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# Parliament of Tasmania

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## LEGISLATIVE COUNCIL

### GOVERNMENT ADMINISTRATION COMMITTEE “B”

# REPORT

ON

*Business Names (Commonwealth Powers) Bill 2011 (No. 43)*

#### Members of the Committee

*Mr Ivan Dean MLC*  
*Mr Craig Farrell MLC*  
*Mr Kerry Finch MLC*  
*Mr Mike Gaffney MLC*  
*Mr Tony Mulder MLC*  
*Ms Tania Rattray MLC (Chair)*  
*Mrs Adriana Taylor MLC*

Committee Secretary: Mr Tom Wise

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## Introduction

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On Thursday, 14 July 2011 the Legislative Council resolved that the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* be referred to the Legislative Council Government Administration Committee “B” for further consideration and report.

Pursuant to this resolution, Government Administration Committee “B” met on Thursday, 4 August 2011 and subsequently held public hearings on the same date. At these hearings, the Committee took evidence from four witnesses. Details of the witnesses who gave evidence are listed in Appendix 1.

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## Background

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The Council of Australian Governments (COAG) agreed to the concept of a national business names register (BNR) in-principle in July 2008 as part of a wider program of developing a seamless national economy. A communiqué released by COAG at the time stated:

*‘COAG... agreed to a new Business Names Registration system. This significant initiative will establish a one-stop online shop for businesses to interact with government, that will mean businesses can apply for their business name and Australian Business Number in one step. Once the system is in operation, businesses operating in more than one State will no longer need to register separately in each jurisdiction, leading to significant savings in registration fees. The system will also provide an interface for improved interactions between business and government, placing information needed by business operators in one place, regardless of their location.’<sup>1</sup>*

The Commonwealth, State and Territory Governments subsequently signed an *Intergovernmental Agreement for Business Names Agreement* on 2 July 2009.<sup>2</sup>

Concurrent to developments at COAG, a public consultation process was underway and has continued until present, as outlined on the Department of Innovation, Industry, Science and Research (DIISR)’s website:

- Stakeholder consultation with key industry associations (September-October 2006).
- Market testing of concept (October 2006)

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<sup>1</sup> COAG, *Council of Australian Governments Meeting 3 July 2008*, at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm) [accessed July 2011]

<sup>2</sup> The *Intergovernmental Agreement for Business Names Agreement* is available online at: [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-07-02/docs/IGA\\_business\\_names.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_business_names.pdf)

- Release of discussion paper and consultation with industry associations (September-October 2007)
- Market testing to review key project assumptions and inform project design (May 2009)
- Public consultation forums on the proposed business name registration system were held in capital cities (April 2010)
- The initial draft of the Business Name Registration Bill 2010 and its related fees bill were exposed for public comments from 28 May to 28 August 2010
- Public consultation sessions on the second exposure draft of the Business Names Registration Bills (April 2011).<sup>3</sup>

Exposure drafts have been tabled in the Senate, but not introduced, as follows:

ED Business Names Registration Bill 2011

Proposes a national business names registration system to be administered by the Australian Securities and Investments Commission.

Senate: Exposure draft tabled 6/7/11

Reference: Exposure draft referred to Senate Economics Legislation Committee 6/7/11; report due 15/8/11

ED Business Names Registration (Fees) Bill 2011

Proposes to impose a tax for chargeable matters in relation to the proposed national business names registration system.

Senate: Exposure draft tabled 6/7/11

Reference: Exposure draft referred to Senate Economics Legislation Committee 6/7/11; report due 15/8/11

ED Business Names Registration (Transitional and Consequential Provisions) Bill 2011

Proposes to make: transitional arrangements in relation to the proposed national business names registration system; and consequential amendments to 11 Acts.

Senate: Exposure draft tabled 6/7/11.<sup>4</sup>

On 6 July 2011, the Senate referred the exposure draft bills to the Senate Economics Legislation Committee. The Committee presented its report to the Senate on 15 August 2011.<sup>5</sup>

The “tabled text” tabled with the Business Names Bill indicates that the two Commonwealth bills have been “presented and read a first time” in the House of Representatives; although there is no record of these bills having yet been introduced.

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<sup>3</sup> DIISR, *Australian Business Number (ABN) Australian Business Register Project*, at <http://www.innovation.gov.au/SmallBusiness/Support/Pages/ABNBusinessNamesRegistrationProject.aspx> [accessed July 2011]

<sup>4</sup> Senate Bills List.

