

national  
competition policy



**Queensland** Government  
Department of **Tourism, Racing and Fair Trading**  
Incorporating  
**Liquor Licensing**

Review of the  
*Business Names Act 1962*

**FINAL PUBLIC BENEFIT TEST  
REPORT**

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Business Names Act 1962 – Legislative Review

PUBLIC BENEFIT TEST (“PBT”) REPORT

## EXECUTIVE SUMMARY

A public benefit test has been conducted on the *Business Names Act 1962* (“the BN Act”) in line with National Competition Policy (“NCP”) guidelines. This document reports the findings of the public benefit test.

The BN Act was introduced with the objective of ensuring consumer protection by having a register of proprietors of business names. Consumers and businesses can search the register to identify the proprietors of business names, essential if legal action needs to be taken against the proprietors. This objective is contrary to a common misconception that the BN Act confers proprietorial rights onto business name proprietors and protects that name from passing-off actions bought by other proprietors, when this is not the case.

The BN Act also has a benefit of helping the business to create goodwill through the use of an identifiable trading name in the marketplace. For government, the BN Act generates revenue of approximately \$14million per annum and employs staff at the Office of Fair Trading (“OFT”) statewide for its administration. All States and Territories have substantially uniform business names legislation.

The BN Act requires the registration of names other than given and surnames which are being used when carrying on business in Queensland. Along with registration, renewal, cancellation and changes to particulars of business names also occur. Names are registered according to the Minister’s Direction on Business Names, which sets out words and phrases whose use is restricted in business names. For example, names suggesting a connection to the Crown are not permitted.

Business names in Queensland are determined using a subjective names test. Proposed names are first tested against corporation names to see if they are identical. If not, they are then tested against Queensland-registered names, and an officer determines whether or not the name is likely to be confused or mistaken for another registered name.

A computerised database is used to maintain the more than 205,000 registered business names in Queensland. This database is used by agencies such as Queensland Police in their enforcement activities, as well as by consumers and businesses to conduct searches. Business name brokers also perform some services on a contracting out basis.

The key stakeholders to the BN Act are consumers, new and existing businesses, business name brokers, professions, government, and resident agents.

A number of minor restrictions on competition in the BN Act have been identified. They are:

- The requirement for certain names to be registered;
- The need to have a resident agent in Queensland for businesses whose proprietor/s reside interstate;
- The Registrar of Business Names' power to cancel undesirable names;
- Renewal of registration;
- Notifying changes of particulars of business names;
- Duty to furnish information;
- Cancellation of registration for non-payment of fees;
- Use and exhibition of business names; and
- Invitations to the public to make loans or deposits.

The objective of these restrictions is to ensure the business names register is as accurate as possible, and that registered names are used correctly and do not deceive the public.

Most States and Territories have not conducted a NCP review of the business names legislation, with the view that their respective legislation did not contain restrictions on competition. Of those States and Territories that have conducted an NCP review, the benefits of retention of the business names legislation outweighed the benefits of removing it.

A number of regulatory options to the restrictions were examined, including deregulation, modifications to the BN Act, and two options for national registration. Deregulation would mean reduced compliance costs for business, but result in confusion between business names, and would deprive consumers (and business) of the opportunity to identify the proprietors of a business name. Government would lose a significant amount of revenue in the absence of the BN Act, while there would be an employment impact on staff at OFT who administer the BN Act. Businesses would be engaged in constant efforts to distinguish themselves from each other by increased advertising and marketing or through costly legal action. Consequently, it is considered that the benefits of deregulation are outweighed by its costs.

In terms of modifying the BN Act, an identical names test was considered. The identical test would be automated, resulting in decreased labour costs and an expected decrease in registration fees for business. New registrations may increase as a result, and new businesses would have a larger choice of names and a quicker registration process. However, existing businesses would be in a position where their name and goodwill resulting from that name would be at risk due to the registration of an identical name. Passing-off actions would likely increase. Existing businesses would have to spend more on advertising to distinguish themselves from other similar businesses. Consumers would also be at risk of increased confusion between identical names. Because the identical test is not labour-intensive, there would be an employment impact on officers of OFT. Consequently, it is considered that the benefits of the identical test are outweighed by its costs.

The repeal of the resident agent provisions of the BN Act would mean fewer administrative burdens for interstate traders and have little impact on the community, as there are relatively few resident agents in Queensland compared to overall business names. Consequently, it is considered that the benefits of retaining the resident agent provision are outweighed by the benefits of repealing it.

