

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Innovation, Industry, Science and Research

Exposure draft of the Business Names Registration Bill 2011 and related bills

General Questions

QUESTION 1: Where will potential registrants be able to register a business name if they do not have an internet connection, or they do not wish to register their business online? Will the current agencies that register business names provide this service or will new agencies be set up to facilitate manual registrations?

ANSWER: ASIC will encourage online lodgment and will provide call centre and other support for customers as they transition to online services. Potential registrants who do not have an internet connection or do not wish to lodge online will be able to:

- Mail an application to ASIC; or
- Submit their application at an ASIC service centre, or use computer terminals in those centres. ASIC has a service centre in each State and Territory.

ASIC is exploring the provision of additional 'in person' services for a transitional period through the Australian Taxation Offices and Business Enterprise Centres Australia.

There are no plans for State and Territory government agencies that currently register business names to provide registration services.

QUESTION 2: Do these bills now give ASIC oversight for small businesses and franchises? If not, will this bill create confusion in the business community regarding ASIC's role?

ANSWER: The bills do not give ASIC general oversight for small businesses and franchises.

To avoid confusion, ASIC will communicate widely with stakeholders about its new responsibilities for business names registration, as part of a wider program communications strategy.

ASIC's online Business Name registration service will include links to the websites of agencies including Franchise Australia, the Australian Business Account (a DIISR initiative), IP Australia (trade mark check) and the Australian Domain Name Administrator (auDA).

QUESTION 3: Do you think it would be helpful if provisions are made whereby a business may have an identical name to another business, provided they are operating in different states?

ANSWER: DIISR believes that the grandfathering provisions in the legislation package strike an appropriate balance between establishing a new national system that minimises confusion for consumers, without imposing an unnecessary burden on existing business operators.

The new system will not allow for identical, or near identical business names to be registered. Identical business names, particularly where businesses are operating in more than one jurisdiction, have the potential to cause confusion for consumers, and reduce the ability of a consumer to identify which entity they are interacting with.

All business names will be 'grandfathered' to the national business names register on commencement of the national system. This will include some identical business names that have been registered (by different owners) in different jurisdictions.

For identical business names, ASIC may insert a distinguishing mark or expression on the register. The business name itself will not include the distinguishing word or expression; therefore businesses will not need to change their business name on their signage or stationery.

A new business name will not be available if it clashes with the registered business name or the combination of the business name plus the distinguishing word/expression.

However, new applicants will have the option of using a business name that currently exists, by selecting their own distinguishing word/expression and including it in their business name.

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

A policy to allow identical names in different locations (e.g. States) for new registrations assumes that businesses do not move interstate or trade interstate. The Corporations register does not allow identical names.

QUESTION 4 – TO BE PROVIDED

QUESTION 5: If a business is a subsidiary of a company, and the business trades under the company's ABN,¹ does this mean a business has to display the name that is registered under that ABN?

DIISR consulted with the Treasury in relation to this question, as they have policy carriage for matters related to ABNs. Treasury has advised:

¹ This normally happens for taxation reasons. Depending on the size of the company and the number of subsidiary businesses, it is often easier to have just one ABN under which each subsidiary business operates.

The phrase 'subsidiary of a company' normally refers to a separate entity eg a company whose shares are controlled by another company.

Where the 'business' is actually a subsidiary company and thus is a separate entity (see Attachment A for a definition of entity), the ABN Act specifically prohibits the subsidiary company from trading under the parent company's ABN (see section 23 ABN Act).

For example: RBA Pty Ltd and ABR Pty Ltd are both Corporations Act companies. RBA Pty Ltd acquires all the issued shares in ABR Pty Ltd and it becomes a subsidiary of RBA Pty Ltd. The ABN Act prohibits ABR Pty Ltd, from trading under the ABN of RBA Pty Ltd notwithstanding it is a subsidiary.

If the business is merely a branch, division etc within the company, that is not a separate entity, it would not be entitled to a separate ABN and would correctly trade under the company ABN. Note there are differences for government entities.

For example: Dog Pty Ltd conducts its business through a number of branches using the names "K9 Emporium" and "Cat's Cingdom" however neither of these are companies. Therefore K9 Emporium and Cat's Cingdom would both operate under the ABN of Dog Pty Ltd.

QUESTION 6: Under the new arrangements does each subsidiary business of a company need to have independent ABNs?

ANSWER: DIISR consulted with the Australian Business Register (ABR) in relation to this question, as they have policy carriage for matters related to ABNs. ABR has advised:

The new Bill does not change the existing circumstances in which an entity is required to obtain an ABN.

