



Government of Western Australia
Department of Commerce

EXPLANATORY MEMORANDUM

Business Names (Commonwealth Powers) Bill 2011

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Overview of the Bill

The object of this Bill is to adopt the *Business Names Registration Act 2011* (Commonwealth) and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth), and refer to the Commonwealth Parliament the power to amend the adopted legislation. The proposed Act also contains transitional and consequential provisions necessary for the implementation of the national business names reforms in Western Australia.

Through the Commonwealth legislation, the national business names reforms will deliver:

- a seamless online registration system for national business names and Australian Business Numbers (ABNs);
- the online provision of personalised information to businesses in regard to regulatory requirements for licences, registrations and permits, through the Australian Business Licence Information Service (ABLIS); and
- improved ongoing online interactions between government and business.

The new national business names register, which will be operated by the Australian Securities and Investments Commission (ASIC), will replace individual business names registers in place across Australia, including the register established under the *Business Names Act 1962* (WA).

History of the national business names reforms

On 3 July 2008, the Council of Australian Governments (COAG) agreed to the development of a single national system for the registration and regulation of business names. An Intergovernmental Agreement, in which States agreed to refer to the Commonwealth Parliament the power to legislate in regard to business names registration, was signed by all Australian jurisdictions at the COAG meeting on 2 July 2009.

Section 51(xxxvii) of the Commonwealth Constitution enables State Parliaments to refer matters to the Commonwealth Parliament or adopt Commonwealth laws that have been enacted pursuant to such referrals.

The reference to support the enactment of the initial Commonwealth legislation was provided by Tasmania with the enactment of the *Business Names (Commonwealth Powers) Act 2011* on 4 October 2011.

The *Business Names Registration Act 2011* (Commonwealth) and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) were passed by the Commonwealth Parliament on 13 October 2011 and received Royal Assent on 3 November 2011.

In view of the enactment of the Commonwealth legislation, it has been determined that Western Australia should adopt the *Business Names Registration Act 2011* (Commonwealth) and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) pursuant to section 51(xxxvi) of the Commonwealth Constitution.

In addition to adopting the Commonwealth business names legislation and referring to the Commonwealth Parliament the power to amend the adopted legislation, the proposed Act will:

- amend the *Business Names Act 1962* (WA) for the purposes of allowing the Department of Commerce, which currently operates the Western Australian business names register, to prepare for the transition of this function to ASIC;
- amend the *Business Names Act 1962* (WA) to reflect the fact that ASIC will be responsible for the regulation of business names registration from the day on which the national business names register commences operation; and
- make consequential amendments to State Acts to replace references to the *Business Names Act 1962* (WA) with references to the *Business Names Registration Act 2011* (Commonwealth).

The Commonwealth regulatory scheme

The national business names reforms are part of the regulatory reform agenda of the Council of Australian Governments (COAG), which is aimed at driving productivity growth and forms part of the COAG National Partnership Agreement to Deliver a Seamless National Economy.

Currently, each State and Territory operates its own business names register. Business proprietors that trade in more than one jurisdiction are required to register their business name and pay a registration fee in each of those jurisdictions. The major advantage of the business names reforms is that a business proprietor will only be required to register a business name once to be able to trade under that name in every jurisdiction in Australia.

The commencement of the Commonwealth business names legislation will see the establishment of a common set of rules relating to the registration of business names. The national business names register will prevent the registration of identical or similar business names across Australia and also prevent the registration of otherwise undesirable names such as names that are offensive or misleading to consumers.

In the same manner as the State and Territory business name legislation, which will cease to have effect when the national business names register commences, the Commonwealth business names legislation contains provisions which apply in relation to the use of business names when a person is disqualified from carrying on business. The Commonwealth legislation also creates offences relating to the use and display of a business name, all of which are comparable to offences which exist under the current Western Australian business names legislation.

The Western Australian business names legislation, as established by the *Business Names Act 1962*, allows for the identification of entities that carry on a business within this State. This is an important function for consumers who need to contact a business to seek redress, particularly as the level of business being conducted online is increasing at a rapid rate.

The national business names register will expand this function, creating one central register which provides contact information for entities which carry on business across all Australian jurisdictions.

The implementation of the Commonwealth business names legislation will be of benefit to both consumers and businesses across Australia. ASIC has made a commitment to maintain existing service levels provided by the States and Territories. In some instances, such as the online availability of registration and search functions, the level of service is expected to increase significantly.

The implementation of the business names reforms in Western Australia will replace various registration systems established across the States and Territories with a single regulatory regime and a business names register that will operate throughout Australia.

Part 1 – Preliminary

Clause 1 Provides that the short title of the Bill (when enacted) is to be the *Business Names (Commonwealth Powers) Act 2011*.

Clause 2 Provides for the commencement of the Bill.

Paragraph (a) provides that Part 1 of the Bill will commence on the day the Act receives Royal Assent.

Paragraph (b) provides that Parts 2 and 3 of the Bill will commence on the day after the Act receives Royal Assent.

Paragraph (c) provides that Part 4 of the Bill will commence when Part 2 of the *Business Names Registration Act 2011* (Commonwealth) comes into operation.

Part 2 of the *Business Names Registration Act 2011* (Commonwealth) will commence on a day fixed by proclamation. While a proclamation has not yet been made by the Commonwealth Government, Part 2 of the Commonwealth Act is expected to commence on 28 May 2012. It is from this day that the national business names register will commence operation.

Part 2 – Adoption of national business names legislation and referral to the Commonwealth

Clause 3 Defines numerous terms used in the proposed Act. The following terms are of particular note –

exemption provision means section 19(5) or section 20(3) of the *Business Names Registration Act 2011* (Commonwealth).

Section 19(1) of the *Business Names Registration Act 2011* (Commonwealth) provides that an entity commits an offence if it carries on a business under a business name and does not include business names information in any written communications relating to that business.

Section 19(5) of the *Business Names Registration Act 2011* (Commonwealth) provides that section 19(1) does not require an entity to include a name or its ABN in a written communication in circumstances where:

- it would be contrary to the law of the Commonwealth or of a referring/adopting State or an affected Territory to include the name or the entity's ABN in the communication;
- the inclusion of the name in the communication would directly or indirectly give rise to a representation that would be contrary to the law of the Commonwealth or of a referring/adopting State or an affected Territory; or
- the use of the name by the entity would be contrary to the law of the Commonwealth or of a referring/adopting State or an affected Territory.

Section 20(1) of the *Business Names Registration Act 2011* (Commonwealth) provides that an entity commits an offence if it carries on business under a business name and does not display that name prominently at every place at which the entity carries on the business that is open to the public.

Section 20(3) of the *Business Names Registration Act 2011* (Commonwealth) provides that section 20(3) does not require an entity to display a name at a place in circumstances where:

- it would be contrary to the law of the Commonwealth or of a referring/adopting State or an affected Territory to display the name at that place;
- displaying the name at the place would directly or indirectly give rise to a representation that would be contrary to the law of the Commonwealth or of a referring/adopting State or an affected Territory; or

- the use of the name by the entity would be contrary to the law of the Commonwealth or of a referring/adopting State or an affected Territory.

express amendment of the national business names legislation means the direct amendment of the text of the national business names legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the national business names legislation.

This will ensure that the matters covered by the amendment reference cannot be the source of power for other Commonwealth legislation.

national business names instrument means any instrument (whether or not of a legislative character) that is made or issued under the national business names legislation.

