

Business Names (Commonwealth Powers) Bill 2011

Explanatory Notes

Short Title

The short title of the Bill is the Business Names (Commonwealth Powers) Bill 2011.

Objectives of the Bill

The objectives of the Bill are to:

1. refer legislative power to the Commonwealth Parliament to enable it to legislate for the registration and regulation of business names;
2. repeal existing Queensland business names legislation (being the *Business Names Act 1962* and *Business Names Regulation 1998*);
3. facilitate migration of business names registration data to the Australian Government, namely, the Australian Securities and Investments Commission; and
4. provide transitional and consequential amendment provisions.

Reasons for the Bill

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.

The registration and regulation of business names seeks to prevent the registration of names that are misleading, inappropriate and offensive, and to provide a business with a unique identity. It does not allow the granting of new business names which are the same or very similar to existing ones.

This process allows customers to know the identity of the person or legal entity behind a business name, thereby providing a level of transparency and confidence in transactions.

All States and Territories currently have their own business names registration regimes. The Queensland regime is administered under the *Business Names Act 1962*. Although the State and Territory regimes were initially based on the same legislative template, there are now substantial differences as a result of jurisdictions amending their legislation over the past 40 years. In addition to these legislative differences, a business seeking to trade in multiple jurisdictions would need to register their business name in each jurisdiction separately. This poses considerable red tape obstacles for such businesses.

To address this, in 2008, the Council of Australian Governments (COAG) agreed to transfer responsibility for the registration and regulation of business names from the States and Territories to the Australian Government. This forms part of the COAG *National Partnership Agreement to Deliver a Seamless National Economy*. Under the proposed new scheme, businesses will be able to register their business names nationally and, if they choose, online, from any jurisdiction. It is proposed that the Australian Securities and Investments Commission (ASIC) will administer the new national business names register. The agreement was formalised in an intergovernmental agreement signed in 2009.

Under the Australian Constitution, the Commonwealth Parliament is not expressly empowered to legislate for the registration of business names. Arguably however, there may be power under sections 51(xx) (i.e. the ‘corporations power’) and 51(i) (the ‘trade and commerce power’) of the Australian Constitution. The COAG nevertheless decided in 2008 upon a ‘collegiate’ approach and to put the matter beyond any doubt by agreeing State Governments would facilitate a referral of power to the Commonwealth Parliament. This approach will also fill any gaps in Commonwealth legislative power where reliance is placed on power under the Constitution.

In order for the Commonwealth Parliament to enact the proposed Commonwealth Business Names Registration Bill 2011 (Commonwealth Business Names Bill) and Business Names Registration (Transitional and Consequential Provisions) Bill 2011 (Commonwealth Transitional Bill) at least one State must first refer legislative power to the Commonwealth Parliament. All other States must then either refer legislative power to the

Commonwealth Parliament or adopt the Commonwealth business names legislation in order to establish the national scheme.

Achievement of the Objectives

The national scheme will be initially achieved by a ‘text-based’ referral of power to the Commonwealth Parliament to make the proposed Commonwealth Business Names Bill and Transitional Bill. This involves one State introducing a Bill which refers legislative power to the Commonwealth Parliament.

The advantage of an initial text-based referral over a broader subject-based referral is that State Parliaments have the opportunity to consider the proposed Commonwealth legislation. The Bill also incorporates a subject matter reference for amending the Commonwealth legislation. This referral of legislative power is constrained through provisions in the Bill (e.g. Clause 5) which restricts future amendments to subject areas specified in the Bill. These provisions are also replicated in the proposed Commonwealth Business Names Bill.

Tasmania will be the lead jurisdiction for the referral of power and as such on 5 July 2011, the Tasmanian Business Names (Commonwealth Powers) Bill 2011 was introduced into the Tasmanian Parliament. The proposed Commonwealth Business Names Bill and Transitional Bill were also tabled. These proposed Commonwealth Bills provide the text which is subject to the referral of legislative power.

Each other State will then introduce similar referral legislation or introduce legislation which adopts the Commonwealth law as a law of that State. This Bill will, among other things, refer legislative power to the Commonwealth Parliament to enact the ‘tabled text’, being the proposed Commonwealth Bills tabled in the House of Assembly of Tasmania on 5 July 2011. At the time of introduction of the Bill into the Queensland Legislative Assembly, the Tasmanian Bill had not been enacted.

