



Senate Economics Legislation Committee

19 December 2011

Senator Mitch Fifield
Suite SG. 90
Parliament House
Canberra ACT 2600

Dear Senator

Inquiry into the future direction and role of the Scrutiny of Bills Committee

I am writing on behalf of the Senate Economics Legislation Committee ('the committee') to make a submission to the above inquiry, with particular reference to proposed national scheme legislation. The committee notes that in its interim report, the Scrutiny of Bills Committee observed that the 'apparent' increase in the number of framework bills and bills seeking to implement national schemes 'frequently give rise to scrutiny issues of concern'.¹ This submission focuses on these issues.

National Scheme Legislation: Business Names Registration Bills

On 6 July 2011, the committee was referred exposure draft versions of the following bills for inquiry and report by 15 August 2011:

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

The Business Names Registration Bill 2011 and related bills are an example of national scheme legislation which seeks to implement uniform legislation across all jurisdictions.

¹ Scrutiny of Bills Committee, *Interim report*, Inquiry into the future direction and role of the Scrutiny of Bills Committee, 23 November 2011, p. 3.

The Scrutiny of Bills Committee noted in its interim report that this type of legislation 'can inhibit the likelihood that Parliaments will amend the content of the bills from the terms in which they were introduced'. It observed that national scheme legislation is frequently the product of agreement between relevant ministers at national forums, such as the Council of Australian Governments (COAG), with the scope of the proposed national scheme usually documented in an intergovernmental agreement. The Scrutiny of Bills Committee argued that 'it could be useful for it to provide its technical scrutiny advice before final versions of these bills are settled'.²

The requirements for the states to transfer power to the Commonwealth

The Senate directed the Economics Legislation Committee to examine the provisions of the bills, which were then in the form of a third exposure draft. The committee's report noted that in order for the bills to be enacted, each state and territory needs to enact their own legislation, referring power to the Commonwealth. In terms of the sequence for this passage, the Department of Innovation, Industry, Science and Research (DIISR) explained to the committee:

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

Thus the sequence of events is:

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

Tasmania has introduced the relevant legislation, and must enact it before the Commonwealth does.³

The Federal and Tasmanian Parliaments' inquiries

The Exposure Draft Bills were referred to the committee in the Senate on 6 July 2011. The committee reported on 15 August 2011. On 17 August 2011, the bills were introduced into the Federal Parliament. The legislation was passed by the House of

2 Scrutiny of Bills Committee, *Interim report*, Inquiry into the future direction and role of the Scrutiny of Bills Committee, 23 November 2011, p. 3.

3 Department of Innovation, Industry, Science and Research, *Correspondence to committee secretariat*, 4 August 2011.

Representatives on 13 September 2011 and by the Senate on 13 October 2011 and received Royal Assent on 3 November 2011.

The first state referral bill, the Business Names (Commonwealth Powers) Bill 2011, was introduced into the Tasmanian House of Assembly on 5 July 2011 and the Legislative Council on 7 July 2011. On 14 July 2011, the bill was referred to the Legislative Council Government Administration 'Committee B' in the Tasmanian Parliament. That committee held a public hearing on 4 August and reported on 21 September 2011. The following day, the bills were passed without amendment in the Tasmanian Legislative Council.⁴

In other words, the Senate Economics Legislation Committee's inquiry fell between the introduction of the referral bill in the Tasmanian Parliament and the subsequent passing of the bill by that parliament.

Key issues

In the context of national scheme legislation and the committee's inquiry into the exposure draft Business Names Registration Bills, there are two key issues:

- whether state legislatures should introduce conferring powers with an appended Commonwealth bill before the federal parliament and its committees have the opportunity to examine and propose amendments to exposure legislation; and
- the ability of the Senate and its committees to scrutinise bills and recommend changes when the bills have been settled between the Commonwealth, state and territory governments.

In a Senate Procedural Information Bulletin on 8 July 2011, the Clerk of the Senate, Dr Rosemary Laing, noted the government's decision to refer the draft legislation for examination by the committee prior to the final bills being introduced:

The referral of draft bills at this stage of their development indicates that concerns raised by parliaments over the past two decades are beginning to be heeded. Such referrals allow parliamentary scrutiny of, and input to, legislative proposals and represent a better process than the presentation to the parliament of such bills, following agreements at extra-parliamentary, intergovernmental forums, as a fait accompli.⁵

4 http://www.parliament.tas.gov.au/bills/Bills2011/43_of_2011.htm
<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2011/5311T5462.pdf>
The New South Wales Legislative Council and Legislative Assembly passed the Business Names (Commonwealth Powers) Act 2011 on 14 September 2011. It received Royal Assent on 20 September 2011.

5 Dr Rosemary Laing, Clerk of the Senate, *Procedural Information Bulletin No. 253*, 8 July 2011, http://www.aph.gov.au/Senate/pubs/proc_bul/bull_253.htm

The Senate Economics Legislation Committee's August 2011 report into the exposure draft provisions noted that the federal and state governments had engaged in a lengthy period of consultation and negotiation on the bills. In July 2009, an Intergovernmental Agreement for Business Names was signed by First Ministers. A first exposure draft of the bills was released for public comment from 28 May 2010 to 28 August 2010. The draft bill was then forwarded to state and territory officials for comment in November 2010. The second exposure draft was released for public consultation on 14 March 2011 and ran until April 2011. Following further discussion among state and territory officials, a third exposure draft was released in May 2011. This version was the subject of the committee's inquiry.

It is the committee's understanding, therefore, that when the exposure draft bills were introduced into the federal parliament in July 2011, they had already gone through an intergovernmental forum of state and territory officials for approval. This is supported by the fact that the Tasmanian Government introduced the business names referral bill the day before the exposure draft bill was referred to the Senate committee (see above). Had the Senate Economics Legislation Committee recommended amendments to the exposure draft bill, and had these amendments been supported by state and territory officials, the bill in the Tasmanian Parliament would have needed to have been amended.

The committee is aware that other Senate committees have expressed concern with this issue of national scheme bills being examined by federal parliamentary committees after the introduction of the referral in state legislatures. In March 2011, as part of its inquiry into the National Vocational Education and Training Regulator Bill 2010, the Senate Education, Employment and Workplace Relations Legislation Committee recommended that:

...in future, exposure drafts of legislation be made available for examination by parliamentary committees prior to their adoption as text-based referrals of power by state legislatures, thereby assisting committees to recommend amendments to bills, if necessary, without threatening the viability of the referral of powers.⁶

The committee agrees with this recommendation. In the case of its inquiry into the business names registration bills, the committee was effectively limited in what it could recommend as an amendment to the draft bills because the bill was already being considered by the Tasmanian Parliament. The committee commends the Department of Industry, Innovation Science and Technology and the Minister for Small Business, Senator the Hon. Nick Sherry, for the decision to expose the draft legislation to parliamentary scrutiny. However, the committee suggests that for future national scheme legislation bills requiring the coordination of their passage through

6 Senate Education, Employment and Workplace Relations Legislation Committee, Inquiry into the National Vocational Education and Training Regulator Bill 2010 and related bills http://www.aph.gov.au/Senate/committee/eet_ctte/nvetr_bills_2011/report/report.pdf Recommendation 2, p. ix.

the various federal, state and territory legislatures, the exposure drafts of the bill(s) should not be introduced into state or territory legislatures before federal parliamentary committees have had the opportunity to examine its provisions and make recommendations.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Bishop', with a stylized flourish at the end.

Senator Mark Bishop
Chair