. The person must apply before they are appointed a director unless the period is extended by the regulations or they are provided an exemption or extension by the registrar.<sup>72</sup>

1.68 The registrar is provided with powers to administer the new requirement. These include powers to: issue DINs; keep necessary records; cancel and reissue DINs; determine the numbering plan for the new requirement; and, determine how directors can establish their identity. The registrar may make data standards, by way of legislative instrument, in relation to these and other matters.<sup>73</sup>

1.69 There are civil and criminal penalties for directors that fail to apply for a DIN. The registrar, or delegated staff, may also issue infringement notices regarding such conduct. There are also civil and criminal penalties which apply to conduct that would otherwise undermine the new DIN requirement.<sup>74</sup>

1.70 The new requirement contains transitional provisions that apply to a person that is appointed as a director at the time the new requirement starts to apply. This person has the period specified in a legislative instrument to apply for a DIN. In addition, during the first 12 months of the operation of the new requirement, a person who is appointed as a director will have an additional 28 days to apply for a DIN.<sup>75</sup>

**Table 1.2: Comparison of key features of new law and current law**

New law	Current law
A director of a body corporate registered under the Corporations Act or the CATSI Act must apply for a DIN before becoming a director unless a later period is prescribed by the regulations (transitional arrangements provide additional time to apply for a DIN when the new requirement firsts starts to apply)	No equivalent.
The registrar must give an applicant director a DIN if satisfied that their identity has been established.	No equivalent.

71 *Explanatory Memorandum*, p. 40.

72 *Explanatory Memorandum*, p. 40.

73 *Explanatory Memorandum*, p. 40.

74 *Explanatory Memorandum*, p. 41.

75 *Explanatory Memorandum*, p. 41.

The registrar may exempt a person from needing to obtain a DIN or provide them with additional time in which to apply for a DIN.	No equivalent.
The registrar is provided with powers to administer the new requirement including powers to record DINs, cancel and reissue DINs, determine the numbering plan for the new requirement, and determine how directors are to establish their identity.	No equivalent.
A person must not engage in certain conduct that would undermine the new requirement including deliberately providing false information to the registrar, intentionally providing a false DIN to a Commonwealth body or registered body corporate, or intentionally applying for multiple DINs.	There are existing penalties in the Criminal Code that relate to providing false information to the Commonwealth. These offences are relied upon by the new law where appropriate.

*Source: Explanatory Memorandum, pp. 40–41*

### Detailed explanation of new law

1.71 Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 amends the Corporations and CATSI Acts to introduce a DIN requirement. The new requirement assists regulators to detect and address unlawful behaviour. To implement this requirement, the bill inserts a new part into both the Corporations and CATSI Acts. The new parts detail:

- the persons to which the new requirement applies;
- the obligations associated with the new requirement;
- how the new requirement is administered; and
- the consequences of contravening the new law.<sup>76</sup>

### Application of new requirements

1.72 The new law is drafted so that the requirement to obtain a DIN applies in relation to body corporates registered under the Corporations or CATSI Acts.<sup>77</sup>

#### *Eligible officer*

1.73 The new law defines 'eligible officer'. They are a director of a registered body:

- who is appointed to the position of director, or to the position of an alternate director and is acting in that capacity (regardless of the name that is given to that position); or

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<sup>76</sup> *Explanatory Memorandum*, p. 42.

<sup>77</sup> *Explanatory Memorandum*, p. 42.

- 
- any other officer of the registered body who is an officer of a kind prescribed by the regulations.<sup>78</sup>

1.74 The DIN requirement therefore initially operates with respect to only appointed directors and acting alternate directors. It does not, at least initially, extend to what are commonly referred to as de facto or shadow directors. The definition of eligible officer may be extended by regulation to other officers of a registered body.<sup>79</sup>

1.75 The regulation's effect is to allow the DIN to be extended to any such officer of a registered body if doing so is appropriate. This ability provides the flexibility necessary to future-proof the new requirement to ensure its ongoing effectiveness.<sup>80</sup>

1.76 The new law also gives the registrar the power to exempt a person or class of person from being an eligible officer. This allows the registrar to respond where the imposition of the requirement would have unintended consequences or would otherwise be unsuitable for those persons.<sup>81</sup>

### ***Registered body***

1.77 For the new DIN requirement to apply to a person, the person must be a director of a registered body. For the purposes of the new law, a registered body is:

- a company, registered foreign company or registered Australian body (which are registered under the Corporations Act); or
- an Aboriginal and Torres Strait Islander corporation (which are registered under the CATSI Act).<sup>82</sup>

### ***Companies***

1.78 Applying the DIN to companies ensures that directors of all Australian companies are subject to the new DIN requirement. This includes directors of companies that are responsible for managed investment schemes and registered charities and directors of companies that are preserved by transitional provisions in Chapter 10 of the Corporations Act.<sup>83</sup>

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78 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, section 308-15 of the CATSI Act and section 1272B of the Corporations Act], *Explanatory Memorandum*, p. 43.

79 The term 'officer' in relation to a registered body is defined in section 9 of the Corporations Act and section 683-1 of the CATSI Act. Those sections define the term to mean a director (including a de facto or shadow director), a secretary, and a range of other persons that may affect the business of a registered body, including administrators, receivers and liquidators. *Explanatory Memorandum*, p. 43.

80 *Explanatory Memorandum*, p. 43.

81 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, section 308-15 of the CATSI Act and section 1272B of the Corporations Act], *Explanatory Memorandum*, pp. 43—44.

82 *Explanatory Memorandum*, p. 44.

83 *Explanatory Memorandum*, pp. 44—45.

### *Registered foreign companies*

1.79 Division 2 of Part 5B.2 of the Corporations Act prohibits a foreign company from carrying on business in Australia unless it is registered or its application for registration is pending, and sets out the requirements for registration. By virtue of the definition of 'foreign company', a registered foreign company may in some instances be an unincorporated body. However, the DIN requirement does not operate in relation to these unincorporated bodies as they cannot hold property in their own name and are thus not prone to issues such as phoenixing. For this reason and for consistency with respect to Australian bodies, the requirement only operates with respect to registered foreign companies that are body corporates.<sup>84</sup>

1.80 Applying the DIN requirement to foreign companies that are body corporates ensures that the requirement operates in a jurisdictionally neutral manner. It ensures that the requirement applies to body corporates incorporated in an external territory or otherwise outside Australia, where those bodies carry on business in Australia. This ensures that the new requirement operates consistently, regardless as to where a registered body is incorporated.<sup>85</sup>

### *Registered Australian Body*

1.81 Section 601CA of the Corporations Act provides that a registrable Australian body must not carry on business in a state or territory unless:

- that state or territory is its place of origin;
- it has its head office or principle place of business in that state or territory; or
- it is registered under Division 1 of Part 5B.2 or its application for registration is yet to be dealt with.<sup>86</sup>

1.82 Applying the DIN requirement to registered Australian bodies ensures that the regime applies to body corporates that are not companies, but which carry on business in one or more states or territories other than their home jurisdiction. As with registered foreign companies, some registered Australian bodies are unincorporated. However, the new requirement does not apply to these bodies as they cannot hold property in their own name and are thus not prone to issues such as phoenixing. The new requirement only applies to Australian bodies that are body corporates.<sup>87</sup>

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84 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, item 11, paragraphs 1272B(1)(a) and 1272B(1)(b) of the Corporations Act], *Explanatory Memorandum*, p. 45.