This will include, but is not limited to, the *Business Names Registration Regulations 2011* (Commonwealth), the *Business Names Registration (Transitional and Consequential Provisions) Regulations 2011* (Commonwealth), the *Business Names Registration (Fees) Regulations 2011* (Commonwealth) and the *Business Names Registration (Availability of Names) Determination 2011* (Commonwealth).

national business names legislation means:

- the *Business Names Registration Act 2011* (Commonwealth); and
- the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

notified State register means a register that is maintained under a State law and is a *notified State/Territory register* within the meaning given by section 6 of the *Business Names Registration Act 2011* (Commonwealth).

Section 6(1) of the *Business Names Registration Act 2011* (Commonwealth) provides that a register is a *notified State/Territory register* if:

- it is maintained under the law of a referring/adopting State or an affected Territory;
- notice of the names of entities registered on the register is received by the Australian Securities and Investments Commission in electronic form from that State or Territory, and updated electronically from time to time to reflect changes in the register; and

- the register is specified, or of a kind specified, in Schedule 1 of the Commonwealth Act.

The following registers will be notified State registers:

- the register of co-operatives established under the *Co-operatives Act 2009* (WA);
- the register of foreign co-operatives established under the *Co-operatives Act 2009* (WA); and
- the register of associations incorporated by the issue of a certificate of incorporation under the *Associations Incorporation Act 1987* (WA).

Clause 4

Defines the scope of continuing business names matters. This clause defines the scope of the amendment reference to the Commonwealth Parliament and specifically reserves a number of matters to the State.

Subclause (1) provides that each of the following is a continuing business names matter to the extent that it is included in the legislative powers of State Parliament –

- (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 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; and
- (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.

Subclause (2) provides for the exclusion of certain matters from the scope of the amendment reference in subclause (1). The matters that are excluded relate to –

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

Subclause (2) prevents the Commonwealth Parliament from imposing obligations upon the following entities in respect of the display or communication of a business name –

- a government body;
- an entity carrying on business under a name registered to it on a notified State register; and
- an entity carrying on business under a name specified in a State law.

Subclause (2) also prevents the Commonwealth Parliament from restricting the State Government's right to –

- limit or remove an exemption provision in respect of any business names matters that remain within the control of the State Government; and

- legislate in relation to the imposition or payment of taxes.

Clause 5 Provides for the adoption of the national business names legislation in this State.

Subclause (1) provides for the adoption of the national business names legislation (as originally enacted), pursuant to section 51(xxxvii) of the Commonwealth Constitution.

Subclause (2) provides that the adoption will have effect from the date on which clause 5(1) commences and will terminate at the end of the day fixed for termination in accordance with clause 8(1)(a) or (c).

As a text based referral of power was not passed prior to the passage of the national business names legislation, the Western Australian Parliament is required to adopt the text of the *Business Names Registration Act 2011* (Commonwealth); and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

Clause 6 Provides for the referral of the power to the Commonwealth Parliament to make express amendments to the national business names legislation.

Subclause (1) refers to the Commonwealth Parliament the power to make express amendments to the national business names legislation in respect of continuing business names matters.

Subclause (2) provides that the reference contained in subclause (1) has effect only to the extent that the matter is not included within the legislative powers of the Commonwealth Parliament (other than by a reference for the purposes of section 51(xxxvii) of the Commonwealth Constitution).

Subclause (3) provides that, other than as provided in clause 9(4), the amendment reference will have effect from the date on which clause 6(1) commences and will terminate at the end of the day fixed for termination in accordance with clause 8(1)(a) or (b).

Clause 7 Provides clarity in regard to the referral to the Commonwealth Parliament of the power to amend the national business names legislation.

Paragraph (a) provides that it is the intention of the Western Australian Parliament that the Commonwealth Parliament has the power to expressly amend, or otherwise affect the operation of, the national business names legislation by reason of the legislative powers that the Commonwealth

Parliament has apart from a reference of any matters for the purposes of 51(xxxvii) of the Commonwealth Constitution.

Paragraph (b) provides that it is the intention of the Western Australian Parliament that 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.

Clause 8 Provides the Western Australian Parliament with the capacity to withdraw the adoption of the national business names legislation and the amendment reference at a future date if required.

Subclause (1) allows the Governor, by proclamation published in the Government Gazette, to fix a day as the day on which –

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

Subclause (2) provides that a date fixed by the Governor for termination must be at least 6 months after the day on which the proclamation is published. This length of time will ensure that the State Government, the Commonwealth Government and external stakeholders have sufficient time to prepare for the consequences of a termination.

Subclause (3) allows the Governor, by proclamation published in the Government Gazette, to revoke a proclamation made in accordance with subclause (1).

Subclause (4) provides that a revoking proclamation will have effect only if it is published in the Government Gazette before the day fixed for termination under subclause (1).

Subclause (5) provides that, in the event of a revoking proclamation being published, the revoked proclamation is taken never to have been published. However, the revocation of a proclamation published under subclause (1) does not prevent a further proclamation being made under that subclause.

Subclause (6) provides that, before a proclamation can be made under subclause (1), the proclamation must first be approved by a resolution passed by both Houses of Parliament.

In the unlikely event that the State Government determines Western Australia should withdraw from the national business names scheme, subclause (6) has been drafted to provide the Parliament with the opportunity to consider the effects of a

proposed withdrawal before a proclamation is made in accordance with subclause (1).

Clause 9 Establishes a process by which the adoption and the amendment reference can be terminated.

Subclause (1) provides for the definition of terms used in clause 9 of the proposed Act.

existing legislation means the national business names as -

- (a) amended by laws made under the amendment reference that have come into operation before the termination; or
- (b) amended or affected by provisions referred to in clause 7(a) or (b) that have come into operation before the termination.

and as in operation immediately before the termination.

termination means the termination of the amendment reference.

Subclause (2) provides that a reference in clause 9 to provisions referred to in clause 7(b) includes a reference to national business names instruments made to carry out or give effect to the national business names legislation as amended by laws made under the amendment reference.

Subclause (3) provides that it is the intention of the Western Australian Parliament that, if the amendment reference is terminated before the adoption terminates, the termination of the amendment reference does not affect –

- (a) any laws made under the amendment reference before the termination; or
- (b) the continued operation in this State of the existing legislation, even if
 - the existing legislation has been amended after the termination by laws referred to in paragraph (a) that come into operation after the termination; or
 - the existing legislation has been amended or affected after the termination by provisions referred to in clause 7(a) or (b).

Subclause (4) clarifies that the amendment reference continues to have effect for the purposes of subclause (3) unless the adoption is terminated.

Subclause (5) provides that subclauses (3) and (4) do not apply in relation 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 Provides authority for regulations to be made by the Governor for the purposes of prescribing all matters that are:

- required or permitted to be prescribed under the proposed Act; or
- necessary or convenient to be prescribed for giving effect to the purposes of the proposed Act.

Clause 11 Provides authority for regulations to be made to exclude matters from the scope of the Commonwealth business names legislation or to displace provisions in State law from the operation of the Commonwealth business names legislation.

Subclause (1) provides authority for regulations to be made which declare a matter to be an excluded matter for the purposes of section 13 of the *Business Names Registration Act 2011* (Commonwealth) in relation to:

- (a) the whole of the national business names legislation; or
- (b) a specified provision of the national business names legislation; or
- (c) the national business names legislation other than a specified provision; or
- (d) the national business names legislation otherwise than to a specified extent.

The national business names legislation is defined in clause 4 to be the *Business Names Registration Act 2011* (Commonwealth) and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

In accordance with section 13 of the *Business Names Registration Act 2011* (Commonwealth), the national business names legislation (or specified parts thereof) will not apply to matters that have been declared to be excluded matters under a law of a State or Territory.

Where a matter has been declared to be an excluded matter in accordance with clause 11(1) of the proposed Act, it will be State law and not the national business names legislation that applies.