The Bill also achieves the policy objectives by repealing the Queensland *Business Names Act 1962* and *Business Names Regulation 1998*, and facilitating the migration of business names data by authorising the chief executive to give such data to the Australian Government. The Bill also contains transitional provisions to deal with matters such as registration applications received but not decided prior to commencement of the national scheme. Finally, the Bill makes consequential amendments to a number of Queensland Acts, largely by replacing references to the repealed

Queensland Business Names Act with references to the proposed Commonwealth Business Names Registration Act and, where applicable, the proposed Commonwealth Business Names Registration (Transitional and Consequential Provisions) Act.

Alternatives to the Bill

Legislation is the only way to give effect to the proposed national scheme. As indicated earlier, the Bill proposes an initial text-based referral of power to the Commonwealth Parliament. An alternative to this is a broad subject-based referral whereby State Parliaments refer power to the Commonwealth Parliament to legislate in respect to a broad subject matter (for instance business names). An initial text-based referral is the preferred option as it provides the greatest certainty regarding the extent of the Commonwealth Parliament's legislative power and presents the least risk to the sovereignty of State Parliaments.

Estimated Cost for Government Implementation

The transfer of business names registration to the Australian Government will result in the Queensland Government forgoing net revenue of approximately \$19.91 million per year. The revenue presently generated from the Queensland business names register is approximately \$21.8 million per year while the cost of administering and staffing the system is approximately \$1.89 million per year.

Under the *National Partnership Agreement to Deliver a Seamless National Economy*, the Queensland Government is eligible for a total of \$112.7 million in reward payments from the Australian Government over five years. This amount relates to the completion of all reform areas under the National Partnership Agreement, with no specific payment allocated for business names reform.

Consistency with Fundamental Legislative Principles

Does the Bill have sufficient regard to the rights and liberties of individuals? (*Legislative Standards Act 1992*, s 4(2)(a))

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 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 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 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.

Does the Bill confer immunity from proceeding or prosecution without adequate justification? (*Legislative Standards Act 1992*, s 4(3)(h))

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.

Does the Bill have sufficient regard to the institution of Parliament? (*Legislative Standards Act 1992*, s 4(2)(b))

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 Bill 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 Bill 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. 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.

As such practice is a breach of fundamental legislative principles it is not usual in Queensland legislation.

Are the proposed Commonwealth Bills consistent with fundamental legislative principles?

The proposed Commonwealth Business Names Bill and Transitional Bill 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 Bill 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 Bill gives the Minister and 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 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 Bill 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 Business Names Bill. There are also some provisions in clause 32, for example, which lack clear criteria for decision making. These protections are normally found in Queensland legislation.

Privacy rights

Part 8 of the proposed Commonwealth Business Names Bill 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 Bill 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 Bill and Transitional Bill 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 Bill 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 Transitional Bill 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.

Consultation

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).

Between March and April 2011, the Australian Government released an exposure draft of the Commonwealth Bills for public consultation. As part of the consultation, representatives from the Australian Department of Innovation, Science and Research met with key industry associations and relevant government officials in six capital cities. The Queensland Government also supplements the consultation undertaken by the Australian Government through the Department of Justice and Attorney-General website, call centre and newsletters.

Consistency with legislation of other jurisdictions

As the Bill forms part of a national scheme, it is consistent with proposed legislation of other jurisdictions. More specifically, the Bill has been drafted based on the model referral of power provisions developed by the Parliamentary Counsels' Committee.

Notes on Provisions

Part 1 Preliminary

Clause 1 provides that the Bill, when enacted, will be cited as the *Business Names (Commonwealth Powers) Act 2011*.

Clause 2 provides that Parts 4 and 5, and the definitions of 'change-over day' and 'existing Act' in schedule 2 of the Bill, when enacted, commence on a day to be fixed by proclamation.

Clause 3 provides that the dictionary in schedule 2 defines particular words used in the Bill. An important term used in the Bill with respect to the referral of power is ‘tabled text’. The dictionary in schedule 2 defines ‘tabled text’ to mean the following proposed Bills for Commonwealth Acts—

- (a) Business Names Registration Bill 2011;
- (b) Business Names Registration (Transitional and Consequential Provisions) Bill 2011;

as tabled in the House of Assembly of Tasmania on 5 July 2011 by or on behalf of the Minister introducing the Bill for the *Business Names (Commonwealth Powers) Act 2011* of that State in that House.

Clause 6 of the Bill will then refer matters to the Commonwealth Parliament to enact laws in the terms, or substantially in the terms, of the tabled text.