85 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, item 11, subsection 1272B(1) of the Corporations Act], *Explanatory Memorandum*, p. 45.

86 *Explanatory Memorandum*, p. 46.

87 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, item 11, subsection 1272B(1) of the Corporations Act], *Explanatory Memorandum*, p. 46.

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### *Aboriginal and Torres Strait Islander corporations*

1.83 The CATSI Act is the law that establishes the role of the Registrar of Indigenous Corporations and allows Aboriginal and Torres Strait Islander groups to form corporations. Registration under the CATSI Act is mostly voluntary. However, some corporations—for example, 'prescribed bodies corporate' set up under the *Native Title Act 1993*—are required to register under the CATSI Act.<sup>88</sup>

1.84 Applying the DIN requirement to directors of Aboriginal and Torres Strait Islander corporations ensures that these directors are treated equivalently to those of registered bodies under the Corporations Act. It also ensures that the members and creditors of all registered bodies may benefit from the regime.<sup>89</sup>

### **Obligations associated with the new DIN requirement**

1.85 The new law inserts four obligations in relation to the new requirement:

- require a director to apply for a DIN prior to being appointed as a director;
- require a director to apply for a DIN within a prescribed period of being directed to do so by the registrar;
- prohibit a person from knowingly applying for multiple DINs; and
- prohibit a person from misrepresenting a DIN to a government body or registered body.<sup>90</sup>

#### ***Directors must apply for a DIN prior to being appointed***

1.86 The first obligation requires a director to apply for a DIN prior to being appointed as a director or within any later period specified in the regulations. While the new law requires that all directors have a DIN, it is a defence if the director applied to the registrar for a DIN prior to being first appointed as a director of any registered body and the application has not yet been dealt with.<sup>91</sup>

1.87 The time period by which a director must have applied for a DIN may be extended by the registrar for a particular director or for a specified class of directors. For a particular director, the period may be extended for the period specified in the application or for such other period as the registrar considers reasonable. An extension relating to a class of persons, however, must be made by legislative instrument as such

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88 *Explanatory Memorandum*, p. 46.

89 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, item 5, subsection 308-15(1) of the CATSI Act], *Explanatory Memorandum*, p. 47.

90 *Explanatory Memorandum*, p. 47.

91 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsections 308-20(1) and 308-20(2) of the CATSI Act and subsections 1272C(1) and 1272C(2) of the Corporations Act], *Explanatory Memorandum*, p. 47.

an extension is legislative in character. The ability to grant extensions provides the registrar with discretion to extend the compliance period.<sup>92</sup>

1.88 It is also a defence if the director was appointed without their knowledge. This defence is aimed at ensuring that a person does not breach the obligation because of the wrong doing of another, for example, due to identity theft or forgery.<sup>93</sup>

1.89 A defendant carries an evidential burden for establishing both defences. The evidential burden in these defences has been reversed because the subject of the defences is peculiarly within the knowledge of the defendant and is significantly more difficult and costly for the prosecution to disprove than for the defence to establish.<sup>94</sup>

1.90 This obligation is designed to ensure the effectiveness of the new requirement and that it does not have unintended consequences. In particular:

- the obligation's compulsory nature ensures that all directors (except those granted an exemption) apply for a DIN, which is essential for the new requirement to achieve its objective;
- the fact that the obligation is an obligation to apply for a DIN means that a director does not breach the obligation where there is a delay in processing an application for reasons beyond their control; and
- the requirement for every director to apply for a DIN regardless of the length of their appointment ensures that the DIN requirement cannot be avoided by a person stepping into the role of a director for short periods at critical times.<sup>95</sup>

1.91 The new law does not include an offence prohibiting the provision of false or misleading information to the registrar.<sup>96</sup>

1.92 The new law includes transitional arrangements for persons who are directors at the time the new requirement starts. Such persons have to apply for a DIN within the period specified in a legislative instrument made by the Minister. In addition, a transitional arrangement provides an extra 28 days for a director to apply for a DIN during the first year of operation of the new requirement.<sup>97</sup>

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92 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, section 308-30 of the CATSI Act and section 1272E of the Corporations Act], *Explanatory Memorandum*, pp. 47—48.

93 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-20(3) of the CATSI Act and subsection 1272C(3) of the Corporations Act], *Explanatory Memorandum*, p. 48.

94 *Explanatory Memorandum*, p. 48.

95 *Explanatory Memorandum*, p. 48.

96 For this purpose, the new law relies upon existing prohibitions that cover such matters including section 137.1 of the Criminal Code, section 1308 of the Corporations Act and section 561-1 of the CATSI Act. *Explanatory Memorandum*, p. 49.

97 *Explanatory Memorandum*, p. 49.

### ***Directors must apply for a DIN upon being directed to by the registrar***

1.93 The second obligation requires a director to apply for a DIN within a prescribed period of being directed to do so by the registrar. The registrar may also extend the period that a director has to comply with a direction.<sup>98</sup>

1.94 This obligation ensures the registrar can require a director to apply or reapply for a DIN where it is desirable to do so. For example, the registrar may wish a director to apply or reapply for a DIN because:

- the director has never applied for a DIN;
- the director's existing DIN profile has been lost or corrupted; or
- the registrar wishes to verify the director's identity.<sup>99</sup>

1.95 This obligation does not include the defences which apply in relation to the first obligation discussed above. Unlike the first obligation, this obligation is not breached until the end of the relevant period. Similarly, the defence of being appointed without knowledge is not relevant in the present context where the registrar has directed the person to apply because they are a director.<sup>100</sup>

### ***A person must not knowingly apply for multiple DINs***

1.96 The third and fourth obligations associated with the new DIN requirement are necessary to ensure the integrity of the new requirement. The third obligation prohibits a person from applying for a DIN if they know that they already have a DIN. However, the prohibition does not apply in the following circumstances:

- where the registrar has directed the person to reapply for a DIN—this defence ensures that this obligation does not conflict with the ability of the registrar to require a director to reapply for a DIN; or
- where the person applied for the additional DIN under another Act—this defence ensures that a person cannot be convicted of breaching this obligation under both the Corporations Act and the CATSI Act if the violation only relates to one of those Acts.<sup>101</sup>

1.97 The prohibition would not be contravened only because a person applies for a DIN in circumstances where they have previously held a DIN that has been cancelled. This is the case whether the cancellation occurred by operation of law or due to a

98 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsections 308-25(1) and 308-25(2) of the CATSI Act and subsections 1272D(1) and 1272D(2) of the Corporations Act], *Explanatory Memorandum*, p. 49.

