

EXPLANATORY STATEMENT

Issued by the authority of the Acting Assistant Treasurer

Business Names Registration Act 2011

Business Names Registration (Availability of Names) Determination 2015

Section 26 of the *Business Names Registration Act 2011* (Registration Act) provides that the Minister may, by legislative instrument, make rules for determining whether a name is identical or nearly identical to another name. The Registration Act applies to the regulation of business name and to related matters.

Section 27 of the Registration Act provides that the Minister may, by legislative instrument, determine that certain kinds of names are undesirable for the purposes of the Registration Act. The Minister has the discretion to permit that certain names, even if undesirable, will be available to an entity.

Subsection 28(1) of the Registration Act provides that the Minister may, by legislative instrument, determine that a word or expression is restricted.

The purpose of the *Business Names Registration (Availability of Names) Determination 2015* is to detail:

- exhaustive rules regarding the determination of whether business names are identical or nearly identical;
- kinds of names that are undesirable;
- words or expressions that are restricted.

Details of the Determination are set out in the Attachment.

No consultation was undertaken on this Determination as the changes are of a minor nature and do not involve any significant policy changes.

The Registration Act specifies no conditions that need to be satisfied before the power to make the Determination may be exercised.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Determination commences the next business day after it registered. The Determination does not operate retrospectively and therefore the *Business Names Registration (Availability of Names) Determination 2012* (the 2012 Determination) continues to have limited operation. When a reviewable decision specified in the table in section 56 of the Registration Act is made before the Determination commences, the 2012 Determination continues to apply to the review of decisions under sections 57 and 58 of the Registration Act.

The Australian Securities and Investments Commission will be required to update the business name register in accordance with decisions made by the Administrative Appeals Tribunal.

Part 1 Preliminary

Section 1 – Name of Determination

This section provides that the name of the Determination is the *Business Names Registration (Availability of Names) Determination 2015* (Determination).

Section 2 – Commencement

This section provides for the Determination to commence on the next business day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Definitions

This section provides definitions for the terms used within the Determination.

‘Act’ refers to the *Business Names Registration Act 2011*

‘character’ refers to any letter, number or other written symbol

‘company name’ means any name that is reserved or registered under the *Corporations Act 2001* for another body

Other words used in this determination have the meaning given by section 3 of the Registration Act.

Section 4 – Determining if business name is available to an entity

Subsection 4(1) of the Determination provides that for the purposes of section 26 of the Registration Act the rules governing whether two business names are identical or nearly identical are set out in Part 2 of the Determination.

Subsection 4(2) of the Determination provides that for the purposes of subsection 27(1) of the Registration Act, the kinds of business names that are undesirable are set out in Part 3 of the Determination.

Subsection 4(3) of the Determination provides that for the purposes of subsection 28(1) of the Registration Act a word or expression that is restricted are set out in Part 4 of the Determination.

Part 2 Rules for determining whether business names are identical or nearly identical to other names

Division 1

Section 5A – Determining if business names are identical or nearly identical

Subsection 5A of the Determination provides that a business name is identical or nearly identical to another name (other than a company name) if - after comparing the business name with the other name by disregarding the matters set out in subsection 5(1) and applying the matters to be considered set out in subsection 6(1), the names are the same; or subsection 6(2) applies in that, despite the characters used in the name, it may be pronounced the same as the other name.

Section 5 – Determining if business names are identical or nearly identical

Subsection 5(1) of the Determination sets out the rules relating to the matters that to be disregarded. Each of the matters listed in paragraphs 5(1)(a)-(f) are to be disregarded when comparing whether two business names are identical or nearly identical.

If the difference or differences between two business names is covered by the matters listed in paragraphs 5(1)(a)-(f), the names for the purposes of the Registration Act will be considered the same. An existing name on the register prevents the registration of a name that differs only by a matter or matters listed in 5(1)(a)-(f).

Paragraph 5(1)(a) provides that the use of the definite article or an indefinite article is to be disregarded, unless the definite or indefinite article is the whole name.

Paragraph 5(1)(b) provides that if one or more of the names contains ‘Association’, ‘Co-operative’, ‘Incorporated’, ‘Limited’, ‘Ltd’, ‘No Liability’, ‘NL’, ‘Proprietary’ or ‘Pty’, this is also to be disregarded.

Paragraph 5(1)(c) provides that words in a plural form and singular form will be treated as the same.

Paragraph 5(1)(d) provides that the size of the letters, the type and case of the letters, any accents, spaces between characters and punctuation marks are also to be disregarded.

Paragraph 5(1)(e) provides that the order of words as they appear in the two names would also be disregarded e.g. the business names ‘Joes Pizza’ and ‘Pizza Joes’ would be the same.

Paragraph 5(1)(f) provides that domain name extensions such as www or .com, are also to be disregarded.

Paragraph 5(2)(a) provides that for the purposes of determining what constitutes a word in names, a character separated by spaces is considered to be a word, e.g. ‘U’ or ‘&’ are considered one word.

Paragraph 5(2)(b) provides that groups of characters separated by spaces are considered to be different words, e.g. abc 123 would be two words.

Paragraphs 5(2)(c) and (d) provide that an abbreviation or an acronym are considered one word.

