

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 214

Issued by the authority of the Minister for Small Business

Business Names Registration Act 2011

Business Names Registration Regulations 2011

Section 90 of the *Business Names Registration Act 2011* (Registration Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Registration Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to Registration Act.

The Registration Act forms part of the National Business Names Registration legislative package (legislative package) which also includes the *Business Names Registration (Transitional and Consequential Provision) Act 2011* (Transitional Act) and the *Business Names Registration (Fees) Act 2011* (Fees Act). A number of legislative instruments also form part of the legislative package.

This legislative package establishes a national business names register to be operated by the Australian Securities and Investments Commission (ASIC), and is a key regulatory reform initiative of the Council of Australian Governments. The National Business Names Register (Register) will replace the business names registers, currently operated by each State and Territory.

The main purpose of business name registration is to protect consumers, by allowing them to identify the entity(s) behind a business (trading) name.

The Business Names Registration Regulations 2011 (the Regulations) support the Registration Act in setting out the rules for determining which names are available to businesses.

The Regulations apply to the regulation of business names and to related matters, including the establishment of a national registration system for business names.

The purpose of the Regulations is to deal with matters of detail within the framework established by the Registration Act.

The Regulations contain details of:

- exceptions to the offences of carrying on a business under an unregistered business name; not including a business name in written communications and not displaying a business name at places open to the public;
- information that can be included in the Register relating to entities who have business names registered to them;
- types of personal information relating to entities which have business names registered to them that is to be removed from extracts provided to the public; and
- information that is publicly available.

Details of the Regulations are set out in the Attachment.

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, and all parts of the draft

legislative package were exposed on one occasion. The text of all elements of the legislative package was negotiated with State and Territory officials over a period of more than one year.

The Office of Best Practice Regulation advised that the National Business Names Registration Project did not require a regulatory impact statement to be prepared.

The Registration Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised. The Regulations do not operate retrospectively.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence at the same time as the commencement of Part 2 of the Registration Act, which will be a date to be fixed by Proclamation.

Authority: Section 90 of the
Business Names Registration Act 2011

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the *Business Names Registration Regulations 2011*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence at the same time as the commencement of Part 2 of the Registration Act.

Regulation 3 – Definitions

This regulation provides definitions for the terms used within the Regulations.

‘Act’ means the *Business Names Registration Act 2011* (Registration Act).

‘Alternative contact details’ means contact details that an entity has voluntarily provided to a State or Territory Government such as a private email address or phone number which are contact details additional to the contact details that an entity was required to provide under either a State or Territory law or the Commonwealth law under which the business name was registered. These details will not be included on searches of the Business Names Register however they will be available for use by State and Territory Government agencies and other agencies that fall within the definition of ‘government body’ contained in section 3 of the Registration Act.

‘Register’ means the Business Names Register established by section 22 of the Act.

Other terms such as ‘ABN’, ‘ASIC’, ‘business name’, ‘entity’, and ‘notified successor’ that are defined in *Business Names Registration Act 2011* have the same meaning in these regulations.

Regulation 4 – Carrying on a business under unregistered business name – offence does not apply

Section 18 of the Registration Act provides that an entity commits an offence if it carries on business under a business name that is not registered to it. This offence does not apply in the circumstances listed in subsection 18(2) of the Registration Act. Paragraph 18(2)(h) also permits other circumstances where the offence does not apply to be prescribed by regulation.

All legal persons who are considered to be an ‘entity’ are set out in section 5 of the Registration Act. This term is used in the Registration Act in relation to the holder of a business name. The term extends beyond what would be considered an entity under the general law, and includes trusts and superannuation funds.

Subregulation 4(1) provides that the offence set out in section 18 of the Registration Act does not apply if an entity carries on business under a domain name form of a business name that is registered to the entity (ie. the holder of the business name) where the entity is not prevented from using that name as a domain name. Circumstances where section 18 of the Registration Act would not apply will include a circumstance where an entity has the business name 'Fred's Fish' registered to them. The entity would therefore be permitted to trade under the name 'fredsfish.com.au' unless this is held by another entity. An entity would also be able to trade under a business name that is formed by adding other host name or domain name extensions such as www or .com to a business name that is registered to an entity.

Subregulation 4(2) provides that an offence is also not committed if an entity carries on business under a business name that is formed by excluding domain name extensions from a business name that is registered to an entity. If an entity registers its business name in domain name form e.g. www.fredsfish.com.au the entity is permitted to trade under a business name that results from removing the host name or domain name extensions e.g. 'freds fish'.