A further modification to the BN Act, to allow for discretionary power to consider proprietor's personal details to be withheld from the register, is to be considered further by OFT upon further investigation. This discretionary power would protect proprietors for whom public access to their personal details could pose risks to their personal safety.

Options for national registrations were considered. The first option involved a national register incorporating all State-based registrations. For identical names, proprietors would need to add a descriptive suffix. For example, if there is a "John's Plumbing" in Queensland and a "John's Plumbing" in Victoria, then the Queensland business would have to change its registration to "John's Plumbing (Qld)" and the Victorian business to "John's Plumbing (Vic)". This option would increase the risk of consumer confusion between similar names, and there is also the risk that consumers would tend to associate similar names with each other. For example, if "John's Plumbing (Vic)" went bankrupt, consumers may then consider "John's Plumbing (Qld)" to be associated with the failed business even if it had no link whatsoever. This could have a negative impact on trade for the Queensland business.

There would also be concerns at a State level as to whether or not a national register could ensure a satisfactory level of access for all areas of Queensland. A national register would have start-up costs that Queensland would likely contribute to. The national register would mean Queensland loses revenue from the BN Act. Consequently, the costs of this option outweigh its benefits, but it is recommended that similar proposals in future should be continue to be considered.

The second national registration option considered was a single business identifier, using the Australian Business Number ("ABN") registered on the Australian Business Register ("ABR"). This option would simplify business registrations and administrative requirements for business. However, there is currently no direct link between the ABR and the state-based registers, meaning there is a risk that information contained on the ABR may not be as accurate as the business names register. If and when such a link is established and the ABR's accuracy enhanced, it is recommended that Queensland be part of any trials to share information between the ABR and the business names register. At present, however, it is considered that the benefits of moving to the ABR option are outweighed by its costs.

It is the finding of this report that the retention of the *Business Names Act 1962*, with the removal of resident agent provisions contained in sections 8, 12 and 30, results in a net public benefit to the community. Additionally, the *Business Names Act 1962* is consistent with Government Priority Outcomes. It is proposed that a further NCP review of the *Business Names Act 1962* be carried out in 10 years time.

## 1.0 REVIEW PARAMETERS

### 1.1 Title of Legislation

*Business Names Act 1962* ("the BN Act") and the *Business Name Regulation 1998*.

### 1.2 Reasons for Review

In April 1995, the Council of Australian Governments ("COAG") agreed to implement a National Competition Policy ("NCP"). The Policy included the Competition Principles Agreement ("CPA") which established principles governing the review and, where necessary, reform of all legislation that contained measures restricting competition. Reviews include the completion of a Public Benefit Test ("PBT") that assesses the costs and benefits of identified restrictions and alternative means of achieving the desired outcomes

This review of the BN Act is being conducted by the NCP Unit of the Office of Fair Trading ("OFT") within the Department of Tourism, Racing and Fair Trading ("DTRFT"), and in accordance with the Queensland Government's *Public Benefit Test Guidelines*.

The review has also been undertaken in accordance with the guiding principles of clause 5(1) of the CPA which require that legislation should not restrict competition unless it can be demonstrated that:

- *the benefits of the restriction to the community as a whole outweigh the costs; and*
- *the objectives of the legislation can only be achieved by restricting competition.*

### 1.3 Terms of Reference for the Review

This review is being conducted according to clause 5(9) of the CPA which states that a review, without limiting itself, should:

- (a) *clarify the objectives of the legislation;*
- (b) *identify the nature of the restriction on competition;*
- (c) *analyse the likely effect of the restriction on competition and on the economy generally;*
- (d) *assess and balance the costs and benefits of the restriction;*  
*and*
- (e) *consider alternative means for achieving the same result including non-legislative approaches.*

The review has given consideration to clause 1(3) of the CPA, which states that:

*Without limiting the matters which may be taken into account, where this Agreement calls:*

- (a) For the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
- (b) For the merits or appropriateness of a particular policy or course of action to be determined; or
- (c) For an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

- (d) Government legislation and policies relating to ecologically sustainable development;
- (e) Social welfare and equity considerations, including community service obligations;
- (f) Government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- (g) Economic and regional development, including employment and investment growth;
- (h) The interests of consumers generally or of a class of consumers;
- (i) The competitiveness of Australian businesses; and
- (j) The efficient allocation of resources.

