Business Names Registration (Transitional and Consequential Provisions) Bill 2011

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Law and Bills Digest Section

Contents

Business Names Registration (Transitional and Consequential Provisions) Bill 2011 .......................... 3
Purpose ........................................................................................................................................ 3
Background .................................................................................................................................... 3
Committee consideration .............................................................................................................. 4
Senate Selection of Bills Committee ............................................................................................. 4
Senate Standing Committee for the Scrutiny of Bills .................................................................. 4
Senate Economics Legislation Committee .................................................................................. 4
Financial implications .................................................................................................................. 6
Key provisions .............................................................................................................................. 6
Change-over Day .......................................................................................................................... 6
Schedule 1—Transitional provisions ............................................................................................. 6
Part 1—Business names registered on change-over day ............................................................... 7
Part 2—Business names held on change-over day to resolve outstanding matters .................. 7
Registration ..................................................................................................................................... 8
ASIC to cease to hold business names ....................................................................................... 8
Regulations to resolve outstanding matters ................................................................................ 9
Comment ....................................................................................................................................... 9
Part 3—Entities disqualified on registration under this Act ....................................................... 9
Part 4—Information-gathering for transitional purposes ............................................................ 10
Part 5—Distinguishing grandfathered business names that are identical or nearly identical ................................................................................................................................. 11
Comment ........................................................................................................................................ 12
Part 6—Aligning registration periods .......................................................................................... 12
Part 7—Other obligations to give information to ASIC ............................................................. 13
Part 8—Preserving exemptions and protecting information .......................................................... 13
Part 9—Review ............................................................................................................................ 14
Part 10—Miscellaneous .............................................................................................................. 14
Schedule 2—Consequential amendments .................................................................................. 14
Business Names Registration (Transitional and Consequential Provisions) Bill 2011

Date introduced: 17 August 2011

House: House of Representatives

Portfolio: Innovation, Industry, Science and Research

Commencement: Sections 1-3 on Royal Assent. Section 4, Schedule 1 and Schedule 2 Part 1 at the same time as section 3 of the Business Names Registration Act 2011, that is, by Proclamation. Schedule 2 Part 2 one year after commencement of Part 2 of the Business Names Registration Act 2011.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Business Names Registration (Transitional and Consequential Provisions) Bill 2011 is to implement the changes that will take place with the transferring of business names from the states and territories business name registers to the Australian Business Register (ABR).

Background

The Business Names Registration package consists of the following Bills:

Business Names Registration Bill 2011

Business Names Registration (Fees) Bill 2011

Business Names Registration (Transitional and Consequential Provisions) Bill 2011

For detailed background information and the basis of policy commitment see the Bills Digests to the following Bills:


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Committee consideration

Senate Selection of Bills Committee

The Committee resolved to recommend at its meeting on 24 August 2011, not to refer the Business Names Registration (Transitional and Consequential Provisions) Bill 2011 to a Committee.¹ However, see below for discussion of the Senate Economics Committee report on the draft Bills.

Senate Standing Committee for the Scrutiny of Bills

The Committee in its Alert Digest drew attention to the occurrence of a Henry VIII clause in Schedule 1, subitem 10(3). Subitem 10(3) provides that the Transitional and Consequential Provisions Act and the Business Names Registration Act have effect subject to modifications made by the regulations to deal with matters outstanding under the law of a state or territory. The Committee report commented:

It is regrettable that the explanatory memorandum does not address the justification of this delegation of legislative power (it amounts to a ‘Henry VIII clause’ in which subordinate legislation can override the effect of the primary legislation). The Committee therefore seeks the Minister’s advice as to the appropriateness of this approach.²

At the time of writing the Digest, the Minister has not as yet replied to the Committee.

Senate Economics Legislation Committee

On 06 July 2011 the Senate referred the draft legislation to the Committee for inquiry and report by 15 August 2011.

a) Draft Business Names Registration Bill 2011;

b) Draft Business Names Registration (Transitional and Consequential Provisions) Bill 2011; and

c) Draft Business Names Registration (Fees) Bill.