99 *Explanatory Memorandum*, p. 50.

100 *Explanatory Memorandum*, p. 50.

101 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, section 308-40 of the CATSI Act and section 1272G of the Corporations Act], *Explanatory Memorandum*, p. 50.

decision of the registrar. This obligation is designed to prevent a person from seeking to circumvent the new requirement by obtaining multiple DINs.<sup>102</sup>

#### ***A person must not misrepresent a DIN to a government or registered body***

1.98 The fourth obligation associated with the new DIN requirement is directed at preventing a person misrepresenting a DIN to a body that is likely to rely upon it for regulatory compliance or identification purposes. In particular, the new law prohibits a person from intentionally representing to a Commonwealth body or a registered body that a DIN is associated with a person when it is not.<sup>103</sup>

1.99 It is important that directors honestly report DINs to Government and regulated bodies. These bodies may rely upon the DIN to establish the identity of directors and those seeking to become directors.<sup>104</sup>

### **Administration of the new DIN requirement**

1.100 Under the new registry regime, the registrar is responsible for the administration of all functions and powers that are of a registry nature. The remaining functions and powers are administered by the ASIC and the Office of the Registrar of Indigenous Corporations (ORIC).<sup>105</sup>

#### ***New law confers powers and functions on the registrar***

1.101 The new law provides the registrar with the functions and powers it requires to administer the DIN. It provides the registrar with the ability to:

- give a person a DIN if the person has applied for a DIN and the registrar is satisfied that the person's identity has been established;<sup>106</sup>
- direct a director to apply for a DIN (whether or not the director already has a DIN);<sup>107</sup>
- keep a record of each DIN that has been given to a person;<sup>108</sup>

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102 *Explanatory Memorandum*, pp. 50-51.

103 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-45 of the CATSI Act and section 1272H of the Corporations Act], *Explanatory Memorandum*, p. 51.

104 *Explanatory Memorandum*, p. 51.

105 *Explanatory Memorandum*, pp. 51—52.

106 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsections 308-5(1) of the CATSI Act and subsection 1272(1) of the Corporations Act], *Explanatory Memorandum*, p. 52.

107 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-10(2) of the CATSI Act and subsection 1272A(2) of the Corporations Act], *Explanatory Memorandum*, p. 52.

108 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-5(2) of the CATSI Act and subsection 1272(2) of the Corporations Act], *Explanatory Memorandum*, p. 52.

- cancel a DIN that has been given to a person if the registrar is no longer satisfied that the person's identity has been established or if the registrar has given the person another DIN;<sup>109</sup> and
- notify a person that they have been given a DIN or that a DIN, which has previously been given to them, has been cancelled.<sup>110</sup>

1.102 The registrar is provided with little or no discretion in the exercise of most of these functions and powers. The registrar must give a person a DIN if that person is eligible to apply and has established their identity. Likewise, the registrar cannot give a person a DIN or cancel a person's DIN without notification.<sup>111</sup>

1.103 The new law also allows the registrar to request a person's tax file number to facilitate the administration of the DIN requirement. This will enable the registrar to establish the person's identity.<sup>112</sup> This ability only allows the registrar to request a person's tax file number. The registrar cannot require a person to provide a tax file number. In addition, the current rules limiting the use and disclosure of tax file information contained in the *Taxation Administration Act 1953* continue to apply in relation to any such information held by the registrar.<sup>113</sup>

### ***Applying for a DIN***

1.104 The registrar may only provide a DIN if that person has applied. The new law provides for two categories of persons who may apply. No other person can apply.<sup>114</sup>

1.105 The first category of persons who may apply for a DIN are directors. The objective of the regime is to promote good corporate conduct of directors by, among other things, establishing their identity and tracking their directorships over time. The second category of persons who may apply for a DIN are persons who are not directors but intend to become directors within 12 months.<sup>115</sup>

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109 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-5(3) of the CATSI Act and subsection 1272(3) of the Corporations Act], *Explanatory Memorandum*, p. 52.

110 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsections 308-5(1) and 308-5(3) of the CATSI Act and subsections 1272(1) and 1272(3) of the Corporations Act], *Explanatory Memorandum*, p. 52.

111 *Explanatory Memorandum*, p. 52.

112 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 17 and 18, section 202 of the Income Tax Assessment Act 1936 and paragraphs 8WA(1AA)(b) and 8WB(1A)(a) and (b) of the Taxation Administration Act 1953], *Explanatory Memorandum*, p. 53.

113 *Explanatory Memorandum*, p. 53.

114 *Explanatory Memorandum*, p. 53.

115 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-10(3) of the CATSI Act and subsection 1272A(3) of the Corporations Act], *Explanatory Memorandum*, pp. 53-54.

1.106 A DIN allocated to a prospective director is automatically cancelled by operation of law if the person does not become a director within 12 months of being given the DIN.<sup>116</sup>

#### ***The registrar's ability to perform its functions and exercise its powers***

1.107 The registrar performs its functions and exercises its powers in relation to the DIN requirement primarily in accordance with the data standards.<sup>117</sup>

1.108 In the present context, the data standards can provide for matters related to the performance of the registrar's functions and the exercise of the registrar's powers in relation to the DIN requirement. Examples of particular matters related to the DIN requirement that the registrar may deal with in the data standards include:

- how a person's identity is to be established for the purposes of the new requirement (for instance, the registrar could require an applicant to provide 100 points of identification);
- the numbering plan for the new requirement (for instance, the registrar could specify rules relating to the allocation and use of numbers in connection with the new requirement, including rules affecting numbers that have previously been given or cancelled);
- how DIN records are to be stored, maintained and integrated to other data;
- how a person can apply for a DIN and the form of any application;
- how the registrar may check or validate the accuracy of any records held in relation to the new requirement; and
- how the registrar notifies people of issues under the new requirement.<sup>118</sup>

1.109 There is flexibility for data standards to include different provisions relating to different functions or powers of the registrar. Standards may also provide different requirements for establishing the identity of directors that may not have traditional forms of identification to ensure that such directors are not treated unfairly. Other amendments in the bill enable the registrar to make data standards on how the registrar is informed of matters about directors that already hold a DIN.<sup>119</sup>

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116 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, subsection 308-5(4) of the CATSI Act and subsection 1272(4) of the Corporations Act], *Explanatory Memorandum*, p. 54.

