

Senate Economics Legislation Committee

SUPPLEMENTARY ANSWERS TO QUESTIONS ON NOTICE

Department of Innovation, Industry, Science and Research

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

QUESTION 18: What are the legislative processes that need to transpire for the enactment of the BNR?

ANSWER: A minimum of one state must enact the legislation before the Commonwealth enacts its legislation. Enacts refers to the relevant state parliament having passed the legislation and gained Royal Assent. The Commonwealth can then enact its legislation, which will rely in part on a referral of state powers to the Commonwealth (paragraph 7(1)(b) of the Business Names Registration Bill 2011). If there is no state referral enacted before the Commonwealth enacts, then paragraph 7(1)(b) may be void.

Thus the sequence of events is:

1. a state enacts the legislation and thereby refers powers to the Commonwealth (this is likely to be Tasmania but other states may also enact the legislation and refer their powers). As Tasmania has introduced the relevant legislation, it must enact it before the Commonwealth.
2. the Commonwealth enacts its legislation.
3. remaining states adopt the business names referral legislation.

QUESTION 19a: Please clarify the intent of Clause 40 in the Main Bill?

ANSWER: The intent of both clauses 39 and 40 is to deal with the transfer of a business after the death of its owner, and the related issue of persons trading while not being registered.

On the death of individuals who own businesses, and hold registered business names because of that, the businesses often continue. Following a death, the persons who operates such businesses would essentially be operating businesses not registered to them. Clause 39 deals with straightforward cases where probate, letters of administration, or something 'similar' is granted to the 'legal personal representative' of the deceased. ASIC must then register the business name to the 'estate of the deceased' and record the details of the 'legal personal representative'.

Clause 40 deals with cases where there is no grant of probate, letters of administration, or something 'similar'. In these cases, ASIC must register a business name to 'the estate of the deceased', and consider entering into the business name register the name of the entity that ASIC is satisfied on 'reasonable grounds' is the successor to the deceased.

QUESTION 19b: Can you also please inform the committee whether ASIC and the states are aware that ASIC has been tasked with the job of determining who is the legitimate heir to a deceased's estate and the ways ASIC proposes to process these claims, the check lists they will use to determine who the legitimate heir is, the definition they are using for 'estate' and how ASIC seeks to deal with state and territory probate law and conflicts that may arise as a result of ASIC's actions?

ANSWER: The states and territories are aware of clause 40 and its proposed operation. State/territory officials approved the draft of the Business Names Registration Bill, including clause 40, in June 2011. The following questions were put to ASIC on 8 August 2011, and ASIC's response is shown below.

Is ASIC aware of clause 40?

Yes.

Will ASIC determine each case involving a 'notified successor' on its individual merits?

Yes, subject to there being reasonable grounds to conclude the person may inherit, such as providing a copy of the Will, and, if there is no Will (that is, if there is an intestacy), the grounds under relevant state/territory legislation the person believes he/she is entitled to inherit the estate.

Does ASIC consider that there will be 'conflicts' with state/territory succession law?

On the basis of the previous answer, no.

Does ASIC note that it is common practice to record the 'estate' as holding something until some other arrangement is made?

These are only a notification to ASIC requiring ASIC to register the business name to the estate of the deceased entity. However, there is no provision in the Main Bill entitling the notified successor to deal with the estate of the deceased entity. Further, the provision only enables ASIC to satisfy any requirement to give notice to an entity to whom the business name is registered by giving notice to the notified successor where the business name has been registered to the estate of the deceased entity (clause 40(7)). This contrasts with clause 39 where the estate of the deceased entity has an actual legal personal representative appointed (clause 39(3)(a)) and is entitled to deal with the estate under laws of the states/territories.

Additionally Treasury has advised that, it is important point to note that the provision:

- (a) provides for the recording of the fact that the original holder is now deceased and the name forms part of their deceased estate;
- (b) records the person who asserts they are the successor (with some check on this assertion being performed - ASIC must be satisfied on 'reasonable grounds' that they will inherit);
- (c) does not record the notified successor as the holder. The provision is primarily to provide for a contact person regarding notifications in relation to the name.