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Office of the  
**Director-General**

Department of  
**Justice and Attorney-General**

The Honourable Dean Wells MP  
Acting Chair  
Legal Affairs, Police, Corrective Services and Emergency Service Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

Dear Mr Wells

I refer to your letter of 9 September 2011 in relation to my Department's assistance in examining the *Business Names (Commonwealth Powers) Bill 2011*.

I enclose my Department's initial overview and information on prior consultation.

In order to assist the Committee I nominate Mr Chris Irons, Director, Fair Trading Policy, to be the Committee Secretariat's point of communication on the Bill. You may contact Chris on 3898 0172 or alternatively by email on [chris.iron@deedi.qld.gov.au](mailto:chris.iron@deedi.qld.gov.au).

Yours sincerely

A handwritten signature in black ink, appearing to read "Philip Reed".

Philip Reed  
**Director-General**

Encl.

19/9/11

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## **Parliamentary Committee Briefing Note**

For the Legal Affairs, Police, Corrective Services and Emergency Services Committee

Department of Justice and Attorney-General

### **Background and Policy Intent**

- A business name is the simplest and in many cases, most convenient method for a business to establish a profile and customer base in the marketplace. Importantly for consumers, business names also provide the means for consumers to access a register of the proprietors behind a business name. Unlike registering a corporation or incorporated association, a business name does not require a corporate structure and as such is an integral part of a small business' operation.
- A single national register for business names aims to reduce the burden on businesses trading interstate by removing the need to register business names in each jurisdiction.
- Upon commencement of the proposed national business names register, existing and prospective business proprietors will have a single, online point of entry upon which to register business names nationally and make changes to details for existing names.
- In 2008, the Council of Australian Governments (CoAG) agreed the responsibility for the registration of business names should be transferred from State and Territory Governments to the Australian Government. This agreement governs the responsibilities of all jurisdictions including the nature of the legislative scheme and how amendments may be made to the Commonwealth business names legislation.
- On 13 February 2011 the CoAG acknowledged the complexity of the reform, requiring agreement to primary legislation and referral of power to the Commonwealth Parliament. In order to progress this project as soon as practicable, the CoAG directed its Business Regulation and Competition Working Group (BRCWG) to provide advice on a firm timetable for delivery for its next meeting.
- On 28 May 2011, the BRCWG agreed the national business names registration system will commence on 28 May 2012. On 19 August 2011 the CoAG agreed the new national registration system will commence on 28 May 2012. The CoAG also agreed the States repeal their legislation and refer power by March 2012.
- The Commonwealth Parliament is not empowered to legislate for the registration of business names. In order for the Commonwealth Parliament to do so one State must first refer its power to the Commonwealth Parliament. This has commenced with the introduction of a referral of power bill into the Tasmanian Legislative Assembly on 5 July 2011.



- The *Business Names (Commonwealth Powers) Bill 2011* proposes to:
  - repeal the *Business Names Act 1962* and the *Business Names Regulation 1998*;
  - refer power to the Commonwealth Parliament to make the *Commonwealth Business Name Registration Bill 2011* and the *Business Names Registration (Transitional and Consequential Provisions) Bill 2011*;
  - refer power to the Commonwealth Parliament for it to make amendments for specific subject matters regarding business names;
  - provide for the relevant authority to migrate the existing business name registration data held on the current Queensland register to the new national Australian Government register; and
  - provide transitional provisions and make consequential amendments to other Queensland legislation.
- The *Business Names (Commonwealth Powers) Bill 2011* proposes to make the initial 'text based' reference by referring to the text of the *Commonwealth Business Names Registration Bill 2011* as tabled in the Tasmanian Legislative Assembly on 5 July 2011.
- On 17 August 2011 the *Business Names Registration Bill 2011* and the *Business Names Registration (Consequential and Transitional Provisions) Bill 2011* were introduced in the House of Representatives.