<sup>5</sup> The Senate Committee Report is available online at: [http://www.aph.gov.au/Senate/committee/economics\\_ctte/business\\_names\\_registration\\_2011/report/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/business_names_registration_2011/report/index.htm)

The Senate Committee relied on a different version entitled “draft settled with State/Territory officials”.<sup>6</sup>

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## The Bill

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The *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* was introduced into the Legislative Council on Thursday 7 July 2011, having previously been agreed to by the House of Assembly. The Second Reading debate on the Bill took place on 14 July 2011.<sup>7</sup>

Essentially, the purpose of the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* is to refer Tasmania’s responsibility for the registration of business names to the Commonwealth in accordance with Section 51(xxxvii) of the Australian Constitution.<sup>8</sup>

This referral of powers will permit the Commonwealth to legislate to establish a national BNR to be administered by ASIC (Australian Securities and Investments Commission). Two draft Commonwealth bills that will cover the operational framework of a BNR and transitional arrangements are specified in the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* as the “tabled text” in s.3.

In practice, this will have the effect of annulling existing State legislation to the extent necessary for the enactment of new Commonwealth legislation, which will replace the foregone State legislation. For Tasmania, this change primarily affects the *Business Names Act 1962* though also has implications for the *Cooperatives Act 1999*, the *Associations Incorporation Act 1964* and the *Partnership Act 1891*, by virtue of the fact that these Acts contain registers of entities that carry out business.<sup>9</sup>

The referral Bill is “text-based”, meaning that the only power referred to the Commonwealth is the text of the two draft Commonwealth bills that were tabled along with the Bill (the “tabled text”). This is distinct from cases where an entire subject or policy area may be referred to the Commonwealth.

In his Second Reading Speech on the Bill, the Leader for the Government in the Legislative Council, the Hon. Doug Parkinson MLC, explained the reason for taking this approach:

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<sup>6</sup> See Senate Economics Legislation Committee website at:

[http://www.aph.gov.au/Senate/committee/economics\\_ctte/business\\_names\\_registration\\_2011/exposure\\_draft/Business\\_Names\\_Registration.pdf](http://www.aph.gov.au/Senate/committee/economics_ctte/business_names_registration_2011/exposure_draft/Business_Names_Registration.pdf)

<sup>7</sup> The Hansard Transcript of the Second Reading debate and the debate on the Motion to refer the Bill to this Committee is available online at: [http://www.parliament.tas.gov.au/ctee/Council/GovAdminB\\_BusinessNames.htm](http://www.parliament.tas.gov.au/ctee/Council/GovAdminB_BusinessNames.htm)

<sup>8</sup> Section 51(xxxvii) states: *Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.*

<sup>9</sup> *Business Names Registration Bill 2011* (exposure draft), s.6 and schedule 1.

*'This referral bill is "text based" which means that the only constitutional power that is referred is the text of Commonwealth bills that are tabled along with this bill. This approach presents the least risk to Tasmania's constitutional sovereignty and is supported by all other States and Territories. The Solicitor-General has examined the referral legislation and has advised that there are no significant risks in this approach.'*<sup>10</sup>

While supporting the view that the text-based approach presented the least risk to constitutional sovereignty, Mr Michael Stokes, Senior Lecturer in Law at the University of Tasmania, did express some reservations. He told the Committee:

*'The first point, if I can address the Hansard of the second reading speech - this is on page 15 of Hansard from 14 July this year - is that it mentions that the referral bill is text-based, which means the only constitutional power that is referred is the text of Commonwealth bills that are tabled along with this bill. Now, that seems to me to be incorrect because there is a substantial referral of power going well beyond the actual bill. It is correct in saying that that bill-based approach presents the least risk to Tasmania's constitutional sovereignty but the fact that it goes well beyond a text-based referral of one particular bill raises questions about State sovereignty ....'*<sup>11</sup>

These reservations, which are shared by the Committee, are discussed later in this report (see page 10).

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<sup>10</sup> D. Parkinson, *Legislative Council Hansard*, 14 July 2011, p. 15.

<sup>11</sup> M. Stokes, *Transcript of Evidence*, 4 August 2011, p. 9.

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## Matters of Concern

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It must be stated at the outset that although it is the Tasmanian Bill that has been referred to the Committee for inquiry and report, it has been an unavoidable consequence that the draft Commonwealth legislation (referred to as the “tabled text” in the Tasmanian Bill) has also been examined.

