

Quote in reply: 21000331/22: Business Law Committee

15 September 2011

Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000

By post and by email: lapcsesc@parliament.qld.gov.au

Dear Research Director

SUBMISSION ON THE BUSINESS NAMES (COMMONWEALTH POWERS) BILL 2011

I write on behalf of the Queensland Law Society's Business Law Committee in relation to the Business Names (Commonwealth Powers) Bill 2011 ("The Commonwealth Powers Bill").

The purpose of the Commonwealth Powers Bill is to refer State legislative power to the Commonwealth Parliament and to facilitate the migration of Queensland business names data to the Commonwealth system. There are also transitional provisions and a section allowing for the repeal of the *Business Names Act 1962* and the *Business Names Regulation 1998* (once part 4 of the Commonwealth Powers Bill commences).

The Commonwealth system will be legislated under the proposed *Business Names Registration Bill 2011* ("The Business Names Bill"), which is currently before the Australian Parliament.

The Society supports a national Business Names Registration Scheme, which will provide prospective business owners a central repository to register and search for Australian businesses. The Society also supports the Commonwealth Powers Bill as enabling legislation to streamline the process of transferring from a Queensland business names registration system to a national one.

However, there are a few issues that the Society would like to raise.

Definition of business

The Commonwealth Powers Bill does not currently define the meaning of 'business'.

The Business Names Bill does define the term 'business' in Clause 4, but does so in a way which does not refer to franchises and in clause 4(1)(c) is particularly unclear:

4 Business

- (1) **Business** means an activity, or series of activities, done:
 - (a) in the form of a profession, a trade, employment, a vocation or a calling; or
 - (b) in the form of an adventure or concern in the nature of trade; or
 - (c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property.
- (2) **Business** does not include an activity, or a series of activities, done in circumstances in which an entity doing that activity or series of activities in, or in connection with, Australia would not be entitled to an ABN.

The Society recommends that a definition of 'business' be included in the Commonwealth Powers Bill, so that the process of transition to the national system will be clear and more certain from the Queensland perspective. We recommend that the definition of business should specifically include reference to a "franchise".

Trademarks and other intellectual property matters

The Society would also like to highlight that there may be a number of complications resulting from the current construction of the Business Names Bill. At present, there is no requirement for an applicant applying for inclusion on the national register to undertake any search or conduct due diligence in relation to intellectual property in the business name. The Society urges the Queensland Government to be aware of the problems that this may bring for businesses trading under similar names.

The Society recommends that the Queensland Government advocates for a change to the Business Names Bill, so that all applicants be required to conduct a simple due diligence search (namely, the free IP Australia search TM Check) to ascertain the uniqueness of their business name. The Society is aware that registration applications in the national system will contain information about the TM Check for applicants, including a link to the website. This is a positive step, informing applicants of the tools available for protecting their business interests.


Overall, the Society welcomes a national business name registration scheme and hopes the Government will assist Queensland businesses by providing literature and resources to assist business owners with the transition as well as guidelines for "nearly identical names" and "undesirable names". Our concern arising from this issue is that there will be instances where the same business names are registered in different states prior to the commencement of the national system and the law is not clear around what happens when the data is transferred to the national system.

We enclose a copy of the submission the Society submitted to the Senate Economics Committee regarding the Business Names Bill, which may be of assistance to the Committee.

The Society is keen to send a copy of this letter to the Hon. Senator Nick Sherry, Federal Minister for Small Business for his information, subject to obtaining the Committee's release.

Thank you for the opportunity to make comments on the Bill. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Graduate Policy Solicitor, Raylene D'Cruz on 3842 5884 or r.dacruz@qls.com.au.

Yours faithfully


Bruce Doyle
President

Enclosed- Submission to the Senate Economics Committee

Your Ref: Business Names Registration Bill 2011 and related bills

Quote in reply: Business Law Committee

22 July 2011

Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Committee Secretary

INQUIRY INTO THE EXPOSURE DRAFT OF THE BUSINESS NAMES REGISTRATION BILL 2011 AND RELATED BILLS

I write on behalf of the Queensland Law Society's Business Law Committee in relation to the Business Names Registration Bill 2011 and related Bills Inquiry ("the proposed Acts").

The Society supports a national Business Names Registration Scheme, which will provide prospective business owners a central repository to register and search for Australian businesses. There are a few comments the Society would like to make on the *Business Names Registration Bill 2011* ("the Bill").

Definition of business

Clause 4 of the Bill defines business, however does not refer to franchises. Clause 4(1)(c) is also unclear.

The Society therefore recommends that:

- Clause 4(1)(a) be amended to include a reference to a "franchise"; and
- The words "in the form of" in clause 4(1)(c) be replaced with "subject to."

Offences relating to business names

The Society notes that clause 17(1) of the Bill specifies that "an entity commits an offence if: the entity carries on a business under a name; and the name is not registered to the entity as a business name on the Business Names Register." The Society notes that there is no transition period for entities registering their application through mail, fax or in person at a Magistrates Court or QGAP Office.



In Queensland, business name registration applications have different processing times. The Queensland Office of Fair Trading website (accessible - <http://www.fairtrading.qld.gov.au/register-business-name.htm>) notes that applications by fax or post to Registration Services or SmartLicence could take between 5-10 business days to process, whereas an application made in person at a Magistrates Court or QGAP Office could take at least 10 business days to process. Therefore a regional business, by virtue of its location, is at a disadvantage to metropolitan businesses.

To remedy this inequity, the Society recommends that the *Business Names Registration Regulations 2011* consider a transition period acknowledging that a lodged application is deemed to be accepted until further written notice confirming otherwise.

Franchising Matters

The Society recommends that the proposed Acts be reviewed to ensure they reflect the unique relationships that arise in franchises, which are discussed in more detail below.

Right to register a business

The Society notes that clause 22(1) allows an entity to lodge a business name registration form with ASIC to register a business. Clause 5 (1) defines "entity" but does not refer to a power of attorney.

As a franchise agreement may require a person as a power of attorney to lodge and register a business, the Society recommends that the definition of "entity" be widened to include this circumstance.

Similarly, a franchise agreement may require a person as a power of attorney to lodge a renewal and a cessation of business name (in the event the franchise is assigned or sold). The Society recommends that a power of attorney also be provided an opportunity to lodge these forms.

Transitional provisions

A franchise agreement may also require parties, who have agreed to a fixed term franchise, to complete a notice of cessation of business at the commencement of a franchise agreement (with the intent it is to be lodged at the completion of the franchise term.)


The Society enquires as to how long the transitional period will be that the Business Name Register will accept the equivalent State forms?

Overall, the Society welcomes a national business name registration scheme and urges the Commonwealth Government to provide literature and resources to assist business owners with the transition as well as guidelines for "nearly identical names" and "undesirable names".

Thank you for the opportunity to make comments on the proposed Acts.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Louise Pennisi on 3842 5872 or l.pennisi@qls.com.au

Yours faithfully



Bruce Doyle
President