The legislation gives effect to the establishment of a National Business Names Register, which is one element of a COAG initiative and forms part of COAG’s Seamless National Economy agenda. The proposed key changes include:


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• the national registration of business names, thus there will no longer be a need to register in each state a business trades in;

• central administration by ASIC, which is currently responsible for the registration of companies;

• lower fees for registration and renewal as well as options for one or three year registration periods;

• the ability of business owners to apply to register a national business name online and receive confirmation of their registration at the same time;

• the availability of joint online registration of a business name in conjunction with the Australian Business Number (ABN) registration with pre-filling from one registration to the next;

• information on and links to the trade mark and domain name searches; and

• businesses with an ABN can register for an AUSkey, a single key to access government online services.3

In relation to the current Bill, the Committee report summarised the clauses and stated that the purpose of the Bill ‘is to guide transitional arrangements upon the enactment of the primary Bill’.4 The report further noted that ‘the Bill refers to the process of transferring business names from state/territory registers to the federal register as ‘grandfathering’.5 A number of concerns were raised in relation to the other two Bills, however the Committee report recommended that the exposure draft Bills be introduced into the Parliament and passed.

The Coalition Senators made additional comments to the report, especially paragraphs 1.3, 1.4 and 1.6. Paragraphs 1.3 and 1.4 relate to the issues raised by the ‘grandfathering’ of existing business names and that these issues should be addressed prior to the enactment of the Bills. Paragraph 1.6 states the following:

Accordingly, as the Inquiry process has highlighted a number of shortcomings in the Bills, it is the view of Coalition Senators that these shortcomings should be addressed as

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5. Ibid., p. 19.

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a matter of priority prior to the bills being introduced for the consideration of Parliament.  

**Financial implications**

The Explanatory Memorandum states:

- that the 2010-11 Budget allocated $125.2m over four years to implement the Registration System. These funds were distributed between the Department of Innovation, Industry, Science and Research (DIISR), the Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO). This amount is being fully offset in unspent funding.

- The National Partnership Agreement to deliver a Seamless National Economy committed the Commonwealth and the states and territories to delivering on agreed implementation milestones and deadlines, which are tied to reward payments under the National Partnership Agreement.

- Compliance cost impact: There is no net increase in compliance costs. The replacement of the existing state and territory business names regimes with a single new Commonwealth business regime will result in a net reduction in compliance costs for business and those transacting with businesses.

**Key provisions**

**Change-over Day**

*Change-over day* is defined in clause 4 as the day on which Part 2 of the Business Names Registration Bill commences. Part 2 will commence on a day fixed by Proclamation. Part 2 deals with offences relating to business names. The date of the proclamation, according to the Explanatory Memorandum to the Business Names Registration Bill, ‘will depend on when the final state or territory passes its referral legislation or adopts the Commonwealth legislation’.

**Schedule 1—Transitional provisions**

Part 1 relates to the transfer of registered business names of a state/territory to the Commonwealth.

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7. Explanatory Memorandum, Business Names Registration Bill 2011, p. 3.
8. Ibid., p. 22.

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Part 1—Business names registered on change-over day

**Item 1** applies to a state/territory that notifies ASIC of a business name registered under the registration law of the state/territory which is to be registered on the Business Names Register. Notification is to be by electronic means or any other form agreed to by ASIC and the state concerned and is to be done before change-over day. The information required in the notification is set out in **subitem 1(3).**

**Item 2** deals with business names registered in relation to a person who trades alone before the change-over day. If ASIC receives notification of a business name where a person carries on the business alone under item 1, ASIC must register the business name to the person. **Subitem 2(2)** sets out the details required to be recorded in the Business Names Register. **Subitem 2(3)** indicates the registration period which commences at the beginning of the change-over day and ends on the last day of the registration period expiring under the law of a referring state or territory where the business name was registered.

**Item 3** deals with names registered in relation to a group of persons before the change-over day. **Subitem 3(1)** relates to notification to ASIC of a business name and a person under item 1 and the person carries on a business with one or more other persons. **Subitem 3(2)** provides that on change-over day, ASIC must register the business name to the entity if it exists or to the group of persons, if the entity is not yet formed. If the business name is registered to a group of persons, each person is a joint venture entity and the group is a joint venture for the purpose of clause 87 of the Business Names Registration Bill (**subitem 3(3)**). **Subitem 3(4)** sets out the details required when ASIC registers a business name of the entity or a group of persons. **Subitem 3(5)** defines the period of registration. It begins at the start of the change-over day and ends on the last day when registration would have expired under the state or territory law.

Part 2—Business names held on change-over day to resolve outstanding matters

**Subitem 4(1)** applies to notifications to ASIC by a state or territory that a business name is to be held so as to resolve outstanding matters under the law of the state or territory. **Subitem 4(2)** states that notification must be in electronic form before the change-over day.