117 *Explanatory Memorandum*, p. 54.

118 *Explanatory Memorandum*, p. 54.

119 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 1 to 4, paragraphs 21-1(3)(ea), 22-1(4)(da), 23-1(4)(da) and subsection 304-5(4) of the CATSI Act], *Explanatory Memorandum*, p. 55.

## Consequences of contravening the new law

### *Civil and criminal penalties*

1.110 Civil and criminal penalties apply to breaches of the DIN requirement.<sup>120</sup> A contravention of every obligation in the new law is both a civil penalty provision and an offence. This allows the regulator or prosecutor to take a proportional approach to enforcement. The maximum penalties applicable to each obligation in the bill are detailed in the EM at pages 56–57. Of note are that the individual civil penalties do not exceed \$200,000 with \$1 million being the figure for a body corporate. The criminal penalties have a ceiling of 100 penalty units ( $100 \times \$210 = \$21,000$ )<sup>121</sup> and/or imprisonment for up to 12 months.<sup>122</sup>

1.111 The penalties applicable are broadly consistent with current penalties in the Corporations and CATSI Acts. Breaching either obligation is a strict liability offence and this negates the need for the regulator or prosecutor to prove fault.<sup>123</sup>

1.112 The imposition of strict liability in relation to these obligations is necessary to ensure the integrity of the new DIN requirement which relates to corporate regulation. The registrar may issue an infringement notice under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to a breach of either obligation.<sup>124</sup>

### *Infringement notices*

1.113 Breaching either obligation relating to failing to apply for a DIN are also subject to the infringement regime in Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*. Because these obligations involve timeframes and apply to a large number of people, minor breaches may be expected to occur with some frequency. Infringement notices are an efficient way of dealing with such breaches and Part 5 of the Regulatory Powers Act sets out a standard framework under which infringement notices can be issued.<sup>125</sup>

1.114 The new law sets out who can act as an infringement officer and as a chief executive for the purposes of the standard framework. The definitions are:

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120 *Explanatory Memorandum*, p. 56.

121 'Penalty Units', AUSTRAC webpage, <http://www.austrac.gov.au/enforcement-action/penalty-units> (accessed 15 March 2019).

122 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5, 6, 11, 12, 13, 15, and 16, subsections 308-20(1), 308-20(4), 308-20(5), 308 25(1), 308-25(3), 308-25(4), 308-40(1), 308-40(4), 308-45(1) and 308 45(2), and paragraph 386-1(1)(ab), of the CATSI Act and subsections 1272C(4), 1272C(5), 1272D(3), 1272D(4), 1272G(4) and 1272H(4), and section 1317E and schedule 3, of the Corporations Act], *Explanatory Memorandum*, pp. 56—57.

123 *Explanatory Memorandum*, p. 57.

124 *Explanatory Memorandum*, p. 58.

125 *Explanatory Memorandum*, p. 58.

- an **infringement officer** is each member of the staff of the registrar who holds, or is acting in, an office or position that is equivalent to an SES employee; and
- the **chief executive** is the relevant chief executive in the registrar's instrument of appointment; or if there is no person specified—the registrar.<sup>126</sup>

1.115 The new law makes one modification to the standard framework for issuing infringement notices under Part 5 of the Regulatory Powers Act. This requires that an infringement notice does not need to give location details of the alleged contravention. All other requirements of the standard infringement notice regime are unchanged.<sup>127</sup>

### **Consequential amendments**

1.116 Definitions are inserted into sections 9 of the Corporations Act and 700-1 of the CATSI Act, which are the main definitions section of those Acts. The definitions support the operation and readability of the new law.<sup>128</sup>

### **Commencement, application and transitional provisions**

#### *Commencement*

1.117 The new requirement commences on a date set by proclamation. This is so that a commencement date can be set when administrative arrangements supporting the new regime are in place. However, if any provisions do not commence within 24 months of the Bills receiving Royal Assent, they automatically commence the day after that period. Automatic commencement after a designated period is a standard feature that provide for commencement by proclamation.<sup>129</sup>

#### *Application*

1.118 The DIN requirement will not apply until the day (the application day) the Minister appoints a registrar to administer the new requirement.<sup>130</sup>

#### *Transitional arrangements*

1.119 The new law provides that a person who is a director immediately before the application day must apply for a DIN within a period specified by a legislative instrument made by the Minister. Until this period is specified, there is no

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126 *Explanatory Memorandum*, p. 59.

127 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 5 and 11, sections 308-35 of the CATSI Act and section 1272F of the Corporations Act], *Explanatory Memorandum*, p. 59.

128 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill, items 7, 8 and 10, sections 694-120 and 700-1 of the CATSI Act and section 9 of the Corporations Act], *Explanatory Memorandum*, p. 60.

129 [Section 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019], *Explanatory Memorandum*, p. 60.

130 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 9 and 14, subitem 5(1) of the Bill and subsection 1649(1) of the Corporations Act], *Explanatory Memorandum*, p. 60.

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requirement on such directors to apply for a DIN. This transitional period will also provide time for existing directors to become familiar with the new requirement and for any information or awareness campaigns in relation to it to take effect.<sup>131</sup>

1.120 In addition, the new law provides a person who is appointed a director within the first 12 months of the new regime's operation with an additional 28 days to apply for a DIN. This transitional period is designed to provide time for new directors to become familiar with the new requirement and for any information or awareness campaigns in relation to it to take effect.<sup>132</sup>

### **Compatibility with Human Rights**

1.121 According to the EM, these bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.<sup>133</sup>

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131 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 9 and 14, subitems 5(2) and 5(3) of the Bill and subsections 1649(2) and 1649(3) of the Corporations Act], *Explanatory Memorandum*, p.61.

132 [Schedule 2 of the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019, items 9 and 14, subitem 5(4) of the Bill and subsection 1649(4) of the Corporations Act], *Explanatory Memorandum*, p. 61.

133 *Explanatory Memorandum*, p. 63.



## Chapter 2

### Views on the bills

2.1 The committee received a total of 14 submissions for this inquiry and a public hearing was held in Melbourne on 13 March 2019.

#### Support for the bills

2.2 Notwithstanding concerns over specifics, all the submitters to the inquiry supported the aim of the bills.<sup>1</sup>

2.3 The Treasury noted:

I think it's fair to say that we have broad support for the two policies—the [Modernising Business Registers] MBR program and the DINs. It is true that there have been lots of questions asked about the 'what' and the 'how' rather than the 'why'.<sup>2</sup>

2.4 The Australian Restructuring Insolvency & Turnaround Association (ARITA) was vocal in its support for the bills and the aim of combatting illegal phoenixing:

We do not accept the submissions of others that seek to water down these proposals. A decisive response is required to end the scourge of [il]legal phoenixing, and DINs will be an important tool in that war. We are particularly concerned to see submissions supporting the 28 days or possibly longer post-registration option. There is very significant scope for abuse by phoenixers in this, and it is of the gravest concern to us.