Part 2 Referral of matters to the Commonwealth Parliament

Clause 4 defines the term ‘initial business names matters’ for the purposes of part 2 of the Bill, in particular for clause 6(1). ‘Initial business names matters’ are matters to which the provisions of the tabled text relate, to the extent that those matters are included in the legislative powers of the Parliament of the State.

Clause 5 sets out matters which are, and are not, a ‘continuing business names matter’ for the purposes of part 2 of the Bill, in particular for clause 6(2). Subclause (1) provides that each of the following matters is a ‘continuing business names matter’ to the extent that those matters are included in the legislative powers of the Parliament of the State—

- (a) the registration of business names;
- (b) the regulation of the use of business names to assist entities who engage with an entity carrying on a business under a business name to identify the entity;

- (c) the regulation of the use of business names to assist entities who engage with an entity carrying on a business under a business name to contact the entity;
- (d) the regulation of the use of business names to reduce the risks that arise from an entity carrying on a business under a name that is not the entity's own;
- (e) the prohibition or restriction of the use of business names that are undesirable, offensive or confusing;
- (f) the prohibition or restriction of the use of business names 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.

However, subclause (2) provides that none of the following matters is a 'continuing business names matter'—

- (a) the imposition of a restriction on a government body affecting the ability of the body to carry on business under a name;
- (b) the imposition of a restriction on an entity affecting the ability of the entity to carry on business under a name registered to the entity on a notified State register;
- (c) the imposition of a restriction on an entity affecting the ability of the entity to carry on business under a name that is specified as the name of the entity in a State law;
- (d) the imposition of an obligation on a government body to include a name in a communication or to display a name;
- (e) the imposition of an obligation on an entity to include in a communication, or to display, a name that is registered to the entity on a notified State register;
- (f) the imposition of an obligation on an entity to include in a communication, or to display, a name that is specified as the name of the entity in a State law;
- (g) the omission of an exemption provision without the insertion of an equivalent provision, or the imposition of a limitation on the operation of an exemption provision;

- (h) any matter relating to the imposition or payment of taxes under a State law.

Clause 6 provides for the ‘initial reference’ and ‘amendment reference’ of power to the Commonwealth Parliament. The ‘initial reference’ is provided in subclause (1), which states that the initial business names matters are referred to the Parliament of the Commonwealth, but only to the extent of the making of laws with respect to those matters by enacting Acts in the terms, or substantially in the terms, of the tabled text.

The ‘amendment reference’ provided in subclause (2) allows the Commonwealth Parliament to make amendments to the Commonwealth laws subsequently enacted. Subclause (2) states that 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.

Subclause (3) provides that the operation of each of subclauses (1) and (2) is not affected by the other subclause.

Subclause (4) clarifies that the matters referred under subclauses (1) and (2) have effect only to the extent that the matter is not within the legislative power of the Commonwealth Parliament under the Australian Constitution (otherwise than by a reference for the purposes of section 51(xxxvii) of the Commonwealth Constitution).

Subclause (5) sets out the period to which a reference under subclause (1) or (2) has effect. A reference has effect for a period beginning when the subclause under which the reference is made comes into operation, and ending at the day fixed under subclause 8(1)(a), (b) or (c) as the day on which the reference is to terminate.

Clause 7 clarifies that it is the intention of the Parliament of the State that—

- (a) the national business names legislation may be expressly amended, or have its operation otherwise affected, at any time by provisions of Commonwealth Acts enacted within the legislative powers of the Commonwealth, apart from references of any matters under section 51(xxxvii) of the Commonwealth Constitution; and
- (b) the national business names legislation may have its operation affected, otherwise than by express amendment, at any time by provisions of national business names instruments.

A ‘national business names instrument’ is defined in the dictionary in schedule 2 to mean any instrument (whether or not of a legislative character) that is made or issued under the national business names legislation. This would include, for example, a regulation.

Clause 8 enables the State to terminate references to the Commonwealth and sets out the process for doing so. Subclause (1) provides that the Governor in Council may, at any time by proclamation, fix a day on which—

- (a) the initial reference and the amendment reference are to terminate; or
- (b) the amendment reference is to terminate; or
- (c) the initial reference is to terminate (if the amendment reference has previously been terminated).

Subclause (2) provides that a day fixed under subclause (1) must be no earlier than 6 months after the proclamation is notified in the gazette.

Subclause (3) provides that the Governor in Council may, by proclamation, revoke a proclamation notified under subclause (1).

