



Australian Government

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Dear Sir/Madam

The Department of Industry, Innovation, Science Research and Tertiary Education (DIISRTE) is pleased to provide a submission to the Standing Committee on Uniform Legislation and Statutes Review inquiry into the Business Names (Commonwealth Powers) Bill 2011.

DIISRTE is the lead Commonwealth policy agency for this Council of Australian Governments (COAG) initiative, and has been working closely with the States and Territories on the development of the referral and adoption bills for introduction into each of the State Parliaments, as well as the Commonwealth legislation that has been passed by the Australian Parliament, which will establish the National Business Names Registration System.

The enclosed submission summarises the background to the project to establish a National Business Names Register, including the COAG framework, the referral of powers and the status of the legislation across the jurisdictions.

DIISRTE 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

Ann Bray
Acting Head of Division
Industry and Small Business Policy Division
12 January 2012



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Department of Industry, Innovation
Science, Research and Tertiary Education

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

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES
REVIEW**

**BUSINESS NAMES (COMMONWEALTH
POWERS) BILL 2011**

JANUARY 2012

OVERVIEW

At present, businesses need to register their name in each State or Territory in which they trade, with varying processes and fees. The National Business Names Registration System will mean businesses pay one fee to register nationally, using an online application process.

The initiative is part of the COAG seamless national economy deregulation agenda. 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 to be established.

An Intergovernmental Agreement (IGA) for Business Names was signed by all First Ministers in July 2009. Under the IGA, the national system cannot commence if any State does not refer powers. Extensive consultation has been undertaken to reach agreement between the States and Territories on the form of the referral, and the powers to be referred. It is proposed that the new national system for business names registration will start on 28 May 2012, subject to the successful passage of legislation by all State Parliaments. By the end of the 2011, the Commonwealth and four States had passed the necessary legislation. The remaining two states (Western Australia and South Australia) have legislation before their respective Parliaments.

The National Business Names Registration legislation mandates 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 Act 2011* (Cth) and the Business Names (Availability of Names) Determination, which is expected to be finalised and tabled in the Australian Parliament in early 2012. This is similar to the process that exists under Corporations law.

To assist with identification of the identity behind a business name, the National Business Names 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.

1. *Background to the National Business Names Register*

In July 2006, COAG identified as a “regulatory hotspot” the demand for a seamless, single on-line registration system for Australian Business Numbers (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.

2. *COAG framework*

A business case for the initiative was completed in April 2008 and recommendations from the Steering Committee were provided to the SBMC in May 2008. A model was agreed to by COAG at its July 2008 meeting and in October 2008 COAG agreed to the Implementation Plan. An IGA for Business Names was signed by First Ministers in July 2009.

The National Business Names Registration Project 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 Commonwealth 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. At its 19 August 2011 meeting, COAG agreed to defer the commencement of the business names reform to 28 May 2012, in acknowledgment of the complexity of the reform and to allow jurisdictions sufficient time to pass legislation through their Parliaments.

3. Benefits to business and consumers

The Register will deliver significant benefits to businesses. At present, a business operating and registering 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 \$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 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 an appropriate level of privacy for home-based business operators.

Mandating the ABN for new business name registrations will mean that consumers and other businesses can have more confidence in 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, trading 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. Referral of powers

Currently, each State/Territory is responsible for registering business names in its own jurisdiction. The States have agreed to make text-based referrals of their business name powers to the Commonwealth under Section 51(xxxvii) of the Constitution. This can be achieved by either enacting referral legislation, or by simply adopting the Commonwealth law on business names.

It was the strong view of the States that a 'text based' referral, which means that the only Constitutional power that is referred is the text of Commonwealth Acts, 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. Norfolk Island will not be included under the National Business Names Registration System 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 could be achieved at a later date through a separate bill to that effect.

The Business Names Registration Act 2011 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 *Business Names Registration Act 2011* and the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (the initial Acts), or by adopting the initial Acts. The States will also be referring specified matters relating to the amendment of the initial Acts (the amendment reference). The application of the initial Acts 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 Acts, and the second enabling subsequent amendment of the initial Acts 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 Acts.

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 of the Registration Act.

The referral corresponds with the State Referral Acts/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.

5. *The legislation*

As noted above, establishment of the National Business Names Register is underpinned by Commonwealth legislation, together with legislation in each of the States.

Officials from the Commonwealth, States and Territories have worked cooperatively in the development of the legislation.