There appears to be universal in-principle stakeholder support for the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* (the Tasmanian Bill). Mr Mark Bowles, the Chief Economist with the Tasmanian Chamber of Commerce and Industry, told the Committee:

*‘Essentially we are all very much in support of this intent. In general, a concern of both the TCCI and indeed our interstate counterparts - and we are all on the same page on this - is that reducing red tape has been a consistent theme for the State Government, and national government in particular. This is one good example that we can encourage and really welcome when this comes through.’<sup>12</sup>*

Similar support was expressed to the Committee by Mr Robert Mallett, Executive Officer of the Tasmanian Small Business Council. Mr Mallett told the Committee:

*‘Both the Tasmanian Small Business Council and the Council of Small Business Organisations of Australia have fully supported the move to a national business names and ABN registration system. We think that will lessen the amount of time to some degree that it is going to take for small businesses especially to register their name. It should lessen the complexity with which they do it. I understand that it is also actually going to reduce the price, which is always a positive.’<sup>13</sup>*

Support at the national level was also expressed in verbal evidence given to the Senate Economics Legislation Committee during its hearings on the draft Commonwealth Bills.<sup>14</sup>

However, in spite of assurances that *‘this is a lay-down misere; there is nothing to investigate about this’*, a number of matters of concern about the Tasmanian and the Commonwealth legislation were raised with the Committee.<sup>15</sup>

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<sup>12</sup> M. Bowles, *Transcript of Evidence*, 4 August 2011, p. 35.

<sup>13</sup> R. Mallett, *Transcript of Evidence*, 4 August 2011, p. 1.

<sup>14</sup> The Hansard Transcript of the Senate Economics Legislation Committee hearings held on 2 August 2011 is available online at: <http://www.aph.gov.au/hansard/senate/committee/s186.pdf>

<sup>15</sup> D. Parkinson, *op. cit.*, p. 17.

Some of these matters were also among a number of significant issues raised with the Senate Committee.

## Sovereignty of State Parliaments

Although it is the Parliament in each State that is responsible for the referral to the Commonwealth of the powers to establish and maintain the BNR, the Committee has reservations about the lack of involvement by the Tasmanian Parliament in this process.

Committee Members are not the only ones who voiced these concerns.

For example, in his evidence to the Committee, Mr Michael Stokes, made the following observation:

*'I must say that I am quite glad that Parliament is having a look at some of these because I really think there is pressure from COAG to get Parliament to rubber-stamp agreed legislation.'*<sup>16</sup>

The question of the sovereignty of the Tasmanian Parliament in dealing with legislation formally agreed to by COAG is becoming more of a concern as growing numbers of such "nationally uniform" legislative packages are presented for approval.

As Mr Robert Mallett observed in his evidence to the Committee:

*'Our word of caution is that harmonisation or similar legislation is definitely an advantage, however we are about to look, for example, at the harmonisation of the occupational health and safety laws and we have some significant concerns with that. Some of my members are definitely worried that they will be bullied - that we could be forced or pressured into having to join the harmonised laws across the country when in fact there will be businesses in Tasmania who will say, "This is not on. We do not want this to happen," but I'm a bit worried that our voice will not actually be heard because we will get the usual, "They're doing it everywhere else in the country so we're going to do it as well," and I don't think that is a valid argument.'*<sup>17</sup>

In addition, the introduction of such legislation is often accompanied by Government warnings about its urgency and about the consequences of delay or, even worse, its rejection.

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<sup>16</sup> M. Stokes, op. cit., p. 10.

<sup>17</sup> R Mallett, op. cit., pp. 6-7.

In the case of the BNR, which has been in development at the COAG level since July 2006, when the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* was introduced into the Legislative Council in mid-July, Members were told that '*there is some urgency to adopt this bill so that the Commonwealth can introduce their bills into the Australian Parliament.*'<sup>18</sup>

This urgency claim was in spite of the fact that the Commonwealth bills had been referred to a Senate Committee for scrutiny a week before the Tasmanian Bill was introduced into the Legislative Council and then referred to this Committee. It seems that the only reason for the urgency is that the Commonwealth has proposed a starting date of May 2012 for the commencement of the BNR and the Tasmanian Parliament should therefore act to meet this deadline.

It may appear that, once again, the approval of State Parliaments around Australia is regarded as a formality as a result of an agreement entered into by State and Federal Governments without reference to the elected representatives of the people in those States.

The Committee has more serious concerns in relation to the mechanism that allows for future amendments to the Commonwealth legislation that are more than minor or technical.

Under the provisions of the Intergovernmental Agreement it signed with the States, the Commonwealth is permitted to make minor or technical amendments to its business names legislation without reference to the States. For more substantive amendments, the Commonwealth is required under the terms of the Agreement to seek the approval of the Ministerial Council for Corporations.

However, there is no provision in the Agreement, the Commonwealth legislation or the Tasmanian Bill for the Commonwealth to seek the agreement of State Parliaments which are the bodies responsible for initial referral of the business name powers to the Commonwealth. There is not even any mechanism that would require State Parliaments to be informed of substantive amendments to the Commonwealth legislation that require the approval of the Ministerial Council.

It should be noted that the Ministerial Council is not an elected or parliamentary body, but an organisation comprised solely of representatives of Commonwealth, State and Territory Governments.

In this regard, it is a matter of concern that the *Intergovernmental Agreement for Business Names Agreement* has never been tabled in, or endorsed by, either House of the Tasmanian Parliament even though it is fundamental to the main objective of the Tasmanian Bill.