It is possible for the Commonwealth Government to disallow declarations of excluded matters that have been made by a State or Territory.

Subclause (2) provides authority for regulations to be made which declare a State law to be a *business names legislation displacement provision* for the purposes of section 14 of the *Business Names Registration Act 2011* (Commonwealth). The declaration may be general or relate to a specific provision of the national business names legislation.

Section 14 of the *Business Names Registration Act 2011* (Commonwealth) operates to remove any inconsistencies between the national business names legislation and provisions that have been declared to be business name legislation displacement provisions by a law of a State or Territory.

Section 14(4) of the *Business Names Registration Act 2011* (Commonwealth) provides that a provision in the national business names legislation does not –

- prohibit the doing of an act; or
- impose a liability (whether civil or criminal) for doing an act;

if the business names legislation displacement provision specifically permits, authorises or requires the doing of that act.

Section 14(5) of the *Business Names Registration Act 2011* (Commonwealth) provides that a provision in the national business names legislation does not operate in or in relation to the State or Territory to the extent necessary to ensure that no inconsistency arises between –

- the Commonwealth provision; and
- the business names legislation displacement provision to the extent to which that provision would be inconsistent with the Commonwealth provision.

It is possible for the Commonwealth Government to disallow declarations that have been made by a State or Territory to declare a provision to be a business names legislation displacement provision.

In the event that an inconsistency between a State law and the national business names legislation is identified, clause 11 of the proposed Act will allow the Western Australian Government to make regulations which ensure the continued operation of the State law. Clause 11 is based on mechanisms which are created in sections 13 and 14 of the *Business Names Registration Act 2011* (Commonwealth).

While it is recognised that clause 11 is a Henry VIII clause, which will enable the proposed Act to be amended by subordinate legislation, its inclusion in the proposed Act provides the State Government with a mechanism to deal with any identified inconsistencies in a timely manner.

If an amendment Act were required to declare a matter to be an excluded matter, or to declare a provision to be a business names legislation displacement provision, there will be a significantly longer period between the identification of the inconsistency and the enactment of the declaration.

Clause 11 will ensure that, in the event that an inconsistency between a State law and the national business names legislation is identified, there will only be a minimal period in which State law is invalid.

Clause 12 Provides authority for regulations to be made for the purposes of dealing with transitional matters.

Subclause (1) provides for the definition of terms used in clause 12 of the proposed Act.

commencement day means the day on which clause 3 comes into operation.

This will be the day after the day on which the proposed Act receives Royal Assent.

Gazettal day, in relation to transitional regulations, mean the day on which the regulations are published in the *Gazette*.

specified means specified or described in transitional regulations.

transitional regulations means regulations made for the purposes of clause 12(2).

Subclause (2) provides that the regulations may deal with all matters of a savings or transitional nature arising as a result of the enactment of the proposed Act, the *Business Names Registration Act 2011* (Commonwealth), the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) or any Act that amends the Commonwealth Acts.

This regulation-making power will allow the State Government to deal with any matters of a transitional matter that arise before the national business names register commences operation, thereby ensuring a smooth transition to the Commonwealth regime.

Subclause (3) allows transitional regulations to provide that a state of affairs was taken to have existed, or not to have existed, from a day prior to the day on which the regulations are gazetted, provided that day is not earlier than the commencement day.

Where transitional regulations contain such a provision, subclause (4) provides that the provision does not –

- affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of the person that existed before the regulations were gazetted; or
- impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the regulations were gazetted.

The combined effect of subclauses (3) and (4) allows regulations to be made with retrospective effect, but ensures that such regulations will not adversely affect a person's rights or liabilities.

Subclause (5) limits the period in which transitional regulations can be made to 12 months after commencement day.

Part 3 – *Business Names Act 1962* amended

Clause 13 Provides that this Part amends the *Business Names Act 1962*.

Clause 14 Inserts section 3A into the *Business Names Act 1962*.

The proposed section 3A(1) of the *Business Names Act 1962* provides that the Act expires on a day fixed by proclamation.

The proposed section 3A(2) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection must provide the Minister for Commerce with a certificate stating that the operation of the Act is no longer necessary before the Minister can make a proclamation under subsection (1).

The *Business Names Act 1962*, as amended by the proposed Act, will be required to continue for at least seven years after the commencement of the national business names register. This will allow the Department of Commerce to respond to requests for copies of physical business names records that will be stored by the Department of Commerce in accordance with State records requirements.

After this time, the Commissioner for Consumer Protection will determine whether there is any residual need for the *Business Names Act 1962* and, if required, provide a certificate to the Minister for Commerce in accordance with the proposed section 3A(2).

Clause 15 Inserts the following definitions into section 4(1) of the *Business Names Act 1962*.

ASIC means the Australian Securities and Investments Commission of the Commonwealth.

ASIC is the Government agency that will assume responsibility for the national business names register.

change-over day has the meaning given in section 4(1) of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

Section 4(1) of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) provides that change-over day is the day on which Part 2 of the *Business Names Registration Act 2011* (Commonwealth) commences, which will be the day on which the national business names register commences operation.

Commonwealth Transitional Act means the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

national business names legislation means –

- the *Business Names Registration Act 2011* (Commonwealth); and
- the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

Clause 16 Amends section 4A of the *Business Names Act 1962* by replacing references to the Australian Securities and Investments Commission in subsections 4A(1), (2), (3) and (4) with references to ASIC.

These amendments reflect the fact that the proposed amendments will define the term ASIC in section 4(1) of the *Business Names Act 1962*.

Clause 17 Inserts sections 4B and 4C into the *Business Names Act 1962*.

The proposed section 4B(1) of the *Business Names Act 1962* defines the term *business names information* as information obtained by the Commissioner for Consumer Protection in connection with the administration or enforcement of that Act.

The proposed section 4B(2) of the *Business Names Act 1962* authorises the Commissioner for Consumer Protection to –

- (a) give notifications to ASIC under Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth); and
- (b) do any other thing that is required to be done by the Western Australian Government to facilitate the transition to the national business names scheme.

The proposed section 4B(3) of the *Business Names Act 1962* provides that, without limiting section 4B(2), the Commissioner for Consumer Protection may –

- (a) give ASIC notification in accordance with Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) that a business name is to be held for the purpose or resolving an outstanding matter; and
- (b) give ASIC notice in accordance with Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) that all outstanding matters in relation to held business names have been resolved.

The proposed section 4B(4) of the *Business Names Act 1962* provides that, without limiting sections 4B(2) or (3), the Commissioner for Consumer Protection may –

- (a) disclose business names information to ASIC; and
- (b) give ASIC copies of records containing business names information that are in the Commissioner's possession or under the Commissioner's control.

The proposed section 4B(5) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may give notifications under sections 4B(2) or (3), or disclose information or copies or records under section 4B(4), in whatever form the Commissioner considers appropriate. This may include the provision of information in electronic format or another format appropriate for the purposes of the national business names legislation.

The proposed section 4B(6) of the *Business Names Act 1962* specifies that the proposed section 4B prevails in the event that it is contrary to any enactment which relates to secrecy or privacy.

The proposed section 4B(7) of the *Business Names Act 1962* provides that, without limiting section 31C of the *Business Names Act 1962*, the doing of anything in good faith under this section –

- (a) does not result in any person incurring civil or criminal liability; and
- (b) is not to be regarded as a breach of any duty of confidentiality or secrecy imposed by law; and
- (c) is not to be regarded as a breach of professional ethics or standards or as unprofessional conduct.

Section 31C of the *Business Names Act 1962* provides protection from liability for persons who are carrying out functions under the act, so long as those actions are done in good faith.