When examining the matters identified under clause 1(3), the review gives consideration to explicitly identifying the likely impact of reform measures on specific industry sectors and communities, including expected costs in adjusting to change.

## **2.0 BACKGROUND**

The BN Act requires persons carrying on business in Queensland to register their business names if they wish to trade using a name other than their own or a registered corporation name. In practical terms, business proprietors often use a name other than their own to attract consumers and establish goodwill. A business name can then become the primary identifier for consumers to relate to when dealing with a business. Often, for legal or financial reasons, there is a need to determine the actual proprietor/s of a business. Legal action can only be commenced against the proprietor(s) of the business, not a business name.

### **2.1 Business name regulation in Queensland**

The Queensland BN Act commenced on 1 January 1963 following the preparation of a model *Business Names Bill* ("the Bill") under the direction of the Standing Committee of Attorneys-General of the Commonwealth and States. The Bill ensured that each State and Territory had substantially uniform legislation in relation to business names. Prior to that, business names in Queensland were regulated under the *Registration of Firms Act 1942*.

### **2.2 Application of the BN Act**

Section 5.1 of the BN Act provides that:



[a] person shall not, either alone or in association with other persons, carry on business in the State under a business name unless:

- (a) the business name consists of the name of that person, and the name of each other person (if any) in association with whom that person is so carrying on business, without any addition; or
- (b) the business name is registered under this [BN] Act in relation to that person and each other person (if any) in association with whom that person is so carrying on business.

The BN Act provides for certain fees to be paid in relation to a range of matters including the registration of a business name, the renewal of registration and searches of the register.

Members of the public are able to search the business name register for details of the person/s or corporation/s trading under a particular business name. Information brokers are also provided with online access to the register to permit their customers to search the register. The existence of a publicly available register assists consumers, businesses and government agencies to overcome information asymmetries and identify proprietor/s when contemplating or undertaking civil or criminal actions.

### 2.3 Names Determination

The availability of a proposed business name for registration is ascertained through a names determination test. The BN Act does not prescribe the process to be used in assessing the suitability or availability of a proposed business name. However, in practice, the names determination test is conducted in a two-step process.

In the first step, proposed names are checked to determine if they are identical to corporation names registered by the Australian Securities and Investment Commission ("ASIC"). In the second step, proposed names undergo a subjective test against registered Queensland business names, incorporated associations and cooperatives. This requires the Registrar of Business Names ("the Registrar") or a delegated business names determination officer to judge whether the proposed name is likely to be confused or mistaken for other existing names registered in Queensland.

### 2.4 Minister's Direction on Business Names

The Registrar also complies with section 9 of the BN Act, which is the Direction on Names ("the direction") issued by the Minister. The direction is published in the Government Gazette. The most recent direction commenced on 4 December 2000. The direction contains details of restrictions on names (or variations of names) the Minister has directed the Registrar not to register. Examples of such names are those inferring a relationship with the Crown, and use of terms such as "university" or "consumer". The direction also lists a number of Queensland statutes that have placed restrictions on the use of business names. These restrictions relate to the use of business names by certain professions under such Acts as the *Architects Act 1985* and the *Veterinary Surgeons Act 1936*. The direction also exists to restrict the

use of certain words and phrases from being associated with commercial ventures in the marketplace.

However, section 9 of the BN Act allows application to be made to the Minister for the Minister's consent to register a name that would otherwise not be registered by the Registrar. There is a one-off fee payable for both application to the Minister (currently \$79) and the Minister's consent, should it be given, to register the name (currently \$147). Normal renewal fees apply thereafter.

## 2.5 Business Names Database

Queensland has developed a business names database called "BACHCO". BACHCO contains the business names register, and facilitates both the determination of business names and the management of associated financial and receipting requirements. Queensland also facility manages the system for the Northern Territory and Tasmania, and has entered into a perpetual lease arrangement with South Australia and Western Australia regarding the relevant software. New South Wales, Victoria and Australian Capital Territory operate their own separate systems. The BACHCO system interfaces with the National Names Index ("NNI") to enable proposed business names to be tested against Australian corporations as the first step of the two-step process.

