



CANBERRA
BUSINESS COUNCIL

10 August 2011

The Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

CANBERRA BUSINESS COUNCIL SUBMISSION - NATIONAL BUSINESS NAME REGISTRATION SCHEME

Principal Members

ACTEW Corporation

ActewAGL

Bankwest

Blue Star Print

Canberra Airport

Clayton Utz

CREATIVE

Elite Sound & Lighting

Ernst & Young

eWAY

Hindmarsh

KPMG

Master Builders Association (ACT)

Medibank Health Solutions

National Australia Bank

National Museum of Australia

NEC Australia Pty Ltd

PricewaterhouseCoopers

Staging Connections (ACT)

TransACT

The Village Building Co

Thyssen Krupp Marine Systems
Australia

Introduction

Canberra Business Council appreciates your Committee's consideration of this submission in relation to the establishment of a National Business Names Register. The Council notes that increasingly, businesses operate across State or Territory borders, but this National Register will have particular significance for Canberra businesses because of our significant cross-border considerations. The Council also strongly supports any legislative reform, Federal or Territory, which has the effect of assisting small business.

Canberra Business Council is the leading business body of the Australian Capital Territory and Capital Region, representing individual members and the interests of more than 30 industry organisations known as Kindred Organisations.

Directly and through its Kindred Organisations, Canberra Business Council represents more than 5,000 businesses across the Capital Region. In 2007 the Council entered into an affiliation arrangement with the NSW Business Chamber which represents over 7,000 businesses in NSW and connects over 30,000 businesses across Australia through the State and Territory Chamber Network.

Transitional arrangements

Canberra Business Council agrees that the transitional arrangements which provide for the migration of existing business names to the National Business Name Register are necessary to preserve business continuity and priority of registration. However, the Council is concerned that the transitional arrangements do not sufficiently deal with a situation where two or more businesses currently operate in different states with the same business name.

The transitional provisions currently provide for an identifying or distinguishing 'word or expression' to be included on the register for any identical business names. However, the Council believes this is not sufficient. If the business name itself is not required to include that distinguishing word or expression, there is potential for consumers and businesses to be confused.

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The National Business Name Register will enable businesses to operate nationwide, without a need to register a principal place of business or registered office in each State and/or Territory. The Council believes this will encourage some businesses to consider commencing trade in States or Territories where otherwise they might not have. The ability for existing businesses to trade with a business name that is no different to that owned by another business (save for the fact that on the register each is distinguished by a word or expression) could result in situations where two businesses are operating in the same city with identical business names.

Canberra Business Council therefore takes the view that any transitional arrangements to migrate existing business names onto the National Business Name Register should:

- a) include the current provision for the registration of a distinguishing word or expression on the register for any identical business names being migrated; and
- b) require the owner of an identical business name to use that distinguishing word or expression in their name if they intend operating the business in any State other than the State or Territory in which they were originally registered.

It is our view that this will put no increased burden on small businesses that currently operate within the requirements of State/Territory based business names legislation and will facilitate, without undue confusion, the potential for businesses to move interstate without seeking registration of a new business name. Should a business plan to operate interstate, it would be required to change its signage or stationery. This requirement seems acceptable, provided a sufficient transition period is available to ensure compliance.

While the nature of the 'distinguishing word or expression' is not clarified in the draft legislation (though the Council notes it must assist in distinguishing the business) it may be preferable to standardise on the State or Territory abbreviated nomenclature.

Name Allocation Restrictions

The exposure draft currently makes clear that names that are identical to names already on the register will not be available for registration. Further, limits will apply to names that are registered under the Corporations Act 2001, are notified on a State/Territory register, or are somehow related to a State/Territory or Federal Government body. Council agrees with these limitations.

A business name will also not be available if another entity has priority over a name that is identical or nearly identical. This clause is ambiguous as to what may establish that 'priority'. If this is limited to Section 28 of the Exposure Draft which relates to priority of two or more applications lodged (where none of those applications is a consent application), then priority is given to the application lodged first. This does not take into account the importance of the Trade Marks Act 1995 in establishing ownership rights in trade marks (which could include a business name).

Canberra Business Council notes the power given to ASIC by Section 50 of the Exposure Draft to cancel a business name where a court order has required it as a result of proceedings under the Trade Marks Act. However, the requirement to obtain a court order is overly burdensome on small businesses who may have taken steps to register a trade mark and protect their identity long before a competitor sought to register a business name.

It is the Council's view that a business that owns a trade mark should be entitled to priority, subject to the date on which it was registered. That business should then have the right to object to the later registration of a business name upon proof of priority. Where a business name has inadvertently been registered despite the existence of a trade mark with priority, the trade mark owner, again on provision of sufficient evidence of ownership and priority of the trade mark, should be entitled to seek to have the infringing business name removed from the register.

It is important that ASIC have the power to cancel such a business name in those circumstances. It is also Council's view that the Trade Marks Act must be enshrined in the legislation in this way in order to maintain the value of trade marks as a business asset.

Period of Registration

The draft legislation currently provides for the registration of business names for either one or three years. This conflicts with existing business name registration procedures in the ACT where a business name can be registered for three or five years. It appears from the transitional legislation that a business name that has more than three years to run on the date that it is migrated to the National Business Name Register will be entitled to enjoy that longer period of registration. However, on each renewal it will need to be renewed for either one or three years, not five.

It is Canberra Business Council's view that one year is an unnecessarily short period of time in which to have a registered business name. Canberra Business Council submits that the National Business Name Register should follow the ACT model of allowing business names to be registered for three or five years.

Conclusion

Canberra Business Council supports the Federal Government proposal to work with the States and Territories to establish a single national system for the registration of business names in Australia. The draft legislation is a major improvement over current State and Territory legislation and will lead to significant economies for all business owners. The Council believes the draft legislation could be further improved to:

- a) avoid confusion where identical business names could be used by different business owners in the same State or Territory;
- b) protect the value of trade mark assets; and
- c) increase the possible period of registration.

If those matters are taken into account, Canberra Business Council would have no hesitation in supporting the draft legislation.

Yours faithfully

Chris Faulks
Chief Executive Officer