Regulation 5 – Not including business name in written communications – offence does not apply

Section 19 of the Registration Act provides that an entity commits an offence if it communicates externally in writing with another entity and the communication is a business document (which may be digital) connected with carrying on the business and the document does not include its clearly legible business name.

The offence does not apply in circumstances listed in subsection 19(4) of the Registration Act. Paragraph 19(4)(i) of the Registration Act also permits other circumstances where the offence does not apply to be prescribed by regulation.

Subregulation 5(1) provides that the offence does not apply if the entity who has a business name registered to it includes in written communications a domain name form of the business name that is registered to it.

Circumstances where section 19 of the Registration Act would not apply would include where an entity has the business name 'Fred's Fish' registered to them, they would be permitted to include the name 'fredsfish.com.au' in written communications provided that the domain name is otherwise held by them. An entity would also be able to include in written communications a name that is formed by adding other host name or domain name extensions such as www. or .com to a business name that is registered to an entity.

If an entity has registered to them a business name that is in domain name form e.g. www.fredsfish.com.au, the entity is permitted to trade under a business name that results from removing host name or domain name extensions e.g. an entity who had www.fredsfish.com.au registered to them could trade under the business name 'freds fish'.

Regulation 6 – Not displaying business names at places open to the public – offence does not apply

Section 20 of the Registration Act provides that an entity commits an offence if it carries on business under a business name and it does not display that name at places of business open to the public.

The offence does not apply in circumstances listed in subsection 20(2) of the Registration Act. Paragraph 20(2)(i) of the Registration Act also permits other circumstances where the offence does not apply to be prescribed by regulation.

Regulation 6 provides that the offence does not apply if an entity displays a domain name form of a business name that is registered to an entity. An example of when the offence would not apply would be if an entity has the name 'Fred's Fish' registered to it; an offence would not be committed if it displayed 'fredsfish.com.au' provided that the domain name is otherwise held by them.

The offence also does not apply when an entity has a business name registered to it that is a domain name and the entity trades under a name that results from excluding one or more host name or domain name extensions. An example of when the offence would not apply would be if an entity has the name www.fredsfish.com.au registered to it, an offence would not be committed if it displayed 'Fred's Fish'.

Regulation 7 – Details that may be included in the Register

Subsection 33(1) of the Registration Act sets out the details that ASIC must enter onto the Register to register a business name to an entity. This includes details sufficient to identify the entity, the business name, the address of the entity's principal place of business in Australia, an Australian address for service of documents, and the period for which the business name is registered to an entity (including start and end date).

Subsection 33(7) of the Registration Act provides that the Register may include other details as prescribed in regulations.

Regulation 7 provides that the other details that can be included on the Register are: contact details for an entity; alternative contact details (as defined in regulation 3); the home address of an entity that is an individual; a home address if it is the principal place of business for an individual who has a business name registered to them; the date and place of birth of an entity that is an individual who has a business name registered to them; details of whether a business name is currently registered to an entity; whether a registration of a business name has been cancelled; and whether an application for review has been made following a decision by ASIC to cancel the registration of a business name.

In addition, the Register may also include a record of any of the information contained in subsection 33(1) of the Registration Act.

Regulation 8 – Details of notified successor that may be included in Register

Subsection 40(1) of the Registration Act provides that if an individual who has a business name registered to them dies, in certain circumstances an entity may lodge notice with ASIC if there are reasonable grounds to suspect that the entity may inherit assets formerly used by the deceased in carrying on the business.

Subsection 40(4) of the Registration Act provides that if an entity lodges a notice under subsection 40(1), ASIC may enter their name as a notified successor in relation to the business name.

ASIC may also enter: the contact details of the notified successor; any alternative contact details (see regulation 3); the way the notified successor expects to inherit the deceased's assets; the relationship that the notified successor has with the deceased; the date and place of birth of the notified successor; and the notified successor's ABN if any.

Regulation 9 – Accessing Register by request

Subsection 60(1) of the Registration Act provides that a person can lodge an application with ASIC for copies of entries on the Register relating to a particular business name or entity.

Subsection 60(5) provides that the regulations may prescribe that certain information be excised from any copy of an entry that is provided to a person, or a person in a prescribed class.

Subsection 23(1) of the Registration Act provides that for an entity to carry on business under a business name, it must lodge an application with ASIC for the name to be registered to them. Subsection 23(3) provides that the application must be in the prescribed form and lodged in the prescribed manner.

Subsection 23(6) of the Registration Act provides that the prescribed form must require the applicant to provide details of someone's date of birth and place of birth if this information is required to identify the entity to whom the business name is registered or whether the entity has

been disqualified. Depending on the entity, this may involve a number of people providing these details.