## 2.6 Market Snapshot

In the 1999/00 financial year, there were 205,398 names on the business names register, an increase of approximately 8% over the previous year. 48,405 new names were registered in 1999/00. 8,802 names were deregistered while a further 25,265 names were removed (a "deregistered" name is one where the proprietors deregister the name while "removal" is where the name is removed from the register by OFT when the registration lapses).

92,254 searches of the register were conducted in 1999/00, a decrease of just over 6% from the previous year. The reason for the decrease is not readily identifiable. However, it is thought to be due to the fact that banks are no longer requiring business names extracts before opening business bank accounts as business name certificates of registration now contain the information that previously was only found in an extract. Of all searches, 92% were performed through business name brokers.

## 2.7 Stakeholders

The following table describes key stakeholders and their role/s in relation to the BN Act:

Stakeholder	Role/s in relation to BN Act
Consumers	<ul style="list-style-type: none"> <li>• Familiarity with a trader is likely to be through a business name;</li> <li>• Searching the business names register to determine proprietor/s when taking action against a trader; and</li> <li>• Use of the business names register to distinguish between traders, reducing consumer confusion and allowing consumers to make informed choices. The register will also help to identify situations where one proprietor is trading under a variety of business names.</li> </ul>
New and	<ul style="list-style-type: none"> <li>• Commencement of a business name to establish an identity in the market;</li> </ul>

Existing Businesses	<ul style="list-style-type: none"> <li>• Display, usage and renewal of a business name to maintain goodwill and to develop marketing, sales and advertising strategies;</li> <li>• Cancellation or change of particulars in a business name;</li> <li>• Use of the register as a marketing tool; and</li> <li>• Use of the register to determine proprietors of other business names in order to take action against them.</li> </ul>
Government	<ul style="list-style-type: none"> <li>• Administration of the BN Act.</li> <li>• Use of the register by Government agencies such as Queensland Police and the Criminal Justice Commission in their enforcement activities.</li> </ul>
Legal and accounting professionals (including resident agents)	<ul style="list-style-type: none"> <li>• Lodging forms on behalf of clients; and</li> <li>• Acting as resident agents for proprietors residing outside of Queensland.</li> </ul>
Business name brokers	<ul style="list-style-type: none"> <li>• Allowing online access to the Business Names register for the purposes of permitting their customers to search the register.</li> </ul>

## 2.8 Partnerships (Limited Liability) Act 1988

The *Partnerships (Limited Liability) Act 1988* ("the PLL Act") has also been reviewed under the NCP legislation review program. One of the recommendations of the PLL Act review was to consider the possibility of exempting applicants under the PLL Act ("limited partnerships") from provisions of the BN Act. Accordingly, this review of the BN Act has examined this recommendation, and the findings are contained in Appendix "A".

## 3.0 OBJECTIVE OF THE BN ACT

No specific objects are listed in the BN Act. However, the provisions in the BN Act, and the way they have been applied over time, indicate that the primary objectives of the BN Act are to protect consumers and businesses by:

- helping to eliminate confusion between identical or similar names in the marketplace; and
- providing a way to check the identity and address of the actual proprietor(s) of a business.

In doing so, the BN Act allows consumers, other businesses and government to hold the proprietor(s) of a business accountable for its actions in the market, including where legal action is underway or contemplated. It provides consumers with better information to identify and differentiate between businesses on the basis of past and current performance. It also provides existing businesses with some protection for the benefits generated by the goodwill associated with a recognisable trading name. There continues to be a need for the protection provided to consumers and businesses under the BN Act.

## 3.1 Misconceptions regarding the BN Act

There appears to be a misconception in the business community that the BN Act protects or confers proprietary interests in a name. This is not the case. No legal

rights accrue from registration of a business name, and there is no protection under the BN Act for the proprietor/s of a business name from legal action such as:

- an action under the *Trade Marks Act 1995 (Cth)* ("the Trade Marks Act"); and/or
- a "passing off" suit under common law. Passing off involves the use of a name or variation of a name that is likely to cause confusion with the goods or services of a rival trader.

However, in practical terms the Registrar indirectly exercises a degree of supervision of intellectual property rights under the BN Act by refusing to register a business name where it is considered there is a likelihood of confusion with an existing registered name. The Registrar is also empowered under section 10 of the BN Act to cancel the registration of names that were registered inadvertently. Notwithstanding these issues, if a business name has been registered correctly in terms of the BN Act, the Registrar is not empowered to adjudicate in any dispute that may arise as a result between parties in conflict over the use of a business name.

