

LAPCSESC
Business Names
Submission 002



Australian Government

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Dear Sir/Madam

The Department of Innovation, Industry, Science and Research (DIISR) is pleased to provide a submission to the Legal Affairs, Police, Corrective Services and Emergency Services Committee inquiry into the Business Names (Commonwealth Powers) Bill 2011.

DIISR is the lead Commonwealth policy agency for this Council of Australian Governments initiative, and has been working closely with the States and Territories on the development of the referral bills that will be introduced into each of the State Parliaments, as well as the Commonwealth legislation that is currently before the Australian Parliament, which will establish the national registration system.

As you may be aware, the Commonwealth Business Names Registration Bills were considered in draft form by the Senate Economics Legislation Committee in July/August 2011. The Committee reported on 15 August recommending that the Bills be introduced into the Australian Parliament and passed. Subsequently, on 22 August 2011 the non-government members of the Committee released comments about a number of issues related to the Bills.

The Commonwealth Business Names Registration Bills were introduced into the House of Representatives on 17 August 2011, and passed unamended by the House of Representatives on 13 September 2011. Debate of the Bills in the Senate is expected to take place in October 2011.

The enclosed submission is based on the DIISR submission to the Senate Economics Committee in July 2011. It outlines the background to the project, summarises the Commonwealth Bills that will underpin the establishment of the National Business Names Register, and addresses the Commonwealth's policy position on a range of issues. The submission also includes a summary of the Senate Committee inquiry and responses provided to the non-Government members following the completion of the inquiry.

DIISR would be happy to provide further information to the Committee should that be required and/or appear at any public hearings that may be scheduled. Please feel free to contact me on telephone 02 6276 1179, or by email at ann.bray@innovation.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ann Bray', written in a cursive style.

Ann Bray
General Manager
Food, Chemicals and Deregulation Branch
16 September 2011



Australian Government

**Department of Innovation
Industry, Science and Research**

**DEPARTMENT OF INNOVATION,
INDUSTRY, SCIENCE AND RESEARCH
SUBMISSION**

**BUSINESS NAMES REGISTRATION
LEGISLATION**

SEPTEMBER 2011

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GLOSSARY

FREQUENTLY ASKED QUESTIONS

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OVERVIEW

As part of the Council of Australian Governments' (COAG's) deregulation agenda, the National Business Names initiative will develop a seamless online registration process for Australian Business Numbers (ABNs) and business names, including trade mark searching. The initiative has a complementary project to deliver online business information services and improve ongoing interactions between business and government.

Currently businesses need to register their name in each State or Territory in which they trade, with varying processes and fees. The proposed national system will mean businesses pay one fee to register nationally, using an online application process.

As part of the COAG agreement, the States agreed to refer their business names registration powers to the Australian Government to allow the national system. An Intergovernmental Agreement (IGA) for Business Names was signed by First Ministers in July 2009. The national system will not be able to commence if any State does not refer or adopt the legislation. Extensive consultation has been undertaken to reach agreement between the States and Territories. It is proposed that the new national system for business names registration will start in the first half of 2012.

The effect of the Business Names Registration legislation package is to ensure that an entity carrying on a business in Australia using a name other than its own must register with the Australian Securities and Investments Commission (ASIC). The new national Business Names Register (the Register) will allow consumers to ascertain who the entity is behind a business name.

In addition, the creation of a national Register will remove the inconvenience and reduce the costs significantly of registering business names across the various States and Territories. The registration system will be online and available as a combined registration process with the ABN.

To assist with identification of the business entities, the Register will prevent identical business names in the States and Territories being registered in the future and also prevent the registration of otherwise undesirable names such as names that are misleading to consumers or offensive. This is achieved through both the Business Names Registration Bill and the Business Names (Availability of Name) Determination 2011. A similar process is also achieved under Corporations law.

To assist with identification of the identity behind a business name, the Registration System mandates an ABN for any new business name registration. Currently all State and Territory business name registers allocate a business name number (BNN). The ABN will replace the BNN for new registrations and allow businesses to be identified through both their name and ABN.

The necessity to register a business name under this legislation does not give rise to any proprietary rights over that name, consistent with trade mark law. The new online system will provide links to IP Australia and information to ensure businesses are aware of this issue.

PART A – BACKGROUND TO THE LEGISLATION

1. *Evolution of the project*

In July 2006, COAG identified as a “regulatory hotspot” the demand for a seamless, single on-line registration system for ABNs and business names, including trade mark searching. This was prompted by a range of drivers, including the January 2006 “Report of the Taskforce on Reducing Regulatory Burdens on Business” (known as the Banks Report).

There are approximately 600,000 ABNs and 250,000 business names registered each year. Currently businesses need to apply to the Australian Government to obtain an ABN (with 96% using electronic channels), and to one or more State or Territories to register their business name.

The Small Business Ministerial Council (SBMC) was tasked with progressing this and a submission was provided to COAG in early 2007. Following consideration, COAG gave a further directive to consider the proposal in terms of strengthening the cost-benefit assessment, and considering related initiatives in business-to-government interaction (including information discovery and business client account management), and to do this in consultation with the Ministerial Council of Consumer Affairs (MCCA).

Key agencies participating in the initiative are the Australian Government’s Department of Innovation, Industry, Science and Research (DIISR), Australian Taxation Office (ATO), IP Australia, Australian Securities and Investment Commission (ASIC) and the Department of the Treasury, and each State and Territory’s agencies for small business, fair trading or consumer affairs.

A business case was completed in April 2008 and recommendations from the Steering Committee were provided to the SBMC in May 2008. In June 2008 the SBMC wrote to the Chair and Co-chair of the COAG Working Group - Business Regulation and Competition Working Group (BRCWG) with its recommendations.

A model was agreed to by COAG at its July 2008 meeting:

COAG notes the Small Business Ministerial Council considered this matter on 23 May 2008 and agreed in principle support for a business model to develop a seamless, single online registration system for both Australian Business Numbers and business names, including trademark searching.

COAG has 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.

COAG has approved the establishment of a national registration system and agrees to the necessary referral of power to the Commonwealth to enable it to implement the system.

COAG has asked that BRCWG bring forward an implementation strategy to its meeting in October 2008.

In October 2008 COAG agreed to the Implementation Plan:

A single system for the registration of business names is another key element of a seamless national economy. An implementation plan for the Australian Business Number (ABN) and Business Names Project has been agreed by COAG. This important project is being developed to deliver a seamless, single online registration system for ABNs and business names, enabling business to register both for their ABN and Business Name in one transaction, as well as undertake other information discovery and transactions with government.

As previously agreed, the financial impacts of the reforms related to the seamless national economy, including on States' revenue and costs will be calculated and incorporated in the overall finalisation of financial arrangements between the Commonwealth and the States.

An IGA for Business Names was signed by First Ministers in July 2009.

2. COAG framework

The national Business Names Register was included as a project under the National Partnership Agreement to Deliver a National Seamless Economy (NPA SNE), which was signed by First Ministers in February 2009. Under the Implementation Plan the Commonwealth, States and Territories originally agreed to have the new national system operational by April 2011.

This timeline reflected in the IGA allowed 12 months for the jurisdictions to agree on the legislation, and three months after this milestone to get referrals through each of the six State Parliaments. In retrospect, this underestimated the complexity and time needed for this process. In addition, at the time the Project Implementation Plan was developed, the type of referral had not been determined. A text-based referral rather than a subject-based referral was subsequently incorporated into the IGA. Text-based referrals, by their nature, are considerably more time and resource intensive, requiring all jurisdictions to agree on the text and necessitating an agreed Bill being attached to State referrals.

At its meeting on 13 February 2011, COAG noted the complexity in agreeing legislation across jurisdictions and committed to delivery of the business names project as soon as practicable. COAG directed the Business Regulation and Competition Working Group (BRCWG) to provide advice on a firm timetable for delivery to its next meeting. BRCWG agreed on 25 March 2011 to recommend to COAG revised milestones and a revised completion date to have the system implemented by mid 2012. COAG is expected to consider the revised implementation date shortly.

3. Benefits to business and consumers

The Register will deliver significant benefits to businesses. At present, a business operating in every State and Territory faces a cost of more than \$1,000 to register a business name for three years. Under the national system, businesses will only pay one fee, which will be in the order of \$70 to register for three years. An optional \$30 fee will apply for a one-year registration.