...we urge the Senate to support this aspect of the legislation without equivocation or watering down. Indeed, we believe it needs further strengthening with greater specificity.<sup>3</sup>

2.5 The introduction of the Director Identification Number (DIN) was strongly supported. Again, ARITA commented:

The creation of a Director Identity Number would remove one of the key tools the phoenixers have in frustrating the investigations of liquidators and

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1 Professor Helen Anderson, *Submission 1*; Australian Charities and Not-for-profits Commission, *Submission 2*; Australian Shareholders' Association, *Submission 3*; Housing Industry Association, *Submission 4*; Australian Restructuring Insolvency & Turnaround Association, *Submission 5*; Australian Securities and Investments Commission, *Submission 6*; Australian Institute of Company Directors, *Submission 7*; Business Council of Co-operatives and Mutuals, *Submission 8*; Australian Institute of Credit Management, *Submission 9*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 10*; Governance Institute of Australia, *Submission 11*; ACT Government, *Submission 12*; Chartered Accountants ANZ, *Submission 13*; Australian Small Business and Family Enterprise Ombudsman, *Submission 14*.

2 Ms Lucy Vincent, Principal Adviser, Consumer and Corporations Division, Department of the Treasury, *Committee Hansard*, Melbourne, 13 March 2019, p. 34.

3 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency & Turnaround Association (ARITA), *Committee Hansard*, Melbourne, 13 March 2019, p. 17.

then, in turn, ASIC, the ATO et cetera. One of the most common tools that are advocated by unregulated pre-insolvency advisers and phoenixers is to falsely register directors—it is easy enough to register your dog as a director of a business; we have seen it occur all too often—or to...make deliberate errors or slight variations in the spelling of your name.<sup>4</sup>

## General issues identified

2.6 Despite the general support, submitters did identify areas where they thought the bills were deficient.

### *Information availability*

2.7 The Australian Charities and Not-for-profits Commission (ACNC) expressed concern about the level of information currently available publicly on Commonwealth registers remains unchanged arguing that any reduction in the availability of such information due to the new regime would impact on the ability of the ACNC to effectively undertake its work.<sup>5</sup>

### *Penalties*

2.8 The ACNC also expressed concern about the imposition of civil penalties and strict liability offences for directors of charities who fail to apply for a DIN. The ACNC believes that the introduction of large penalties for failing to acquire a DIN within a specified timeframe may make it more difficult for charities to recruit directors.<sup>6</sup>

2.9 The Housing Industry Association (HIA) also expressed disquiet at the punitive aspect of the bills. HIA commented:

DINs will also impact ordinary businesses, including small businesses, many of whom are 'mums and dads' that never intend to phoenix or engage in any illegal activity.<sup>7</sup>

In HIA's view, the proposed penalty regime is disproportionate with the consequential harm that would result from non-compliance. Directors who do not have a DIN or that fail to apply for a DIN within the applicable timeframe will be liable for civil and criminal penalties. This approach is considered unnecessary and excessive.<sup>8</sup>

2.10 The Australian Institute of Company Directors (AICD) also raised the issue:

There are substantial penalties attached to breaches of the new requirement around the obligation to hold a DIN and to provide a DIN in certain circumstances. The penalties are significant. There are civil and criminal penalties and there are strict liability offences prospective directors and

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4 Mr John Winter, ARITA, *Committee Hansard*, Melbourne, 13 March 2019, p. 17.

5 Australian Charities and Not-for-profits Commission (ACNC), *Submission 2*, p. 1.

6 Australian Charities and Not-for-profits Commission (ACNC), *Submission 2*, p. 4.

7 Housing Industry Association (HIA), *Submission 4*, p. 2.

8 HIA, *Submission 4*, p. 3.

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directors who breach those obligations. We think strong penalties are obviously very important for the DIN regime to work but we are also conscious that the obligation to hold a DIN is going to apply to all of the millions of directors in the country. That includes directors of small companies, proprietary limited companies, not-for-profits, school organisations and charities. It is capturing a large number—over 2.7 million—directors, according to ASIC. The vast majority of those people are obviously law-abiding citizens who just want to set up companies, use them and govern them effectively.<sup>9</sup>

### ***Structure of laws and regulations***

2.11 The structure of the laws and regulations also received attention from submitters. ARITA commented:

The draft legislation sets a framework only and there are few, if any, real details included, and this is of concern. As a general observation, we believe that the core of the policy should be captured in legislation, in order to provide certainty and oversight, and not left to subordinate legislative instruments.<sup>10</sup>

2.12 The Australian Institute of Credit Management (AICM) concurred with this view and recommended that:

Legislation should encompass further detail currently left to data standards and administrative instruments specifically core elements such as identity verification and continuity of current data on registers.<sup>11</sup>

### ***Evidential burden***

2.13 Concerns were also raised about the reversal of evidential burden in relation to criminal matters. AICD commented that:

The bills before the committee propose reversing the evidential burden of proof by requiring defendants in court who breach their obligations around DINs to meet an evidential burden for establishing the defence themselves... While in some instances that stacks up, we're not supportive of reversing that evidential proof. We think, for example, in a case where a director has been appointed without their knowledge, it actually would be very difficult for them to establish the evidential burden. It would be much easier for ASIC, with its information-gathering powers, to be able to establish the grounds of intention in that case.<sup>12</sup>

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9 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors (AICD) *Committee Hansard*, Melbourne, 13 March 2019, p. 1.

10 Australian Restructuring Insolvency & Turnaround Association (ARITA), *Submission 5*, p. 3.

11 Australian Institute of Credit Management, *Submission 9*, p. 6.

12 Ms Louise Petschler, AICD, *Committee Hansard*, Melbourne, 13 March 2019, p. 2. See also AICD's *Submission 7*, p. 3.

### ***Security and privacy issues***

2.14 Given the amount of personal information required to be provided by new and potential directors, concerns were expressed regarding the security of that information and the potential for identity theft. The AICD commented:

The AICD is also very concerned with the confidentiality and security of information held on Registrar systems. High standards of security and accountability for breaches of security are required to provide officers with confidence in supplying highly personal identity verification information online.<sup>13</sup>

...the introduction of director identification numbers with the support of identity verification behind that should allow those registers to remove some of the very personal information that is currently publicly available on the registers, which includes date of birth, place of birth and residential address. In our view, that exposes directors and officers of companies to undue privacy, cybersecurity and personal safety risks, including identity fraud.<sup>14</sup>

2.15 Both ARITA<sup>15</sup> and the Governance Institute of Australia also recommended that personal information should be limited for security reasons. They argued that the home address, place and date of birth of officeholders should not be included in the public part of the register.<sup>16</sup>

### **Issues pertaining to the Director Identification Number**

2.16 Despite support for the introduction of DINs, a number of issues were raised.

#### ***DIN itself inadequate to combat illegal activity***

2.17 Firstly, there was recognition that the DIN would not in and of itself, be enough to combat illegal activity. AICM commented:

...the DIN model alone will not stop illegal phoenix activity; it will need to be accompanied by other measures such as proactive policing and enforcement of relevant laws by regulators.<sup>17</sup>

2.18 The Treasury concurred with this assessment:

A DIN itself as a number will not stop phoenixing, because it is just an identifier; it is just a number. It is about the profiling that can be achieved through the integration of the DIN with the other important registry data that will provide the benefits in relation to something like phoenixing.<sup>18</sup>

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13 AICD, *Submission 7*, p. 2.