A targeted education program, focussed on the point of contact with business clients, informing applicants of the differences between business names and trademarks registration and the greater protection available under the Trade Marks Act is currently under consideration.

#### 4.0 LEGISLATIVE REQUIREMENTS IN OTHER JURISDICTIONS

Australian States and Territories have substantially uniform business names legislation based upon a model bill developed by the Standing Committee of Attorneys-General in 1962.

The following table gives a basic overview of the requirements in relation to, and administration of, registration of business names in other States. The table indicates that virtually all States and Territories regard business names administration as primarily a function of the relevant State/Territory consumer protection agency. The exception is the Australian Capital Territory, where business names administration is a role of the same agency which administers births, deaths and marriages and land titles.

State/ Territory	Names Determination Test	Fees <sup>1</sup>	Administering Body
NSW	Uses the "Substantially similar test" – names will not be registered if they are substantially similar to each other.	Registration: \$118 Renewal: \$91	Department of Fair Trading
Victoria	Similar to Queensland	Registration: \$70 Renewal: \$50	Consumer and Business Affairs Victoria – Department of Justice
South Australia	Similar to Queensland	Registration: \$106 Renewal: \$84	Office of Consumer and Business Affairs – Department of Justice
Western Australia	Similar to Queensland	Registration: \$93 Renewal: \$75	Ministry of Fair Trading
Tasmania	Similar to Queensland	Registration, and Renewal: \$102	Business Affairs – Justice Tasmania
ACT	Similar to Queensland	Registration: \$109 Renewal: \$89	Registrar-General's Office

Northern Territory	Similar to Queensland	No registration or renewal fees	Consumer Affairs – Department of Industries and Business
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1 – These figures are for 3-year terms

## 4.1 Differences between jurisdictions

While each State and Territory administers substantially uniform business name legislation, there are some significant points of difference as follows:

### 4.1.1 Prohibited Persons

Legislation in New South Wales, Victoria, South Australia, Western Australia and Tasmania contain provisions prohibiting certain convicted persons from registering a business name unless such persons have leave of the Magistrates or County Court in that State or Territory to do so. Generally, these persons are prohibited because of a conviction relating to fraud, dishonesty, or an offence in relation to the promotion, formation or management of a body corporate. If a convicted person does apply to the Court to have leave to apply for a business name, the Minister in that State or Territory may be represented at the hearing and may oppose the application.

The purpose of this restriction is to restrict a person with a history of fraudulent activity from trading in the marketplace. However, there is little or no proactive checking of business name applications in States or Territories that have this prohibition. For example, the application for a business name in Victoria mentions this prohibition, but there is no provision on the application form for a person to declare that they have a conviction. Neither is there a provision in Victoria's *Business Names Act 1962* to authorise checks of policy records for any applicant for a business name.

### 4.1.2 South Australia

South Australia's *Business Names Act 1996* ("the BN Act (SA)") was the result of a review begun in the early 1990s and a repeal of the previous legislation emanating from the uniform legislation of 1962.

This review process, according to the South Australian *Hansard*, recognised a "changed business environment from what was envisaged by the 1963 Act". The review removed resident agent provisions, and sought to make more flexible the administration of the requirement for registration and keeping the register up to date. This was achieved by giving the Corporate Affairs Commission in South Australia the power to approve forms and notices used in registering names and notifying changes in registered particulars. The prohibited persons provision was also added to the BN Act (SA) during the review.

While South Australia is the only Australian jurisdiction to repeal and replace the original uniform business name legislation from the 1962, the BN Act (SA) is still substantially similar to business name legislation Australia-wide.

## 4.2 Status of NCP reviews in other States/Territories

Western Australia, Victoria and Tasmania will not be conducting NCP reviews of their business name legislation. These States have assessed their respective pieces of legislation as not containing restrictions on competition which warrant NCP review. Both the Australian Capital Territory and New South Wales have recently completed their reviews, the recommendations of which are now under consideration at Ministerial level. South Australia's review determined that the BN Act (SA) contained restrictions in the public benefit and no changes were recommended.