Section 6 – Matters to be considered

Section 6 sets out matters which must be considered to determine whether the names are identical or nearly identical.

Schedule 1 sets out the words and expressions taken to be the same (items 101 to 299). The words or expressions in each item are taken to be the same for the purposes of whether a business name is available.

Subsection 6(2) provides that if a business name is pronounced the same as another name despite being spelt differently, it will be considered to be the same.

Subsection 6(3) provides that, for subsection (1), a character separated by spaces, a group of characters separated by spaces and an abbreviation are to be treated as a word.

Division 2

Section 7 – Matters to be disregarded when comparing business names with company names

Section 7 provides that the rules for determining whether a business name is identical or nearly identical to a company name are as set out in Part 1 of Schedule 6 of the *Corporations Regulations 2001*.

Part 3 Kinds of names that are undesirable

Section 8 – Characteristics to be considered

Section 27 of the Registration Act provides that the Minister by legislative instrument may, determine the kinds of names that are undesirable.

Section 8 provides an itemised table of characteristics to be considered when determining whether a name is undesirable.

For example, a name is undesirable if ASIC opines that it is likely to be offensive to members of the public; it suggests a connection with the Crown or any arm of government. Further a name is to be considered undesirable if in the context in which it is used, the name suggests that the members of the organisation are totally or partially incapacitated.

Subsection 8(2) provides that in circumstances where a name includes the word Commonwealth or Federal, if ASIC is satisfied that the use of the words in the name is in a geographical context, the name is not undesirable due to the use of the words in the name.

The Minister has the power under section 27 of the Registration Act to make available to a business any word or expression for inclusion in a business name that is otherwise considered undesirable by this Names Determination.

Part 4 Restricted words and expressions

Part 1 of Schedule 2 lists restricted words and expressions that are, subject to exceptions provided for in section 9, unable to be used in a business name registered to an entity under the Registration Act. This restriction extends to words or expressions that have the same or similar meaning to words or expressions in Part 1 of Schedule 2.

Part 2 of Schedule 2 lists restricted words and expressions that are not to be used in business names unless the entity has received written consent from the responsible Minister.

Part 3 of Schedule 2 lists words and expressions that require consent from the Australian Prudential Regulatory Authority (APRA) before they can be used in a business name.

Section 9 Restricted words and expressions

Subsection 9(1) of the Determination provides that words or expressions listed in Part 1 of Schedule 2 are restricted words or expressions.

Subsection 9(2) provides that any words or expressions that have the same meaning as any word or expression in an item in Part 1 of Schedule 2 are also restricted words or expressions.

Subsection 9(3) provides that an abbreviation of a restricted word or expression is also a restricted word or expression.

Other Commonwealth, State or Territory laws may restrict trading using a particular name or expression in a particular jurisdiction. However, the Determination does not restrict entities from trading under a particular name or expression unless it appears in Schedule 2 or is otherwise covered by subsection 9(2) i.e. it is word or expression that has the same or similar meaning as a word that is specifically included in Schedule 2.

Subsection 9(4) provides that a word or expression in item 113, 117, 123, 135, 141, 142 or 143 of Schedule 2 are not restricted words or expressions if the entity is required to include the word or expression by the legislation under which they were either incorporated or registered.

Subsection 9(5) provides that despite the restriction in item 123 of Schedule 2, the word 'incorporated' is not a restricted word if the Act which the body is incorporated or registered under requires it to use the word 'incorporated' in its name. This includes registrable Australian bodies; registered Australian bodies; registered foreign companies or a foreign company.

Section 10 Words and Expressions that are restricted unless consent is given

Subsection 10(1) provides that Part 2 of Schedule 2 sets out words and expressions that are not able to be used in business names unless the entity has received written consent from the responsible Minister.

Subsection 10(2) provides that this restriction appearing in subsection 10(1) extends to words or expressions that have the same or similar meaning to words or expressions in Part 2 of Schedule 2.

Part 3 of Schedule 2 lists words or expressions which are available to a business if the public authority or agency listed has given consent to the word or expression that is used. Subsection 10(3) provides that a word or expression mentioned in Part 3 of Schedule 2 is a restricted word or expression unless the public authority listed consents to its use in a business name.

Subsection 10(4) provides that any word or expression that has the same or similar meaning to a word or expression in Part 3 of the Schedule 2 is also restricted word unless the public authority or agency mentioned has given written consent to the use of the word or expression.

Subsection 10(5) provides that subsections 10(1) to (4) also apply to collections of characters which are not words or expressions in English and words or expressions that are used as part of another word or expression or in combination with other words or characters.

Subsection 10(6) provides that a word or expression contained in Part 3 of Schedule 2 is not a restricted word or expression if ASIC is satisfied that it is used in a geographical context. Further, ADI is not restricted if it is used as part of another word.

Subsection 10(7) provides that a written consent received by an entity does not need to refer specifically to the use of the word or expression in a business name.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

BUSINESS NAMES REGISTRATION (AVAILABILITY OF NAMES) DETERMINATION 2015

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Business Names (Availability of Names) Determination 2015* is to detail:

- exhaustive rules regarding the determination of whether business names are identical or nearly identical;
- kinds of names that are undesirable;
- words or expressions that are restricted.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.