

CONSULTATION FORUM HANDOUT

PROPOSED NATIONAL BUSINESS NAME REGISTRATION SYSTEM

Fact Sheet

It is proposed that a new national system for business names registration will start in the first half of 2011. 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. The main purpose of business names registration is to protect consumers, by allowing them to identify the person(s) or company behind a business (trading) name.

Key Features of the Proposed System

The new system will give the Australian Securities and Investments Commission (ASIC) national responsibility for registering, renewing and administering business names for all Australian businesses.

The key features of the initiative are:

The establishment of a national business names registration system

- persons and companies who carry on business or trade within Australia must register their business names under the national system, unless trading under their own company or personal names
- business names which are currently registered under the State and Territory business names systems will be automatically rolled into the new national system
- business names will be able to be registered online 24/7
- costs for registering a business will be coming down in nearly all jurisdictions - business name applicants will be given the choice to renew their registrations for a one year period (proposed fee \$30) or for three years (proposed fee \$70)
- the public will be able to access certain contact details about a business name holder on a free, online business names register. Further information will be available for a proposed \$20 fee.

New business name registrations will require an Australian Business Number (ABN)

- all new business name applicants must have an ABN in order to register a business name
- applicants will be able to apply for an ABN at the same time as lodging an application for a business name.

Business names available for registration

Some business names will not be able to be registered such as:

- names which are "identical or nearly identical" to a company or business name which has already been registered;
- names which are likely to be offensive;
- names which contain prohibited or restricted words without appropriate permission; and
- names which are likely to mislead or deceive consumers and traders.

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Maintaining the business names register

- a business name holder may cancel her/his business name at any time by giving notice to ASIC
- ASIC may cancel a business name on specific grounds (for example because the renewal fee was not paid), subject to appropriate notice being given to the business holder.

Review and appeal procedures

- a business name applicant whose application for a name is rejected will be able to request a review of the decision
- a third party review is available to entities where there is a real risk of substantial detriment because of the registration of the business name
- business name applicants and holders will be able to appeal a decision made by ASIC to the Administrative Appeals Tribunal.

Transition

The national business names registration scheme is expected to commence on 4 April 2011.

The States and Territories will finalise any in-process transactions (e.g. business name renewals) and any outstanding business name reviews and appeals. From 4 April 2011 all new interactions (e.g. applications, renewals) will be dealt with by the Australian Securities and Investments Commission.

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

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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.

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 2011. 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 (except in the Northern Territory where there will be a small increase) and options for one year 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.

From April 2011, 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, the Australian Securities and Investment 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 worldwide web.

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) offices 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.

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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.

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 \$30 for a one year registration period and \$70 for a three year registration period. Renewal of the national business name registration is the same cost.

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. Victorian's registration fee will drop but rise for renewals. The North Territorian's fees will increase slightly. All other Australians will pay a lesser fee in some cases significantly less. This is primarily due to the online system and efficiency gains related to rationalising the delivery of eight services to one.

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.

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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 in seven days 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, 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 (after 27th April 2010)

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 some business contact details, address and ownership of any business name presently registered in Australia.

Home-based businesses will have their suburb only shown on the free online register.

The Australian Business Register (ABR) will also show the registered business name on the public register.

Extracts with more information on the business will be able to be purchased for a proposed fee of \$20 from ASIC (such as business address for home-based businesses).

Businesses will be able to seek suppression of details on request to ASIC. This would suppress details on the public register but not to nominated government agencies.

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.

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NAME ALLOCATION

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

As it is too confusing for consumers for multiple businesses registering the same name on the register, identical names will not be registered. 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 registerable names, hence allowing the process to be fast, objective and repeatable.

In general a national business name will be registered unless:

- the name contains unaccepted characters (e.g. a foreign language character)
- the name contains restricted words which require consent of a particular body to be used (e.g. ANZAC)
- the name is likely to be offensive
- The name suggests a connection with government [be it local, state, federal or foreign], government departments agencies etc Royal family etc where no such connection exists.
- the name is identical, or nearly identical to, an already registered company or business name or a name on the National Names Index (which holds names of cooperatives, associations, limited partnerships etc) including when:
 - Certain elements of a name are disregarded (e.g. the spaces between Out Back Tours and Outback Tours).
 - Phonetic spellings are substituted (eg. Outback Tours and Owtback Tours)
 - Creative spellings are substituted (eg. Alligator Adventures and Allig8er Adventures)
 - Synonyms or word groups are substituted (eg. restaurant and café may be regarded as equivalent)

Q16. How will the system deal with names that differ only by a locational identifier?

The test will allow the registration of a business name that differs only by a location regardless of whether or not there is a relationship between the businesses.

Examples of this are:

Joe's Plumbing and Joe's Plumbing Kingston

Castle Hill Newsagency and Chester Hill Newsagency

Royal Hotel Hillcrest and Royal Hotel Red Hill

It remains the responsibility of the business to ensure that they do not pass off as other businesses.

Q17. 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 will display a warning to registrants that to use such terms in a business name they must have appropriate Australian qualifications, memberships or approvals.

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Q18. 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.

FRANCHISES

Q19. 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.

TRADE MARKS

Q20. What is the difference between a business name and a trade mark?

The difference between trade marks, business names, company names and domain names sometimes causes 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.

Q21. 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 one may need to check. 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.

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

APPEALS

Q22. 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.

Q23. 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 BN 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 \$682, however the fee is refundable if the applicant wins.

Q24. 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 Federal Trade Practices Act and State Fair Trading Acts and the law of passing off.

TRANSITION

Q25. 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. The business name renewal will need to be completed regardless of whether the original registration was completed through a State/Territory service or the national business name service. It is expected that from April 2011, all renewals will occur through the national system and reminders will be issued from ASIC in due course. Renewals will be able to be done online.

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Q26. 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 initially register using the new system will select either a one year or three year registration period.

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 April 2011 and all renewal notices thereafter will be issued by Australian Securities and Investments Commission. Those businesses with renewals that fall due around the transition time will be notified in plenty of time to renew their registration.

Q27. What happens if the same business name has previously been registered by different businesses in different states/territories?

All business names registrations will be transferred to the national business name register on commencement of the national service. This will include some identical business names that have been registered (by different owners) in different jurisdictions. These identical business names will be distinguished on the register by a geographical suffix or qualifier e.g. (WA). The business name itself will not include the identifier/suffix.

Businesses will continue to be able to renew their existing business name registration under the new national system.

New registrations of identical or near identical names will not be allowed.

Q28. 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.

Q29. 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 provide guidance on the options available to businesses, but importantly they will have a business name registered on the national system. In most cases it will be preferable for businesses to renew the registration of a single national business name only.

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NEXT STEPS

Q30. When will the system go live?

The national business names registration system is expected to commence in April 2011. 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.

Q31. Who is responsible for the changes to the Australian business registration system?

The new Australian 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

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