For business an online system combined with the ABN registration will save time and effort in registration as only two States offer an online system at present.

The 2009 cost/benefit analysis by Ernst & Young to undertake a cost/benefit analysis of the ABN Business Names Registration Project found that this part of the initiative will provide around \$500 million in savings to business over eight years through the reduction of time and cost spent registering a national business name and ABN.

Savings include (but are not limited to):

- \$203 million over eight years in savings through reduced costs to business from standardised national fees
- \$116 million over eight years through the online 24/7 combined ABN/business names registration forms

Consumers will also benefit from the new national system. Consumers will be able to search online free of charge for business contact details, business address and the entity to which the business name is registered in Australia. Further information (current and historical) will be provided for a small fee.

Home-based businesses will have contact details and the suburb of their principle place of business shown on the free online register. This will provide greater transparency for consumers and allows them to easily direct enquiries or complaints to the right address but provides some privacy for home-based businesses.

In mandating of the ABN for new business name registrations, consumers and other businesses will have more confidence of the bona fide nature of the business they are dealing with. The ABN was designed to be the unique business identifier and the entity requires authentication during the process of registration. Currently only Queensland requires proof of identification for business name registration.

The Australian Business Register (ABR) will also show the registered business name on the public register. Previously registered business names were not cross checked with State registers and unregistered names did appear on the ABR. The new service will allow consumers and other businesses to more easily cross- reference business names with ABNs due to improvements in the currency of information on the ABR.

4. Consultation overview

There has been extensive consultation for this initiative since it commenced in 2006. Early consultation activities on the initiative included:

- Stakeholder consultation with key industry associations (September-October 2006)
- Market testing of concept (October 2006)
- Release of discussion paper and consultation with industry associations (September-October 2007)
- Market testing to review key project assumptions and inform project design (May 2009)
- Public consultation forums on the proposed business name registration system were held in capital cities (April 2010).

The first exposure draft of the Business Name Registration Bill 2010 and its related fees bill were exposed for public comments from 28 May to 28 August 2010 (a period of three months) following consideration by States and Territories. The draft Bill was revised as a result of comments received and it, and the draft Transitional Bill, were forwarded to State/Territory officials for further comment in November 2010.

The second exposure draft of all the primary legislation was released for public consultation on 14 March 2011. The closing date for submissions was 24 April 2011. (This was in accordance with the Ministerial Council on Corporations' agreement to truncate the consultation period.)

Public consultation sessions on the second exposure draft of the Business Names Registration Bills ran from March until April 2011. A significant effort was made to ensure parties interested in the initiative were aware of the second exposure. Firstly, advertisements on the public consultation appeared in *The Australian* and the *Australian Financial Review* on 14 March 2011. 717 emails went to those who had expressed an interest in the initiative after previous consultations. A news item was sent to 3680 email subscribers to the business.gov.au website. A notification was sent to 1109 relevant Business Consultation Website email subscribers. The Business Consultation Website had an additional 105 hits. Finally 131 industry associations were invited to meet face to face with officials from the Commonwealth Department of Innovation, Industry, Science and Research (DIISR) in six capital cities in early to mid April 2011.

General feedback received suggests that the initiative is welcomed and well received by industry and business. Seventeen formal submissions were received during the second round of public consultation, with many submissions raising issues that were specific to the particular organisation. Minor amendments were made to the legislation following the consultation. A particular issue that was raised during the consultation related to the requirement for an ABN to be on all written communications. This concern has now been addressed with increased clarity around the requirement added to the legislation.

DIISR attempted to contact all submission authors to discuss their specific concerns or misunderstandings. Generally, submission authors contacted were comfortable with the approach taken. Some continued to hold their concerns and indicated that they may bring their concerns to the attention of the Senate Economics Committee.

5. Project risks

At its meeting of 13 February 2011, COAG noted that the task of agreeing complex national business names legislation in an environment of elections at both the State and Commonwealth levels has delayed the implementation of the reform beyond the agreed implementation date of April 2011. COAG also acknowledged the complexity of the reform, which requires the agreement of all jurisdictions to primary legislation, referral of powers and passage of legislation through seven parliaments.

COAG agreed on 19 August 2011 to a revised delivery date of 28 May 2012. To meet this delivery deadline, a number of key milestones need to be met:

30 September 2011	One or more States to pass referral legislation
24 November 2011	Passage of primary legislation through Commonwealth Parliament
31 December 2011	Assent to primary legislation in Commonwealth Parliament
31 March 2012	Remaining States to enact referral/adoption legislation
April-May 2012	Legislation comes into effect and data is transferred from State/Territory registers to national system

Delays or amendments to the legislation in any of the parliaments, State or Commonwealth, represent a significant risk to the national business names initiative. Any amendments, particularly those arising later in the process, will have flow-on implications for all of the jurisdictions that have passed their legislation. This is because it is a text-based referral – and text passed by the Commonwealth needs to be the same or substantially the same.

It will also be difficult for the Commonwealth and States/Territories to plan an effective national education campaign advising businesses of their rights and responsibilities under the new system if there is uncertainty about the launch date for the new system. Additionally, data transfer to the Australian Securities and Investments Commission will be impeded if any State legislation is not enacted by March 2012.

6. Development of the legislation

The Commonwealth, States and Territories have worked cooperatively in the development of the Business Names legislation.

A Legal and Governance Working Group (LGWG) was formed in July 2008, comprising representatives of all jurisdictions, DIISR, the Treasury and ASIC. The LGWG developed drafting instructions by reference to existing provisions in a variety

of Acts and provided drafting instructions to the Office of Parliamentary Counsel. The draft legislation was revised six times in line with the collaborative process adopted by the LGWG in reaching consensus on the Business Names Registration Bill 2011, the Business Names (Transitional and Consequential) Bill 2011.

The LGWG convened in excess of 50 meetings and teleconferences to work through the complex issues that arose as the legislation was developed and to achieve the consensus required across all jurisdictions. Drafts of the bills were provided in confidence to LGWG members and the bills were worked through, clause by clause, to ensure that the final Bills could be endorsed in their entirety by each of the jurisdictions.

7. Proposed Communication/Education activities

The promotion of the new Business Name Registration System will primarily be undertaken by ASIC and the ABR, with DIISR undertaking a coordination role. The States and Territories will also play an important role in communicating the new system to target audiences, for example those who are likely to use the current business name registration channels.

DIISR is working to facilitate the delivery and coordination of consistent, effective, and appropriate messages to raise awareness and promote uptake of the services being delivered through the program with the aim of:

- Minimising duplication of effort and maximising coordination and collaboration across partner agencies
- Achieving value for money by maximising sharing of information and resources
- Minimising duplicative contact with external stakeholders across partner agencies by approaching stakeholders in a unified manner.

Strategies to promote the new national Register may include:

- a formal launch
- provision of a central program communication webpage
- scripts for government call centres and telephone information lines
- media releases
- calendar of conferences/forums to allow for promotion to target audiences
- letters to industry organisations, CEOs and managing directors
- newsletter submissions for contributing to industry association publications such as the *National Tax and Accountants' Association*, *Association of Taxation and Management Accountants*, *Financial Planning Association* and *CPA Australia*.

PART B –THE LEGISLATION

8. The Commonwealth legislation

The initiative will deliver a national business name registration system which includes a seamless, online registration for both Australian Business Numbers (ABNs) and business names.

Currently, each State and Territory operates its own business names registration regime. The purpose of a national business names registration scheme will be to allow businesses to register once, regardless of how many jurisdictions they operate in. The scheme will be operated by the Australian Securities and Investments Commission (ASIC).

Following referral of State powers, the National Business Names Register will be established under Commonwealth legislation – the National Business Names Registration package includes the Business Names Registration Bill 2011, the Business Names (Transitional and Consequential) Bill 2011 and the Business Names (Fees) Bill 2011; and other legislative instruments including regulations and the Business Names (Availability of Name) Determination 2011. .

The new laws will replace the *Business Names Act 1962 (WA)*; *Business Names Act 1963 (ACT)*; *Business Names Act 2007 (NT)*; *Business Names Act 1962 (QLD)*; *Business Names Act 2002 (NSW)*; *Business Names Act 1996 (SA)*; *Business Names Act 1962 (TAS)*; and *Business Names Act 1962 (VIC)* and their supporting regulations and instruments.

