

# Chapter 2

## Provisions of the exposure draft bills

2.1 This chapter outlines the key provisions of the three exposure draft bills:

- the Business Names Registration Bill 2011;
- the Business Names Registration (Transitional and Consequential Provisions) Bill 2011; and
- the Business Names Registration (Fees) Bill.

2.2 The draft Business Names Registration Regulations 2011, draft Business Names Registration (Fees) Regulations 2011 and the draft Business Names Registration (Availability of Names) Determination 2011 are discussed where relevant.

### Provisions of the bills

2.3 The bills will:

- establish a national business names register, replacing the current system of registers operating in each state and territory;
- establish a central business names registration database to be administered by the Australian Securities and Investments Commission (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;
- allow business owners to apply to register a national business name online and receive confirmation of their registration at the same time;
- provide for 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;
- provide information on and links to the trade mark and domain name searches; and
- enable businesses with an ABN to register for an AUSkey—a single key to access government online services.

2.4 As part of these changes, businesses will be required 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;
- display their entity name and ABN on all written correspondence and communication (except internal communication); and

- ensure that new business names are not identical or near identical to existing business names.

### ***Business Names Registration Bill 2011***

2.5 The Business Names Registration Bill 2011 is the primary bill outlining the new provisions for the registration of business names and for other related purposes.

2.6 Clauses 1 through to 11 (Divisions 1–3), outline the primary interpretation provisions, such as the meaning of 'referring/adopting state', the meaning of 'referred business names matter' and the constitutional basis for the legislation.

2.7 Clauses 12 to 15 outline the interaction between the new Business Names Registration Bill and state and territory laws.

2.8 Specifically, subclauses 12(1) and 12(2) explain that the bill does not exclude or limit state/territory laws as they relate to licensing and accreditation requirements; the conversion of one body into another and/or the amalgamation of bodies; permit requirements; and the permission to use certain words or expressions.

2.9 Subclauses 14(1)–(5) and clause 15 outline the legislative hierarchy and the application of the bill should a conflict occur between state/territory and Commonwealth laws.

2.10 The objectives of the legislation are listed in clauses 16 and 17. They are:

- to identify a business and how that business may be contacted;
- to simplify the registration process and to negate the need to register a business name individually in each state and territory;
- to ensure identical or near identical business names are not registered; and
- to ensure that undesirable and/or restricted names are not registered.

2.11 Offences relating to business names are outlined in clauses 18–21. Most of the offences have remained consistent with previous practice. There are a few notable additions, however:

- It is considered an offence if the name is not registered to the entity as a business name on the Business Names Register.<sup>1</sup>
- The entity must display the registered business name on all official, non-internal, communications when corresponding with another entity.<sup>2</sup>
- The entity must prominently display their registered business name to the public.<sup>3</sup>

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1 Business Names Registration Bill 2011, subclause 18(1).

2 Business Names Registration Bill 2011, subclauses 19(1)-(5).

2.12 The processes associated with registering a business name are outlined in Part 3 of the bill in clauses 22–34. ASIC's role in establishing and maintaining the register is stipulated in clause 22, while clause 23 outlines the registration process. The actual registration process is largely consistent with current state and territory requirements with two notable exceptions:

- (a) registration will be online, with manual facilities provided for those without an internet connection; and
- (b) if businesses do not already have an ABN, they will be required to register for one commensurate with registering a business name.

2.13 Point (b) is a potentially significant change for small business. Under current legislation, businesses are not required to register for an ABN if their gross income is less than \$75 000 per annum (\$150 000 for not-for-profit organisations). In other words, businesses are only required to register for an ABN if they have to pay Goods and Services Tax (GST). Most businesses (except for Taxi services) are not required to pay GST if they earn a gross income of less than \$75 000.<sup>4</sup>

2.14 Clauses 24 to 31 outline the types of business names that are registrable and the period after which unresolved applications are cancelled. It includes clauses on identical or nearly identical names, undesirable names and restricted words and expressions.

2.15 Subclauses 32(1)–(4) outline the offences that warrant the disqualification of businesses by ASIC. These relate to criminal offences committed under the Commonwealth Criminal Code by an individual or groups of individuals who registered the business name.

