

# ALERT

28 MAY 2012

## Business names – a new national scheme

A new national Business Names Register will be operational from 28 May 2012, replacing existing state and territory services. Business names already registered before this date will be automatically transferred to the national register.

The key piece of legislation is the *Business Names Registration Act 2011* (Cth) (**Act**), which is supported by the *Business Names Registration (Availability of Names) Determination 2012* (Cth) (**Determination**).

Further information is provided in ASIC's Regulatory Guide 235: Registering your business name, March 2012, which is available at the [ASIC website](#).

### Business Names Register

At the time of applying for the proposed business name, ASIC conducts a number of checks to determine whether to register the name. These include checking whether the name is:

- identical, or nearly identical, to a business name already registered to another entity under the Act or the Corporations Act 2001;
- offensive;

- made up of words not in the Macquarie Dictionary;
- made up of, or includes, a 'restricted word or expression'; or
- currently under review with another application.

### **Business Names Registration (Availability of Names) Determination 2012**

When is a business name **available** to an entity?

A name is available if it is not identical or nearly identical to:

- a business name registered to another entity; or
- a name that is reserved or registered under the *Corporations Act 2001* for another body; or
- a name that ASIC receives notice of electronically from a referring state or territory; and
- no other entity has priority over a name that is identical or nearly identical; and
- the name is not of a kind that is undesirable, or if it is, consent has been given by the Minister that the name is available to the entity; and



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- the name is not constituted by, and does not include, a restricted word or expression, or if it does, relevant consent is received.

## Priority in relation to new registrations

Where two or more applications are lodged with ASIC for registration of business names that are identical or nearly identical, the applications take priority in the order in which they are lodged. This priority is not affected by the fact that an ABN application by the entity is pending.

ASIC may refuse two or more applications for registration of business names that are identical if all of the applications take the same priority.

Where the entity's application for registration is refused, the entity's priority over the business name is not affected during the

review period in relation to that decision, which begins 28 days from the day on which the entity is notified of the decision.

## Priority in relation to existing registrations

When the new register commences, there may be two or more identical – or nearly identical – business names recorded on the ASIC business names register. This may be because identical business names were previously registered in different states or territories to different entities.

ASIC has suggested that it will deal with two or more identical names transferred from state and territory registers by inserting a distinguishing word or expression on the public register to help the public differentiate between identical business names. The additional information does not form part of the business name, but is used to allow people to distinguish between identical business names on the register. ASIC will publish further information regarding when it will commence inserting a distinguishing word or expression on the business name register.

## Identical or nearly identical business names

The Determination sets out the rules relating to matters that are to be **disregarded** when comparing whether a business name is identical or nearly identical to another name. If the difference or differences between two business names is covered by the matters listed in this section, the names are considered the same for the purposes of the Act. An existing name on the register prevents the registration of a name that differs only by a matter or matters listed.

The matters to be disregarded under this section include:

- the use of the definite or indefinite article unless it is the whole name;
- the use of 'Association', 'Co-operative', 'Incorporated', 'Limited', 'Pty' and the like;
- whether a word is in the plural form or singular form;
- the size, type and case of the letters and any accents, spaces and punctuation marks;
- the order of the words; and
- domain extensions, such as .com or www.

The Determination sets out matters that **must be considered** when comparing business names to determine whether the names are identical or nearly identical. Schedule 1 includes words and expressions taken to be the same for the purposes of whether a business name is available. They are commonly used antonyms (eg credit, finance, lending, loan centre, loans and money are regarded as the same word). Where a business name is pronounced the same as another name despite being spelt differently, it will be considered the same. A character separated by spaces, a group of characters separated by spaces and an abbreviation are to be treated as a word.

The rules for determining whether a business name is identical to a company name are as set out in Part 1 of Schedule 6 of the Corporations Regulations 2001, which is substantially similar to the Determination provisions.



## Kinds of names that are undesirable

A business name is undesirable if the name has one or more of the characteristics listed, including, inter alia:

- it is offensive to members of the public, or any section of the public;
- it suggests a connection with the Crown, commonwealth, government authority, charity or royalty that does not exist; or
- it suggests that the members of an organisation are totally or partially incapacitated and those members are not so affected.

Where ASIC is satisfied that the word 'commonwealth' or 'federal' is used in the name in a geographical context, the name is not undesirable.

Under the Act, the Minister retains the power to make available to a business any word or expression for inclusion in a business name that is otherwise considered undesirable by the Determination.

## Restricted words and expressions

The Determination lists restricted words and expressions that are unable to be used in a business name, unless the Minister has given written consent to the use of the word or expression. This restriction extends to words or expressions that have the same or similar meaning to words or expressions in Part 1 of Schedule 1.

A word or expression mentioned in Part 2 or Part 3 of Schedule 2 is a restricted word, unless the responsible Minister or public authority mentioned in the item has given written consent to the use of the word or expression.

## Appealing a decision of ASIC regarding a business name

If a person is not satisfied with certain decisions ASIC makes about a business name, they may seek an internal review of the decision within 28 days of being notified of the decision. ASIC may confirm or vary the decision, or set aside the original decision and make a substitute decision. If they are still not satisfied with ASIC's decision, they may apply to the Administrative Appeals Tribunal for a review of the decision.

## Obligations to give information to ASIC

ASIC needs information relevant for the purposes of establishing and maintaining the Business Names Register and may ask an entity to provide such information. ASIC can cancel a business name if a request to provide information is refused by an entity.

Cancellation of a registered business name may also occur if the court rules that the name is a trade mark infringement.

Further information is provided in ASIC's Regulatory Guide 235: Registering your business name, March 2012, which is available at the [ASIC website](#).

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