## 4.3 International Comparisons

### 4.3.1 Ontario, Canada

The Ontario *Business Names Act 1990* ("the Ontario Act") does not prohibit registration of similar names. Applicants are responsible for any consequences of confusion with other existing registrations. For a fee, a check can be done through the Ministry of Consumer and Commercial Relations for duplicates of an applicant's proposed name. There are prohibitions on the use of certain names, such as names indicating an association with the Crown or obscene or misleading names. In displaying registered names on such things as advertising, invoices and contracts, the name must also be accompanied by the phrase "Registered Name" (or its French or abbreviated equivalent).

Registration is effective for 5 years. Fees payable differ depending on whether the registration is done in person or by post (it is more expensive by post). Registration is essentially "self-service" in that an applicant can go to offices called "Ontario Business Connects" and search and register, via a computer work station, a business name as well as other registrations such as taxation. In registering a name, applicants provide the same type of details (name, corporation office holders, address, and signature) as are required under the Queensland BN Act. There is no requirement for residency in Ontario, or a resident agent to be nominated, under the Ontario Act.

### 4.3.2 California, USA

Under Division 7, Chapter 5 of the Californian *Business and Professions Code* ("the Code"), the equivalent to a business name is a "fictitious" name. A fictitious name is one that does not include the surname of an owner or owners, or, if a corporation, the corporate name. A fictitious name statement must be filed if a person regularly transacts business in California for profit under the fictitious name.

If a fictitious name is used, a fictitious business name statement must be filed within 40 days from the time the business begins transacting. Such a statement requires the person using the name ("the registrant") to provide to the county clerk the following details:

- Fictitious name or names being used;
- At what location the name is being used;
- The person/s and/or corporations using the name; and
- The date at which use of the name commenced.

Filing of the statement includes payment of a fee (\$US10) plus the statement and one copy. Within 30 days of filing the statement, the registrant is required to publish in a newspaper of general circulation a statement in relation to their registration. The newspaper is to be in circulation in the county in which business is being conducted, or, if there is no newspaper in that county, an adjoining county or in Sacramento County.

There is no residency requirement for use of, or provision for a resident agent in relation to, a fictitious name. Fictitious names have a five-year expiry term. If the fictitious name is no longer being used, a statement of abandonment is to be filed. The county clerk maintains the equivalent of a business names register in relation to fictitious names. This register is publicly searchable.

There are penalties for the provision of false or misleading information in relation to fictitious names (maximum penalty \$US1000). There are no restrictions on the types of names that can be registered, and there are no subjective/identical tests. There is also no protection under the Code for registrants from passing off actions or actions under the relevant trade mark legislation.

## 5.0 RESTRICTIVE PROVISIONS IN THE BN ACT

The BN Act in Queensland contains a number of minor restrictive provisions in relation to registration, renewal and cancellation of names, restriction on use of certain names and display and usage of names. These are outlined in the table below.

Section	Restriction	Restriction Type	Description of Restriction
5	Certain business names to be registered	Business Conduct	<p>A person who carries on business in Queensland under a business name must have the name registered under the BN Act. This does not include a person who carries on business under his/her own name only, or corporations using corporate names.</p> <p>The objective of this provision is to require names to be registered so that a public register can be maintained for the benefit of consumers and other businesses.</p>
7	Registration of business names	Business Conduct	<p>The BN Act requires the provision of specified information including: the business name; description of the nature of the business; date from which business is being carried on; name, address, date of birth and signatures of proprietor/s applying for a business name; and addresses of place where business is being carried on. Addresses must be physical, not a PO Box. The prescribed fee must accompany the application - the current prescribed fee is \$95.40.</p> <p>The objective of this provision is to ensure that accurate information about persons carrying on business under a business name is obtained at the time of registration.</p>