Under the existing rules, an entity may need to carry on an enterprise to be entitled to an ABN. Each subsidiary entity of this type must examine whether it is carrying on an enterprise in its own right to determine whether it is required to have a separate ABN to its parent company.

ATO Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number* provides a comprehensive explanation of different circumstances in which an ABN is required. Example 7 at paragraphs 106 to 109 considers a situation in which more than one enterprise is carried on by a consolidated group:

A company (Head Co) and its subsidiary members being a company (Sub Co) and a trust (Red Trust) form a consolidated group for income tax purposes.

The consolidated group carries on a number of grape growing, wine making and selling activities. Head Co provides accountancy and taxation services to the other group members. Sub Co operates a winery where wine is produced and sold. The trustee for Red Trust grows and supplies grapes to Sub Co.

The activities of the group are not examined as a whole in order to determine if an enterprise is being carried on. The activities of each entity of the group are examined separately to determine whether that entity is carrying on an enterprise.

Although both Head Co and Sub Co are entitled to an ABN as Corporations Act companies it is still necessary to determine whether they carry on an enterprise for GST registration purposes. The Commissioner considers that Head Co, Sub Co and Red Trust are each carrying on an enterprise.

The answer again depends on whether the subsidiary businesses are separate entities or not. If they are not separate entities, then the entity that conducts the businesses (enterprises) would be entitled to one ABN and it would use that ABN for all its businesses (as in the example with Dog Pty Ltd).

However, if the businesses are separate entities (as defined below) then they would not be able to use the parent company's ABN (as in the example with RBA Pty Ltd).

QUESTION 7: Can you please inform the committee how a two-tiered system will advantage businesses in the long term? Could policy issues arise due to the fact that grandfathered businesses have one set of requirements, namely the ability to trade under identical/near identical names without an ABN, while new businesses are required to comply with different provisions?

ANSWER: COAG agreed on 23 May 2008 to develop a seamless, single online registration system for both Australian Business Numbers and business names, including trademark searching. COAG approved the establishment of a national registration system which will also deliver online business information services and improve ongoing interactions between government and business, through such innovations as automatic form filling.

The Bills currently before the Senate Economics Committee, together with the State referral/adoption bills, will implement COAG's decision. The ABN/BN Project, and its deadlines, form part of the National Partnership Agreement to Deliver a Seamless National Economy of November 2008.

The "two-tiered system" referred to in the question has been agreed between the Commonwealth, States and Territories as an effective transitional arrangement for the new national business names system. This is considered to be an appropriate balance – allowing for the introduction of a new national system, which benefits businesses and consumers, without imposing additional compliance burdens on existing businesses.

The primary purpose of establishing a national business names registration system is to reduce red tape and the compliance burden on businesses. For that reason, businesses that are currently operating and registered on State/Territory registers will simply transfer from State/Territory registers to the national register. This will mean that they will not need to incur any costs associated with the complying with the new system.

Under the national system entities applying to register a new business name will need to hold an ABN, or be in the process of applying for one, and not have been refused, in order to register a business name. The purpose of linking business name registration with ABN is to enhance

consumer protection by allowing the individuals behind businesses to be identified. Existing business name holders who hold an ABN will be encouraged to notify ASIC of their ABN.

New business name applicants will have the option of applying for an ABN and a business name in one online registration process, as a means of further simplifying the interactions between business and government.

This “two-tiered” approach advantages businesses by allowing all businesses (both existing and new) to benefit from reduced red tape, and the lower fees and compliance burden associated with the national register, while not imposing additional costs associated with changing their business name or undertaking additional registration activities not previously required under the State/Territory regimes (eg providing their ABN).

Domain names

QUESTION 8: Has the department taken into consideration international systems, such as the Start website provided by the National Business Registry in the UK? Wouldn't this represent the optimal registration system given that it prohibits the registration of business names that impede on domain names and trademark rights?

ANSWER: DIISR and the State/Territory fair trading agencies have considered a range of policy responses used internationally.

The UK does not have a Government mandated registration process for unincorporated businesses. Instead a private company, the National Business Registry, ‘registers’ names for a yearly fee of £100 (plus VAT) and for £80.00 (plus VAT) will check the likelihood of passing off for a business upon ‘registration’ with them. They also guarantee and will pay all costs of litigation. On their website they say:

“For an annual membership of The National Business Register costs £80.00 (plus VAT) and provides -
- Initial name searches
- Obtaining formal statutory permission as necessary
- A National Business Register display certificate
- Protection against 'passing-off' through legal pursuit of firms which copy members' names.