Information that is excised from a copy of an entry on the Register before it is released publicly includes date and place of birth if the entity is an individual and date and place of birth information for anyone else whose details are provided to ASIC under subsection 23(6).

ASIC is also required to remove from a copy of a Register entry any alternative contact details (as defined in regulation 3) provided by an entity, and the home address of an entity that is an individual.

In relation to home addresses that are also principal places of business for an entity that is an individual, ASIC is required to remove from the copy of a Register entry, all information relating to the address other than the suburb and State or Territory where the individual lives.

If the entry identifies a notified successor that ASIC considers to not be an entity, the details of the notified successor related to the way they would inherit assets, their relationship to the deceased and their place and date of birth [See paragraphs 8 (c), (d), and (e)] are also to be excised.

Regulation 10 – Publicly available information

Section 61 of the Registration Act provides that ASIC must make available to the public and for free of charge, information that is prescribed in the regulations.

The information that is to be made publicly available and for free is the business name, the name of the entity (entities if joint) to whom a business name is registered, any ABN, the entity's principal place of business in Australia, the entity's address in Australia for service of documents, where a business name is currently registered and if so the date the registration is due for renewal, whether a business name has been cancelled; whether an application has been made to review a decision to cancel a registration of a business name to an entity; State/Territory of registration and registration number; date of registration; names of debtor representative, and notified successor; and any distinguishing word or expression identified under item 18 of Schedule 1 to the Registration Act.

In relation to an individual who has a business name registered to them, if their principal place of business is also a home address, the only information that will be publicly available is the suburb and the State or Territory where the individual lives.

ASIC is obliged to provide copies of entries on the Register in response to a request made in the prescribed form, lodged in the prescribed manner and accompanied by the application fee. ASIC must also make publicly available, or otherwise free of charge, the information listed in regulation 10.

Regulation 11 – Certain information to be made available to government bodies

Section 62 of the Registration Act sets out that information included on the Register is to be made available to government bodies for a range of purposes. These purposes include: enforcement of criminal law; enforcement of law imposing a pecuniary penalty; protection of public revenue; exercise of powers and functions related to consumer protection, anti-discrimination; workers' compensation, insolvency and bankruptcy, licences; maintaining a notified State/Territory Register; and the exercise of powers in relation to intelligence and security. The information must be made available electronically and free of charge.

Regulation 11 prescribes that all details recorded in the Register may be provided to government bodies, for the purposes outlined in section 62 of the Registration Act.

Regulation 12 – Destruction or disposal of documents

Section 74 of the Registration Act provides that ASIC may destroy or otherwise dispose of any document that is lodged with it under the provisions of the Registration Act or the Transitional Act if ASIC considers it is no longer necessary or desirable to keep the document and ASIC has either made and retained an electronic copy of the document or the document has been in ASIC's possession for the period prescribed by the regulations. This period is seven years.

Regulation 13 – Delegation of powers

Regulation 13 allows the Minister to delegate the powers outlined in subsection 28 (2) of the Registration Act. Subsection 28(2) allows the Minister to determine in writing that a word or expression is restricted in relation to a specified entity or business unless certain conditions are met. Section 80 of the Registration Act allows the Minister to delegate prescribed powers and functions.

Regulation 14 – Persons who may receive notice for entities that have ceased to exist

Section 89 of the Registration Act provides that the regulations may prescribe the person who may receive notice on behalf of an entity that no longer exists but which is required to receive notice under the Registration Act.

Regulation 14 provides that in cases where an entity was a body corporate and the entity was being wound up immediately prior to its deregistration, notice can be given to the liquidator appointed to wind up the body corporate.

In relation to a body corporate that was deregistered without being wound up, notice can be given to the directors of the body corporate immediately prior to its deregistration.

In relation to partnerships that have dissolved, notice can be given to a person who has been nominated by the partnership under section 82 of the Registration Act to be a principal contact for the partnership. If no person has been nominated, notice can be given by sending a notice to the address for service of documents for the partnership as registered to the partnership under paragraph 33(1)(d) of the Registration Act.

In relation to unincorporated associations or bodies that have been dissolved, notice can be given to a person nominated under section 84 of the Registration Act as the principal contact for the association. If no person has been nominated, notice can be given by sending a notice to the address for service of documents for the entity as registered to the entity under paragraph 33(1)(d) of the Registration Act.

In relation to trusts that have been dissolved, notice can be given to a person nominated under section 86 of the Registration Act as the principal contact for the association. If no person has been nominated, notice can be given by sending a notice to the address for service of documents for the entity as registered to the entity under paragraph 33(1)(d) of the Registration Act.