The proposed section 4C of the *Business Names Act 1962* provides that outstanding matters for which the Commissioner for Consumer Protection can give notice to ASIC to 'hold' a business name under section 4B(3) include, but are not limited to –

- (a) an application to register a business name under section 7(1) of the *Business Names Act 1962* that was lodged but not finally dealt with before the commencement of the national register;
- (b) an application for the consent of the Minister for Commerce to register a business name under section

9(1) of the *Business Names Act 1962* that was lodged but not finally dealt with before the commencement of the national register;

- (c) a renewal application under section 11(1) of the *Business Names Act 1962* that was lodged but not finally dealt with before the commencement of the national register;
- (d) a statement notifying the Commissioner for Consumer Protection of changes of particulars under section 12 of the *Business Names Act 1962* that was lodged but not finally dealt with before the commencement of the national register;
- (e) a notice sent by the Commissioner for Consumer Protection under section 10(1) of the *Business Names Act 1962* which proposes the cancellation of a business name, where that notice specifies a period that expires on or after the commencement of the national register;
- (f) a notice sent by the Commissioner for Consumer Protection under section 18(1) or (2) of the *Business Names Act 1962* which proposes the cancellation of a business name, where a response to that notice can be provided on or after the commencement of the national register;
- (g) an application for the leave of the District Court under section 5A(3) of the *Business Names Act 1962* to carry on a business under a business name that was not finally dealt with before the commencement of the national register;
- (h) an application made to the State Administrative Tribunal under section 19(3) of the *Business Names Act 1962* for the review of a decision of the Commissioner for Consumer Protection to cancel a business name that was not finally dealt with before the commencement of the national register;
- (i) the right of a person to lodge an application for the consent of the Minister for Commerce to register a business name under section 9(1) of the *Business Names Act 1962* on or after the commencement of the national register;
- (j) the right of a person to lodge a renewal application under section 11(1) of the *Business Names Act 1962* on or after the commencement of the national register; and
- (k) the right of a person to lodge an application with the State Administrative Tribunal under section 19(3) of the *Business Names Act 1962* for the review of a decision of the Commissioner for Consumer Protection to cancel

a business name on or after the commencement of the national register.

The national business names register, which will be operated by ASIC, will replace business names registers in place in the States and Territories. If a business name is registered on a State or Territory register immediately before it is closed, in most cases it will be registered on the national register.

A business name that was registered on the State business names register will not appear on the national register from its commencement where there is a matter on hand (an 'outstanding matter', such as those listed in the proposed section 4C of the *Business Names Act 1962*) that has not been finally dealt by the time the State register ceases operation.

In these cases, the Commissioner will notify ASIC that the business name must be 'held' until the outstanding matter has been resolved. In accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth), ASIC is required to 'hold' business names until further advised by the Commissioner.

The 'holding' of a name is similar to an interim registration on the national register. It will not be possible for anyone else to register an identical or similar business name and the owner of the business can continue to trade under the business name without committing an offence under the Commonwealth business names legislation.

Once an outstanding matter has been resolved, the Commissioner will notify ASIC whether the business name should either be registered or cease to be 'held'.

The Commissioner will also have the authority to require ASIC to 'hold' a business name where an application to register a business name has been received but not finally dealt with before the State register is closed. In this situation, another person will not be able to register an identical or similar name on the national register.

Once the Commissioner has determined whether the business name should be registered, ASIC will be notified to either register or cease to hold the name.

Where the Commissioner has notified ASIC that a name should be 'held', Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) will require ASIC to hold that name indefinitely, until one of the following things happens:

- the Commissioner notifies ASIC that the name is to be registered, in which case ASIC will enter the name on the national register in accordance with clause 7, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth);
- the Commissioner notifies ASIC that the name should cease to be held, in which case the interim registration will be cancelled and other people will be able to register an identical or similar business name; or
- ASIC requests an update from the Commissioner on a name which is being held, and the Commissioner does not respond within 28 days (or a longer period as specified in the notice), in which case ASIC will cease to hold the name under clause 9, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

Clause 18 Inserts subsections (1A) and (1B) into section 5 of the *Business Names Act 1962*.

The proposed section 5(1A) of the *Business Names Act 1962* provides that section 5(1) of the *Business Names Act 1962* does not apply to an act or omission that occurs on or after the day on which the national business names register commences operation.

Section 5(1) of the *Business Names Act 1962* prohibits a person from carrying on a business in Western Australia under a business name unless that name consists of the name of that person (and the name of any other persons in association with whom that person is carrying on business) without any addition, or is registered on the business names register established by the *Business Names Act 1962*.

From the day on which the national register commences operation, it will no longer be possible to register a business name on the Western Australian business names register. It is therefore necessary to remove the prohibition contained in section 5(1) from that day.

The proposed section 5(1B) provides that, despite the proposed section 5(1A) and section 11 of the *Criminal Code*, which provides that a person cannot be punished for an action or omission that is not an offence at the time they are charged, a person may be punished on or after the day on which the national register commences operation in respect of an offence committed under section 5(1) before the national register commenced operation.

This proposed amendment reserves to the Commissioner for Consumer Protection the option of pursuing a penalty after the national register commences against a person who had not complied with the requirements of section 5(1) while the State business names register was still operating.

Clause 19 Subclause (1) inserts subsections (2A) and (2B) into section 5A of the *Business Names Act 1962*.

The proposed section 5A(2A) provides that section 5A(2) of the *Business Names Act 1962* does not apply on or after the day on which the national business names register commences operation.

Section 5A(2) of the *Business Names Act 1962* prohibits a person who has been convicted of an offence listed in section 5A(1) from carrying on a business in Western Australia under a business name unless that name consists of the name of that person (and the name of any other persons in association with whom that person is carrying on business) without any addition, or they have obtained the leave of the District Court to carry on business.

From the day on which the national register commences operation, the Western Australian Government will no longer be responsible for the regulation of business names. It is therefore necessary to remove the prohibition contained in section 5A(2) from that day.

Section 32 of the *Business Names Registration Act 2011* contains provisions similar to those in section 5A of the *Business Names Act 1962*. Under section 32, a person will be disqualified if they have been disqualified from managing corporations under the *Corporations Act 2001* (Commonwealth) or have been convicted of an offence under Commonwealth, State or Territory law that involves dishonesty and is punishable by imprisonment for at least three months.

Under the Commonwealth Act, it will be an offence to carry on a business under a business name while disqualified.

The proposed section 5A(2B) provides that, despite the proposed section 5A(2A) and section 11 of the *Criminal Code*, which provides that a person cannot be punished for an action or omission that is not an offence at the time they are charged, a person may be punished on or after the day on which the national register commences operation in respect of an offence committed under section 5A(2) before the national register commenced operation.

This proposed amendment reserves to the Commissioner for Consumer Protection the option of pursuing a penalty after the national register commences against a person who had not complied with the requirements of section 5A(2) while the State business names register was still operating.

Subclause (2) inserts subsections (4A) and (4B) into section 5A of the *Business Names Act 1962*.

The proposed section 5A(4A) provides that an application cannot be made under section 5A(3) of the *Business Names Act 1962* on or after the day on which the national business names register commences operation.

Section 5A(3) of the *Business Names Act 1962* provides that a person can apply for leave of the District Court to carry on business under a business name, provided they have given the Minister for Commerce at least 28 days notice of the proposed application.

As the Western Australian Government will not be responsible for regulating business names from the day on which the national business names register commences operation, there will be no need for a person to make an application to the District Court after that time.