**Item 5** deals with a business name that is held during the grace period for renewal. **Subitem 5(1)** provides that ASIC must hold the business name until it is registered under item 7 (registration) or ASIC ceases to hold the business name under items 8 (notice given by states/territories) or 9 (ASIC may request update on names held). **Subitem 5(2)** states that no entity commits an offence under Part 2 of the Business Names Registration Act while the business name is held under **subitem 4(1)** of the Transitional Act by ASIC.

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9. Clause 87 of the Business Names Registration Bill deals with joint ventures. It sets out the rules for treating joint ventures in the same way as entities see note in item 7 of Part 2 Schedule 1.

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Subitem 6(1) provides that item 7 (registration) applies if a state/territory notifies ASIC in electronic form (subitem 6(2)) and the notification includes the details set out in subitem 6(3). They may also nominate the period of registration for the business name (paragraph 6(3)(b)).

Registration

Item 7 deals with the procedures associated with registration of business names. Subitem 7(1) provides that ASIC must register the business name to:

- a person if the business is carried on by the person alone
- to an entity if a group of persons has formed an entity
- to the group of persons if they have not formed an entity.

Subitem 7(2) states that if a business name is registered to a group of persons each of those persons is a joint venture entity and the group is a joint venture for the purpose of clause 87 (joint ventures) of the Business Names Registration Bill.

Under subitem 7(3) ASIC registers the business name by entering in the Business Names Register:

- details identifying the entity or group of persons to whom the business name is registered
- details will include the ABN of the person, the entity or each person within the group
- the business name, and
- address of each principal place of business of which ASIC is aware, and
- each address for service of documents of which ASIC is aware, and
- period for which the business name is registered.

Subitem 7(4) states that the state or territory nominate the period for which the business name is registered under paragraph 6(3)(b).

Subitem 7(5) states that if notice to register a business name under item 6 four months after the change-over day, ASIC must notify in writing of the registration, the entity or a group of persons treated as an entity.

Subitem 7(6) states that item 7 does not apply if the business name is already registered to the entity, because of a previous application, another provision of this Act or of the Business Names Registration Act.

ASIC to cease to hold business names

Subitem 8(1) provides that if all states and territories who have given notice to ASIC to hold a business name under item 4, then give notice that ASIC is to cease to hold the business name, ASIC must do so. Notification must be given in electronic form (subitem 8(2)).
Regulations to resolve outstanding matters

Item 10 provides that regulations may be made for the purpose of resolving outstanding matters. Subitem 10(1) enables the Governor-General to make regulations dealing with business names to resolve outstanding matters under the law of a state or territory. Subitem 10(2) clarifies that any regulations made under subitem 10(1) are not intended to direct a state or territory on how matters are to be resolved. Subitem 10(3) without limiting the effect of subitem 10(1), provides that this Act and the Business Names Registration Act have effect subject to any modifications by the regulations relating to outstanding matters under the law of a state or territory.

Comment

Subitem 10(3) has the effect of making primary legislation subject to changes occurring in subordinate legislation where a power is included in the Act to make it possible to amend the Act or any other Act by regulation. This is the Henry VIII clause referred to by the Senate Scrutiny of Bills Committee. Commentators have discouraged this practice and in the text, Delegated Legislation in Australia, reference is made to the recommendations of the Donoughmore Committee. This was a United Kingdom Parliamentary Committee on Ministers’ Powers in 1932. It recommended that:

The use of clauses of this kind be abandoned in all but the most exceptional of cases (and, even then, be used only for the purpose of bringing an Act into operation). The basis of the Committee’s objection was that such clauses vested an enormous amount of power in the executive government and that, while they could find no evidence of abuse of power, this power was capable of abuse.  

They comment further that the practice in Australian jurisdictions has become more common, however the parliamentary committees whose function is to review the ‘exercise of such powers have largely been able to monitor and report on their use, ensuring that the various parliaments are at least conscious of the use of these mechanisms’.

Part 3—Entities disqualified on registration under this Act

Item 11 deals with entities disqualified on registration under this Act. Subitem 11(1) provides that if an entity to whom a business name is registered, and the entity is disqualified on the day it is registered under this Act, the entity must notify ASIC. Subitem 11(3) provides that if a business name is registered to an entity, but the entity is disqualified on registration day, sections 21 and 44 of the Business Names Registration Act do not apply in relation to that disqualification. Subitem

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11. Ibid., p. 15.
13. Clause 21 of the Business Names Registration Bill 2011 deals with the offence of carrying on a business while disqualified. Clause 44 of the Bill deals with cancellation if the entity is disqualified.