2.16 ASIC's role and the steps taken by the agency to register a business name are described in clauses 33 and 34. Particularly important is clause 33, which outlines the length of time business names may be registered for. According to the provisions set out in this clause, business names may be registered for a period of one or three years unless an exemption has been granted by ASIC. These exemptions are outlined in subclauses 33(2)–(4) and relate to the coordination of registration expiry dates (see paragraph 2.19 below).

2.17 Parts 4 and 5 of the bill (clauses 35–54), outline the information business owners are required to provide ASIC and the conditions under which business names may be cancelled and/or applications rejected. Of particular note is clause 54, which allows ASIC to hold business names while an application is being reviewed. This means that later applicants who apply for a near identical or identical business name to the one being reviewed will be rejected.

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3 Business Names Registration Bill 2011, subclauses 20(1)-(5).

4 Details are available on the ATO's website at:  
<http://www.ato.gov.au/businesses/content.aspx?doc=/content/20724.htm>

2.18 Clause 40 is also noteworthy because it appears to grant ASIC limited powers of probate, which is a state and territory issue. This issue is explored in more detail in chapter 4.

2.19 The provisions for the renewal of business names and length of registration periods are provided in Part 6 (clause 55). Most noteworthy is the provision for businesses to coordinate registration periods. This means that if an individual owns more than one business or if a business is a subsidiary of a company, registration periods can be coordinated so that each business/company will be due for renewal commensurately. Otherwise, businesses may be registered for a period of one or three years.

2.20 Part 7, containing clauses 56–59, explains reviewable decisions and ASIC's internal processes as they relate to reviews. ASIC reviews will be conducted free of charge. Should an applicant be dissatisfied with ASIC's review, they will be able to take their grievances to the Administrative Appeals Tribunal.<sup>5</sup>

2.21 Provisions governing access to the Business Names Register are contained in Part 8, clauses 60–62. These sections outline the application process for accessing business information and ASIC's disclosure obligations as they relate to the dissemination of information regarding business ownership.

2.22 Clause 60 brings about a large change in the ability of third parties to access information on the business register. Under current arrangements, credit and financial service providers are able to access business information for identity verification purposes. This clause denies private bodies the ability to access previously accessible information. Proposed regulation 9 of the Business Names Registration Regulations 2011 stipulates that information such as date of birth and personal address details will be excised from any copies of information provided by ASIC to private third-party entities. This is discussed in greater detail in chapter three.

2.23 Clauses 63–80 (Part 9 of the bill) describe ASIC's powers, general disclosure powers (in particular to other agencies) and the processing of fees. Specifically:

- clause 65 allows ASIC to enter into individual arrangements with states and territories, with the consent of the Commonwealth Minister, for the performance of functions or the exercise of powers by ASIC as an agent of the state or territory;
- ASIC will have the authorisation to accept fees for registration on behalf of the Commonwealth;
- ASIC will have the power to waive and/or refund fees according to the guidelines set out in paragraph 72(a) and (b); and
- clause 78 outlines a disclaimer under the heading of 'liability for damages'. Under this provision, the Minister, ASIC, members of ASIC, staff and/or

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5 Business Names Registration Bill 2011, clauses 58(1)-(4).

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members of an ASIC delegation and APS employees will not be liable to an action or other proceedings for damages in 'relation to an act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, conferred or expressed to be conferred by or under this Act or the Transitional Act'.<sup>6</sup>

2.24 Clauses 81–90 outline the impacts of the Business Names Registration Bill 2011 on various business models, including partnerships (clause 82), trusts (clauses 85–86), joint ventures (clause 87) and unincorporated associations and bodies (clauses 83–84). Most provisions apply to these business models, with the only exception relating to offences. Under the provisions set out by clauses 81–90, punishment for offences committed will be imposed on all members of the partnership, committee of management of the association or body on behalf of the association or body and/or each trustee. Moreover, each partner and/or trustee must be signatories on the relevant registration forms.

2.25 Schedule 1 provides listings of the notified state/territory registers.

### ***Business Names Registration (Transitional and Consequential Provisions) Bill 2011***

2.26 The purpose of Business Names Registration (Transitional and Consequential Provisions) Bill 2011 is to guide transitional arrangements upon the enactment of the primary bill.

2.27 This bill has two Schedules. Schedule 1 outlines the changes that will occur to currently registered business names on 'change-over day'. The bill refers to the process of transferring business names from state/territory registers to the federal register as 'grandfathering'.

2.28 Subclauses 1(1)–(4) describe the reporting and notification obligations of states and territories to ASIC. All states and territories must notify ASIC of registered business names in the respective states and territories in electronic format prior to change-over day.