The proposed section 5A(4B) provides that, if an application made under section 5A(3) of the *Business Names Act 1962* for leave of the District Court has not been finally dealt with before the day on which the national business names register commences operation, the Court retains the power to determine whether leave would have been granted had the application been dealt with before that time.

Clause 11, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) provides that the Commonwealth Minister responsible for the regulation of business names may not cancel a business name where leave has been granted by the District Court in accordance with section 5A of the *Business Names Act 1962*.

It is therefore necessary for the District Court to be able to finally determine any applications on hand at the time the national register commences operation, as it will affect a person's ability to carry on a business under a business name under the Commonwealth business names legislation.

Clause 20 Inserts subsection (1A) into section 6 of the *Business Names Act 1962*.

The proposed section 6(1A) provides that section 6 of the *Business Names Act 1962* does not apply on or after the day on which the national business names register commences operation.

Section 6 of the *Business Names Act 1962* requires the Commissioner for Consumer Protection to maintain a register of business names registered under the Act.

As the Commonwealth Government will be assuming responsibility for the regulation of business names, there is no role for the continuation of the register established under the *Business Names Act 1962*. The State register will be closed from the time the national register commences operation.

Clause 21 Subclause (1) inserts subsection (1A) into section 7 of the *Business Names Act 1962*.

The proposed section 7(1A) of the *Business Names Act 1962* provides that an application cannot be made under section 7(1) of the *Business Names Act 1962* on or after the day on which the national business names register commences operation.

Section 7(1) of the *Business Names Act 1962* sets out the application process for the registration of a business name. As the Commonwealth Government will be assuming responsibility for the regulation of business names from the day on which the national register commences, applications must not be able to be made under section 7(1) of the *Business Names Act 1962* from that time.

Subclause (2) amends section 7(3) of the *Business Names Act 1962*.

Section 7(3) of the *Business Names Act 1962* requires the Commissioner for Consumer Protection to register a business name where an application has been lodged under section 7(1). The proposed amendment will limit this requirement to applications that are finalised prior to the day on which the national business names register commences operation.

Subclause (3) inserts subsection (4A) into section 7 of the *Business Names Act 1962*.

The proposed section 7(4A) of the *Business Names Act 1962* provides that if an application to register a business name is received under section 7(1) is not finally dealt with before the day on which the national business names register commences operation, the Commissioner for Consumer Protection retains the power to determine whether the business name would have been registered had the application been dealt with before that time.

In this situation, the Commissioner will notify ASIC that the business name should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). An identical or similar business name will not be able to be registered by another person while the name is being 'held'.

Once the Commissioner has determined whether the business name should be registered, ASIC will be notified to either register or cease to hold the name.

Subclause (4) amends section 7(4) of the *Business Names Act 1962*.

Section 7(4) of the *Business Names Act 1962* requires the Commissioner for Consumer Protection to issue a certificate of registration when registering a new business name. The proposed amendment will limit this requirement to business names which have been registered before the national business names register commences operation.

Subclause (5) amends section 7(5) of the *Business Names Act 1962*.

Paragraph (a) amends section 7(5)(a) of the *Business Names Act 1962*.

Section 7(5)(a) of the *Business Names Act 1962* allows the Commissioner for Consumer Protection to issue an additional certificate of registration upon payment of a fee. The proposed amendment provides that the Commissioner may only issue additional certificates before the national business names register commences operation.

Paragraph (b) amends section 7(5)(b) of the *Business Names Act 1962*.

Section 7(5)(b) of the *Business Names Act 1962* requires the Commissioner for Consumer Protection to issue a new certificate of registration where the holder of the business name has notified the Commissioner of a change to the place or address of the business. The proposed amendments provide that the Commissioner must only issue this additional certificate if an application for a change of particulars is finally dealt with before the national business names register commences operation.

The proposed amendments to section 7 of the *Business Names Act 1962* reflect the fact that the Western Australian Government will no longer have responsibility for the regulation of business names from the day on which the national business names register commences operation, except for finally dealing with matters that are on hand at the time of transition.

Clause 22 Subclause (1) inserts subsection (1A) into section 9 of the *Business Names Act 1962*.

The proposed section 9(1A) of the *Business Names Act 1962* provides that an application for the consent of the Minister to register a business name cannot be made –

- (a) where the Commissioner for Consumer Protection has determined that the name should not be registered without the consent of the Minister before the national business names register commences operation, more than two months after the national register has commenced operation; or
- (b) where the Commissioner for Consumer Protection has determined that the name should not be registered without the consent of the Minister on or after the day on which the national business names register has commenced operation, more than 28 days after the Commissioner's decision.

Section 9(1) of the *Business Names Act 1962* provides that, except with the consent of the Minister for Commerce, a business name shall not be registered if the Commissioner for Consumer Protection believes it to be undesirable or of a nature that the Minister has directed the Commissioner not to accept.

Where the Commissioner has determined that a name should not be registered without the consent of the Minister, the Commissioner will notify ASIC that the business name should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). An identical or similar business name will not be able to be registered by another person while the name is being 'held'.

The proposed amendments reserve the right of an applicant to apply for the consent of the Minister in accordance with section 9 of the *Business Names Act 1962*, but limit the time in which this right can be exercised. This will ensure that any names held by ASIC under these circumstances will not be required to be held indefinitely.

Subclause (2) inserts subsections (2A) and (2B) into section 9 of the *Business Names Act 1962*.

The proposed section 9(2A) of the *Business Names Act 1962* provides that section 9(2B) applies if –

- (a) an application for the consent of the Minister for Commerce is made under section 9(1) but not finally dealt with before the national business names register commences operation; or

- (b) an application for the consent of the Minister for Commerce is made under section 9(1) is made on or after the day on which the national business names register commences operation.

The proposed section 9(2B) of the *Business Names Act 1962* provides that, on or after the day on which the national business names register commences operation, the Minister for Commerce retains the power to determine whether consent would have been granted had an application made under section 9(1) been finally dealt with before that time.

As the Commissioner for Consumer Protection will have notified ASIC to hold any business names which may be subject to an application seeking consent from the Minister under section 9(1) of the *Business Names Act 1962*, once the Minister has determined whether consent should be granted, ASIC will be notified to either register or cease to hold those name.

Clause 23 Subclause (1) amends section 10(1) of the *Business Names Act 1962*.

Section 10(1) of the *Business Names Act 1962* provides that, if a business name that should only have been registered with the consent of the Minister for Commerce under section 9(1) is registered through inadvertence or otherwise, the Commissioner for Consumer Protection may notify the holder of the business name that the name will be cancelled 28 days (or a longer period if specified) after the notice is issued.

The proposed amendments will provide that –

- the Commissioner may only send a notice under section 10(1) before the national register commences operation; and
- the Commissioner may cancel the registration if the period specified in the notice expires before the national register commences.

Subclause (2) inserts subsections (2A) and (2B) into section 10 of the *Business Names Act 1962*.

The proposed section 10(2A) of the *Business Names Act 1962* provides that section 10(2B) applies if, before the national business names register commences operation, the Commissioner sends a notice proposing the cancellation of a business name under section 10(1), and that notice specifies a period that expires on or after the day on which the national register commences.

The proposed section 10(2B) provides that, upon the expiration of the period specified in a notice proposing the cancellation of a business name under section 10(1), the Commissioner may decide whether the name would have been cancelled if the period specified in the notice had expired before the national register commenced operation.

Where the Commissioner has issued a notice of proposed cancellation of a business name under section 10(1) of the *Business Names Act 1962* that specifies a period which expires after the commencement of the national register, the Commissioner will notify ASIC that the business name should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). An identical or similar business name will not be able to be registered by another person while the name is being 'held'.