Subclause (4) provides that a revoking proclamation has effect only if notified in the gazette before the day fixed under subclause (1).

Subclause (5) provides that if a revoking proclamation has effect, the revoked proclamation is taken, for the purposes of section 6, never to have been notified but the revocation does not prevent the notification of a further proclamation under subclause (1).

Subclause (6) provides that a proclamation under subclause (1) or (3) is subordinate legislation.

Clause 9 deals with the effect of a termination of the amendment reference before the termination of the initial reference. Specifically, subclause (2) clarifies that it is the intention of Parliament that if the amendment reference terminates before the initial reference terminates, the termination of the amendment reference does not affect the operation of laws already in place. Accordingly, subclause (3) provides that the amendment reference continues to have effect for the purposes of subclause (2) unless the initial reference is also terminated. However under subclause (4), subclauses (2) and (3) do not apply to an amendment of the national business names legislation that is excluded from the operation of clause 9 by the proclamation that terminates the amendment reference.

Clause 10 deals with evidentiary matters relating to the tabled text. Subclause (1) provides that a certificate of the Clerk of the House of Assembly of Tasmania certifying that a document is an accurate copy of the tabled text, or is an accurate copy of a particular part or of particular provisions of the tabled text, is admissible in evidence in any proceedings and is evidence—

- (a) of the matter certified; and
- (b) that the text of the proposed Commonwealth Bills was tabled in the House of Assembly of Tasmania as referred to in schedule 2, definition of ‘tabled text’.

Subclause (2) provides that subclause (1) does not affect any other way in which the tabling or content of the tabled text, or the accuracy of a copy of the tabled text or of a part or provisions of the tabled text, may be established.

Part 3 Migration of business names data to the Commonwealth

Clause 11 provides a definition of ‘Commonwealth register’ for the purposes of part 3. ‘Commonwealth register’ means the Business Names Register established and maintained under the proposed Commonwealth Business Names Act.

The ‘Commonwealth Business Names Act’ is subsequently defined in the dictionary in schedule 2 to mean the Commonwealth Act in the terms, or substantially in the terms, of the proposed Bill for a Commonwealth Act mentioned in paragraph (a) of the definition of ‘tabled text’ (i.e. the proposed Business Names Registration Bill 2011).

Clause 12 facilitates the migration of data to the Commonwealth and ASIC to establish and maintain the Business Names Register. Subclause (1) authorises the chief executive to do the following for the State—

- (a) give the Commonwealth, ASIC, or any officer of the Commonwealth or ASIC, information recorded in, or concerning the use of, the Queensland register that the chief executive considers appropriate in order to assist the Commonwealth and ASIC to establish or maintain the Commonwealth register; and

- (b) give notices to ASIC for the purposes of the Commonwealth Transitional Act, schedule 1.

Subclause (2) provides that the chief executive may give the information in whatever form the chief executive considers appropriate, including electronic data or in an approved form under the proposed Commonwealth Business Names Act or Commonwealth Transitional Act.

The ‘Commonwealth Transitional Act’ is defined in the dictionary in schedule 2 to mean the Commonwealth Act in the terms, or substantially in the terms, of the proposed Bill for a Commonwealth Act mentioned in paragraph (b) of the definition of ‘tabled text’ (i.e. the proposed Business Names Registration (Transitional and Consequential Provisions) Bill 2011). The proposed Commonwealth Transitional Act deals with transitional and consequential matters in connection with the proposed Commonwealth Business Names Act.

Clause 13 deals with the giving of notices and information under the proposed Commonwealth Transitional Act. Subclause (1) provides that the chief executive may give the following to ASIC—

- (a) a notice under the Commonwealth Transitional Act, schedule 1, item 4 that a business name is to be held;
- (b) information requested by ASIC under the Commonwealth Transitional Act, schedule 1, item 9 about whether a business name should continue to be held.

Schedule 1, item 4 of the Commonwealth Transitional Act provides that part 2 of the Commonwealth Transitional Act applies where a State or Territory notifies ASIC that a business name is to be held and the notification is given for the purposes of resolving outstanding matters under the law of the State or Territory. Part 2 of the Commonwealth Transitional Act deals with business names held on the change-over day to resolve outstanding matters, for instance where business names to be transitioned to the Business Names Register are identical or nearly identical.

Schedule 1, item 9 of the Commonwealth Transitional Act enables ASIC to request information from States and Territories that have given a notice under item 4 in relation to a business name to inform ASIC whether the business name should continue to be held for the purposes of resolving outstanding matters.