14 Ms Louise Petschler, AICD, *Committee Hansard*, Melbourne, 13 March 2019, p. 2.

15 Mr John Winter, *Committee Hansard*, Melbourne, 13 March 2019, p. 18.

16 Governance Institute of Australia, *Submission 11*, p. 5.

17 Ms Kerry Hicks, Senior Policy Adviser, AICD, *Committee Hansard*, Melbourne, 13 March 2019, p. 1.

18 Ms Lucy Vincent, Treasury, *Committee Hansard*, Melbourne, 13 March 2019, p. 37.

### **Possible delays to the DIN's introduction**

2.19 Professor Helen Anderson argued that the introduction of the DIN could potentially be delayed and that this was an undesirable outcome. Specifically, Professor Anderson said:

Treasury should not allow the DIN project to become bogged down by the logistics of the broader Modernising Business Registers project. This could delay the implementation of the DIN for years.<sup>19</sup>

2.20 Professor Anderson's views were supported by a number of other agencies who provided evidence to the committee. ARITA commented:

We are obviously aware that the sooner this is in—and Professor Anderson's comments around the decoupling do have some merit—we'd like to see the DIN in sooner rather than later. We appreciate that the business registry part is complex and challenging in terms of its execution, so this isn't a critique of the intent; it's more about the practicality of it. I think expediting the creation of the DINs has significant value for us to consider.<sup>20</sup>

2.21 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) expressed their support for Professor Anderson's viewpoint,<sup>21</sup> as did AICM.<sup>22</sup>

### **Timings**

2.22 Of all the issues covered in submissions and public hearing evidence, the most commented upon were the timings regarding DIN application and the transition period. There were a variety of different views as to whether these time periods were appropriate.

2.23 For example, the AICM recommended that:

...the 28 day time frame to apply for a DIN is reduced or eliminated to avoid manipulation by dodgy directors and to improve governance around director appointments.<sup>23</sup>

2.24 Conversely, the Governance Institute of Australia recommended that the bills should:

...extend the period in which to apply for a DIN to 60 days or alternatively extend the transition period to enable a new officeholder 28 days in which to apply for a DIN.<sup>24</sup>

2.25 AICD argued that the:

19 Professor Helen Anderson, *Submission 1*, p. 3.

20 Mr John Winter, ARITA, *Committee Hansard*, Melbourne, 13 March 2019, p. 19.

21 Ms Anne Scott, ASBFEO, *Committee Hansard*, Melbourne, 13 March 2019, p. 9.

22 Mr Nicolas Pilavidis, Chief Executive Officer, Australian Institute of Credit Management, *Committee Hansard*, Melbourne, 13 March 2019, p. 14

23 AICM, *Submission 9*, p. 2

24 Governance Institute of Australia, *Submission 11*, p. 3.

...obligation in the current bill for new directors to apply for a DIN prior to appointment needs to be amended. It currently allows for 28 days to apply for a DIN once they're appointed as a new director of an organisation, with a 12-month transition period. In our view, particularly thinking about those small proprietary companies, charities and not-for-profits, awareness of the obligation to have a DIN is going to be an ongoing challenge, and our recommendation would be that 28 days apply as a permanent feature of the regime, not just for the first 12 months.<sup>25</sup>

2.26 With regard to cancellation and expiry periods, the AICD commented on the proposed automatic cancellation of a prospective director's DIN after a 12-month period of not being appointed as a director and argued that the time period should be at least two years, both for practical reasons and in light of the penalties proposed,<sup>26</sup> while the Governance Institute of Australia recommended that the bills should extend the expiry period for a DIN from 12 months to three years.<sup>27</sup>

2.27 Conversely, ARITA argued that the DIN should be an indelible number and never be cancelled. ARITA commented:

We've had discussions with ATO around why they think it needs to have time period on it. Their argument is that it's a constitutional problem. We're a little surprised by that view. If you can have a tax file number or any other registration, or a passport, we think it should be as indelible as those. We don't see a case for removing it, because that then raises the risk of multiple identity numbers being created.<sup>28</sup>

## Australian Securities and Investments Commission IT systems

2.28 In both their submission to the committee, and during the evidence provided at the public hearing, the Australian Securities and Investments Commission (ASIC) made repeated reference of their aging IT systems to adequately deal with the expected requirements for the new regime. ASIC commented:

The current technology utilised by ASIC to maintain the registers is ageing and is not adequate to meet growing future demand. For the companies register the technology is nearly 30 years old.

Further, the statutory framework under which ASIC maintains the registers has not kept pace with developments in technology, restricting ASIC's ability to collect and publish registry data as well as communicate with registry customers in a modern way. Together, these constraints make it difficult to support in a timely and cost-effective manner the development of new types of register or registry information such as direct identification numbers, readily deliver enhancements to the integrity and value of registry

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25 Ms Louise Petschler, AICD, *Committee Hansard*, Melbourne, 13 March 2019, p. 2.

26 AICD, *Submission 7*, p. 2.

27 Governance Institute of Australia, *Submission 11*, p. 4.

28 Mr John Winter, ARITA, *Committee Hansard*, Melbourne, 13 March 2019, p. 19.

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data and meet the needs of registry customers, who expect to be able to interact with government in a digital business environment.<sup>29</sup>

I'd strongly encourage people not to build new functionality into ASIC's existing legacy systems, particularly the companies database...It's getting very close to the end of its usable life. That means programming is difficult and costly, and quite potentially there are a great deal of costs that will be thrown away once the system actually hits the end of its usable life.<sup>30</sup>

2.29 Treasury agreed with ASIC's assessment of its systems observing that:

ASIC's registers are outdated. Adding large amounts of functionalities on registers that will soon be replaced would be costly and potentially unstable for little long-term gain. Moreover, ASIC currently does not have identity verification processes.<sup>31</sup>

2.30 ARITA provided a 'coalface' perspective of ASIC's registry systems, describing them as 'broken and inadequate':

Anybody who has to use that registry finds the great challenges in how it is operated. As I understand it, the IT that sits behind ASIC's systems is from the nineties; it clearly shows in the way that it operates. Its interoperability with other databases is questionable. All of that leads to very unfortunate outcomes. It is just overwhelming feedback from our people who are at the coalface, using it all the time.<sup>32</sup>

ASIC's registry systems are broken and inadequate. As they exist, they are a hindrance to all businesses and those who must interact with them. We concur that a fresh and more efficient solution is required.<sup>33</sup>

## **Committee view**

2.31 The committee notes the broad level of support for the bills and their intention. Ongoing problems such as illegal phoenixing have been repeatedly identified in numerous committee reports, and these new bills, and the new registry regime they will introduce, will be of great benefit to governments, business and the economy in general.