Once the Commissioner has determined whether the business name should be cancelled, ASIC will be notified to either register or cease to hold the name.

Subclause (3) amends section 10(2) of the *Business Names Act 1962*.

Section 10(2) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection shall not, without the consent of the Minister for Commerce, exercise the power under section 10(1) to cancel a business name that is deemed to be registered by virtue of section 3(4) of the Act.

Section 3(4) of the *Business Names Act 1962* provides that a business name that was registered under the Act that preceded the *Business Names Act 1962* is deemed to be registered under the current Act.

The proposed amendment will insert a reference to section 10(2B) into section 10(2) of the *Business Names Act 1962*, which will prohibit the Commissioner from exercising the power to cancel a business name that is deemed to be registered by virtue of section 3(4) of the Act where the Commissioner is dealing with such a situation after the national business names register commences.

Subclause (4) amends section 10(4) of the *Business Names Act 1962*.

Section 10(4) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may remit any fee payable for the application to register a business name, where the registration of that business name has been cancelled under section 10(1).

The proposed amendment inserts a reference to section 10(2B) into section 10(4) to provide the Commissioner with the option to remit the registration fee paid in respect of a business name that was cancelled by the Commissioner under section 10(2B) after the commencement of the national business names register.

Clause 24 Subclause (1) inserts subsections (1A) and (1B) into section 11 of the *Business Names Act 1962*.

The proposed section 11(1A) of the *Business Names Act 1962* provides that a renewal application cannot be lodged under section 11(1) in respect of a business name registration that expires on or after the day on which the national business names register commences operation.

The Commonwealth, State and Territory Governments have agreed that ASIC will be responsible for the renewal of any business names registrations that expire after the national register commences.

The proposed section 11(1B) of the *Business Names Act 1962* provides that, if a business name registration expires before the national business names register commences, a renewal application is able to be lodged for up to one month after the expiry, even if that national register commences during this time.

Section 11(1) of the *Business Names Act 1962* allows a person to lodge a renewal application at any time within the period of one month before or after the expiry of a business names registration. The proposed section 11(1B) will ensure that the holders of business names registrations which expire in the month before the national register commences will be afforded the same time limits in which to lodge a renewal application as were provided to holders of business names registrations which expired more than one month before the national register commenced.

Subclause (2) inserts subsections (2A) and (2B) into section 11 of the *Business Names Act 1962*.

The proposed section 11(2A) provides that section 11(2B) applies if –

- (a) a renewal application is lodged under section 11(1) but not finally dealt with by the Commissioner for Consumer Protection before the national business names register commences operation; or
- (b) a renewal application is lodged under section 11(1) on or after the day on which the national business names register commences operation.

The proposed section 11(2B) provides the Commissioner for Consumer Protection with the authority to decide whether a renewal application would have been granted, had the application been lodged before the national business names register commenced operation.

Where a business name registration expires in the month before the national register commences, and a renewal application has not been received, or has been received but not finally dealt with, before the transition, the Commissioner will notify ASIC that the business name should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth).

An identical or similar business name will not be able to be registered by another person while the name is being 'held' and the owner of the business can continue to trade under the business name without committing an offence under the Commonwealth business names legislation.

If, after the national register commences, a renewal application is lodged within one month after the expiry of the business name registration, the proposed section 11(2B) will allow the Commissioner to determine whether the business name registration should be renewed and then notify ASIC to either register or cease to hold the name.

If, after the national register commences, no renewal application has been received for a business name registration within one month after expiry, the Commissioner will notify ASIC to cease to hold the name.

Subclause (3) amends section 11(2) of the *Business Names Act 1962*.

Section 11(2) of the *Business Names Act 1962* provides that a renewal of a business name registration will last for three years from the date on which the previous registration expired. The proposed amendment will limit this to instances where a renewal application was finally dealt with before the national business names register commenced operation.

The Commonwealth, State and Territory Governments have agreed that the expiry dates for business names registrations registered on a State or Territory register at the time of transition will be maintained.

Subclause (4) inserts subsection (3A) into section 11 of the *Business Names Act 1962*.

The proposed section 11(3A) provides that, if a renewal application lodged under section 11(1) of the *Business Names Act 1962* is dealt with after the commencement of the national business names register in accordance with section 11(2B), the business names registration is taken to have remained in force from expiry to the day on which the national register commences.

This will ensure that the holder of a business name cannot be considered to have committed an offence for carrying on a business without a registered business name in the period between the expiration of the business name registration and the commencement of the national register.

Subclause (5) amends section 11(3) of the *Business Names Act 1962*.

Section 11(3) of the *Business Names Act 1962* requires the Commissioner for Consumer Protection to issue a renewal notice to a holder of a business name within one month before or at any time after the expiration of the business name registration. The proposed amendment will –

- require the Commissioner to issue renewal notices only in respect of business names registrations that expire before the commencement of the national business names register; and
- require the Commissioner to issue any required renewal notices before the national register commences.

The Commonwealth, State and Territory Governments have agreed that ASIC will be responsible for the renewal of any business names registrations that expire after the national register commences.

Clause 25 Subclause (1) inserts subsections (1A) and (1B) into section 12 of the *Business Names Act 1962*.

The proposed section 12(1A) of the *Business Names Act 1962* provides that, except as provided for in section 12(1B), a statement notifying the Commissioner for Consumer Protection of changes of particulars cannot be lodged on or after the day on which the national business names register commences operation.

The proposed section 12(1B) of the *Business Names Act 1962* provides that a person can lodge a statement notifying the Commissioner for Consumer Protection of changes of particulars on or after the day on which the national business names register commences operation, where they are required to do so in accordance with a notice which was issued by the Commissioner under section 18(2) of the *Business Names Act 1962* before the national register commenced.

Under section 18(2) of the *Business Names Act 1962*, where the Commissioner has reasonable cause to believe that the holder of a business name has not advised of a change of particulars, the Commissioner may issue a notice stating that the person has one month to comply with the requirements of section 12. At the end of the month, unless the requirements of section 12 have been met or the Commissioner is satisfied that there was no failure to comply with section 12, the Commissioner may cancel the business name registration.

Where the Commissioner has issued a notice under section 18(2) in the month before the national register commences, the proposed amendments provide that the Commissioner retains the power to determine whether a business name registration should be cancelled after the national register has commenced.

In situations where a notice has been issued under section 18(2), the Commissioner will notify ASIC that the business name should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). An identical or similar business name will not be able to be registered by another person while the name is being 'held'.

Once the Commissioner has determined whether the circumstances warrant the cancellation of the business name, ASIC will be notified to either register or cease to hold the name.

Subclause (2) inserts subsections (5) and (6) into section 12 of the *Business Names Act 1962*.

The proposed section 12(5) of the *Business Names Act 1962* provides that section 12(6) will apply if –

- (a) a statement notifying the Commissioner for Consumer Protection of changes of particulars is lodged under section 12(1), (2), (3) or (4) but is not finally dealt with before the national business names register commences operation; or
- (b) a statement notifying the Commissioner for Consumer Protection of changes of particulars is lodged under section 12(1), (2), (3) or (4) on or after the day on which the national business names register commences operation.

The proposed section 12(6) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may, on or after the day on which the national business names register commences operation, decide what particulars would have been incorporated into the Western Australian business names register had a statement notifying the Commissioner of changes of particulars lodged under section 12(1), (2), (3) or

(4) been finally dealt with before the national register commenced operation.

The proposed amendments provide that the Commissioner retains the power to deal with any statements of changes of particulars that were received but not finalised before the national register commenced operation.

In such circumstances, once the Commissioner has finally dealt with any outstanding statements, ASIC will be notified of any changes that will need to be incorporated into the national register.