A Legal and Governance Working Group (LGWG) was formed in July 2008, comprising representatives of all jurisdictions (State and Commonwealth), to develop the Commonwealth legislation.

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, which is made up of First Parliamentary Counsels from each of the jurisdictions, allocated the drafting of the State referral and adoption bills 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.

Subject to the successful passage of legislation in each of the States, the National Business Names Register will be established under Commonwealth legislation – the National Business Names Registration package includes the Business Names Registration Act 2011, the Business Names (Transitional and Consequential) Act 2011 and the Business Names (Fees) Act 2011; and other legislative instruments including regulations and the Business Names (Availability of Names) Determination.

The Commonwealth Bills were passed by the House of Representatives on 13 September 2011 and by the Senate on 13 October 2011. The Bills received Royal Assent on 3 November 2011. An additional bill to clarify the application of consequential amendments in the Business Names Registration (Transitional and Consequential Provisions) Act 2011 was passed by the Parliament on 23 November 2011 received Royal Assent on 5 December 2011. The Business Names Registration Regulations were tabled in the House of Representatives on 24 November 2011 and in the Senate on 25 November 2011. The Names Determination is expected to be tabled in Parliament in early 2012.

Three States have enacted referral legislation: The New South Wales (NSW) referral legislation received Royal Assent on 20 September 2011 and proclamation took effect on 10 October 2011; Tasmania's referral legislation received Royal Assent on 4 October 2011 (there is no proclamation clause in the Tasmanian legislation); and the Queensland referral legislation received Royal Assent on 28 October 2011. The remaining States are progressing adoption legislation: Victoria's adoption legislation received Royal Assent on

21 December 2011; South Australia and Western Australia have introduced adoption bills into Parliament.

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, now the Ministerial Legislative and Governance Forum.

6. Fee Structure

The Fee structure for the National Business Names Registration System is set out in the *Business Names Registration (Fees) Act 2011*. The approach taken in the Fees Act 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 are prescribed in the *Business Names Registration (Fees) Regulations 2011*.

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 \$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 9 January 2012)

7. 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.

8. *Communications*

With more than 1.5 million business names registered across Australia, a coordinated, timely and targeted communication campaign is crucial for transition to, and implementation of the new National Business Names Registration System.

The promotion of the system will primarily be undertaken by the Australian Securities and Investments Commission (ASIC), with the Australian Business Register (ABR), Department of Industry, Innovation, Science, Research and Tertiary Education and States and Territories supporting ASIC's activities.

ASIC's activity will focus on ensuring businesses are aware of the timing and nature of changes, how the changes will affect existing and new businesses; and informing other relevant stakeholders of the changes. ASIC will use a

number of methods to promote the National Business Names Register, including online channels and a road show that will visit each capital city.

While ASIC will be the main driver of communication activity, collaboration and coordination is critical to supporting the national approach to delivering key messages.

ABR, DIISTRE and state and territory communication activity will support ASIC's efforts through providing broad information on the changes, and maximise the use of existing resources and leverage established processes, relationships and opportunities to disseminate key messages.

A number of mechanisms have been developed to support the delivery of a national approach to communication activity. A Communication Forum has been established to ensure that all Commonwealth, and State and Territory, agencies are engaged and participate in the planning and implementation of communication activity. Shared tools/resources have also been developed to drive, coordinate and support communications.

The planning of communication activity is being guided by the COAG Business Regulation and Competition Working Group (BRCWG) milestones.

The commencement date of the National Business Names Registration System is dependant on the enactment of legislation by the Commonwealth and the States. The current status of the legislation across the jurisdictions is discussed in Section 5 above, and each jurisdiction is currently on track to have legislation in place to allow the 28 May commencement date to be achieved

To ensure a smooth transition for businesses moving from State/Territory Registers to the new National Register, communication activity, including the promotion of the 28 May 2012 commencement date (with appropriate caveats) will need to begin before the legislation has been finalised in the remaining jurisdictions. This is particularly important as there will be a short time frame between all States enacting legislation and the National Business Names Register launch. Officials from the Commonwealth, and States and Territories, have agreed to begin communicating the May 2012 commencement date from January 2012, noting that this is subject to legislation being enacted by all States.

Communicating the commencement date from January 2012 will allow the States and Territories to inform businesses that are due to renew their business names about the changes. The Commonwealth is funding the production of a brochure for use by the States and Territories for this purpose. Other marketing material, provided by the Commonwealth, will also be provided to the States and Territories to support communication activity.