2.32 Notwithstanding the broad support, the committee notes the issues identified through the evidence it has gathered. We note the need for ASIC to be able to perform its duties and the advice received about the expected inadequacies of its aging systems. Accordingly, the committee recommends that ASIC's registry systems be reviewed and assessed as to whether they now need to be replaced.

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29 Mr John Price, Commissioner, Australian Securities and Investments Commission (ASIC), *Committee Hansard*, Melbourne, 13 March 2019, p. 24.

30 Mr John Price, ASIC, *Committee Hansard*, Melbourne, 13 March 2019, p. 28.

31 Ms Lucy Vincent, *Committee Hansard*, Melbourne, 13 March 2019, p. 33.

32 Mr John Winter, ARITA, *Committee Hansard*, Melbourne, 13 March 2019, p. 20.

33 Mr John Winter, ARITA, *Committee Hansard*, Melbourne, 13 March 2019, p. 17.

**Recommendation 1**

**2.33 That the government review the Australian Securities and Investments Commission registry technology in order to assess its continued suitability and the possible need for its replacement.**

2.34 The committee also notes the differing views on the DIN, the application process and its timings. Given the importance of the DIN's introduction and successful implementation, a further review two years after its introduction is desirable to ascertain if the potential problems identified by the evidence have manifested themselves.

**Recommendation 2**

**2.35 The committee recommends the operation of the Director's Identification Number (DIN) be reviewed two years after its introduction to ascertain its effectiveness.**

2.36 Notwithstanding the issues raised, the evidence clearly points to the desirability of the new registry regime and that it is introduced as soon as possible. Accordingly, the committee recommends that the bills be passed.

**Recommendation 3**

**2.37 The committee recommends that the bills be passed.**

**Senator Jane Hume  
Chair**

## **Additional Comments from Labor Senators**

1.1 Labor Senators believe that this legislation should not be debated in the Parliament while key details of the modernisation project have not been made public. While the intent to modernise business registers is supported, there are three areas of concern that Labor Senators wish to raise.

1.2 The first issue is that stakeholders have expressed concern about tying the introduction of the Director Identification Number (DIN) to the registry modernisation project, which may delay the implementation of DINs for years. This would delay and inhibit the benefits of DINs, particularly when it comes to identifying dodgy directors and cracking down on phoenixing activity.

1.3 The second issue is that the details of the modernisation project remain unclear. Basic project management details such as an estimated completion date, the estimated total cost for implementation and the anticipated tactics for execution, such as whether to migrate all registers in one attempt or to iteratively merge registers, have not been provided to the Parliament. Many of these details are presumably in the business case that has been developed and provided to Government, and as yet has not been made public.

1.4 Labor Senators also note the recommendation from the Business Council of Co-Operatives and Mutuals (BCCM) that the legislation be amended to allow States and Territories the option to refer functions to the Commonwealth. Labor Senators urge the Government to work with BCCM and the States and Territories to find ways to reduce red tape for co-operatives.

1.5 Labor Senators believe it is incumbent upon the government to make public the business case, and provide sufficient time subsequently to consider its details. This is particularly important given the Government's poor track record when it comes to digital projects. Labor Senators consider the Parliament ought be provided the information necessary to hold the Government to account and ensure taxpayer money is spent wisely.

### **Tying the Director Identification Number policy to the business registry modernisation project**

1.6 Professor Helen Anderson, well regarded expert in the area of phoenixing activity, expressed concern in her Treasury submission that the DIN project might be excessively delayed if it was only implemented when the new registry work was completed:

Treasury should not allow the DIN project to become bogged down by the logistics of the broader Modernising Business Registers project. This could delay the implementation of the DIN for years.<sup>1</sup>

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1 Professor Helen Anderson, *Submission 1*, p. 3.

1.7 The Australian Institute of Company Directors did not oppose the proposition that some elements of the DIN policy could be implemented earlier:

Our view is that the timing is a matter for the government and a matter for what is a pretty complex program of coordinating. It may well be that some aspects of, for example, identify verification could be introduced earlier.<sup>2</sup>

1.8 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) shared Professor Anderson's concerns:

Senator KETTER: I asked the previous witnesses to comment about the submission from Professor Helen Anderson, who says that the Treasury should not allow the director identification number project to become bogged down by the logistics of the broader modernising business registers project. She says this could delay the implementation of the DIN for years. Do you share her concerns?

Ms Scott: Yes. From the cases where we have done deep reviews into the impacts of insolvency and phoenixing, where there have been devastating losses to tradies in those supply chains, and concerns the sector is giving us that this is getting worse, not better, we think that any delay is not great. This has been discussed for a very long time. We understand the complexity of implementing the register. But anything that can be done to assist, especially in the building and construction sector, in dealing with insolvency and phoenixing and strengthening the processes around that so that illegal phoenixing is diminished would be good.<sup>3</sup>

1.9 The Australian Institute of Credit Management shared similar concerns:

It is a valid concern, knowing that, for IT projects and for the scale of this project, delays are possible. So, yes, I do share her concerns.<sup>4</sup>

1.10 The Australian Restructuring Insolvency and Turnaround Association also supported the idea of implementing DINs earlier than the registry modernisation, which they were advised could take three to five years:

Senator KETTER: I turn to the director identification number issue. Based on your earlier comments, I take it you support proceeding more expeditiously with the DIN part of the equation rather than leaving it till the finalisation of the registry project.

Ms McHattan: Yes.

Senator KETTER: And you share the concerns of Professor Helen Anderson in that regard.

Mr Winter: We do.

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2 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, Melbourne, 13 March 2019, p. 5.

3 *Committee Hansard*, Melbourne, 13 March 2019, p. 9.

4 Mr Nicolas Pilavidis, Chief Executive Officer, Australian Institute of Credit Management, *Committee Hansard*, Melbourne, 13 March 2019, p. 14.