Subclause (3) inserts subsection (9A) into section 12 of the *Business Names Act 1962*.

The proposed section 12(9A) of the *Business Names Act 1962* provides that if a statement notifying the Commissioner for Consumer Protection of changes of particulars could have been lodged in accordance with section 12(1), (2), (3) or (4) on or after the day on which the national business names register commenced operation, a person does not commit an offence under section 12(8) if the statement is not lodged.

Section 12(8) of the *Business Names Act 1962* creates an offence where the holder of a business name does not lodge a statement notifying the Commissioner for Consumer Protection of changes of particulars within one month of the change occurring, as is required under section 12(1), (2), (3) and (4).

The proposed amendments provide that, if the change of particulars occurs in the month before the national register commences, it will not be an offence for a person not to lodge a statement as required under section 12(1), (2), (3) or (4).

Clause 26 Inserts subsection (2A) into section 13 of the *Business Names Act 1962*.

The proposed section 13(2A) of the *Business Names Act 1962* provides that, on or after the day on which the national business names register commences operation, the Commissioner for Consumer Protection cannot issue a notice under section 13(1) except for the purposes of ascertaining whether a person did, or failed to do, anything before the national register commenced.

Section 13(1) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may require a person to furnish information to allow the Commissioner to ascertain whether a person –

- is carrying on business under a business name that is required to be registered under the *Business Names Act 1962*; or

- has failed to lodge a statement that is required under the *Business Names Act 1962*.

The proposed amendment provides that the Commissioner retains the power to investigate possible offences that occurred prior to the commencement of the national register.

Clause 27 Amends sections 18(1) and (2) of the *Business Names Act 1962*.

Sections 18(1) and (2) of the *Business Names Act 1962* allow the Commissioner for Consumer Protection to issue a notice to the holder of a business name proposing that the name be cancelled.

The proposed amendments provide that the Commissioner may only issue such notices before the national business names register commences operation.

Clause 28 Subclause (1) amends section 19(1) of the *Business Names Act 1962*.

Section 19(1) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may cancel the registration of a business name in certain circumstances.

The proposed amendment provides that the Commissioner may only exercise this power before the national business names register commences operation.

Subclause (2) inserts subsections (2A), (2B) and (2C) into section 19 of the *Business Names Act 1962*.

The proposed section 19(2A) of the *Business Names Act 1962* provides that section 19(2B) applies if, before the national business names register commences operation, the Commissioner for Consumer Protection sends a notice referred to in section 19(1)(b) or (c) that specifies a one month period which expires on or after the day on which the national register commences operation.

The proposed section 19(2B) provides that, upon the expiration of the one month period, the Commissioner for Consumer Protection may decide whether, had the one month period expired before the national business names register commenced operation, the business name would have been cancelled under section 19(1).

The proposed section 19(2C) provides that the Commissioner for Consumer Protection cannot exercise the power under section 19(2B) more than one month after the day on which the national business names register commences operation.

In accordance with sections 19(1)(b) and (c) of the *Business Names Act 1962*, the Commissioner for Consumer Protection may cancel a business name registration where a person has not satisfied the Commissioner that the name should not be cancelled within one month of receiving a notice under section 18(1) or (2).

Where the Commissioner has issued a notice with a period that expires after the commencement of the national register, the proposed amendments provide that the Commissioner retains the power to determine whether the business name should be cancelled.

In such situations, before the national register commences operation, the Commissioner will notify ASIC that the business name should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). An identical or similar business name will not be able to be registered by another person while the name is being 'held'.

Once the Commissioner has determined whether the circumstances warrant the cancellation of the business name, ASIC will be notified to either register or cease to hold the name.

Subclause (3) amends section 19(2) of the *Business Names Act 1962*.

Section 19(2) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may revoke the cancellation of a business name. The proposed amendment provides that the Commissioner can only revoke cancellations which occurred before the commencement of the national business names register.

Subclause (4) amends section 19(3) of the *Business Names Act 1962*.

Section 19(3) of the *Business Names Act 1962* provides that where a business name has been cancelled by the Commissioner for Consumer Protection under section 19(1), the person who held that name may apply to the State Administrative Tribunal for a review of the Commissioner's decision.

The proposed amendment inserts references to section 19(2B) of the *Business Names Act 1962* into section 19(3). The effect of the amendment will be that, if the Commissioner determines that a business name should be cancelled on or after that day on which the national register commences operation, the person who held that name will be afforded the same rights to seek a review of that decision through the State Administrative

Tribunal as a person who had their business name cancelled before the national register commenced.

Subclause (5) replaces section 19(4) of the *Business Names Act 1962*.

Section 19(4) of the *Business Names Act 1962* currently provides that the time in which an application can be made to the State Administrative Tribunal is unlimited.

The proposed amendment will replace section 19(4) and provide that an application to the State Administrative Tribunal cannot be made –

- (a) where the Commissioner for Consumer Protection decided to cancel a business name before the national business names register commenced operation, more than 2 months after the national register commenced; or
- (b) where the Commissioner for Consumer Protection decided to cancel a business name on or after that day on which the national business names register commenced operation, more than 28 days after the Commissioner's decision.

The Commissioner will have notified ASIC before the national register commences that any business names which have been cancelled should be 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth). An identical or similar business name will not be able to be registered by another person while the name is being 'held'.

The proposed amendment will limit the time in which a person can exercise their right to apply to the State Administrative Tribunal for a review of the Commissioner's decision. This will ensure that any names held by ASIC under these circumstances will not be required to be held indefinitely.

Subclause (6) amends section 19(5) of the *Business Names Act 1962*.

Section 19(5) of the *Business Names Act 1962* provides that if the State Administrative Tribunal sets aside the decision of the Commissioner for Consumer Protection to cancel a business name, the business name will be deemed to have continued to be registered as if the cancellation had not occurred. In this situation, the Commissioner will be required to update the Western Australian business names register accordingly.

The proposed amendment will provide that section 19(5) only applies to decisions made by the State Administrative Tribunal before the commencement of the national business names register. This reflects the fact that, from the day on which the

national register commences operation, the Western Australian business names register will be closed.

If the State Administrative Tribunal sets aside a decision of the Commissioner to cancel a business name after the national register commences operation, the Commissioner will notify ASIC that the name which was previously being 'held' in accordance with Part 2, Schedule 1 of the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Commonwealth) should be registered.

Clause 29 Amends sections 21(1) and (4) of the *Business Names Act 1962*.

Section 21(1) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may correct an entry on the Western Australian business names register or a certificate of registration of a business name.

Section 21(4) of the *Business Names Act 1962* provides that the Commissioner for Consumer Protection may accept and register a statement lodged to correct an error in a statement previously lodged. In this situation, both the statement lodged and the statement previously lodged will both form part of the Western Australian business names register.

The proposed amendments provide that the Commissioner may only carry out these functions before the national business names register commences operation. As the Western Australian register will be closed upon the commencement of the national register, it is necessary to cease the operation of these functions of the Commissioner.

Clause 30 Inserts subsection (1) into section 22 of the *Business Names Act 1962*.

The proposed section 22(1) provides that section 22 of the *Business Names Act 1962* will no longer apply seven years after the day on which the national business names register commences operation.

Section 22 of the *Business Names Act 1962* provides that, upon payment of a fee, a person may inspect any statement lodged with the Commissioner for Consumer Protection under the Act, and make copies of or take extracts from such statements.

The Commonwealth, State and Territory Governments have agreed that all electronic business names information from State and Territory registers will be transferred to ASIC before the national business names register commences operation. This includes both current and historical data.