Clause 13(2) provides that if the chief executive is satisfied a matter to which a provision of part 3 of the Bill applies and has been resolved, the chief executive may give notice to ASIC under the Commonwealth Transitional Act, schedule 1, item 6 or 8 stating that—

- (a) ASIC is to cease to hold the business name; or
- (b) the business name is to be registered on the Commonwealth register.

Accordingly, where ASIC holds a business name in relation to an unresolved matter, and the matter has been resolved, ASIC may either cease to hold the business name or register it on the Business Names Register in accordance with the proposed Commonwealth Transitional Act.

Clause 14 provides protection from liability for an official. Subclause (1) provides that an official does not incur civil liability for an act done, or omission made, honestly and without negligence in relation to the giving of information under part 3. Any liability instead attaches to the State, pursuant to subclause (2).

Subclause (3) defines ‘official’ to mean—

- (a) the chief executive; or
- (b) a public service employee to whom the chief executive has delegated functions under clause 15.

Clause 15 enables the chief executive to delegate functions. Subclause (1) provides that the chief executive may delegate the chief executive’s functions under this part to an appropriately qualified public service employee. Subclause (2) then provides definitions of ‘appropriately qualified’ and ‘functions’.

Part 4 Repeal and transitional provisions

Clause 16 provides definitions for ‘change-over day’ and ‘existing Act’ for part 4. ‘Change-over day’ means the day part 4 commences. ‘Existing Act’ means the Queensland *Business Names Act 1962* as in force immediately before its repeal under part 4.

Clause 17 repeals the *Business Names Act 1962* No. 12 and the *Business Names Regulation 1998* SL No. 35.

Clause 18 clarifies that unless the context otherwise requires, a word used in part 4 and defined under the existing Act has the meaning given under the existing Act.

Clause 19 deals with the continuation of provisions of the existing Act. Subclause (1) provides that the clause applies if, despite the repeal of the existing Act, a provision of the existing Act (the ‘primary provision’) is continued in effect for a purpose under part 4.

Subclause (2) provides that any other provision of the existing Act—

- (a) mentioned in the primary provision; or
- (b) the continued application of which is otherwise necessary for the continued application of the primary provision;

is also continued in effect to the extent it is necessary for the continued application of the primary provision.

Clause 20 deals with applications for the registration or renewal of the registration of business names. Subclause (1) provides that subclause (2) applies if an application for registration, or renewal of registration, of a business name is made, but not finally decided, under the existing Act before the change-over day.

Subclause (2) provides that on or after the change-over day, the registrar may continue to deal with the application under the existing Act as if it had not been repealed.

Clause 21 deals with the offence of carrying on business in Queensland under particular business names being held. Subclause (1) provides that the clause applies if, before the change-over day—

- (a) an application for registration of a business name is made under the existing Act; and
- (b) the chief executive gives ASIC a notice under the proposed Commonwealth Transitional Act, schedule 1, item 4 that the business name is to be held.

Subclause (2) provides that section 5 of the existing Act continues to apply in relation to the business name. Section 5 of the existing Act creates an offence for carrying on business without a registered business name and a maximum penalty of 40 penalty units (\$4000) applies.

Subclause (3) provides that subclause (2) applies for the period—

- (a) starting on the change-over day; and
- (b) ending when the business name is registered, or ASIC ceases to hold the business name, under the proposed Commonwealth Transitional Act.

Clause 21 continues the offence provision currently contained in section 5 of the *Business Names Act 1964* only for the purpose of prohibiting those names which are not registered. Clause 21 will prohibit the use of those proposed business names the subject of registration applications under the *Business Names Act 1964* prior to change-over day but not yet decided by the registrar. This offence will not be continued after a decision by the registrar to grant registration of the proposed business name, this decision has been notified to the ASIC and the name has been registered.

Clause 22 deals with show cause notices about the cancellation of registration of business names that are undesirable and so on. Subclause (1) provides that the clause applies if—

- (a) a notice is given to a person by the registrar under section 10 of the existing Act before the change-over day; and
- (b) the period stated in the notice had not expired before the change-over day.

Subclause (2) provides that despite the repeal of section 10 of the existing Act, the registrar may continue to deal with the notice under section 10 of the existing Act.

Section 10 of the existing Act gives the registrar the power to cancel the registration of a business name that contravenes section 9(1) (i.e. an undesirable name) that is registered by inadvertence or otherwise. In order to do so, the registrar must first issue a show cause notice to the person or persons to whom the name is registered.