Searches against registered Trade Marks are more complex than business names. A Trade Mark Search can also be undertaken at the time of registration at an additional charge of £80.00 (plus VAT).”

And

“The Register will pay all costs of litigation to protect your business name (subject to our legal Counsel's advice).”

[source - <http://www.start.biz/> (4 August 2011)]

A policy decision was made that, unlike the UK Government, the Australian Government should operate a register and that it should be mandatory to register a business name if one does not trade under one's own entity name.

Private organisations in Australia can assist businesses to ensure they do not pass off as well as offer services for registration of a business name.

IP Australia also provides a low cost service to undertake a trade mark search for businesses or a free "do it yourself" check.

ASIC will not be responsible for ensuring businesses do not pass-off nor infringe on another business's trade mark. However ASIC's online business name registration facility provides quick links to Franchise Australia, the Australian Business Account (a DIISR initiative), IP Australia (trade mark check) and the Australian Domain Name Administrator (auDA).

ASIC will also provide relevant information to potential business name registrants. Key messages will include:

- that a business name does not give any exclusive rights to a name;
- registrants may be subject to litigation if using a business name to mislead others; and
- registrants should undertake checks to ensure that they are not infringing on existing trademarks.

QUESTION 9: Can you confirm that currently, there is a link whereby after you register a business name, a trademark or a company name, you can then register an Australian domain name?

ANSWER: The proposed ASIC service will provide information about domain name registration prior to, and after, business name registration. It will include prominent online links to the Australian Domain Name Administrator website.

The AML/CTF Act

QUESTION 10: Does the department share the concerns of various financial organisations that their inability to provide accurate verification and matching of a business name with a person may compromise their responsibilities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act)?

ANSWER: DIISR does not share the concerns of various financial institutions that the Business Names legislation in any way breaches or inhibits the Government's AML/CTF Act requirements. The Department has received legal advice that confirms that the draft Business Names legislation would not breach or inhibit the intent of the Government's AML/CTF Act.

As outlined in the submission to the Committee from AUSTRAC (the regulator for the AML/CTF Act), "it is up to reporting entities to choose which sources they use to verify company information"; other sources are available to reporting entities, aside from the business names

register, to verify information such as the Australian Business Register for entity name; electoral roll for home address; driver licence for name, home address, and date of birth; passport for name, home address and date of birth; birth certificate for name and date of birth. These sources are more accurate and reliable than unchecked data i.e. date of birth and home-address on a business name register. Whilst the business name register could be a quick and cheap online mechanism for 'verifying' data, DIISR must emphasise that these two pieces of information are not checked. DIISR notes that a full data set of personal information is not currently available in all jurisdictions through business names registers, nor is it checked (except in Queensland).

DIISR also notes that one of the private entities seeking the additional data (in particular, date of birth and home address) is Veda Advantage, and draws to the attention of the Committee that Veda's privacy policy (included on the Veda Advantage web site) does not include state/territory business names registers as a source of personal information:

3. How we collect personal information

Collectively, Veda group of companies collects personal information from the following third parties:

- Credit providers, mortgage insurers and trade insurers*
- Real estate agents*
- Insurers and Loss Assessors*
- Law courts*
- Australian Securities and Investments Commission*
- Telstra*
- Australia Post*
- Australian Electoral Commission*
- Australian Communications and Media Authority*
- Corporate partners of our Secure Sentinel service*
- Market research organisations*

In addition, there are a number of limited circumstances in which we will collect personal information from you:

- When you apply for membership or whilst you are a member of Secure Sentinel*
- When you contact our Australian credit bureau to obtain a copy of your credit file or your insurance file*
- When you contact our Australian credit bureau to request an amendment to your credit file or dispute information on your credit file or your insurance file*
- When you contact VSG, regarding material you have received from a VSG client.*
- When you contact ntd for a copy of your tenancy database file or to request an amendment to that file.*
- When you obtain information from us over the internet such as a Veda Auto Report*

[source - <http://www.veda.com.au/privacy/> (4 August 2011)]

QUESTION 11: Can the department advise why public and private companies are distinguished in the legislation? Why can government security agencies access private information for criminal law enforcement purposes, but private companies are not given the same provisions (even though they are attempting to enforce the same/similar criminal laws/legislative requirements, particularly as they relate to their obligations under the AML/CTF Act)?

ANSWER: DIISR has consulted extensively with the Privacy and FOI Branch of the Department of Prime Minister and Cabinet (PM&C) in response to representations made by information brokers seeking access to home address and date of birth information from the national business names register.