Under the IGA, amendments to the Commonwealth business names legislation will need the approval of the Ministerial Council for Corporations.

8.1 Business Names Registration Bill 2011 (Registration Bill)

The Registration Bill establishes the National Business Names Registration System. This involves the States either referring powers to regulate business names to the Commonwealth or adopting the Commonwealth law. The law will apply in all Territories except Norfolk Island (however Norfolk Island could be brought into the scheme at a later date). The Registration Bill and the Transitional Bill are not intended to exclude the concurrent operation of most State or Territory laws. Subject to displacement provisions, the law will not apply to provisions that are capable of concurrent operation.

This means, for example, that if would-be real estate operators obtain business names, they are not entitled to operate in a jurisdiction unless they also comply with the relevant real estate licensing requirements in that jurisdiction

The objects of the Registration Bill are to ensure that businesses can be identified, that the inconvenience of multiple registrations is avoided and that the registration of names that are undesirable, including names that are offensive or misleading, is prevented.

The Registration Bill contains a number of offences including: carrying on business under an unregistered business name (30 penalty units); failure to include a business name in written communications (5 penalty units); failure to display a business name at a place of business open to the public (5 penalty units); carrying on business under a business name while disqualified (30 penalty units); and failure to comply with a request from ASIC to provide information (5 penalty units). A penalty unit is currently set at \$110.

These offences are all strict liability offences, as defined by section 6.1 of the *Criminal Code*. However, ASIC is able to issue formal warnings when there is a reasonable belief that an entity has contravened a provision of the Registration Bill.

The Registration Bill provides that a business name will be available to an entity if it is not identical or nearly identical to another business name, a company name, or a name on a notified State or Territory Register. A business name will not be available if it is undesirable or it contains words or expressions that are restricted. The Business Names Registration (Availability of Names) Determination 2011 will specify what is considered to be identical, nearly identical, undesirable or restricted.

Unless ASIC otherwise determines an alternative period of registration, registrations will be for one or three years.

While the Registration Bill does not mandate any particular service delivery channel, it is drafted to facilitate a high degree of online service delivery. It is intended that ASIC will provide extensive online services in respect of the Register to maximise convenience, reduce complexity and minimise cost to businesses and consumers. It also minimises the cost of running the system which is passed on the form of lower fees.

The Registration Bill allows registration of business names to entities as defined in the Bill. An entity includes common business forms including a person, a company and a partnership, but also includes superannuation funds and trusts. Generally, if those involved in the management of an entity have committed an offence, the entity may be disqualified from operating under a registered business name.

Entities are obliged to provide information to ASIC and can be subject to a 5 penalty unit sanction if they do not comply with this obligation. ASIC has the power to request information for the purposes of establishing and maintaining the Register. If an entity refuses to supply information to ASIC, the Federal Court may order that the entity provide the information to ASIC. This is a strict liability offence.

Businesses aggrieved by a decision of ASIC have the right to seek review of ASIC's decision. The business can initially ask for an internal review by ASIC. If this does not provide a satisfactory outcome, the business can apply to the Administrative Appeals Tribunal.

A person can request that ASIC provide them with extracts of entries on the Register. Before providing an extract of the Register to a person, ASIC must excise specified personal details (as prescribed in the Regulations) from any extract.

Much of the information on the Register will be available for free. Further current and historical details will be available from the Register for a fee. This is prescribed in the Regulations.

ASIC's powers and functions are as given to it by the Registration Bill and the Transitional Bill. The Minister may provide ASIC with a written direction about which policies it should pursue or priorities it should follow in carrying out its functions and powers.

The Registration Bill permits ASIC to engage with the Registrar of the ABR for the purposes of identifying business names registered to an entity, and for the purposes of ensuring consistency between the ABR and ASIC's registers.

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

Regulation making power

The Registration Bill will provide the Governor-General with a power to prescribe regulations which are required or permitted in the Act, or which are necessary or convenient to carry out or give effect to the Act.

8.2 Business Names Registration (Transitional and Consequential Provisions) Bill 2011 (Transitional Bill)

The Transitional Bill sets out the transitional provisions necessary to establish the national business names registration scheme. The commencement of the substantive provisions of the Transitional Bill will be linked to the commencement of provisions in the Registration Bill

A national Business Names Register (the Register) will be formed by the electronic transfer of existing registers to ASIC.

During policy discussions a range of options were considered in relation to grandfathered business names. The overriding policy considerations in these deliberations related to the effective operation of a national system, consumer protection, and the need to ensure that the new National Register does not impose unnecessary burdens on small business. The proposed arrangements under the Registration Bill and Transitional Bill allow for the operation of an effective national business names registration system, and will not require existing businesses to spend money on reissuing stationery or re-doing signage as a result of their name already being in use in another jurisdiction. In addition, a level of consumer protection is added through the use of distinguishing markers on the register allowing specific businesses to be identified.

The effect of the Bill is outlined in Section 14 of this submission.

The Transitional Bill also proposes consequential amendments to several Commonwealth Acts, including:

ANL Act 1956, Qantas Sale Act 1992, Olympic Insignia Protection Act 1987, Wine Australia Corporation Act 1980, Financial Transaction Reports Act 1988, Corporations (Aboriginal and Torres Strait Islander) Act 2006, Corporations Act 2001, Bank Integration Act 1991, Defence Service Homes Act 1918 and the Australian Securities and Investment Commission Act 2001.

The effect of these amendments is to ensure the Acts recognise the national Business Names Register established under the Registration Bill.

Consequential amendments are also proposed to the *A New Tax System (Australian Business Number) Act 1999* to require that only registered business names appear on the ABR, and to remove references to State business name laws and unregistered business names.

There is a transitional period allowing for unregistered business names used for business purposes and appearing in the entry relating to the entity in the ABR immediately before change over day, to continue to be displayed on the ABR for twelve months.

This will allow the ABR time to implement an effective communication strategy about the new Commonwealth business names registration requirements and ensure continuity for the business community, who rely on the information provided by the ABR.

Regulation making power

The Transitional Bill will provide the Governor-General with the power to prescribe regulations which are required or permitted under the proposed legislation, or which are necessary or convenient to carry out, or give effect to, this proposed legislation.

8.3 Business Names Registration (Fees) Bill 2011

The Fees Bill provides for the imposition of fees for activities undertaken under the Registration Bill. It is a separate piece of Commonwealth legislation to ensure compliance with Commonwealth constitutional requirements in relation to taxation bills.

Under the Registration Bill, various fees are to be imposed in relation to, amongst other things, the registration and renewal of a business name and for an extract of the Business Names Register. These fees are imposed, as taxes, by the Fees Bill. The fees are prescribed in the Fees Regulations

The Fees Bill is not included as part of the State Referral legislation.

As a taxing measure, policy oversight for the development of the Fees Bill was undertaken by the Department of the Treasury. It has been included with the overall Business Names legislation package for administrative ease, and to allow for comprehensive consultation with the States and Territories, the business community and other interested groups.

8.4 Legislative Instruments

The Business Names legislation package will be supported by a number of legislative instruments:

- Business Names Registration Regulations 2011
- Business Names Registration (Fees) Regulations 2011
- Business Names Registration (Transitional and Consequential Provisions) Regulations 2011
- Business Names Registration (Availability of Names) Determination 2011

The Business Names Regulations and the Names Determination flow directly from the Registration Bill, and contain details such as the information that will be available on the Business Name Register and the tests to determine whether a particular business name is available for use. The Transitional Regulations flow from the Transitional Bill, and the Fees Regulations flow from the Fees Bill.

DIISR has been working closely with the Treasury, ASIC and the Office of Legislative Drafting and Publishing to finalise the draft regulations and the legislative instrument.

Whilst they are substantially complete, the Regulations and Names Determination will continue to be refined while the legislation passes through the Australian and State Parliaments. Agreement among the Commonwealth, States and Territories will be required on the final form of the Regulations and Names Determination.

It is anticipated that these instruments will be tabled in the Australian Parliament in early 2012.

9. Referral of powers

Currently, each State/Territory is responsible for registering business names in its own jurisdiction. The States will make text-based referrals of their business name powers to the Commonwealth under s 51(xxxvii) of the Constitution. The States may also simply adopt the Commonwealth law on business names.