### Consultation

- Although the CoAG only agreed in 2008 the registration of business names would be transferred to the Australian Government, the Australian Government Department of Innovation, Industry, Science and Research (DIISR), the Australian Government agency facilitating this reform, has conducted extensive consultation since the inception of this project. This includes stakeholder consultation with key industry associations during September and October 2006, the release of a discussion paper and consultation with industry associations during September and October 2007.
- The DIISR released information technology specifications to review key project assumptions and inform project design in May 2009.
- The initial draft of the *Commonwealth Business Name Registration Bill 2010* and its related fees bill were exposed for public comments from 28 May to 28 August 2010. In April 2010



public consultation forums on the proposed business name registration system were held in capital cities.

- The DIISR again conducted public consultation sessions in April 2011 on the second exposure draft of the Commonwealth *Business Names Registration Bill 2011*. 18 written submissions were received by the DIISR. Individual submissions may be viewed at the DIISR's website at <http://www.innovation.gov.au/SmallBusiness/Support/Pages/PublicSubmissions.aspx>.
- The Commonwealth Bills were developed by the Australian Government in conjunction with the States and Territories. The Commonwealth Bills were subsequently drafted by the Parliamentary Counsel's Committee, which consists of the heads of the offices of Parliamentary Counsel for the Commonwealth, the States and Territories, and New Zealand (although New Zealand is not a party to these reforms).

#### **Current and previous parliamentary inquiries**

##### *Tasmanian Legislative Council*

- During July and August 2011 a committee of the Tasmanian Legislative Council examined the Tasmanian *Business Names (Commonwealth Powers) Bill 2011*, including public hearings. This Bill proposes to refer power to the Commonwealth Parliament to make the Commonwealth *Business Names Registration Bill 2011*. On 25 August 2011 the Legislative Council tabled its report.

##### *Senate*

- On 24 August 2011, in Alert Digest No. 9 of 2011, the Senate Standing Committee for the Scrutiny of Bills reported on its examination of the Commonwealth *Business Names Registration Bill 2011* and the *Business Names Registration (Consequential and Transitional Provisions) Bill 2011*, the text of which Bills forms the initial reference proposed in the *Business Names (Commonwealth Powers) Bill 2011*.

##### *House of Representatives*

- On 12 September 2011 the Commonwealth *Business Names Registration Bill 2011* and *Business Names Registration (Consequential and Transitional Provisions) Bill 2011* were referred to the House's Main Committee for examination.

#### **Fundamental Legislative Principles**

##### *Privacy rights*



- The transfer of business names registration data to the Australian Government requires the migration of electronic information recorded in the Queensland business names database. While this may appear to breach a person's right to information privacy, disclosure of information is restricted to the establishment of the new national Business Names Register administered by the Australian Securities and Investments Commission (ASIC).
- This will be done by migrating all existing business names on the Queensland register to the proposed ASIC Business Names Register for its anticipated commencement on 28 May 2012. Personal information will also be migrated to assist in the establishment of the register.
- The operation of the new Business Names Register must comply with the Information Privacy Principles contained in the Commonwealth *Privacy Act 1988*. This provides similar privacy protections contained in the Queensland *Information Privacy Act 2009* for existing data on the Queensland register. The Bill proposes to provide the legislative authority, required under the *Information Privacy Act 2009*, for the transfer of business name registration data to the ASIC.

#### *Continuing offence*

- Clause 21 contains a provision which 'continues' the offence provision contained in section 5 of the *Business Names Act 1962*. Section 5 provides a person must not carry on business under a business name unless it is the person's own name or the name is registered.
- This 'continuation' of section 5 is for the limited circumstance where an application to register a business name is made before the commencement of the national scheme and the chief executive has provided the ASIC with a notice under the proposed Commonwealth *Business Names Registration (Transitional and Consequential Provisions) Act 2011* that the proposed name is to be held.
- Schedule 1, Item 4 of this proposed Commonwealth Act allows for a State or Territory jurisdiction to notify the ASIC of a proposed business name to be held and not registered under the national scheme. This is to allow for the outcome of the decision on the registration application by the State or Territory jurisdiction.
- In other words the continued offence is only for that short period of time to prevent a person using an unregistered business name until commencement of the proposed ASIC business names register and the proposed Commonwealth *Business Names Registration Act 2011*.
- The proposed Commonwealth Transitional Act envisages the State and Territory Governments completing all of their pending applications after change over day and then advising the ASIC. Once a decision is made to register, the States and Territories notify the ASIC to register the name.