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<sup>18</sup> D. Parkinson, op. cit., p. 15. Also see M. Bishop, *Senate Economics Legislation Committee Hansard*, 2 August 2011, p. 1.



Further, the Australian Securities and Investment Commission, which will have powers and functions to administer the national law, will also be subject to the Intergovernmental Agreement in carrying out that role.<sup>19</sup>

The questionable status of this quasi-legislative power of the Intergovernmental Agreement, without endorsement or approval by State Parliaments, is a matter of concern to the Committee.

## The Tasmanian Bill

The main objective of the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)* is the referral to the Commonwealth of the State power to require the registration of business names.

There is a clear power under Section 51(xxxvii) of the Australian Constitution for States to refer any of their responsibilities to the Commonwealth. What is less clear in the Constitution is the power for States to rescind the referral and this was a concern for the Committee.

The Tasmanian Bill does provide for the referral to be rescinded, although in his evidence Mr Michael Stokes did point out that *'there is a great deal of uncertainty because the courts have never ruled on it, about exactly what happens when a State withdraws or repeals a referral of power.'*<sup>20</sup>

Mr Stokes went on to tell the Committee:

*'There is absolutely no doubt that the State Parliament has the power to repeal the referral. A method of terminating the reference is given in clause 8. The Governor can do it at any time by proclamation and that will take effect six months later, but that does not prevent the Parliament itself simply passing repealing legislation. It retains that option, so there is absolutely no doubt that Parliament can repeal the referral, but the exact legal consequences of repealing a referral are unclear. There are two views. One is that the Commonwealth loses that power and legislation based on the referral would be invalid. The other view is that the Commonwealth law remains until repealed but is unamendable. Which of those two views the High Court will eventually adopt is not quite certain. I think the former is the more logical one. If the State gives the Commonwealth a power it should be able to take it away again and the exercise of the power fails.'*<sup>21</sup>

While noting that there may be doubts about the legal consequences of the termination of a referral, the clear State power to take such action provides the Committee with enough certainty to satisfy its concerns about this issue.

<sup>19</sup> See *Intergovernmental Agreement for Business Names Agreement*, Section 3.1 Commission's Responsibilities.

<sup>20</sup> M. Stokes, op. cit., p. 13.

<sup>21</sup> Ibid.

However, in general, the Committee is of the view that the referral to the Commonwealth of State responsibilities under the Australian Constitution should not be undertaken without due consideration and scrutiny of the legislation enabling such referrals.

A particular example relates to the provisions of Sections 5 and 6 of the Tasmanian Bill.

The Committee received verbal evidence that, notwithstanding claims that the referral in the Tasmanian Bill was restricted to the 'tabled text' of the Commonwealth draft legislation, there was potential for a broad interpretation of matters defined as *continuing business names matters* under Section 5 of the Bill.

These matters, included as part of the referral of State responsibilities to the Commonwealth, were described by Mr Michael Stokes as '*really very broad*.'<sup>22</sup> Section 6 of the Tasmanian Bill refers to the Commonwealth, the power to amend these broadly-defined continuing business names matters, without any further reference to the Parliament of Tasmania.

While it is clear from the Tasmanian Bill and the complex and convoluted nature of the Commonwealth legislation that there has been an effort to place boundaries around the Commonwealth's ability to exercise the referred State power, the effectiveness of those boundaries is unknown.

As Mr Stokes noted, '*how a court would interpret those terms of course is going to be up to the courts*.'<sup>23</sup> It could be argued that, in relation to this legislation, the States are really relying on the goodwill of the Commonwealth and the legal wisdom of the courts to ensure that the interests of their residents are being properly protected.

Mr Chris Batt, the Director of Consumer Affairs and Fair Trading in Tasmania, addressed this concern in his evidence, telling the Committee:

*'The other thing is that this is about a relationship between the Commonwealth and the States and all the Commonwealth has to do is, on one occasion, abuse that and it would mean that these relationships would be not achievable in the future. I do not believe, if you look at that relationship that underpins this whole thing, that means nobody is going to play this game, even if it were theoretically possible and even if they were able to get through all of the restraints and barriers that are there.'*<sup>24</sup>

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<sup>22</sup> Ibid, p. 9.

<sup>23</sup> Ibid.

<sup>24</sup> C. Batt, *Transcript of Evidence*, 4 August 2011, p. 23.

Mr Batt later told the Committee:

*'The detail of this is important, but going back to my earlier question about a relationship and about trust, I am not saying as a State we should necessarily trust the Commonwealth, that is not really what I am saying, but at some stage in order to progress these things there is a level of trust that does need to underpin that.'*<sup>25</sup>

Another issue raised with the Committee about the Tasmanian Bill related to the definition of 'unlawful conduct' referred to in Section 5(f).