It was the view of the States that a ‘text based’ referral, which means that the only Constitutional power that is referred is the text of Commonwealth Bills, presents the least risk to States’ constitutional sovereignty.

Having regard to section 122 of the Constitution, the Territories will not need to refer power to the Commonwealth. At this stage it is anticipated that Norfolk Island will not be included under the national business names registration scheme as it currently has its own business names scheme and ASIC does not register companies that operate within Norfolk Island. However, should the Minister for Regional Australia and the Norfolk Island Government wish to bring Norfolk Island into the National Scheme, this can be achieved through a separate bill to that effect.

The Constitutional Policy Unit of the Attorney-General’s Department (AGD) has been consulted throughout the legislative drafting process and the Parliamentary Counsel’s Committee allocated the drafting of the State referral bill to a drafter from the Western Australian Parliamentary Counsel’s Office.

Agreement on the form of the State referral bill was reached under the same consultative process as the Commonwealth legislation. That is, the Legal and Governance Working Group agreed on the form of the referral bill as part of its legislation development role for the initiative.

The Registration Bill provides the constitutional basis for its effective operation. The States will be referring constitutional power of the States to the Parliament of the Commonwealth either by a text referral, comprising the text of the initial version of the Registration Bill and the Transitional Bill (the initial Bills), or by adopting the initial Bills. The States will also be referring specified matters relating to the amendment of the initial Bills (the amendment reference). The application of the initial Bills in the referring/adopting States is based on:

- the legislative powers of the Commonwealth Parliament under section 51 of the Constitution, apart from paragraph 51(xxxvii); and
- the legislative powers of the Commonwealth Parliament which it has as a result of matters referred to it by the Parliament of the referring States under paragraph 51(xxxvii) of the Constitution.

The State referrals cover matters to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament.

The reference of powers is in two parts, the first enabling the enactment of the initial Bills, and the second enabling subsequent amendment of the initial Bills by the Commonwealth Parliament.

The first part of the reference of powers relates to the extent of the making of laws with respect to those matters by including the referred provisions in the initial Bills.

The second part of the reference of powers covers the referred business names matters to the extent of the making of laws with respect to those matters by making express amendments to the Act or the Transitional Act (as in force). The meaning of ‘referred business names matter’ is set out in section 9.

The referral corresponds with the draft State Referral/Adoption Bills. Whether a State chooses to refer or adopt, all States need to refer to the Commonwealth a subject-based amendment power in respect of amendments to the national legislation.

10. Fee Structure

The approach taken in the Fees Bill is generally consistent with:

- the *Corporations (Fees) Act 2001* which deals with the imposition of fees under the *Corporations Act 2001*, and
- the *National Consumer Credit Protection (Fees) Act 2009* which deals with the imposition of fees under the *National Consumer Credit Protection Act 2009*.

Fees associated with the national Register will be prescribed in regulations.

Registering for an ABN is currently free, and this will not change following the establishment of the National Business Names Register. Registering or renewing a business name will be in the order of \$30 for one year or \$70 for three years.

Costs for registering a business name will be reduced in nearly all jurisdictions. This means reduced costs for business, especially for businesses that want to trade in more than one State or Territory.

Comparative costs to register a business for three years are shown below:

	National	ACT	NSW	Vic	Qld	SA	Tas	NT	WA
Register (3 years)	\$70	\$151	\$160	\$85.50	\$255.60	\$159	\$140	\$66	\$90
Renew (3 years)	\$70	\$127	\$115	\$61.10	\$206.85	\$128	\$140	\$56	\$75

(Fees current as at 21 July 2011)

Currently, a business operating and registering their business name in every State and Territory faces a cost of more than \$1,000 for three years.

11. Strict liability

The offence provisions in the Business Names Registration Bill are strict liability offences.

The appropriateness of applying strict liability for the offences in sections 18, 19, 20, 21 and 37 of the Registration Bill was considered in accordance with Report 6/2002 of the Senate Standing Committee for the Scrutiny of Bills: Application of Absolute and Strict Liability Offences in Commonwealth Legislation.

First, the largest penalty imposed under the Registration Bill is up to 30 penalty units. Secondly, the punishment of offences not involving fault is likely to allow ASIC to establish a compliance program that will significantly enhance the enforcement of the regime in deterring offences.

The defence of reasonable mistake of fact as well as the other general defences in part 2.3 of the Commonwealth Criminal Code will continue to apply in relation to the strict liability offences under the Registration Bill.

Strict liability will also help ensure the integrity of the regulatory regime, by ensuring that the entity behind a business name can be identified. This is consistent with the justifications for strict liability indicated by Report 6/2002 of the Scrutiny of Bills Committee at 284:

"strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime."

Strict liability will provide consistency with analogous offences under other Commonwealth legislation, in particular the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 (Credit Act). For example, the offence under section 19 of the Registration Bill is comparable to the strict liability offence relating to the obligation to cite an Australian credit licence number in certain documents under section 52 of the Credit Act and the obligations relating to the use of company names and ACNs under section 153 of the Corporations Act. Many of the existing corresponding offence provisions in State and Territory business name legislation contain strict liability offences. Therefore, applying strict liability will not impose an unduly onerous burden and entities will be provided with sufficient notice to guard against the possibility of inadvertently contravening the offence provisions.

Section 75 of the Registration Bill allows ASIC to issue formal warnings if it believes on reasonable grounds that an entity has contravened a provision of the Registration Bill and warn the entity of the action that may be taken by ASIC under the Act in response to the contravention. This provision is intended allow ASIC pursue its objective of compliance more effectively.

The offences include:

- Clause 18: Carrying on a business under an unregistered business name
- Clause 19: Failure to include business name in written communications
Clause 20: Failure to display business name at places open to public
- Clause 21: Carrying on a business under a business name while disqualified and
- Clause 37(3): Not complying with a request from ASIC to give information.

The imposition of strict liability is consistent with the Attorney-General's Department (AGD) *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, which consolidates the principles and precedents relevant to the framing of offences and enforcement provisions in Commonwealth laws. Three applicable considerations for the use of strict liability are set out in Part 4.5 of the Guide:

1. The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual.

The largest penalty under the Business Names Registration Bill is up to 30 penalty units.

2. The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring offences.

The punishment of offences not involving fault is likely to allow ASIC to establish a compliance program that will significantly enhance the enforcement regime in deterring offences.

3. There are legitimate grounds for penalising persons lacking 'fault'.

The task of establishing the mental element for the offences will be extremely difficult, if not impossible. The defence of reasonable mistake of fact as well as the other general defences in part 2.3 of the Criminal Code will continue to apply in relation to the offences of strict liability.

Strict liability will provide consistency with other Commonwealth legislation, in particular the Corporations Act, which has predominantly strict liability offences.

Consultation with the States and Territories, the Australian Government Solicitor (AGS), AGD, ASIC and the Treasury took place in determining the appropriateness of strict liability. The Attorney-General's Department provided advice regarding strict liability offences under the Registration Bill and agreed to their inclusion.

12. Privacy

The objects of the Bill are to provide for a national registration regime and to allow those engaging or proposing to engage with a business with the means of identifying that business, as well as a means of contacting that business.

As a proposed Commonwealth law, the Bill should comply with the *Privacy Act 1988* and the Bill also needs to comply with that Act because that is a requirement under the Intergovernmental Agreement on the National Business Register.

The Business Names package complies with the *Privacy Act 1988* and also provides sanctions for unauthorised uses and disclosures of information.

The Regulations propose to prescribe the collection of the following items of personal information:

- Contact details;
- Alternate contact details;
- Home address, if principal place of business; and
- Date and place of birth of an entity that is also an individual.

The Bill proposes to prohibit the publication of date and place of birth details on the public register and proposes to limit disclosure of those details - to government bodies for one of the following purposes:

- the Information Privacy Principle (IPP) 11 exceptions,;
- consumer protection purposes;
- anti discrimination purposes;
- workers compensation purposes;
- insolvency purposes;
- licence purposes;
- maintenance of notified State/Territory registers;
- and to intelligence or security agencies.

ASIC, is also able to share data with the ABR to ensure consistency between registers.

The objects of National Business Names Register Bill (i.e. including the removal of registration inconvenience and consumer protection) limit the uses and disclosures that may be made of personal information collected, without the consent of the person whose information it is. They also inform the level of scrutiny that needs to be applied to the collection of that information. Appropriately the objects do not provide for the personal information collected to be of a standard suitable for use/disclosure for “identity” checking/verification purposes.