Unlike many public sector organisations, private sector organisations are not criminal law enforcement agencies, and therefore are necessarily treated differently under the law. The obligations placed on businesses regulated by the AML/CTF Act to “know their clients” may be adequately met by conducting the kinds of searches and checks referred in that law, they are not dependent on searches of business names registers, and should not be compared with the information needed by many public sector organisations for a wide variety of criminal law enforcement purposes.

Whilst neither the information submitted by applicants nor the integrity of the data that the States/Territories will pass on to the Commonwealth to establish the national register will be verified, the totality of information collected, including the ABN, will ensure that the information collected is *fit for purpose*. The Bill’s primary purpose is neither to facilitate the matching of information about individuals nor to verify/authenticate identities.

QUESTION 12: Can the department provide the committee a copy of any legal advice received, particularly in regards to ASIC’s compliance with the provisions of the Privacy Act? Can the department please provide a copy of the advice from the Solicitor General?

ANSWER: DIISR has not needed to seek advice from the Australian Government Solicitor on this issue.

QUESTION 13: Does the EM note that the government must comply with privacy laws, that information must be used for the purposes for which it is collected, and that it has not been collected for purposes for private organisations to verify their data?

ANSWER: The EM outlines the primary purpose of the Act.

The primary purpose of the national registration scheme is to ensure that any business that does not operate under its own entity name, registers its name and details on a national register to enable those who engage or propose to engage with that particular business to determine the real identity of the entity and its contact details.

It is noted on page 6 that ASIC must comply with the Privacy Act

ASIC, as a Commonwealth agency, is obliged to handle personal information in accordance with the Privacy Act 1988. Additionally, the Bill contains strict penalties for the misuse of information obtained in the course of performing functions or exercising powers under the Registration Bill or the Transitional Bill.

Page 23 outlines the reasons for collecting information, in particular the ABN for identifying ‘the holder of a business name’

Subsection 23(2) sets out what must be included in the application. These details include identifying details (such as the name of the entity), various contact details and the period for which registration is sought. Of particular note is that an application must include an ABN for the entity or details of a pending ABN application. A business name will only be available to a business that is eligible for an ABN. The ABN of the entity is a mandatory field in relation to the record in the Register in respect of a business name. The purpose of mandating the ABN is to improve the ability of persons to identify the holder of a business name. Currently the Australian Business Register (the register of ABNs maintained by the Commonwealth) includes the 'trading name' for the ABN holder.

The default position is that the Commonwealth should comply with the Privacy Act. Unless specific exemptions are to apply, the EM does not need to state that personal information must be used for the purposes for which it is collected, and that it has not been collected for purposes for private organisations to verify their data.

However, the Department will consider making this clearer in the EM.

QUESTION 14 – TO BE PROVIDED

QUESTION 15: What happens if a franchisee wants to open two stores in the same city with the same name, or if a franchisee wants to register a franchise name that already exists (clause 21)?

ANSWER: As is the case now, unless the franchised business is trading under its own entity name e.g. company name, they will need to register the franchise name. This would normally include some sort of region or location in the title e.g. Summer Salad Richmond.

Registration of a franchise name will not require the franchisee to provide the written permission from the franchisor to ASIC. However a business that applies to register a franchised name should ensure it has the authority to trade under that name through its franchise agreement. Messaging on the business name registration application system will advise applicants of this responsibility.

It remains the responsibility of the business to ensure that do not pass off as another business or infringe on other businesses trade marks.

QUESTION 16: How does clause 32, which stipulates that ASIC cannot request a business' ABN, relate to the requirement that businesses provide their ABN at the time of registration?

ANSWER: The Department assumes that the Committee is seeking information in relation to Item 31 (Schedule 1) of the Business names Registration (Transitional and Consequential Provisions) Bill 2011.

The new national business names registration system will impose no additional burden on existing businesses. Schedule 1, at item 31:

31 Limit on exercise of powers to require information

- (1) This item applies if a business name is registered to an entity under this Act and no other business name is registered to the entity under the Business Names Registration Act.
- (2) ASIC must not exercise its powers under this Act or the Business Names Registration Act to require the entity to give ASIC any of the following information:
 - (a) the entity's ABN;
 - (b) if the entity is an individual—the entity's date or place of birth.

Item 31, which applies to existing businesses, would operate only in relation to business names registered by virtue of the Transitional Act ("this Act"), that is only in relation to business names that come into the national registration system because they were previously registered in state/territory registration systems (the so called grand-fathered names).

After the commencement of the national business names registration system, new registrations will be made under the Business Names Registration Act. Those registrations will be subject to a requirement to have an ABN registration.