Section 6 of the Tasmanian Bill, relating to the matters being referred to the Commonwealth, states that, among those matters, is the following:

*'.... (2) Each continuing business names matter is referred to the Parliament of the Commonwealth, but only to the extent of the making of laws with respect to the matter by making express amendments of the national business names legislation.'*<sup>26</sup>

The continuing business names matters mentioned in Section 6 are listed in Section 5 and among them is the following:

*'(f) the prohibition or restriction of the use of a business name by an entity because –*  
*(i) the entity has engaged in unlawful conduct; or*  
*(ii) a person involved in the management of the entity has engaged in unlawful conduct.'*<sup>27</sup>

There is no definition of unlawful conduct in the Tasmanian Bill and such an open-ended referral of a State power has the potential to cause future problems in the way the Commonwealth implements this referred power.

At present the draft Commonwealth legislation includes specific offences, related mainly to the *Corporations Act 2001* or matters of dishonesty, and for which a conviction would mean refusal to register a business name. Subsequent conviction for these offences could also lead to cancellation of a registered business name.

However, as it stands now, the referral in the Tasmanian Bill would appear to allow the Commonwealth to refuse or cancel a business name registration for any unlawful conduct, whatever that might mean and no matter how minor or unrelated it is to the operation of a business.

The Committee is of the view that the Tasmanian Bill should include a definition of the unlawful conduct referred to in Section 5(1)(f).

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<sup>25</sup> Ibid., pp. 30-31.

<sup>26</sup> *Business Names (Commonwealth Powers) Bill 2011 (No.43)*, p. 9.

<sup>27</sup> Ibid., p. 7.

## The Tabled Text

As mentioned, it has been necessary for this Committee to consider the draft Commonwealth legislation on business names as part of its inquiry into the Tasmanian Bill. The draft Commonwealth Bills were tabled in the Legislative Council when the Tasmanian Bill was introduced and are referred to in that Bill as the ‘tabled text’. The exercise of the State powers being referred to the Commonwealth will find their practical application in the administration of “the tabled text” when it is passed by the Australian Parliament and becomes law.

The report of the Senate Economics Legislation Committee released on 15 August 2011 provides a comprehensive review of the two draft Commonwealth Bills. In particular, the report deals with a number of problems identified during verbal evidence given to the Senate Committee at public hearings held on 2 August 2011.

This Committee does not intend to canvas all the issues dealt with in the Senate Committee report, but two significant problems were raised in evidence to this Committee. It is therefore appropriate that they are discussed in this Report.

### Similar business names

Mr Robert Mallett, representing the Small Business Council of Tasmania told the Committee that, while strongly supporting the BNR, his organisation saw some potential problems in the administration of the register.

Among the most significant of these is the way in which businesses with similar names would be determined by the BNR after the transition period from the Tasmanian register. There has certainly been some confusion in relation to the registration of new business names after the initial transition from the State registers.

Mr Mallett said *‘that bureaucrats are bureaucrats and so it comes down to a determination by an individual as to whether a business name that is about to be registered is identical or similar.’*<sup>28</sup>

He went on to explain:

*‘There is no question as to whether a business name is identical because identical is identical, however I am not quite sure what determines a similar business name. There does not seem to be any clear guidelines about how that might be.’*

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<sup>28</sup> R. Mallett, op. cit., p. 2.

*I think Tasmania has for some time effectively, when you do a business name search, looked for the rest of the country and you have already had a clear idea as to whether or not the name you are seeking is either going to be fairly similar to an existing one. But now if every State and Territory is going to be part of it, and they may not have had that process before, then I think you should allow reasonably similar names because it is not going to be that long before we run out of words.'*<sup>29</sup>

A similar concern was raised with the Senate Economics Legislation Committee about so-called "grandfathering" of business names as part of the transition from State business names registers to the BNR.

In a written submission to the Senate Committee, Gilbert and Tobin Lawyers said:

*'We note the proposal that business name registrations already on the various registers will automatically transfer across to the new national register. Where identical or similar names are registered by different entities in different States and Territories, a geographical suffix or notation will be added to the national register. However, when used, the business name will not need to include this qualifier. In this situation, similar businesses could potentially trade in the same State or Territory under an identical name. We believe the proposed grandfathering mechanism will create a 2 tiered ownership system where current registrants of identical names are advantaged over future business name registrants and that registration of these names at a national level poses a potential risk of consumer confusion.'*<sup>30</sup>

In a *Frequently Asked Questions* document explaining the operation of the BNR, the Department of Innovation, Industry, Science and Research (DIISR) confirmed this administrative approach.