Additionally, the Registration 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.

13. Trade marks, and similar names

The sole purpose of business names registration is to allow consumers and others involved in consumer protection and law enforcement to ascertain the entity behind a business name, and how the entity can be contacted. This will be accomplished by requiring an entity carrying on an enterprise in Australia, and using a name other than its own, to register with the Australian Securities and Investments Commission (ASIC).

Business name registration is not intended to affect the rights of any other entity, and an entity does not acquire property in a business name upon registration. The purpose and effect of business name registration is therefore different from that of registering a trade mark, which gives the trade mark holder proprietary rights.

As part of the COAG initiative, IP Australia has released a new trade mark search tool – TM Check – to help identify pending or registered trade marks that may be similar to a proposed name. ASIC will be providing an online business names registration service on its web site, which will include a link to TM Check so that applicants can compare their proposed business names with registered Australian trade marks. ASIC will also include information on its web site, and on business name application forms, warning business name applicants that it is their responsibility to ensure that they do not infringe on a trade mark. Similarly, business name applicants will be advised that they will not acquire property in a business name upon registration, and that if they wish to protect their business names they should consider registering a trademark.

When an applicant enters a name on the ASIC business names search service, it will give a list of identical, near identical and similar names that exist. For instance, when an applicant enters “Joe and Bill” or “Joe & Bill” on the National Names Index search service, “JoeBill” is presented back in a list as an existing name. In addition, when “Jack Jill” is entered, both “Jack and Jill” and “jack & Jill” are displayed as existing names. The business seeking to register a business will therefore be aware of any similar names. Whilst business names that are very similar may be registered by ASIC, it is important to remember that no property is acquired when registering a business name.

The new system will have an automated name determination test (similar to company name registration).

ASIC will not be responsible for checking proposed business names against trade marks. It is an ongoing responsibility of business name registrants to ensure that they do not infringe on any trade marks, including trade marks registered after the registration of their business names. IP Australia was consulted in development of the legislation and agrees with the proposed approach.

14. Transitional Arrangements

Automatic name transfer for existing business name registrations

Existing businesses will not need to do anything when the new national business name service is launched. Their existing State or Territory business name registration will automatically be transferred into the national Register.

If a business name was previously registered in more than one State or Territory, by the same business name owner(s), then each of the State/Territory registrations will be transferred to the national Register. ASIC will communicate with the business name owners, advising that only one of the registrations will continue (the one with the latest renewal date) and that they only need pay a single renewal fee.

The national Register will include some identical business names that have been registered by different owners in different States/Territories. These identical business names will be distinguished on the Register by a distinguisher (e.g. WA). The business name itself will not include the suffix, so there will be no need to change their business name on signage or stationery, for example. This process mimics the process that occurred when the various State and Territory corporations' registers were transferred to ASIC in 1990 (TBC).

Business name renewals

All businesses with registered business names will receive renewal reminders and details of the new online process will be included in their renewal notice.

Business owners will still be able to renew their business name without an ABN. This is to ensure that existing businesses are not disadvantaged when moving from the State or Territory system to the national system.

ASIC will enable businesses to align their renewal date with another date such as their company's review date or another business name renewal date. This will reduce the impost on business.

Identical names on existing State/Territory registers

Under the Transitional provisions, grandfathered names that are identical or nearly identical will be allocated a distinguishing word or expression which will be displayed on the Register. This may be a geographic locator or other word nominated by the entity. The distinguishing word or expression does not form part of the business name.

A name will not be available to a new applicant if it is identical or near identical to an existing (grandfathered) name, or if it is identical or near identical to an existing (grandfathered) name and the accompanying distinguishing word or expression.

15. *Written communications*

Following the public consultation, Clause 19 of the Business Names Registration Bill was clarified to include a broad statement of the type of communications to which the obligation to include an entity's business name applies, and identification of a more specific subset of documents that require inclusion of an entity's business name and ABN.

This change came in response to public consultation comments and aims to ensure clarity surrounding the scope of an offence provision.

Under the legislation, when an entity communicates, externally, in writing with another entity and the communication is a business document (including digital communications) connected with carrying on the business, the entity must include its clearly legible business name.

This requirement is consistent the current position under the Victorian, Tasmanian, Western Australian and Queensland business names legislation, with the extra catch all of 'all business documents connected with carrying on business', which is used under the current NSW business names legislation. This means that most businesses will not have a large compliance burden and will most likely not need to change stationary.

The Australian Business Number (ABN) and business name of an entity must be displayed on the following documents:

- a document that is lodged with ASIC;
- a statement of account (including an invoice);

- a receipt;
- an order for goods or services;
- a cheque;
- a promissory note or bill of exchange;
- an offer to provide goods or services (rather than an invitation to treat).

The documents required to include an entity's ABN, are similar to the documents that are required to display an Australian Company Number under the *Corporations Act 2001* (Cth). The consistency in the requirements for businesses and companies is intended to provide more certainty for the business community.

A provision has been included to create a defence where the inclusion of a business name or an ABN in a document would in some way be contrary to the law of a referring/adopting State or an affected Territory. A similar defence has been included in clause 20, where the Commonwealth obligation to display a business name is imposed.

PART C – SENATE ECONOMICS COMMITTEE INQUIRY

16. *The inquiry*

In advance of the legislation being introduced into Parliament, the Minister asked the Senate on 6 July 2011 to refer the draft legislation to the Senate Economics Committee for an inquiry. The purpose of an early referral was to identify any key issues likely to be raised by the Senate during the debate stage.

The Committee received 12 submissions and a hearing was held in Canberra on 2 August 2011.

The key issue for discussion at the hearing was whether the National Business Names Registration legislation would inhibit the ability of financial institutions, and third party credit reporting agencies (particularly Veda Advantage), to meet their obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and/or the *National Consumer Credit Act 2009*.

The Department sought advice on this matter, and the advice confirmed that there is nothing in the AML/CTF Act or the Consumer Credit Act that requires business name registers to be used for data verification purposes and that other sources can be used.

A proposal was put to the Committee that the information sought by a third party (particularly date of birth and home address) could be made available via a match/no match system – whereby the system would not reveal the information, only confirm that the information entered is correct or incorrect.

However, after seeking advice it was confirmed that to implement a match/no match system, the draft of the Bill which had been agreed by the Commonwealth and States/Territories would need to be amended. This would mean re-opening negotiations with the States and Territories, and if agreement could be reached, seeking further policy approvals and having the Bill amended in the Commonwealth, Tasmanian and Queensland Parliaments. This would pose risks to meeting the COAG milestones and delivering the system by 28 May 2012.

In addition, the legislation would need to apply retrospectivity because in three jurisdictions ‘consent’ is not obtained in the application forms.

Overall the Commonwealth concluded that there appears to be no public interest justification for overriding the right of people who register business names to have certain personal information kept private.

The Committee reported on 15 August and while the report discussed the concerns raised by submission authors within the financial services sector, the Committee recommended that the legislation be introduced into the Parliament and passed.

17. *Response to Coalition Senators’ Comments*

Subsequently, on 22 August 2011, Coalition members of the Committee released additional comments on the draft legislation, outlining eight issues of concern for the Coalition, and suggesting passage of the legislation be delayed until these issues are resolved.

DIISR briefed the Shadow Minister for Small Business and provided written responses to the issues raised, as set out below. On the basis of the information

provided, the Federal Opposition supported the Bills during debate in the Main Committee of the House of Representatives on 12 September 2011, which agreed to report the business names legislation to the House of Representatives as being legislation that should be passed without amendment. The Bill was read a third time and passed by the House of Representatives on 13 September 2011.

The Requirement to have an ABN

To assist with identification of the identity behind a business name, the registration system mandates an Australian Business number (ABN) for any new business name registration. Currently all State and Territory business name registers allocate a business name number. The ABN will replace the Business Name Number for new registrations and allow businesses to be identified through both their name and ABN.

With regards to linking the business name registration with the ABN, if a business is refused an ABN, they will not be considered a business therefore would not be able to register a business name.

An ABN is only refused under certain circumstances:

- the application is not in a form approved by the Registrar
- the applicant is already registered with an ABN
- the Registrar is not satisfied with the identity of the applicant
- the application contains insufficient information
- the applicant has requested in writing that their application be treated as refused because a decision to register was not made within 28 days
- the applicant is not carrying on an enterprise in Australia or making supplies connected with Australia as part of carrying on an enterprise.