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11(4) provides that the Minister may determine in writing that the registration of an entity be cancelled because of the seriousness of an offence or offences for which the entity was disqualified and that allowing the entity to carry on a business poses serious threat to consumers. However, the Minister must not make a determination under subitem 11(4) if a business name was registered to a person under the law of a state or territory because leave was granted by a relevant court. In the case of a business name registered to a person in association with one or more other persons, each person was registered under that law because leave was granted by a relevant court or because such leave was not necessary (subitem 11(5)). Subitem 11(6) defines for the purpose of subitem 11(5) what is meant by leave is granted by a relevant court. It refers to particular provisions in the respective Business Names Acts of New South Wales, Victoria, Western Australia, South Australia and Tasmania.

Part 4—Information-gathering for transitional purposes

The Explanatory Memorandum states that:

- 3.4 ASIC may disclose information to the Registrar of the ABR (Australian Business Register) and to the states and territories for transitional purposes.
- 3.5 There are other obligations to notify ASIC of such matters as bankruptcy, insolvency and death of an individual.  

Item 12 deals with the interaction of ASIC with the Australian Business Register (ABR). Under subitem 12(1), ASIC may disclose information to the Registrar of the ABR to obtain assistance to establish details of:

- whether an entity is in fact an entity under the law of a state/territory and if so, what is its ABN
- obtain details of business names on the ABR as registered for an entity under the law of a state/territory
- obtain details of business names on the ABR not registered for an entity under the law of a state/territory but used for business purposes by the entity.

Subitem 12 (2) specifies the provisions in the Transitional and Consequential Bill where ASIC may record and use information disclosed by the Registrar of the ABR for the purposes of making those decisions.

Item 13 provides that ASIC may disclose information to states and territories for transitional purposes. This means that ASIC may disclose the information in order to ensure that a business...

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name is registered to the right entity under this Act and to ensure that the details contained on the Business Names Register are correct.

**Item 14** enables ASIC to record and use information disclosed to it by states and territories in making decisions under the specified provisions of this Act.

**Item 15** provides that ASIC may rely on information disclosed to it by a state or territory or by the Registrar of the Australian Business Register when it exercises powers or performs functions or duties under this Act.

### Part 5—Distinguishing grandfathered business names that are identical or nearly identical

**Item 18** deals with the use of distinguishing words and expressions to distinguish between business names registered under the Act. **Subitem 18(1)** provides that item 18 applies if two or more identical business names are registered under this Act. Item 18 also applies if one or more business names are registered under the Business Names Registration Act under an application to which an entity has consented under section 31 of that Act (subitem 18(2)). **Subitem 18(3)** provides that ASIC may nominate a word or expression to be entered on the ABR to distinguish the business names by notice to each entity.

**Subitem 18(6)** provides that if ASIC gives notice under subitem 18(3), the entity has 28 days to lodge a notice with ASIC either accepting the nominated word or expression or objecting to the nominated words and suggesting an alternative. If the entity fails to comply with subitem 18(6), the entity is taken to have accepted ASIC’s nomination (subitem 18(8)).

**Subitem 18(9)** states that ASIC must accept the alternative word or expression nominated by the entity unless ASIC is reasonably satisfied that the altered business name would not be available under clause 25 of the Business Names Registration Bill. **Subitem 18(10)** states that ASIC must notify the entity if it accepts or rejects the alternative word and if ASIC rejects the alternative, specify the word in the notice that is to be entered on the ABR.

**Item 20** relates to ASIC entering the distinguishing word on the ABR. **Subitem 20(1)** states that ASIC must enter the distinguishing word or expression that relates to identical business names on the ABR. The distinguishing words are not part of the business name (subitem 20(2)). **Subitem 20(3)** states that ASIC may remove the distinguishing word if ASIC is satisfied that confusion would not

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15. Clause 31, Business Names Registration Bill 2011, relates to the consent of a holder of the business name to registration by another entity. The note to clause 31 gives the example of the holder of a business name selling the business and consenting to the business name being registered to the purchaser.

16. Clause 25 of the Business Names Registration Bill 2011 relates to whether a business name is available to an entity or not.

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result about who is carrying on the business under that business name. **Subitem 20 (4)** states, that if ASIC removes an entity from ABR, ASIC must notify the following entities of the removal:

- the entity to whom the business name is registered
- each entity for whom ASIC has contact details, to whom the business name or nearly identical business name, was formerly registered.