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Senator KETTER: And you do actually mention:

*A greater understanding of the timetable for implementation is necessary as the DIN regime is now included in this MBR process ...*

You say:

*It will be unfortunate if implementation of DINs is delayed by difficulties in implementation of technical aspects of the MBR program.*

Mr Winter: It's very true, and the reason is that we have heard estimates that the rollout of the MBR piece could be three to five years.<sup>5</sup>

1.11 While many stakeholders expressed a desire to implement DINs earlier, the committee also took evidence from the Australian Securities and Investments Commission (ASIC) that care should be taken when considering implementing DINs through current ASIC database architecture, but that implementation of DINs could still be carried out much earlier than the register project:

Senator KETTER: Mr Price, the iterative approach that you mentioned sounds to me to be conducive to an outcome where you could have the director identification number rolled out much earlier than the actual register.

Mr Price: That's possible. You would still need linkages back into some of ASIC's legacy systems, which would be challenging. But, nonetheless, I think it's possible. The one point I would like to make to the committee is: it's always a matter for government, but I'd strongly encourage people not to build new functionality into ASIC's existing legacy systems, particularly the companies database. It is at the end of its usable life. It's getting very close to the end of its usable life. That means programming is difficult and costly, and quite potentially there are a great deal of costs that will be thrown away once the system actually hits the end of its usable life.<sup>6</sup>

## The business case and key information about the registries modernisation project

1.12 The explanatory memorandum indicates that both schedules have no financial impact<sup>7</sup>, as they are framework legislation. Yet it is clear that this project will require significant capital expenditure.

1.13 While the committee heard evidence from stakeholders indicating that the project might take three to five years, Treasury could not provide this level of information themselves:

Senator KETTER: Do you confirm that a three- to five-year estimate has been provided?

Ms Vincent: There has been a lengthy time frame provided, and we've been very open about that and that it will be iterative delivery.<sup>8</sup>

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5 Committee Hansard, Melbourne, 13 March 2019, p. 21.

6 Committee Hansard, Melbourne, 13 March 2019, pp. 27—28.

7 Explanatory Memorandum, p. 3.

1.14 In terms of the expected budget for this project, Treasury could not provide any details, instead pointing to the business case, which is currently being considered by the Government:

Senator KETTER: Can you tell us what scale of investment is required to bring this project to fruition?

Ms Vincent: That goes to the business case that will be considered by government. It goes to advice to government.<sup>9</sup>

1.15 Treasury has also confirmed that capital expenditure advice has been developed for consideration by Government in relation to the 2019-20 budget:

Senator KETTER: Mr Price, from ASIC, told us there are capital requirements here. So you provided advice to the government about this?

Ms Vincent: Yes, we did. That is in relation to the funding that was given in the 2018-19 budget to develop the business case, to come back for consideration by government in relation to the 2019-20 budget.<sup>10</sup>

## **Recommendation from the BCCM**

1.16 Labor Senators also note the submission from the BCCM and its concerns that co-operatives, which are registered under State and Territory laws will not stand to benefit as much from the business registry modernisation project as other corporate structures:

The BCCM supports initiatives to reduce red tape for businesses and to combat the incidence of director malpractice. The BCCM submits that the benefits from these initiatives should flow to all business forms, not just those that are regulated under Commonwealth Laws.

Co-operatives are registered under State and Territory laws. They carry on business nationally and compete in the same markets as companies.

...

We strongly urge the Committee to recommend an amendment to the legislation that would allow the States and Territories the option to refer functions to the Commonwealth.<sup>11</sup>

## **Conclusion**

1.17 Labor Senators believe it proper and prudent to withhold support for this legislation until such time as the business case is made public and sufficient time is given to consider its details. Such consideration would include evaluating options to implement DINs more expeditiously, noting concerns about the current database architecture.

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8 *Committee Hansard*, Melbourne, 13 March 2019, p. 36.

9 *Committee Hansard*, Melbourne, 13 March 2019, p. 37.

10 Ms Lucy Vincent, Principal Adviser, Consumer and Corporations Division, Department of the Treasury, *Committee Hansard*, Melbourne, 13 March 2019, p. 37.

11 Business Council of Co-operatives and Mutuals, *Submission 8*, p. 1.

**Recommendation 1**

**1.18 That the bill be passed only if the business case is made public and sufficient time is given to consider the details.**

**Senator Chris Ketter**  
**Deputy Chair**

**Senator Jenny McAllister**  
**Senator for New South Wales**



# **Appendix 1**

## **Submissions and answers to questions on notice**

### **Submissions**

- 1 Professor Helen Anderson
- 2 Australian Charities and Not-for-profits Commission
- 3 Australian Shareholders' Association
- 4 Housing Industry Association
- 5 Australian Restructuring Insolvency & Turnaround Association
- 6 Australian Securities and Investments Commission
- 7 Australian Institute of Company Directors
- 8 Business Council of Co-operatives and Mutuals
- 9 Australian Institute of Credit Management
- 10 Uniting Church in Australia, Synod of Victoria and Tasmania
- 11 Governance Institute of Australia
- 12 ACT Government
- 13 Chartered Accountants ANZ
- 14 Australian Small Business and Family Enterprise Ombudsman

### **Answers to questions on notice**

- 1 Australian Institute of Credit Management: Answer to a question taken on notice at a public hearing in Melbourne on 13 March 2019 (received 14 March 2019).



## **Appendix 2**

### **Public hearings**

***Melbourne, 13 March 2019***

**Members in attendance:** Senators Hume, Ketter.

BELL, Ms Rosanne, Senior Executive Leader—Registry, Australian Securities and Investments Commission

BOWD, Mr Matthew, Senior Adviser, Law Design Office, Department of the Treasury

CALDARARO, Mr Lou, Director, Australian Institute of Credit Management

CROSBY, Ms Michelle, Deputy Registrar, Business Reporting and Registration, Australian Taxation Office

HICKS, Ms Kerry, Senior Policy Adviser, Australian Institute of Company Directors

McHATTAN, Ms Natasha, Legal Director, Australian Restructuring Insolvency and Turnaround Association

PETSCHLER, Ms Louise, General Manager, Advocacy, Australian Institute of Company Directors

PILAVIDIS, Mr Nicolas, Chief Executive Officer, Australian Institute of Credit Management

PRICE, Mr John, Commissioner, Australian Securities and Investments Commission

ROBERTSON, Ms Belinda, Assistant Commissioner Business Reporting and Registration, Australian Taxation Office

SCOTT, Ms Anne, Principal Adviser, Australian Small Business and Family Enterprise Ombudsman

SEDGWICK, Mr Matthew, Manager, Business Infrastructure Unit, Department of the Treasury

VINCENT, Ms Lucy, Principal Adviser, Consumer and Corporations Division, Department of the Treasury

WINTER, Mr John, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association