An enterprise is a defined term in the goods and services tax (GST) and the Australian business number (ABN) legislation. An enterprise includes a business and other commercial activities. The other commercial activities include adventures and concerns in the nature of trade and where they are done on a regular or continuous basis, leases, licences and other grants of an interest in property. It includes the activities of entities such as charities, deductible gift recipients, religious and government organisations, and certain non-profit organisations.

It also includes activities done in the form of a business or adventure or concern in the nature of trade.

It does not include:

- private recreational pursuits and hobbies
- activities carried on as an employee, labour hire worker, director or office holder
- activities carried on by individuals (other than trustees of charitable funds) or partnerships (in which all or most of the partners are individuals) without a reasonable expectation of profit.

The vast majority of businesses have ABNs. There are approximately 600,000 ABNs and 250,000 business names registered each year. Currently businesses need to apply to the Australian Government to obtain an ABN (with 96% using electronic channels). The new system will provide a combined online process for registering ABNs and business names.

Businesses choosing to not register an ABN will still be able to trade under their own entity name.

Accessing Private Information on the Register

The purpose of the national business names registration system, as set out in the Registration Bill and derived from the intergovernmental agreement, is to provide consumers, and other interested parties, with a means of identifying the entity behind that business, as well as a means of contacting that business. Entities are required to register their business name if they do not trade under their own name.

The intergovernmental agreement states that ‘all business names data held by the Commission, whether originating in State or Territory agencies or collected by Commonwealth agencies, will from the commencement of the national law be subject to the Commonwealth’s privacy and secrecy legislation’.

The regulations rather than the primary legislation, prescribe what information is collected and withheld about entities registering business names.

The following information will be available online for free: the business name; the name of the entity; entities ABN, if any; contact details of the entity; the principal place of business; address for service; registration status, renewal date, whether there is a review lodged, if grandfathered - old State/Territory and old registration number, registration date, qualifier (may be geographical). An exception to this is individuals where the business address is the home address – in this case the suburb and State will be provided. Historical information will be provided for a small fee.

Private information such as date of birth and home-address will be made available for free to government bodies and to intelligence or security agencies as outlined in the Registration Bill (Clause 62).

Private information such as date of birth and home address will not be made available to the public or private companies due to the objects of the Act, and States and Territories were concerned about data being made available that was not made available publicly in their jurisdiction (see Clause 26 of the Transitional Bill)

Also another reason residential addresses will not be provided is that many of those who provided this information to existing State and Territory registration systems either did not provide consent as it was not required under the laws of certain States (such as SA and WA). Such consent would be required to release the information under Commonwealth privacy law. It would be impractical for the Commonwealth to sort through and approach those holders of business names, who are being grandfathered into the system, to seek their consent. The only alternative would be to seek Parliament’s agreement to retrospective legislation.

Also the reason date of birth will not be provided is only three States and Territories provide date of birth for adults and Clause 26 of the Transitional Bill prohibits ASIC from making the information public that had not been prior to change over day, consent would need to be sought and it would be impractical to distinguish between registrations grandfathered from States and Territories who do provide/consent to release date of birth information. The only alternative would be to seek State and Territory agreement and Parliament’s agreement to retrospective legislation to authorise such Commonwealth disclosures, without consent.

Advice has confirmed that the provisions in the legislation do not breach or inhibit the intent of the identity verification requirements set out in the Anti-Money Laundering and Counter Terrorism Financing Act 2006 (the AML/CTF Act) i.e. Know Your Customer (KYC). Whilst there is a requirement to collect a customer’s full name, date of birth and residential address, there is no requirement under this Act to use the

business names registers for these purposes. There is however a requirement under the AML/CTF Act that the information used to KYC is 'reliable'. The business names data for date of birth and home address is not checked. Nor do the provisions inhibit the intent of the National Consumer Credit Protection Act 2009. This Act does not impose a specific requirement to verify a consumer's date of birth or home address nor is there a requirement under this Act to use the business names.

Overall, there appears to be no public interest justification for overriding the right of people who register business names to have certain personal information kept private. Whilst it may be in the business interests of certain organisations and may suit their particular business models, this is not sufficient to override the public interest.

Probate Law and Jurisdictional Issues Relating to Clause 40 of the Bill

The Department of Innovation, Industry, Science and Research (DIISR) appreciates the concerns of the Law Council regarding clause 40 of the Business Names Registration Bill. It is anticipated, however, that clause 40 would apply only where persons were awaiting a grant of probate or letters of administration. The process is necessary to prevent the person running the business in that period to not be liable to offences under the Act. Thus the process described under clause 40 is simply an administrative step towards the situation covered by clause 39, where the legal representative of an estate is appointed as a result of the Supreme Court of a State/Territory in granting probate or letters of administration. This being the case, DIISR is confident, and has legal advice to the effect, that there is no conflict between clause 40 and the probate laws of the various States and Territories.

Trade Marks

The sole purpose of the business names register is to allow consumers, and other interested parties, to ascertain the entity behind a business name, and how the entity can be contacted. This will be accomplished by requiring an entity carrying on an enterprise in Australia, and using a name other than its own, to register with ASIC, which will administer the new business names register.

Business name registration confers no rights of property in a business name upon the registering entity. The purpose and effect of business name registration is therefore different from that of trademark registration, which gives the trademark holder proprietary rights.

IP Australia has advised that ASIC is not in a position to provide advice to traders about whether their trading name will or will not infringe on another Australian or overseas organisation's trade mark. This is best left to private organisations.

ASIC will however raise awareness of the issue as part of the national business names registration process, including a statement explaining that a business name does not give exclusive name rights and that if they wish to protect their business names they should consider registering a trademark. A link to IP Australia's trade mark search will also be provided. Businesses will have to acknowledge this information before being able to complete the registration process.

As part of the Business Names Registration Project, IP Australia released a new trademark search tool – TM Check – to help identify pending or registered trade marks that may be similar to a proposed business name. It also offers a low cost service to check if your trademark may be registrable before you actually apply.

Failure to Address the Risks Associated with 'Opportunistic Registrations'

In order to address the issue of opportunistic registrations, ASIC, under subclause 47(1), may take action to cancel registrations where it is evident that no business has been conducted under the relevant business name during the preceding three months.

In the case of an entity who has registered a business name for the purpose of “name squatting”, then it is likely that they would not actually be conducting any business under the business name. In that situation, ASIC could use its power to cancel the business name registration, making that business name available to be registered for other businesses.

In addition ASIC may deregister the business name if ordered by a court where there has been an infringement of a trade mark.

Failure to Address the Potential Positive Outcomes Available from Adding 'Unsatisfied Judgments' to the Database

It is illegal for an entity to trade while bankrupt/insolvent. ASIC must be notified in cases where the entity concerned is bankrupt or insolvent (see clause 38 of the Business Names Registration Bill). ASIC will then record on the business names register the names of the trustee in bankruptcy/ debtor representative.

The purpose of the business names register is to allow consumers and others to ascertain the entity behind a business name. In the case of bankruptcy/insolvency this entity is the trustee in bankruptcy/debtor representative.

The register is not designed to record the debts of entities, not even "unsatisfied judgments". Unless such "unsatisfied judgments" cause the entity in question to become bankrupt/insolvent, they are beyond the purposes of the business names registration project.

The Need for an Education Campaign to Explain the Changes to Stakeholders

There has already been extensive consultation on the national business names system. Such consultation included:

- Stakeholder consultation with key industry associations (September-October 2006)
- Market testing of concept (October 2006)
- Release of discussion paper and consultation with industry associations (September-October 2007)
- Market testing to review key project assumptions and inform project design (May 2009)
- Public consultation forums on the proposed business name registration system were held in capital cities (April 2010).
- The first exposure draft of the Business Name Registration Bill 2010 and its related fees bill were exposed for public comment (28 May to 28 August 2010).

- The second exposure draft of all the primary legislation was released for public consultation (14 March 2011 to 24 April 2011).

Future education campaigns regarding the new business names registration system will primarily be undertaken by ASIC and the Australian Business Register (ABR), with DIISR undertaking a coordination role. The States and Territories will also play an important role in communicating information about the new system to those who are currently registered in their systems.