*'E.g. Joe Smith operates Joe Smith's Plumbing in Fremantle. Another Joe Smith operates Joe Smith's Plumbing in Brisbane. Both names will be grandfathered onto the national register. ASIC may insert (Fremantle) and (Brisbane) on the register as appropriate, to distinguish between the business names.'*<sup>31</sup>

However, after a name has been grandfathered into the national system, applicants in the future could not register the same or even a similar name differentiated by location.<sup>32</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Gilbert and Tobin Lawyers, *Written Submission to Senate Committee*, 22 July 2011, p. 5.

<sup>31</sup> DIISR, *'Proposed National Business Name Registration System Frequently Asked Questions'*, Version 3, 6 April 2011, p. 6.

<sup>32</sup> Law Council of Australia, *Written Submission to DIISR*, p. 2

According to DIISR:

*'If this occurs, not only would another business not be able to make an application to register Joe Smith's Plumbing, but it would also not be able to register Joe Smith's Plumbing Brisbane or Joe Smith's Plumbing Fremantle.'*<sup>33</sup>

Master Grocers Australia pointed out that there are, for example, three towns called Rosebery in Australia, but the draft bill would not permit three future businesses to be called the "Rosebery Grocery Store". The Master Grocers argued that the distinguishing feature mechanism in the BNR and geographic distance would be an adequate safeguard against confusion.<sup>34</sup>

The solution, according to Mr Anthony Burke, the Chair of the Small and Medium Enterprise Business Law Committee of the Law Council of Australia, is to allow the use of a geographic identifier in the business name for grandfathered names and those that seek registration after the transition period. Mr Burke explained to the Senate Committee:

*'That is what we suggest is an appropriate way of addressing the issue. It should be possible to have Jim's Plumbing Bundoora, Jim's Plumbing Bundaberg and Jim's Plumbing Bunbury. There is no risk of confusion on the part of consumers and people in business if those locality identifiers or other identifiers are permitted to distinguish what are otherwise identical names. With respect, the vast majority of business proprietors who concern themselves with business names are fairly parochial in their operations. I do not claim to have done any research on this, but I suspect it is only a small proportion of business name proprietors who do in fact seek to operate across multiple states and territories.'*<sup>35</sup>

It was also made clear in evidence to this Committee that the use of a geographic identifier in a proposed new business name application after the transition would not be accepted.

Mr Chris Batt responded to a question about whether only a geographic suffix could be used to differentiate a new business name by saying:

*'No. ... it is too similar and therefore it wouldn't be permissible under the laws. It would be considered identical or a similar name, as it would be if the same name existed in Tasmania under the current rules even though the rules are slightly*

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<sup>33</sup> DIISR, 'Proposed National Business Name Registration System Frequently Asked Questions', Version 3, 6 April 2011, p. 7.

<sup>34</sup> Master Grocers Australia, *Written Submission to DIISR*, p. 2.

<sup>35</sup> A. G. Burke, *Transcript of Evidence to Senate Economics Legislation Committee*, 2 August 2011, p. 16.

*different. .... It often relies on what the first name or couple of names are. I don't think there is any easy answer to this.*<sup>36</sup>

However, it now appears that DIISR has either recognised the need for clarification of this issue or has had a change of heart about the use of geographic identifiers.

On 8 August 2011 DIISR responded to a Question on Notice from the Senate Committee in the following terms:

*'A new business name will not be available if it clashes with the registered business name or the combination of the business name plus the distinguishing word/expression. **However, new applicants will have the option of using a business name that currently exists, by selecting their own distinguishing word/expression and including it in their business name.***

[Emphasis added]

*Eg – Joe Smith operates Joe Smith's Plumbing in Fremantle WA. Another Joe Smith operates Joe Smith's Plumbing in Brisbane. Both names will be grandfathered onto the national register. ASIC may insert (Fremantle) and (Brisbane) on the register as appropriate, to distinguish between the business names. If this occurs, another business would not be able to make a new application to register Joe Smith's Plumbing, or Joe Smith's Plumbing Fremantle or Joe Smith's Plumbing Brisbane. **However, a third Joe Smith could choose to register Joe Smith's Plumbing Sydney if that name is currently not registered.***<sup>37</sup> [Emphasis added]

This statement by the Department certainly appears more reasonable and practical, both for ASIC, which will manage the BNR, and for small and medium businesses around the nation. It would help provide additional certainty to the business community if this revised policy could be enshrined in the Commonwealth bills or the regulations which will no doubt follow them.

Another concern raised with this Committee and with the Senate Committee was the Department's position in relation to financial institutions being able to use the BNR to assist them in meeting their obligations under Commonwealth counter-terrorism and money-laundering legislation.

The Australian Bankers Association described the problem in a written submission to the Senate Committee.

*'Our understanding of the BNR is that it will only permit matching of a business proprietor's name. With name matching only, BNR will not provide reliable data, as multiple proprietors could have the same or similar names. The current State*

<sup>36</sup> C. Batt, op. cit., p. 26.