Clause 23 deals with incomplete statements that have not been dealt with by the registrar before the change-over day. Subclause (1) provides that the clause applies if—

- (a) a statement is purportedly lodged by a person under section 12 of the existing Act before the change-over day; and
- (b) the registrar has not taken any action in relation to the statement before that day; and

- (c) on or after that day, the registrar reasonably believes the statement—
 - (i) contains an alteration or erasure, or a matter contrary to law; or
 - (ii) is incomplete; or
 - (iii) does not comply with the existing Act as it was in force when the statement was required to be lodged.

Subclause (2) provides that if the business name is not being held by ASIC under the Commonwealth Transitional Act, the registrar—

- (a) can not take action under section 16 or 16A of the existing Act in relation to the statement; and
- (b) must give the person a written notice stating that—
 - (i) the registrar reasonably believes the statement was not lodged as required under the existing Act; and
 - (ii) the grounds for the registrar’s reasonable belief; and
 - (iii) the person may be required under the Commonwealth Business Names Act to give the information contained in the statement to ASIC; and
- (c) must refund any fee that accompanied the statement.

Subclause (3) provides that if the business name is being held by ASIC under the Commonwealth Transitional Act, sections 16 and 16A of the existing Act continue to apply in relation to the statement. Under sections 16 and 16A of the existing Act, the registrar has the power to ask a person to take certain steps to rectify statements that are incomplete and to ask a person to verify information by way of a statutory declaration.

Subclause (4) provides that the clause does not prevent the person from committing an offence against section 12(5) or 17(1) of the existing Act in relation to the statement.

Clause 24 deals with a pending notice requiring information to be given. Subclause (1) provides that the clause applies if—

- (a) a notice is given to a person by the registrar under section 13 of the existing Act before the change-over day; and
- (b) the period stated in the notice, or further period allowed by the registrar under section 13(2) of the existing Act, had not expired before the change-over day.

Subclause (2) provides that despite its repeal, section 13 of the existing Act continues to apply in relation to the notice.

Section 13 of the existing Act places a duty on a person to furnish information required by the registrar to determine whether a person is carrying on business either alone or in association with other persons under a business name that is required to be registered, or has failed to lodge with the registrar a statement required to be lodged under the existing Act.

Clause 25 deals with a notice of proposed cancellation of a business name. Subclause (1) provides that the clause applies if a notice is given to a person by the registrar under section 18(1) or (2) of the existing Act within 1 month before the change-over day. Subclause (2) provides that despite the repeal of section 19 of the existing Act, the registrar may continue to deal with the notice under that section. Section 18 of the existing Act deals with the issuing of a notice of proposed cancellation of registration and section 19 gives the registrar the power to cancel a registration.

Clause 26 continues the application of section 19 of the existing Act in relation to an application to the District Court for restoration of the registration. Subclause (1) provides that subclause (2) applies if, immediately before the change-over day, a person has a right to apply to the District Court under section 19(3) of the existing Act for an order directing the registrar to restore the registration of a business name.

Subclause (2) provides that section 19 of the existing Act continues to apply in relation to the exercise of the right to apply to the court for the order.

Subclause (3) provides that if an application to the District Court was made under section 19(3) of the existing Act, but not finally decided, before the change-over day, the application may be decided by the District Court as if the existing Act had not been repealed.

Subclause (4) provides that if the District Court makes an order under section 19(4) of the existing Act as continued in effect under the clause, the registrar must give notice to ASIC under the Commonwealth Transitional Act, schedule 1, item 6 requiring that the business name be registered.

Clause 27 deals with offences against the existing Act before the change-over day. Subclause (1) provides that the clause applies if a person is alleged to have committed an offence against the existing Act before the change-over day. Subclause (2) provides that despite the Criminal Code, section 11, a proceeding for the offence may be started or continued, and

the court may hear and decide the proceeding, as if part 4 (other than clause 27) had not commenced.

Clause 28 provides that section 24 of the existing Act continues to apply on and after the change-over day in relation to a certificate of registration issued under the existing Act before the change-over day. Section 24 of the existing Act deals with the admissibility of certain documents as prima facie evidence of the information contained in the document.

Clause 29 provides for the continuation of the registrar's functions. Subclause (1) provides that the existing registrar is, on and from the change-over day, taken to continue to be employed as the registrar for the purpose of performing the registrar's continuing functions.