A project-level Commonwealth Communications Working Group has been established to develop appropriate communication strategies and materials to ensure stakeholders are adequately informed about the national system. DIISR maintains a fact sheet and frequently asked questions document on its website including information about the progress of the project. DIISR also maintains a list of interested stakeholders – those who have previously expressed interest in being kept informed of the project’s progress – and communicates with these stakeholders at key stages of the project (e.g. to inform them of the release of the exposure draft legislation).

The States and Territories will also play an important role in communicating the new system to those who are currently registered in their systems. A project-level Communications Forum with representation from the Commonwealth and each of the States and Territories, has been established for some time to address communications issues and progress strategies and materials to facilitate the delivery and coordination of consistent, effective, and appropriate messages on the proposed national system.

Leveraging the extensive existing Commonwealth, State and Territory communication channels and the strategies and materials developed by the project-level communication bodies, there will be comprehensive and effective communication with businesses and consumers.

Associated Regulations of the Business Names Registration (Fees) Bill 2011

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

Registering or renewing a business name will be in the order of \$30 for one year or \$70 for three years.

Costs for registering a business name will be reduced in nearly all jurisdictions. This means reduced costs for business, especially for businesses that want to trade in more than one State or Territory.

Currently, a business operating and registering their business name in every State and Territory faces a cost of more than \$1,000 for three years.

Comparative costs to register a business for three years are shown below:

	National	ACT	NSW	Vic	Qld	SA	Tas	NT	WA
Register (3 years)	\$70	\$151	\$160	\$85.50	\$255.60	\$159	\$140	\$66	\$90
Renew (3 years)	\$70	\$127	\$115	\$61.10	\$206.85	\$128	\$140	\$56	\$75

(Fees current as at 21 July 2011)

The implementation by regulations of the provisions that provide for CPI indexing to fees is 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.

GLOSSARY

<i>Abbreviation</i>	<i>Definition</i>
AGD	Attorney-General's Department
AGS	Australian Government Solicitor
ASIC	Australian Securities and Investments Commission
ABN	Australian Business Number
ABR	Australian Business Register
COAG	Council of Australian Governments
DIISR	Commonwealth Department of Innovation, Industry, Science and Research
Fees Bill	Business Names Registration (Fees) Bill 2011
IGA	Intergovernmental agreement for business names agreement
LGWG	Legal and Governance Working Group
National Business Names Registration package	Business Names Registration Bill 2011, Business Names Registration (Transitional and Consequential Provisions) Bill 2011, Business Names (Fees) Bill 2011 and other legislative instruments
Register	Business Names Register
Registration Bill	Business Names Registration Bill 2011
Registration System	National Business Names Registration System
Transitional Bill	Business Names Registration (Transitional and Consequential Provisions) Bill 2011

FREQUENTLY ASKED QUESTIONS

Businesses need to register a business name if they carry on a business or trade within Australia and are not trading under their own entity name. An entity name may be an individual's name, partners' names or a company name. This is so that consumers can easily identify the person(s) or company behind a business (trading) name through a public register.

Currently business names are registered in each State or Territory a business trades in. It is proposed that a new national system for business names registration will start in the first half of 2012. The new national system is a Council of Australian Governments initiative in which the States agreed to refer their business names registration powers to the Australian Government.

This FAQ sheet has been prepared to help explain the new proposed system.

The new system

Q1. What are the proposed key changes to business names registration?

- Business names will be registered nationally, thus there will no longer be a need to register in each State a business trades in.
- There will be lower fees for registration and renewal and options for one or three year registration periods.
- Businesses will be able to apply to register a national business name online and receive confirmation of their registration at the same time.
- The business name registration will also be available as a joint online registration in conjunction with the Australian Business Number (ABN) registration with pre-filling from one registration to the next.
- There will be information on and links to the trade mark and domain name searches.
- New businesses will need to have an ABN or be in the process of applying for an ABN and not have been refused an ABN in order to register a business name.

Q2. What changes are being proposed to the application process?

Business names registration will be managed and administered by the Australian Securities and Investments Commission (ASIC). ASIC already has responsibility for the registration of companies.

On commencement of the new national system, businesses will be able to register for an ABN and a national business name in a single integrated online registration process by visiting www.abr.gov.au. Businesses that already have an ABN can register separately online at www.asic.gov.au.

A paper based form will also be available which can be mailed to the Registrar, Australian Securities and Investments Commission (ASIC).

Q3. For businesses that don't have access to the internet, where can they go to register business names?

Clients will be able to access the online services from home, or other locations, if they have access to the internet.

Access to the online national business names service will be available through a range of service centres across Australia including ASIC and Australian Taxation Office (ATO) office locations. Designated State or Territory agency offices, business enterprise centres or small business centres will be able to offer information about how/where to access the online national business name service and will continue to provide other business licensing services (e.g. trade licences).

Those who do not have internet access can call ASIC for alternative registration methods on 1300 300 630.

Q4. Will businesses need to register their business names in their State and Territory also?

No, the new system replaces separate State or Territory business name registrations with a single national business name registration.

Registration of limited partnerships, limited associations and the like plus licensing and professional registration will continue to be administered, as per current arrangements, mostly by States and Territories.

Q5. Who can complete the online business name registration on behalf of a business?

A person legally responsible for the business, or their nominated and suitably qualified business advisor (e.g. accountant or solicitor), may complete the online application. ASIC Registered Agents can also lodge information for a client after the client has nominated them to act on their behalf.

All members of a partnerships or unincorporated association can nominate a principal contact authorized to act on their behalf in dealings with ASIC.

Options and fees

Q6. What is the proposed fee under the new business name registration regime?

It is proposed that registering a new business name is in the order of \$30 for a one year registration period and \$70 for a three year registration period. Renewal of the national business name registration is proposed to be in the order of \$30 for a one year registration period and \$70 for a three year registration period. A payment advice and a Business Name Extract will be supplied by ASIC to confirm registration.

Q7. How do these fees compare with previous State/Territory registration systems?

Previously, different States and Territories each had different fee structures and different options for registration periods. On commencement of the new national business names registration system, Businesses will pay a lesser fee and in some cases significantly less. Currently business names fees in certain States can be as high as \$255.60 for three years. These savings for business are primarily due to efficiency gains related to rationalising the delivery of eight services to one and from a new online system.

Q8. What payment options are available when registering in the new system?

The client will be offered a range of payment options in line with existing ASIC payment options for company services e.g. BPay and Australia Post BillPay. In addition, online electronic payments will be available via Mastercard and Visa through a secure transaction process.

Q9. Are there any fees for applying for an ABN in the new integrated business name registration process?

Registering for an Australian Business Number will remain free.

ABN requirements

Q10. Will it be mandatory to have an Australian Business Number (ABN) to register a business name?

New businesses will need to have an ABN or be in the process of applying for an ABN and not have been refused an ABN in order to register a business name. The combined ABN/business name online registration process will help facilitate this.

Q11. If a business has an ABN but hasn't told the Fair Trading Office, what will happen?

At the commencement of the national business name service ASIC will encourage businesses to declare their ABN if they have one. Transitional arrangements will assist businesses meet this requirement. For more information go to www.asic.gov.au.

Q12. Sometimes ABN registration isn't instantaneous and can take up to 28 days to be processed. Will those businesses affected be able to get a business name registered?

If a business has applied for an ABN, not been refused an ABN, but has not yet received it, the business name registration process will allow for a name to be 'pending' and not able to be registered by someone else. Once the business name application and payment has been

received and ABN provided, the business name will then be registered. If payment is not received or if the ABN has not been allocated within 28 days the name will not be registered.

Q13. If a current business has a registered business name but doesn't have an ABN, will it still be able to keep on renewing its business name registration?

Yes, existing business owners will still be able to renew their business name without an ABN. However, they will require an ABN to register for an AUSKey, the single key to access government online services.

AUSKey is a new online security credential designed for businesses to access government online services. Businesses will have less need for different user IDs and passwords as AUSKey becomes accepted by more government agencies for their online services.

More information go to www.abr.gov.au/auskey

Public information

Q14. How will consumers find out who is behind a registered business name?

Consumers will be able to search online for free at www.asic.gov.au for the business name and other details behind the business name including the name of the entity (such as a company) behind the business name, the entity's principal place of business and an address for service. Home-based businesses will only have their suburb and State or Territory displayed on the free online register. Businesses will be able to seek suppression of any otherwise publicly available details upon request to ASIC. This would suppress details on the public register but not to nominated government agencies.