2.29 Clauses 2 and 3 outline the registration processes for various business models, including sole traders and group of persons. As part of this process, the states and territories are required to disclose identifying information to ASIC for the purposes of registration.

2.30 Clauses 4–10 relate to the holding of business names and applications in progress on change-over day. According to these provisions, ASIC is obliged to hold business names that are currently being processed and/or reviewed, according to the notifications provided by the relevant states and territories. In particular, clause 7 stipulates that ASIC must register current business names where the owners have not been disqualified (see paragraph 2.31 below). Moreover, ASIC must cease to hold a

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6 Business Names Registration Bill 2011, paragraph 78(e).

business name if the relevant states and territories request that a business name be no longer held (clause 8).

2.31 Clause 11 defines the term 'disqualified'. As part of this clause, guidelines for disqualification are provided and any action that may be taken against disqualified businesses on change-over day, including the cancellation of a previously registered business name—see subclause 11(4).

2.32 Clauses 12–16 outline ASIC's disclosure powers and interaction with the Australian Business Register. Under clause 13, ASIC may disclose information to states and territories for transitional purposes as it deems necessary. ASIC may also alter and/or complete information on the Business Names Registry, where it deems business details as incomplete (clauses 16–17).

2.33 Clause 18 gives ASIC the power to add distinguishing features to grandfathered business names where they are identical or nearly identical. For example, if there is a business named Joe's Plumbing in Brisbane and a Joe's Plumbing in Melbourne, ASIC can add the relevant city to the name of the business, i.e. Joe's Plumbing (Brisbane). This will be for administrative purposes only and will not alter the actual business name. There is a provision in subclause 9, where an entity can nominate a distinguishing word or expression, which will be utilised if ASIC deems it acceptable.

2.34 Clauses 19 and 20 further define and explain distinguishing words or expressions and clause 21 re-iterates the requirement that identical or near identical business names cannot be registered.

2.35 Clause 22 elaborates on clause 55 of the Business Names Registration Bill 2011 that allows businesses to align registration periods.

2.36 Clauses 23 and 24 describe the various obligations of business owners to provide information to ASIC. These include details of bankruptcy and insolvency etc (subclause 23(1)) and the death of 'an entity that is an individual' (clause 24).

2.37 Clause 25 provides a list of exemptions for businesses in providing their business names and ABNs under clauses 19 and 20 of the Business Names Registration Bill 2011. This clause stipulates that if businesses were exempt from providing this information on communications under the registration laws of the relevant state or territory, then they continue to be exempt under the Business Names Registration Bill 2011.

2.38 Clause 27 provides a table of reviewable decisions and clause 28 explains the process of internal reviews and associated timeframes. Applications for a review of a decision must be lodged within 28 days of notification of rejection/registration by ASIC.

2.39 The process of appeal to the Administrative Appeals Tribunal is briefly outlined in clause 29. Subclause 29(3) allows the Minister to dispute a review decision and to make a claim to the Tribunal if the Minister wishes to pursue a matter.

2.40 Clauses 30–33 cover miscellaneous provisions. Significantly, clause 32 stipulates that ASIC may not retrospectively cancel a business registration if it later

finds that a name was not available at the time of registration. Moreover, under clause 31 ASIC may not require that an entity provide their ABN, or, if an entity is an individual, their date or place of birth.

2.41 Schedule 2 of the bill provides a list of consequential amendments that will be enacted in other Acts, where the provisions relate to business names registration.

***Business Names Registration (Fees) Bill 2011***

2.42 The purpose of this bill is to enact fees for things done under the Business Names Registration Bill 2011.

2.43 The clauses contained in this bill are very vague and do not seem to relate to the 'chargeable matters' definition provided in clause 3 of the Fees bill. Perhaps it would be better to simply refer to the definition already provided for chargeable matters in the primary bill.

2.44 Clauses 4 and 5 have been copied over from the *Corporations (Fees) Act 2001* and appear to be logically inconsistent within the context of the Business Names Registration Bills. Clause 5 provides a cap of \$10 000 (for a single fee) and \$50 000 (the sum of fees) for chargeable matters.

2.45 The actual fee structure and formula used to calculate the fees are not included in this bill, but instead are found in the Business Names Registration (Fees) Regulations 2011. This will be discussed in more detail in chapter four.