**Comment**

The term ‘grandfathering’ refers to the transfer of state and territory business names to the federal Australian Business Register. Both the Law Council of Australia and the Gilbert + Tobin Lawyers are of the opinion that the use of geographical suffix by ASIC may not be sufficient to distinguish between identical or nearly identical business names. Gilbert + Tobin Lawyers note the following:

We believe the proposed grandfathering mechanism will create a 2 tiered ownership system where current registrants of identical names are advantaged over future business name registrants and that registration of these names at a national level poses a potential risk of consumer confusion.

In relation to consumer confusion, if a business with an identical name in one state and territory then made a decision to expand into another state or territory where the identical name is in use, a geographical suffix is not required to be used and may not in any event be sufficient to distinguish between the trading entities leading to consumer confusion.

Instead, we suggest that existing business name registrations are grandfathered as state specific with a mechanism for registrants to convert the existing state or territory registration to national registrations.

In the event of conflicting identical names on a national conversion application, a requirement of registration should be use of the geographic indicator and a limitation on the right to use a name to a particular geographic area.

**Part 6—Aligning registration periods**

**Item 22** deals with aligning registration periods. **Subitem 22 (1)** applies to the first renewal after the day the business name is first registered under this Act. **Subitem 22(2)** provides that ASIC must determine an alternative registration period for the renewal of the registration if the entity lodges a

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request to have the alternative registration period. If the renewal period is one year then the period requested is not more than 18 months. If the renewal period would have been three years, then the alternative period is not more than three years and six months.

Part 7—Other obligations to give information to ASIC

Item 23 relates to notifying ASIC of bankruptcy, insolvency, et cetera. Subitem 23(1) provides that a debtor representative of an entity immediately before a business name is first registered to the entity under this Act will satisfy clause 38\(^{19}\) of the Business Names Registration Bill if:

- the debtor representative has notified a person responsible for registration in a referring/adopting state or an affected territory
  - that the person is appointed or authorised to act as a debtor representative of the entity, and
  - identify who will carry on the business under the business name while that person is appointed or authorised, or

- the debtor representative lodges with ASIC notice of the person’s appointment or authorisation in accordance with paragraphs 38(2)(b) to (d) within 28 days beginning on the registration day.

Item 24 deals with notifying ASIC of death of an entity that is an individual. The legal personal representative in relation to a deceased estate of an individual immediately before the business name is first registered to the individual under this Act, will satisfy subsection 39(1) of the Business Names Registration Act if:

- the person gives notice before the registration day in a referring/adopting state or an affected territory that one of the following is granted:
  - probate of the will of the deceased,
  - letters of administration of the estate of the deceased,
  - any other similar grant, or

- the person lodges with ASIC notice of the relevant grant in accordance with subclause 39(2) of the Business Names Registration Bill within 28 days beginning on the registration day.

Part 8—Preserving exemptions and protecting information

Item 25 relates to exemptions. Subitem 25(1) provides that there is an exemption for an entity to include a name or its ABN in a written communication if an exemption existed under the registration law of a state or territory. Under section 19 of the Business Names Registration Act, it is an offence not to include the business name and ABN in written communications. Subitem 25(3) provides that

\(^{19}\) Clause 38 of the Business Names Registration Bill 2011, deals with notifying ASIC of bankruptcy, insolvency, et cetera.

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an entity is exempt under section 20 from displaying the business name if immediately before the change-over day the entity was subject to an exemption under the registration law of a state or territory.

Item 26 relates to protecting information.

**Part 9—Review**

Item 27 deals with reviewable decisions. The table of reviewable decisions is set out in item 27 as well as who may seek review.

Item 28 deals with internal review of certain decisions. Subitem 28(1) provides that an entity may seek review of a decision by ASIC, other than as a delegate of the Minister, by lodging an application with ASIC. Subitem 28(2) provides that if a reviewable decision is made by an ASIC member or staff member as a delegate of the Minister, the entity may lodge an application with the Minister for review of the decision.

Item 29 deals with administrative review of certain decisions. Subitem 29(1) allows an application to be made to the AAT for review of a decision made by ASIC or the Minister under item 28. In subitem 29(2) the wording and meaning is unclear. Subitem 29(3) allows an application to be made to the AAT for review of a decision made personally by the Minister to cancel a business name under subitem 11(4) (written determination by Minister to cancel a business name).

**Part 10—Miscellaneous**

Item 33 is a regulation making power where the Governor-General may make regulations prescribing matters that are required and permitted by this Act or that are necessary or convenient to carry out and give effect to this Act.

**Schedule 2—Consequential amendments**

Part 1 relates to consequential amendments of Acts commencing on change-over day.

Part 2 relates to a consequential amendment commencing on the first anniversary of change-over day.

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