When a business communicates, externally, in writing about a business-related matter, the business will be required to its business name.

The Australian Business Number (ABN) will also need to be included on certain documents, including:

- documents lodged with ASIC;
- a statement of account (including an invoice);
- a receipt;
- an order for goods or services;
- a cheque;
- a promissory note or bill of exchange;
- an offer to provide goods or services (rather than an invitation to treat).

Name allocation

Q15. How will ASIC determine if a business name can be registered?

Proposed business names that are identical or nearly identical to names already on the register will not be available for registration. A name will not be registered if it is inappropriate, or likely to offend, mislead or deceive consumers and traders.

An online and automated test will be used to determine registrable names, hence allowing the process to be fast, objective and repeatable. The restrictions on what can be registered are similar to what is allowed for company names and under state business name legislation.

Q16. How will the system deal with protected titles?

The online registration system will not prevent the registration of a protected title (e.g. pharmacist or doctor) or a licensed trade (e.g. plumber) but business owners will need to ensure that they comply with State or Territory laws and have appropriate Australian qualifications, memberships or approvals where applicable.

Q17. How will the new system handle business names that need Ministerial approval?

Names that require Ministerial approval such as those that use words or terms that may imply government endorsement or an official advisory body status, are expected to go through a process where Ministerial approval is sought. ASIC will advise businesses regarding this process.

This is similar to the existing process for company names.

Franchises

Q18. How does the new system deal with franchise names?

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.

Trade marks

Q19. What is the difference between a business name and a trade mark?

The differences between trade marks, business names, company names and domain names sometimes cause confusion. Registration of a business name, company name or domain name does not in itself give any proprietary rights (property rights) - only a trade mark can give that kind of protection. The same word(s) may be registered by different people as business names and trade marks. However, the registered trade mark owner can sue the business owner for infringing the trade mark if the business name owner uses it on goods or services similar to those covered by the trade mark registration. Links will be provided during the business name registration process to give applicants the opportunity to search the trade mark database. For more information go to www.ipaustralia.gov.au.

Q20. Why can't the system check whether a business is infringing on someone's trade mark?

It is the responsibility of a business to ensure their business name does not infringe on the rights of trade marks both here in Australia and, if businesses are planning on exporting and/or having a web presence, overseas.

Trade marks are registered in different categories (45) of goods and services and there may be instances where the same or a similar trade mark is registered to different businesses in different categories. If a business is trading online and/or exporting, there may be overseas trade marks that need to be checked. It can be a very complex area, and it may be best to consider seeking advice regarding a proposed name should a business wish to invest much time, money and energy in developing a brand.

Although IPAustralia has some general information on trade marks and also a freely accessible database (ATMOSS) to check pending and registered trade marks in Australia, advice could be sought from a registered trade marks attorney or lawyer experienced in intellectual property matters. An intellectual property advisor can assist businesses in developing a branding strategy, clearance searches and obtaining trade mark rights in Australia and overseas.

Checking for trade marks is an ongoing responsibility of businesses as new trade marks are being used and/or applied for continuously. This can be done by watching out for new applications on the free database or checking whether trade marks have been accepted in the Official Journal of Trade Marks. For three months after the advertisement date of acceptance, anyone who believes that the trade mark should not be registered may oppose its registration.

To access the ATMOSS database, or for more information about trade marks, the application process, fees and other information go to www.ipaustralia.gov.au

Appeals

Q21. What happens if the national business name applied for is rejected?

Using the online system, in most cases the applicant will immediately receive a message advising that the name cannot be registered before they complete the transaction.

The system will explain the reason the name was rejected. The applicant can then choose another name and proceed with completing the application process.

Q22. If a business is told it can't register a certain business name, can it appeal the decision?

Yes, an applicant dissatisfied with the rejection of a business name application will have 28 days to seek a review by ASIC. There is no fee for the review.

Grounds for review and appeal will be whether the rule/s, as specified in the Business Names Registration Act and regulations, has/have been satisfied.

If dissatisfied with the outcome of that review, businesses can appeal to the Administrative Appeals Tribunal. The cost for an appeal to the AAT is currently \$777; however the majority of the fee is refundable if the applicant wins.

Q23. If a third party is aggrieved by ASIC registering a particular name to an applicant, can the third party seek a review by ASIC of that name determination decision?

Yes if:

- The name objected to is not grandfathered (or carried over) as part of the transition to the national system; and
- The third party is an entity in relation to whom there is a real risk of substantial detriment because of the registration of the business name; and
- The application for review is received by ASIC within 15 months of the date of registration of the name being objected to, or a longer period allowed by ASIC.

Since it is the responsibility of the original applicant to ensure they do not pass off as another business or mislead or deceive consumers, there are other areas of law in Australia which may be used to try and stop the unauthorised use of a business name including the Commonwealth Competition and Consumer Act and State Fair Trading Acts and the Intellectual Property law.

Transition

Q24. What will happen to existing registrations of State/Territory business names?

The registration of existing State or Territory business names will be transferred into the national system at the introduction of the new national service. This is called 'grand-fathering'.

Businesses will be able to review and check their details online at www.search.asic.gov.au.

Business name registrations will still need to be renewed when the original registration period expires. If this is before the change-over date, the State/Territory fee is applicable, and must be paid to the appropriate State/Territory agency.

On commencement of the new national business names registration system, all renewals due after the change-over date will occur through the national system. The national renewal fee shall apply and reminders will be issued from ASIC in due course.

Q25. How will businesses know when to renew their business name registration?

Existing business names originally registered in the States or Territories will still be due for renewal on their original expiry date.

Those who register using the new system will select either a one year or three year registration period, and will be able to align their renewal dates (if they have various business names registered, or if they also have a company registration).

All businesses with a registered business name will be reminded prior to the expiration date that their renewal is due. The reminder will be sent to the client, prior to the registration expiration date.

It is expected that renewals will continue to be issued by States and Territories up until the commencement of the new national system. All renewal notices thereafter will be issued by the Australian Securities and Investments Commission. Those businesses with renewals that fall due after the changeover date will be notified in plenty of time to renew their registration.

Q26. What happens if the same business name has previously been registered by different businesses in different States/Territories?

All business name registrations will be transferred to the national business name 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 stationary.

When a distinguishing word/ expression is added to the details held on a business name record, the assessment of new applications for business names will be impacted. A new business name will not be available if it clashes with the registered business name OR with the combination of business name plus the distinguishing word/expression.

E.g. Joe Smith operates Joe Smith's Plumbing in Fremantle. 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, not only would another business not be able to make a new application to register Joe Smith's Plumbing, but also it would also not be able to register Joe Smith's Plumbing Brisbane or Joe Smith's Plumbing Fremantle.

Q27. For current business name registrations, during the sale of a business, will the business name registration be transferable to someone else, even though there happens to be another identical business name?

In this circumstance a current registration can be transferred to a new owner by lodging the appropriate notices with ASIC.

Q28. If a business has the same business name registered in two States, but registered on different dates, what will the business owner have to do?

ASIC will communicate to the business, confirm the list of identical names that belong to the business, notify them that only one name will be renewed and the renewal date (which will be the latest renewal date). Importantly the business will have one business name registered on the national system.

Next steps

Q29. When will the system go live?

The national business names registration system is expected to commence in mid-2012. However this is dependent on the passage of legislation in all jurisdictions. There will be comprehensive communications to ensure the business community, business intermediaries, industry associations and consumer groups are aware of the changes.

Q30. Who is responsible for the changes to the Australian business registration system?

The new proposed national business registration system is a joint initiative between the Australian Government, State and Territory governments through the Council of Australian Governments (COAG).

The delivery partners of this new national system are:

- Australian Securities and Investments Commission (ASIC)
- Australian Business Register
- IP Australia
- Department of Innovation, Industry, Science and Research (DIISR)
- The Treasury
- State and Territory small business and fair trading/consumer affairs agencies

Keep updated on progress by checking:

<http://www.innovation.gov.au/Section/AboutDIISR/FactSheets/Pages/AustralianBusinessNumberABNBusinessNamesRegistrationProjectFactSheet.aspx>

Comments can be sent to: businessnamesconsultation@innovation.gov.au