- Upon commencement of the proposed Commonwealth *Business Names Registration Act 2011*, offence provisions relating to use of an unregistered business name will commence. This will prohibit the use of names other than those held names.

*Protection from liability*

- Clause 14 of the Bill confers immunity from liability on the Chief Executive or a public service employee in relation to the giving of information to the Australian Government. Although immunity is proposed to be conferred, it is justified by only applying it to an act done, or omission made, honestly and without negligence in the performance of those functions. Additionally, an aggrieved party is not prevented from seeking redress as any liability attaches to the State.

*Sufficient regard to the institution of Parliament*

- The Bill forms part of national scheme legislation by referring legislative power to the Commonwealth Parliament. This may be seen as eroding the sovereign power of the Queensland Parliament. However, the sovereign power of the Queensland Parliament to make laws is preserved as legislative power can only be referred and consequently removed by an Act of Parliament.
- The Bill proposes to delegate the removal power by empowering the Governor in Council to terminate the text-based and / or subject-based references by proclamation. To place parliamentary oversight on this delegation of power, the Bill proposes to declare any such proclamation made by the Governor in Council to be subordinate legislation. This will enable the tabling and disallowance provisions of the *Statutory Instruments Act 1992*. This delegation of legislative power to the Governor in Council does not remove Parliament's sovereign right to terminate one or both of the references.
- In terms of national scheme legislation, the text-based referral gives the greatest regard to the institution of Parliament as it allows Parliament to consider the proposed initial Commonwealth legislation.
- The proposed Commonwealth *Business Names Registration Bill 2011* also contains provisions which protect States' interests. For instance, clause 12 allows for concurrent operation of State and Commonwealth laws, while clause 13 allows a State law to declare certain matters to be excluded from the operation of the Commonwealth law. Clause 14 also allows Parliament to displace the operation of a provision of the proposed Commonwealth *Business Names Registration Bill 2011* where there is a direct legislative inconsistency with Queensland



legislation. Under other circumstances, section 109 of the Constitution renders that Queensland provision invalid to the extent of the inconsistency with the Commonwealth provision.

- Clause 7 of the Bill contemplates the national business names legislation may be amended by Commonwealth Acts and legislative instruments other than what is the subject of the referral of power. This has been expressly identified in the Explanatory Memorandum to the Commonwealth *Business Names Registration Bill 2011* introduced into the House of Representatives on 17 August 2011. The Explanatory Memorandum notes the State Parliament referrals cover legislative matters to the extent to which the Commonwealth Parliament lack power. Amendment of the proposed primary Commonwealth legislation by other proposed Commonwealth legislative instruments may be an inappropriate delegation of legislative power.
- In terms of clause 7 of the Bill, the extent of inappropriateness of this proposed delegation would be determined by the scope of the Commonwealth Parliament's legislative power under section 51 of the Constitution. In other words, reliance upon the Legislative Assembly's referral of power to make amendments to Commonwealth primary legislation by Commonwealth legislative instruments would be limited by the scope of the Commonwealth Parliament's original power under section 51 of the Constitution. Exercise of power outside of the referral in the Bill proposing to allow legislative instruments to amend Commonwealth primary legislation, although giving rise to fundamental legislative principles issues, is a matter for the Commonwealth Parliament.

*Is the proposed Commonwealth Bill consistent with fundamental legislative principles?*

- The proposed Commonwealth *Business Names Registration Bill 2011* and *Business Names Registration (Consequential and Transitional Provisions) Bill 2011* contain provisions which may be inconsistent with fundamental legislative principles but are otherwise considered to be justified and appropriate. While the Commonwealth Parliament is ultimately responsible for considering these matters, such matters are also considered in the context of this *Business Names (Commonwealth Powers) Bill 2011* as it will refer power to the Commonwealth Parliament to enact the proposed Commonwealth Bills.

