

14 March 2012

Parliamentary Secretary to the Treasurer

cc: Deputy Prime Minister and Treasurer

**BUSINESS NAMES REGISTRATION (AVAILABILITY OF NAMES) DETERMINATION 2012**

**Timing:** Tabling of the Names Determination in the current sittings of Parliament is required to ensure the Determination is operational by 28 May 2012.

**Recommendation:** That you

- (i) sign at Attachment A the Business Names Registration (Availability of Names) Determination 2012
- (ii) approve at Attachment B the text of the explanatory statement for the Business Names Registration (Availability of Names) Determination 2012

Approved/Not Approved (i) (ii)

Signature: s22

20 3  
...../...../2012

**KEY POINTS**

- The National Business Names Project (the Project) involves developing a national system for registering and regulating business names, to be administered by the Australian Securities and Investments Commission (ASIC). It is part of COAG's National Partnership Agreement to Deliver a Seamless National Economy (NPA).
  - The Department of Innovation, Industry, Science, Research and Tertiary Education (DIISRTE) has had primary carriage for this COAG reform initiative.
- The ASIC National Business Names Register (National Register) is scheduled to commence on 28 May 2012.
  - Legislation establishing the National Register passed the Commonwealth Parliament in December 2011. This legislation was developed after lengthy negotiations between State and Territory Officials.
- The Commonwealth requires a referral of constitutional power from the States to establish and administer the National Register. All States have enacted referral laws apart from South Australia and Western Australia; however referral legislation is expected to be passed in these jurisdictions shortly.
- Following the transfer of Administrative Arrangement Orders for Business Names Registration to the Treasury portfolio in February 2012, the responsibility for this legislation now falls within Treasury. As the responsible Minister, you are required to approve the texts of the Business Names Registration (Availability of Names) Determination 2012 and its explanatory statement.
  - To meet the COAG commitment for this reform initiative, the determination should be operational in time for the commencement of the National Register on 28 May 2012.

s22

Manager s22  
Governance and Insolvency Unit

Contact Officer: s22

Ext: s22

## ADDITIONAL INFORMATION

### Background – Policy Context

- On 3 July 2008, the Council of Australian Governments (COAG) agreed to the development of a single national system for registering and regulating business names. The proposal was one of 27 areas of business and competition regulatory reforms.
- The Project implementation plan was approved by the Strategic Priorities and Budget Committee of Cabinet (SPBC) on 18 September 2008 with the Inter-Governmental Agreement with the States and Territories signed on 2 July 2009.
  - The agreement covered arrangements for the constitutional referral of powers by the States and the subsequent management of those powers, including requirements for consultation and approval by the States and Territories.
- The lead agency for the business names project has been the Department of Innovation, Industry, Science, Research and Tertiary Education (DIISRTE). As the project envisages an ongoing role for ASIC in the management and oversight of the National Register, both Treasury and ASIC have been actively involved in the development of the laws. At each stage in the development of the laws, agreement to policy approval requests from the Prime Minister has been obtained from Treasury ministers, Minister Bradbury before him Minister Bowen in his role as Minister for Financial Services, Superannuation and Corporate Law.
- Currently, each State and Territory operates its own business names register.
  - The purpose of the National Register would be to allow a businesses to register once, regardless of how many jurisdictions they operate in. The National Register is scheduled to commence on 28 May 2012 and is to be administered by the Australian Securities and Investments Commission(ASIC).

### The Business Names Legislation

- The business names legislation package passed the Commonwealth Parliament in December 2011.
- This includes:
  - the *Business Names Registration Act 2011* (Registration Act) which establishes the National Register; details the circumstances when ASIC can cancel a registration; obligations on business to provide information to ASIC; circumstances where members of the public can access the National Register.
  - the *Business Names Registration (Transitional and Consequential Provisions) Act 2011* (Transitional Act) sets out the law governing the transition from separate State and Territory Registers to one National Register.
  - The *Business Names Registration Fees Act 2011* (Fees Act) governs the charging of fees to access the register and registration fees.