QUESTION 17: What would be the impediment to including the CPI formula for fees in the primary bill, as opposed to the regulations (as has been advised by PM & C (Legislation Handbook, pp 3-4) and the Scrutiny of Bills committee on a number of occasions)?

ANSWER: DIISR sought advice on this matter from Treasury who have policy carriage for the Fees Bill. Treasury provided the following advice:

Treasury notes the following relevant paragraphs in the Department of the Prime Minister and Cabinet's Legislation Handbook:

1.12 While it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance. Matters of the following kinds should be implemented only through Acts of Parliament:

(h) provisions imposing taxes or levies;

(i) provisions imposing significant fees and charges (equal to more than

50 penalty units consistent with (f) above);

6.45 Matters of detail and matters liable to frequent change should be dealt with by subordinate legislation, for example:

(a) fees to be paid for various services;

6.47 The Office of Parliamentary Counsel needs to be aware of the general scope of any intended regulations and other legislative instruments so that a sufficiently wide regulation-making power or authorising provision is included in the legislation. For example, where regulations are to confer judicial power, impose penalties, require the charging of fees or require the furnishing of a statutory

declaration, express provision conferring power for these purposes must be included in the Act. Legislative instruments for which there is no clear authorising provision in the relevant Act may become a focus of the Senate Standing Committee on Regulations and Ordinances (see paragraph 1.14) and may be disallowed as part of the parliamentary process.

The implementation by regulations of the provisions that provide for CPI indexing to fees would appear to be consistent with the Legislation Handbook.

Treasury notes that the approach to indexation adopted in the Bill is based on the model utilised in *Corporations (Fees) Act 2001* and regulation 3 of the *Corporations (Fees) Regulations 2001*. Indexing was introduced into the *Corporations (Fees) Regulations 2001* by *Corporations (Fees) Amendment Regulations 2010 (No.2)* with no adverse comment by the Scrutiny of Regulations and Ordinances Committee.

Recently, the *National Consumer Credit Protection (Fees) Act 2009* and regulations 6 and 7 of the *National Consumer Credit Protection (Fees) Regulations 2010 (No. 2)* similarly followed the *Corporations (Fees) Act* approach to indexing (in particular, the placement of the indexing provisions in the regulations rather than the primary legislation). Neither the Act nor Regulations were subject to negative comment by the Scrutiny of Bills Committee (on this issue) or the Scrutiny of Regulations and Ordinances Committee (on any issue).

Treasury believes that the transfer of the indexing mechanism to the Fees Bill would impede the timely amendment of the provisions to address any possible problems that may be identified in the future, in relation to what are basic machinery provisions.

Commentary by the Committee on other fees bills, such as the *Offshore Petroleum and Greenhouse Gas Storage Regulatory Levies Legislation Amendment (2011 Measures No.1) Bill 2011*, has noted that: “the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the levy, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.”

Treasury believes that the inclusion in regulations of provisions that determine fees by reference to a fixed and certain formula (the application of which does not rely on the exercise of any discretion and which utilises objectively determinable inputs) is therefore appropriate. A CPI indexing mechanism would be such a provision.

Section 184-1 GST Act

(1) **Entity** means any of the following:

- (a) an individual;
- (b) a body corporate;
- (c) a corporation sole;
- (d) a body politic;
- (e) a * partnership;
- (f) any other unincorporated association or body of persons;
- (g) a trust;
- (h) a * superannuation fund.

Note: The term **entity** is used in a number of different but related senses. It covers all kinds of legal persons. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.

(1A) Paragraph (1)(f) does not include a * non-entity joint venture.

(2) The trustee of a trust or of a * superannuation fund is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees, at any given time.

Note 1: This is because a right or obligation cannot be conferred or imposed on an entity that is not a legal person.

Note 2: The entity that is the trustee of a trust or fund does not change merely because of a change in the person who is the trustee of the trust or fund, or persons who are the trustees of the trust or fund.

(3) A legal person can have a number of different capacities in which the person does things. In each of those capacities, the person is taken to be a different entity.

Example: In addition to his or her personal capacity, an individual may be:

sole trustee of one or more trusts; and

one of a number of trustees of a further trust.

In his or her personal capacity, he or she is one entity. As trustee of each trust, he or she is a different entity. The trustees of the further trust are a different entity again, of which the individual is a member.

(4) If a provision refers to an entity of a particular kind, it refers to the entity in its capacity as that kind of entity, not to that entity in any other capacity.

Example: A provision that refers to a company does not cover a company in a capacity as trustee, unless it also refers to a trustee.

Note: For GST purposes, non-profit sub-entities are treated as entities (see Division 63), and government entities can be treated as entities (see Division 149).