Subclause (2) provides that for the purpose of subclause (1), section 4(1) of the existing Act continues to apply on and after the change-over day. Section 4(1) of the existing Act provides that a registrar of business names is to be employed under the *Public Service Act 2008*.

Subclause (3) provides definitions for 'continuing functions' and 'existing registrar'. 'Continuing functions', of the registrar, means the functions of the registrar under part 4 or a provision of the existing Act continued in effect under part 4. The 'existing registrar' means the person employed, immediately before the change-over day, as the registrar of business names under section 4 of the existing Act.

Clause 30 continues delegations and the registrar's protection from liability under the existing Act. Subclause (1) provides that the clause applies for the purpose of the exercise of an administrator's powers under the existing Act as continued in effect under part 4.

Subclause (2) provides that on and from the change-over day—

- (a) section 4C of the existing Act continues to apply; and
- (b) a delegation in effect under that section immediately before the change-over day continues in effect.

Subclause (3) provides that section 24B of the existing Act continues to apply in relation to acts done, or omissions made, by the registrar.

Part 5 **Consequential amendments of legislation**

Clause 31 provides that schedule 1 amends the legislation it mentions.

Clause 32 provides that the amendment of a regulation by schedule 1 does not affect the power of the Governor in Council to further amend the regulation or to repeal it.

Schedule 1 Legislation amended

Associations Incorporation Regulation 1999

Clause 1 omits section 3(1)(h)(iii) and inserts a new subparagraph (iii) in order to replace the reference to the Queensland Business Names Act with references to the proposed national business names legislation.

Cooperatives Regulation 1997

Clause 1 omits the reference to the Queensland Business Names Act in schedule 5, item 1(a).

Clause 2 inserts a new paragraph (c) into schedule 5, item 1 which refers to the proposed national business names legislation.

Dental Technicians Registration Act 2001

Clause 1 amends section 133(1)(b) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register and business names legislation.

Clause 2 inserts a note after section 133(1)(b) directing the reader to section 18 of the proposed Commonwealth Business Names Act which creates an offence for carrying on a business under an unregistered business name.

Clause 3 inserts new subsections (3) and (4) into section 133. The new subsection (3) provides that for (the amended) subsection (1)(b) a name is held under business names legislation if it is held under certain provisions of the proposed national business names legislation. The new subsection

(4) provides a definition of ‘Business Names Register’ which refers to the register established and maintained under the proposed Commonwealth Business Names Act.

Land Protection (Pest and Stock Route Management) Regulation 2003

Clause 1 omits section 15(a) and inserts a new paragraph (a) in order to remove the reference to the Queensland Business Names Act.

Medical Radiation Technologists Registration Act 2001

Clause 1 amends section 144(1)(b) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register and business names legislation.

Clause 2 inserts a note after section 144(1)(b) directing the reader to section 18 of the proposed Commonwealth Business Names Act which creates an offence for carrying on a business under an unregistered business name.

Clause 3 inserts new subsections (3) and (4) into section 144. The new subsection (3) provides that for (the amended) subsection (1)(b), a name is held under business names legislation if it is held under certain provisions of the proposed national business names legislation. The new subsection (4) provides a definition of ‘Business Names Register’ which refers to the register established and maintained under the proposed Commonwealth Business Names Act.

Occupational Therapists Registration Act 2001

Clause 1 amends section 129(1)(b) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register and business names legislation.

Clause 2 inserts a note after section 129(1)(b) directing the reader to section 18 of the proposed Commonwealth Business Names Act which creates an offence for carrying on a business under an unregistered business name.

Clause 3 inserts new subsections (3) and (4) into section 129. The new subsection (3) provides that for (the amended) subsection (1)(b), a name is held under the business names legislation if it is held under certain

provisions of the proposed national business names legislation. The new subsection (4) provides a definition of ‘Business Names Register’ which refers to the register established and maintained under the proposed Commonwealth Business Names Act.

Partnership Act 1891

Clause 1 omits section 77(4) and inserts a new subsection (4) in order to replace the reference to the Queensland Business Names Act with a reference to the proposed Commonwealth Business Names Act.

Clause 2 omits section 81 as the registration of business names for incorporated limited partnerships will be dealt with under the proposed Commonwealth Business Names Act.

Printing and Newspapers Act 1981

Clause 1 inserts a definition of ‘Business Names Register’ into section 5 to mean the register established and maintained under the Commonwealth Business Names Act.

Clause 2 amends section 6(1)(d)(i) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register and business names legislation. Clause 3 further amends section 6 as explained below.