## **BUSINESS NAMES REGISTRATION (AVAILABILITY OF NAMES) DETERMINATION 2012**

- The Business Names Registration (Availability of Names) Determination 2012 (Names Determination) sets out the rules for determining whether a business name is available to a business. These rules only apply to new application for registration of a business name under the National Register.
- The primary availability test for a business seeking to register a business name is whether the business name is identical or nearly identical to an existing registration. If a business seeks to have registered to it, a business name that is identical or nearly identical to an existing registration, the name will not be available to them.
- This restriction does not apply to existing registrations on a State or Territory business names register at the commencement of the National Register. These registrations will be 'grandfathered' on to the National Register. No business will lose its entitlement to trade under a name that is currently registered to it.
- The Registration Act permits the minister by legislative instrument to make rules for determining: whether a name is identical or nearly identical to another name; whether business names are undesirable (e.g. offensive business names or names which suggest a connection with the Commonwealth where no connection exists) and whether certain words should be restricted to avoid misleading consumers (e.g. bank)
- The rules for both undesirable names and restricted words and expressions are modelled on the rules from the Corporations Act for the registration of company names. For both undesirable names and restricted words and expressions, ASIC is not able to register names to a business that contain words that would be considered undesirable and restricted without ministerial consent. The ministerial consent will be delegated to an SES officer at ASIC.
- For undesirable names, ASIC is prohibited from registering to a business, names that are offensive or suggest a connection with the Commonwealth, or a State or Local Government or department. In addition, other names that are undesirable include names which suggest a connection with the Royal Family, Sir Donald Bradman, Mary MacKillop and the United Nations.
- For restricted words or expressions, businesses are not able to have registered to them business names which contained the words listed in Part 1 of Schedule 2. These include words such as ambulance, consumer and expressions including Made in Australia. In Part 2 of Schedule, there are words and expressions whose use is restricted unless the nominated minister gives consent to the use of the word or expression in a business name. Restricted words include 'ANZAC' which is not able to be used by a business in a business name unless the Minister for Veteran's Affairs consents.
- A similar process where a business can obtain consent exists for words or expressions that appear in Part 3 of Schedule 2, which contains words used in financial services. In this case, rather than ministerial consent, the Australian Prudential Regulatory Authority (APRA) can consent to the use of a word such as 'bank' in a business name. The consent of APRA is not required if ASIC is satisfied that the otherwise restricted word or expression is used in a geographical context eg. South bank Café.
- In determining whether a name is identical or nearly identical, minor matters such as the inclusion of definite or indefinite articles, whether the name is plural or singular, and the order of words in the name are to be disregarded.

- The Names Determination contains as a schedule a word group table, which will contain high risk words which will be treated as being “the same” for the purpose of excluding identical or nearly identical business names. If a business name only differs by use of one of the words in a word group, the name will be considered the same for the purposes of the National Register and will thus be not available for registration.

### **Determination – Consultation and Legislative Process**

- Prior to the introduction of the legislation into Parliament, the draft Registration Bill and the related Fees Bill were exposed for public consultation on two occasions. All parts of the draft legislative package were exposed on one occasion. The text of the legislative package were negotiated with State and Territory officials over a period of more than one year.
- The Names Determination was unable to be finalised whilst DIISRTE had responsibility for the business names legislation. As the business names legislation is now within your portfolio responsibilities, you are required to approve the Names Determination and the Explanatory Statement.
- Once you approve the Explanatory Statement and sign the Names Determination, these documents will be lodged for registration with the Federal Register of Legislative Instruments. Following this, Explanatory Statement and Names Determination will be tabled in both Houses of Parliament. The Names Determination will commence at the same time as Part 2 of the Registration Act on a date to be proclaimed which is expected to be 28 May 2012.
- Either House of Parliament has the power to disallow the Names Determination, by way of notice of motion, within 15 days after the tabling of the notice of motion in that House. If the Names Determination was disallowed, it would at that time, cease to have effect.