<sup>37</sup> DIISR, *Answers to Questions on Notice*, 8 August 2011, p. 2.

*registers allow verification of name, address and date of birth to the standard required by the AML/CTF Act and Rules.*

*The implementation of BNR with name-matching only will make it more difficult for banks and other reporting entities to meet their customer identification obligations as the proposed approach will not meet the requirements of reliable and independent electronic data verification, which ultimately may also weaken Australia's AML/CTF regime.'*

This Committee raised the issue with Mr Chris Batt when he gave verbal evidence on 4 August 2011.

He told the Committee:

*'The view about privacy and the information that should be freely available to the public is different at the Commonwealth level than it is at the State level. I think that is really the only simple answer. .... My understanding is that some people who did get access to information before will not get access to information because of the Commonwealth's view about privacy. I suppose the question is, notwithstanding what they may or may not have received before, is this in the public interest and is this a proper function of the business name register. Clearly the view is that the Commonwealth would see that as much narrower than the States have traditionally seen it.'*<sup>38</sup>

The view put by Mr Batt was in accordance with the position put by DIISR in verbal evidence to the Senate Committee. Ms Ann Bray, the Acting Head of Division, Industry and Small Business Policy Division of DIISR, told the Senate Committee:

*'I can only say that the law enforcement agencies and the government bodies, those looking after consumer protection in the states and territories and the Commonwealth, will have access to all the data on the bill, including date of birth and residential address for law enforcement purposes. The data will not be passed over to private bodies because of privacy reasons. That is not why it is being collected. .... We need to comply with Commonwealth privacy principles because it is legislation sitting under our laws. We have had advice. The Anti-Money Laundering and Counter-Terrorism Financing Act requires people to know their customer and to find a reliable source of information for a name, address and date of birth. But it does not say you must use the Business Names Register.'*<sup>39</sup>

The Department's position appears to be in conflict with provisions of the

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<sup>38</sup> C. Batt, op. cit., p. 28.

<sup>39</sup> A. Bray, *Transcript of Evidence to Senate Committee*, 2 August 2011, p. 4.



Intergovernmental Agreement which state:

***'SERVICES TO BE PROVIDED NATIONALLY***

*5.1. The Commission will use its best endeavours to provide the following services as part of the national system: ....*

*(f) an online service for the searching of the business names register by the public, States and Territories, and information brokers; and*

*(g) an extract service for brokers on commercial terms agreed with individual brokers.*

*....*

***LEVELS OF SERVICE***

*5.4. (1) The Commission will use its best endeavours to, at least, maintain existing service levels provided by States and Territories agencies in relation to business names registration, and strive to enhance progressively existing levels of service in each referring State and Territory.<sup>40</sup>*

The Department also rejected a proposal from Veda Advantage, a financial information company, for a data matching facility to avoid the necessity for ASIC to provide date of birth and residential address information to financial institutions.

Mr Matthew Strassberg, of Veda Advantage, told the Senate Committee:

*'We would point out that the legislation is structured such that neither the regulations nor the legislation dictates the manner of search of the register; they refer to disclosure. In coming before the committee today, we are not actually seeking an amendment to the legislation. Indeed, as I see it, there is nothing preventing a search of the register based on match/no match - on submitting a name, date of birth and a residential address and, if that matches, you then get a return for that information. So there is not actually a need for the committee to make a finding on that; it seems to be more a sense of the operation as seen by the department, which, of course, ASIC will then have some obligation to follow.'<sup>41</sup>*

The following exchange between Mr Strassberg and Senator David Bushby, a Member of the Senate Committee, provides further clarification about this process:

<sup>40</sup> *Intergovernmental Agreement on Business Names Agreement*, 2 July 2009.

<sup>41</sup> M. Strassberg, *Transcript of Evidence to Senate Committee*, 2 August 2011, p. 26.

**Senator BUSHBY:** On the 'match/no match' thing that you are talking about, firstly you are saying that nothing that you have seen in the exposure regulations would prohibit that?

**Mr Strassberg:** That is correct.

**Senator BUSHBY:** And what you are talking about there is where you say, 'Here are the details of a particular individual; can you indicate whether you have a match or not?' And that might include the business name.

**Mr Strassberg:** Correct.

**Senator BUSHBY:** And they will come back and say, 'No, there is no match.' So if you have Matthew Strassberg recorded as being born on a certain date, living at a certain address and running a certain business, you give that to the Business Names Register and they come back and say, 'Yes, that's right,' or 'No, that's not right.'