Clause 3 inserts a new subsection (5) into section 6 which provides that for (the amended) subsection (1)(d)(i), a name is held under the business names legislation if it is held under certain provisions of the proposed national business names legislation.

Clause 4 amends section 7(1)(a) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register and business names legislation. Clause 5 further amends section 7 as explained below.

Clause 5 inserts a new subsection (4) into section 7 which provides that for (the amended) subsection (1)(a), a name is held under the business names legislation if it is held under certain provisions of the proposed national business names legislation.

Queensland Civil and Administrative Tribunal Act 2009

Clause 1 amends schedule 2, section 4(2) by replacing the reference to the Queensland Business Names Act with references to the Business Names Register established and maintained under the proposed national business names legislation.

Security Providers Regulation 2008

Clause 1 amends section 9 by inserting ‘or held’ after ‘registered’ to take into account that business names may be held by ASIC under the proposed national business names legislation.

Clause 2 amends section 13(2)(b) by inserting ‘or held’ after ‘registered’ to take into account that business names may be held by ASIC under the proposed national business names legislation.

Clause 3 omits the definition of ‘registered business name’ in the dictionary in schedule 2 and inserts a new definition of ‘registered or held business name’.

Speech Pathologists Registration Act 2001

Clause 1 amends section 129(1)(b) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register and the national business names legislation.

Clause 2 inserts a note after section 129(1)(b) directing the reader to section 18 of the proposed Commonwealth Business Names Act which creates an offence for carrying on a business under an unregistered business name.

Clause 3 inserts new subsections (3) and (4) into section 129. The new subsection (3) provides that for (the amended) subsection (1)(b), a name is held under business names legislation if it is held under certain provisions of the proposed national business names legislation. The new subsection (4) defines ‘Business Names Register’ to mean the register established and maintained under the proposed Commonwealth Business Names Act.

State Penalties Enforcement Regulation 2000

Clause 1 amends the entry for the Queensland Business Names Act in schedule 1 by omitting the reference to section 5(1) with a reference to the

repealed section 5(1). The entry is further amended by clauses 2 and 3 as explained below.

Clause 2 omits the references to sections 11(6), 12(5), 13(2) and 20.

Clause 3 inserts a note after the new entry for the repealed section 5(1) directing the reader to section 21 of the proposed Commonwealth Business Names Act.

Supreme Court of Queensland Act 1991

Clause 1 amends section 90 by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register.

Clause 2 inserts a new subsection (2) into section 90 which provides that for (the newly created) subsection (1), a name is held under business names legislation only if it is held under the proposed national business names legislation.

Clause 3 amends section 91(1)(a) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register.

Clause 4 inserts a new subsection (3) into section 91 which provides that for (the amended) subsection (1), a name is held under business names legislation only if it is held under the proposed national business names legislation.

Clause 5 inserts a definition of ‘Business Names Register’ into the dictionary in schedule 2. ‘Business Names Register’ means the register established and maintained under the proposed Commonwealth Business Names Act.

Surveyors Act 2003

Clause 1 amends section 79(2) by replacing the reference to the Queensland Business Names Act with references to the proposed Business Names Register and national business names legislation.

Clause 2 inserts a note after section 79(2) directing the reader to section 18 of the proposed Commonwealth Business Names Act which creates an offence for carrying on a business under an unregistered business name.

Transport (Rail Safety) Regulation 2010

Clause 1 omits the definition of ‘registered business name’ in the dictionary in schedule 4 and inserts a new definition of ‘registered business name’ which means a business name registered on the register established and maintained under the proposed Commonwealth Business Names Act.

Trust Accounts Act 1973

Clause 1 amends section 15(2)(e) by replacing the reference to the Queensland Business Names Act with a reference to the Business Names Register. Clause 2 further amends section 15 as explained below.

Clause 2 inserts a note after section 15(2)(e) directing the reader to section 18 of the proposed Commonwealth Business Names Act which creates an offence for carrying on a business under an unregistered business name.

Wine Industry Act 1994

Clause 1 amends section 47(1) by replacing the reference to the Queensland Business Names Act with a reference to the proposed Commonwealth Business Names Act.

Clause 2 inserts a note after section 47(2) which provides that subsection (2) is intended to operate concurrently with the proposed Commonwealth Business Names Act.

Clause 3 omits section 47(3).

Clause 4 renumbers section 47(4) as section 47(3).

Schedule 2 Dictionary

The dictionary in schedule 2 provides definitions for terms used in the Bill.