However, due to the impracticality of transferring all physical records, these will remain in the custody of the Western Australian Government. As there may be a continuing need for

ASIC and members of the public to access these records (e.g. for legal proceedings), it is necessary for the Commissioner to have the authority to provide these records under section 22 after the commencement of the national register.

The proposed amendment will continue the operation of section 22 for seven years after the national register commences operation. After this time, the physical records will be disposed of in accordance with State records laws.

Clause 31 Inserts subsection (1A) into section 23 of the *Business Names Act 1962*.

The proposed section 23(1A) of the *Business Names Act 1962* provides that a request cannot be made under section 23(1) on or after the day on which the national business names register commences operation.

Section 23(1) of the *Business Names Act 1962* provides that, upon payment of a fee, the Commissioner for Consumer Protection must issue –

(a) a copy or extract from the Western Australian business names register; or

(b) a certificate stating that a business name was or was not registered on the Western Australian business names register during a specified period.

The Commonwealth, State and Territory Governments have agreed that all electronic business names information from State and Territory registers will be transferred to ASIC before the national business names register commences operation. This includes both current and historical data.

Therefore, the Commissioner will no longer require the ability to issue business name extracts as ASIC will assume this function from the day on which the national register commences operation.

Clause 32 Inserts subsections (2) and (3) into section 24 of the *Business Names Act 1962*.

The proposed section 24(2) of the *Business Names Act 1962* provides that a copy of an entry in the Commonwealth register, provided by ASIC in accordance with section 60 of the *Business Names Registration Act 2011* (Commonwealth), in relation to a business name that was registered under the *Business Names Act 1962* is admissible as evidence in proceedings relating to a matter arising before the Commonwealth register commenced operation.

The proposed section 24(3) defines *Commonwealth register* as the register established and maintained under section 22 of the *Business Names Registration Act 2011* (Commonwealth).

From the day on which the national business names register commences operation, the Commissioner for Consumer Protection will no longer issue business name extracts. Rather, this function will be carried out by ASIC.

Currently, section 24 of the *Business Names Act 1962* provides that an extract issued by the Commissioner is admissible as evidence in all courts. The proposed amendments will ensure business name extracts issued by ASIC after the national register commences are also admissible as evidence in proceedings relating to a matter arising before the national register commenced.

Clause 33 Deletes section 25 of the *Business Names Act 1962*.

Section 25 of the *Business Names Act 1962* currently provides that the Commissioner for Consumer Protection must retain all inactive business names records for 12 years and all other records for at least 21 years.

From the day on which the national business names register commences operation, the Western Australian Government will have no role in the regulation of business names.

The proposed amendment will delete section 25 of the *Business Names Act 1962*, which will mean that the storage and retention of business names records will be carried out in accordance with the *State Records Act 2000* which requires such records to be retained for seven years before being destroyed.

Clause 34 Amends section 28(3) of the *Business Names Act 1962*.

Section 28(3) of the *Business Names Act 1962* provides that, notwithstanding anything contained in any Act, proceedings for an offence against the *Business Names Act 1962* may be brought –

- within three years after the commission of the alleged offence; or
- with the consent of the Minister for Commerce, at any later time.

The proposed amendment will limit the authority of the Minister to provide consent to bring proceedings to a period of three years after the day on which the national business names register commences operation.

This amendment will provide a set period in which proceedings can be brought after the commission of an alleged offence, ensuring the authority of the Minister does not continue indefinitely after responsibility for the regulation of business names registration has been transferred to the Commonwealth Government.

Part 4 – Other Acts amended

Division 1

Clause 35 Provides that this Division amends the *Auction Sales Act 1973*.

Clause 36 Amends the definition of *firm* in section 4 of the *Auction Sales Act 1973*.

The definition of *firm* in section 4 of the *Auction Sales Act 1973* currently provides that a firm is an unincorporated body of persons (whether consisting of individuals or of corporations or partly of individuals and partly of corporations) registered under the *Business Names Act 1962*.

The proposed amendment will remove the reference to the *Business Names Act 1962* and replace it with a reference to the *Business Names Registration Act 2011* (Commonwealth).

The proposed amendment reflects that fact that it will not be possible for a firm to be registered under the *Business Names Act 1962* once responsibility for the regulation of business names is transferred to the Commonwealth Government and the national business names register, as established by the *Business Names Registration Act 2011* (Commonwealth), commences operation.

Division 2

Clause 37 Provides that this Division amends the *Employment Agents Act 1976*.

Clause 38 Amends the definition of *firm* in section 4 of the *Employment Agents Act 1976*.

The definition of *firm* in section 4 of the *Employment Agents Act 1976* currently provides that a firm is an unincorporated body of persons (whether consisting of individuals or of corporations or partly of individuals and partly of corporations) registered under the *Business Names Act 1962*, and includes the several persons constituting that body.

The proposed amendment will remove the reference to the *Business Names Act 1962* and replace it with a reference to the *Business Names Registration Act 2011* (Commonwealth).

The proposed amendment reflects that fact that it will not be possible for a firm to be registered under the *Business Names Act 1962* once responsibility for the regulation of business names is transferred to the Commonwealth Government and the national business names register, as established by the *Business Names Registration Act 2011* (Commonwealth), commences operation.

Division 3

Clause 39 Provides that this Division amends the *Legal Profession Act 2008*.

Clause 40 Amends section 157(4) of the *Legal Profession Act 2008*.

Section 157(4) of the *Legal Profession Act 2008* currently provides that section 157 does not authorise the use of name or designation that contravenes any requirements of the law of this jurisdiction concerning the use of business names or that is likely to lead to any confusion with the name of any established domestic law practice or foreign law practice in this jurisdiction.

The proposed amendment will remove the reference to 'the law of this jurisdiction' and replace it with a reference to 'the law application in this jurisdiction'.

The proposed amendment reflects the fact that the Commonwealth Government will be assuming responsibility for the regulation of business names from the State Government. From the day on which the national business names register commences operation, the law relating to business names will be a Commonwealth Act and not a State Act.

Division 4

Clause 41 Provides that this Division amends the *Settlement Agents Act 1981*.

Clause 42 Amends clause 2(h) of Schedule 2 of the *Settlement Agents Act 1981*.

Clause 2(h) of Schedule 2 of the *Settlement Agents Act 1981* currently provides that a business settlement agent may prepare and arrange the execution of an application for a transfer of a business name under the *Business Names Act 1962*.

The proposed amendment will remove the reference to an application for a transfer of a business name under the *Business Names Act 1962* and replace it with a reference to any applications necessary under the *Business Names Registration Act 2011* (Commonwealth) to effect the transfer of a business name under that Act.

The proposed amendment reflects the fact that the Commonwealth Government will be assuming responsibility for the regulation of business names from the State Government. From the day on which the national business names register commences operation, the law governing the registration of business names will be the *Business Names Registration Act 2011* (Commonwealth).

Division 5

Clause 43 Provides that this Division amends the *Travel Agents Act 1985*.

Clause 44 Amends section 14(1) of the *Travel Agents Act 1985*.

Section 14(1) of the *Travel Agents Act 1985* provides that, subject to the *Business Names Act 1962*, a licence may authorise its licensee to carry on business as a travel agent under a name or names in addition to or in substitution for the name of the licensee.

The proposed amendment will remove the reference to the *Business Names Act 1962* and replace it with a reference to the *Business Names Registration Act 2011* (Commonwealth).

The proposed amendment reflects the fact that the Commonwealth Government will be assuming responsibility for the regulation of business names from the State Government. From the day on which the national business names register commences operation, the law governing the registration of business names will be the *Business Names Registration Act 2011* (Commonwealth).