**Mr Strassberg:** Correct.

**Senator BUSHBY:** And that is all you would get back. They would not be providing you with any information.

**Mr Strassberg:** That is quite right. There is no disclosure.

**Senator BUSHBY:** The only disclosure that is occurring is from you to them.

**Mr Strassberg:** Correct.<sup>142</sup>

In its report released on 15 August 2011, the Senate Committee included a detailed discussion on this aspect of the Commonwealth legislation and the Department's approach. On the basis of this discussion, the Senate Committee made the following recommendation:

*'3.66 Therefore, in light of the foregoing discussion, the committee suggests that the government give further consideration to its decision to deny information brokers the same level of access to the business names register that they currently have.'*<sup>143</sup>

This Committee fully endorses that recommendation and urges the Tasmanian Government to raise this matter with the Commonwealth so that

<sup>142</sup> D. Bushby & M. Strassberg, *Transcript of Evidence to Senate Committee*, 2 August 2011, p. 29.

<sup>143</sup> Senate Economics Legislation Committee, *Report on Exposure Draft of the Business Names Registration Bill 2011 and Related Bills*, 15 August 2011, p. 42.

financial institutions can comply with counter-terrorism and money-laundering legislation in the most efficient and cost-effective way possible.

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## Conclusions

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**In respect of the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)*, the Committee concludes that:**

1. The claim that the Tasmanian Bill is a text-based referral of powers is not entirely correct.
2. The poorly-defined referral of a State power has potential to cause future problems, such as the lack of a definition in the Bill for 'unlawful conduct'.
3. Referral of State powers to the Commonwealth is a significant and important function of State Parliaments that should not be treated as a mere formality by Commonwealth, State and Territory Governments.

**In respect of the draft Commonwealth legislation (the 'tabled text') to establish a national business names register, the Committee concludes that:**

1. At present, there is no requirement for amendments to the tabled text of nationally consistent legislation to be tabled in all State Parliaments.
2. Except under the transitional arrangements, the process of registering a business name does not specifically allow for a geographical identifier to differentiate businesses operating in different locations; for example, Joe's Plumbing Brisbane and Joe's Plumbing Hobart.
3. Access to information held on business name registers in some States is an important and cost-effective option for financial institutions to meet their obligations under Commonwealth counter-terrorism and money-laundering legislation. Under the new national business names register this access will no longer be available.

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## Recommendations

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**In respect of the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)*, the Committee recommends that:**

1. A definition of 'unlawful conduct' be included in the *Business Names (Commonwealth Powers) Bill 2011 (No. 43)*.

**In respect of the draft Commonwealth legislation (the 'tabled text') to establish a national business names register, the Committee concludes that:**

1. Substantive amendments to the BNR Legislation be tabled in all Australian Parliaments before becoming law.
2. A geographic identifier be allowed for businesses in different locations registering similar names that would otherwise not be acceptable.
3. Financial institutions be granted access to BNR information to comply with Commonwealth counter-terrorism and money-laundering legislation.

**In respect of nationally consistent legislation and the referral of State powers to the Commonwealth, the Committee recommends that:**

1. Intergovernmental Agreements signed through the Council of Australian Governments (COAG) be tabled in the relevant State and Territory Parliaments before they are binding on those jurisdictions.



**Tania Rattray MLC  
(Chair)**

**25 August 2011**

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**Appendix 1****List of Witnesses**

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**List of Witnesses**

The following witnesses gave evidence at public hearings on 4 August 2011:

Mr Robert Mallett, Executive Officer, Tasmanian Small Business Council.

Mr Michael Stokes, Senior Lecturer in Law, University of Tasmania.

Mr Chris Batt, Director of Consumer Affairs and Fair Trading, Tasmania

Mr Mark Bowles, Chief Economist, Tasmanian Chamber of Commerce and Industry.

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## Appendix 2 Documents Taken Into Evidence

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The following documents were taken into evidence:

- A. Farina, *'Bones without Flesh – the issues with skeletal legislation'*: a presentation by the Hon. Adele Farina MLC, Chairman of the Uniform Legislation and Statutes Review Committee, Western Australian Legislative Council.
- A. Lynch, *After a Referral: The Amendment and Termination of Commonwealth Laws relying on s 51(xxxvii)*, Sydney Law Review (Vol. 32, No. 3), September 2010, pp. 363-387.
- Australian Bankers Association Inc., *Letter to the Senate Standing Committee on Economics*, 25 July 2011.
- Department of Innovation, Industry, Science and Research, *'Proposed national business name registration system: Frequently Asked Questions'*.
- *Intergovernmental Agreement for Business Names Agreement*, 2 July 2009.
- M. Strassberg, Senior Adviser External Relations, Veda Applied Intelligence, *Supplementary Submission to the Senate Economics Committee*, 8 August 2011.
- Senate Economics Legislation Committee, *Proof Committee Hansard*, 2 August 2011.
- Senate Economics Legislation Committee, *Report of Inquiry into the exposure draft of the Business Names Registration Bill 2011 and related bills*, 15 August 2011.