Is administrative power sufficiently defined and subject to appropriate review?

- The proposed Commonwealth *Business Names Registration Bill 2011* gives the Minister and the ASIC the power to make administrative decisions. It is considered that such decisions are sufficiently defined and subject to appropriate review. For example, clause 24 of the Commonwealth *Business Names Registration Bill 2011* sets out the matters the ASIC must be

satisfied of in order to register a business name. A registration of a business name, or a refusal to register a business name, is a reviewable decision, subject to internal review and external review by the Administrative Appeals Tribunal. Also, clause 27 allows the Minister to revoke a determination made that a business name is available to an entity, where the business name is otherwise undesirable. The revocation power is balanced by the requirement that the Minister must first give written notice to the entity and the decision is reviewable.

- However, clauses 19 and 20 of the Commonwealth *Business Names Registration Bill 2011* do not provide a right of review in relation to a refusal to make a determination exempting an entity from particular requirements under the proposed Commonwealth Bill. There are also some provisions in clause 32, for example, which lack clear criteria for decision making.

#### Privacy rights

- Part 8 of the proposed Commonwealth *Business Names Registration Bill 2011* allows the Business Names Register to be accessed. While this may raise privacy concerns, it is considered that the privacy of individuals will be appropriately protected. For instance, clause 60 allows a person to obtain a copy of an entry in the Business Names Register relating to a particular business name or a particular entity. In order to protect the privacy of individuals, clause 60(5) provides that the regulations may provide that details of a kind specified in the regulations are to be excised from a copy of an entry before it is to be given to a person. The proposed Commonwealth regulations require personal details to be excised from the copy.
- Clause 61 requires the ASIC to make publicly available on the internet or otherwise free of charge any details of a kind prescribed by the regulations. This enables the public to search the Business Names Register, similar to what can be done now, so that the entity behind the business name can be identified. Personal information will not be made publicly available. However, under the proposed Commonwealth regulations, if an entity is an individual (e.g. a sole trader) and their principal place of business is their home address, only the suburb and State or Territory will be made publicly available.
- Clause 62 requires the ASIC to give details of a kind prescribed by the regulations, such as a person's date of birth, to a government body if so requested. However, a government body may only request such information for certain purposes, such as the enforcement of criminal law, the protection of public revenue, or consumer protection. Accordingly, it is considered that the disclosure of information to government bodies for such purposes is justified.

#### Immunity from proceeding or prosecution without adequate justification





- Clause 78 of the proposed Commonwealth *Business Names Registration Bill 2011* confers immunity from actions or proceedings to the Minister, the ASIC, delegates and public servants in relation to an act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power under the legislation. While this provision does not conform to the standard usually required in Queensland legislation, the immunity is considered to be sufficiently limited.

Sufficient regard to the institution of Parliament – Henry VIII clauses

- The proposed Commonwealth *Business Names Registration Bill 2011* and *Business Names Registration (Consequential and Transitional Provisions) Bill 2011* contain provisions which allow the proposed Acts to be modified by Commonwealth regulations. For instance, clauses 18 to 21 of the proposed Commonwealth *Business Names Registration Bill 2011* allow regulations to prescribe circumstances in which the offences provided for in clauses 18 to 21 do not apply.
- Also, clause 10 of the proposed Commonwealth *Business Names Registration (Consequential and Transitional Provisions) Bill 2011* allows regulations to be made to deal with outstanding business names matters to be resolved, which would override the proposed Acts in respect to these matters. There is no expiry of this provision or regulations made under it as would normally be expected of a transitional regulation making power in Queensland legislation. This approach is common in Commonwealth regulations and the use of regulations in the Commonwealth jurisdiction does differ to Queensland. However, as indicated, it is ultimately for the Commonwealth Parliament to consider such matters.
- The Senate Committee noted the use of such provisions in its report and has left the question of their appropriateness to the Senate.

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