Section	Restriction	Restriction Type	Description of Restriction
8	Resident Agent	Restrictions on Out-of-State Parties	<p>Where the proprietor/s of a business name reside/s interstate, the name and address of a resident agent who has consented to act as such must be included in the application.</p> <p>The objective of this provision is to have someone within the State to whom notices may be served in relation to the business name.</p>
10	Undesirable business names	Business Conduct	<p>The BN Act allows cancellation of registration of business names that have been registered inadvertently. Notice is to be given to proprietor(s) and the Minister may annul the notice.</p> <p>The objective of this provision is to ensure that no name remains in contravention of the direction.</p>
11	Renewal of registration	Business Conduct	<p>The registration of a business name shall remain in force for a period of 12 months. Registration may be renewed by lodging with the Registrar before the expiry of the registration a statement together with the prescribed fee of \$54.50 annually.</p> <p>The objective of this provision is to maintain the currency and accuracy of the register. This provision also ensures a finite period for currency of names, meaning that names no longer being used or ceasing to be registered are available for registration by other proprietors.</p>
12	Notification of changes in particulars	Business Conduct	<p>The proprietor(s) must lodge notification of the following particulars:</p> <ul style="list-style-type: none"> <li>• changes to the place/address of the business;</li> <li>• change of proprietor;</li> <li>• change of resident agent; and</li> <li>• cessation of business name.</li> </ul> <p>The objective of this provision is to maintain the currency and accuracy of the register.</p>
13	Duty to furnish information	Business Conduct	<p>The BN Act empowers the Registrar to seek information or to verify information about the registration details of a business name.</p> <p>The objective of this provision is to enable to Registrar to maintain a current and accurate register, particularly if the Registrar has cause to believe information supplied by a business in relation to a registered name is misleading or inaccurate.</p>



Section	Restriction	Restriction Type	Description of Restriction
19, 19A	Cancellation of registration	Business Conduct	<p>Registration of a business name may be cancelled if:</p> <ul style="list-style-type: none"> <li>the Registrar is advised that a business is no longer being carried on under the business name; or</li> <li>following notification by the Registrar, the proprietor(s) fails to satisfy the Registrar that business is being carried on under the business name; or</li> <li>following notification by the Registrar in relation to compliance with a provision under section 12, the proprietor(s) fail to satisfy the Registrar that the provision has been complied with; or</li> <li>a corporation, as a proprietor of a business name, has been struck off any register kept under <i>Corporations Law</i>; or</li> <li>the proprietor(s) fails to pay the prescribed fee.</li> </ul> <p>The objective of this provision is to enable cancellation to be effected, and thus the register to be updated, as a result of matters that indicate a business is no longer carrying on business.</p>
20	Use and exhibition of business name	Business Conduct	<p>Person(s) carrying on business under a business name must include that business name in all business letters, any statement of account, invoice, official notice publication, and order for goods or receipt. The business name is to be displayed in a conspicuous position on the outside of every place of business where business is carried on under a particular name.</p> <p>The objective of this provision is to enable consumers to distinguish between businesses and to readily identify a business. It also compels businesses to accurately display their business name.</p>
26	Invitations to the public to make deposits or loans	Business Conduct	<p>Person(s) seeking or inviting public deposits, or asking to have money lent to that person, must not make reference to any business name registered or required to be registered under the BN Act. The exceptions are a public company under the terms of the <i>Corporations Law</i>, or instances where a loan or deposit of money is not related to a public invitation issued, published or otherwise given.</p> <p>The objective of this provision is to protect consumer interests by preventing unscrupulous traders from obtaining loans or deposits. This provision is part of the uniform business name legislation Australia-wide.</p>

## 6.0 ANALYSIS OF ALTERNATIVES

In undertaking this review, the current arrangements have been adopted as the "base case". The following alternatives have been assessed:

1. Deregulation
2. Modification of current legislation, including:
  - Triennial renewals;
  - Fully identical names tests;
  - Removal of the resident agent provisions; and
  - Registrar's discretion under section 7(1) of the BN Act to not make proprietors' details publicly available on the business names register.
3. Uniform national systems, including:
  - Central national register; and
  - A single business identifier.

### 6.1 Deregulation

Under this model, the BN Act would be repealed. The result would be that businesses could use virtually any names, words and phrases they choose including those currently protected by the Minister's Direction on Business Names, without fulfilling any registration requirements. Any limitations on names under the Trade Marks Act and the *Corporations Law* would still apply.

#### **Impacts on stakeholders**

Under this alternative, there is potential for widespread consumer confusion between similarly or identically named businesses. Consumers would have difficulty distinguishing between businesses and may be misled into doing business with one trader on the grounds that the name of that trader seems very similar to that of the trader they actually did business with previously. Consumers would find it harder and more costly to identify and avoid persistently unscrupulous or incompetent business proprietors. Additionally, there would be no register for consumers to use to identify the names and addresses of proprietors for legal purposes. Individual consumers could incur significant costs in gathering and assessing market information and from lower service standards provided by some businesses in response to the reduced transparency and accountability. While existing businesses would make some savings in renewal fees, which could theoretically be passed on to consumers, any savings to individual consumers would be too small to be measurable.

Under deregulation, existing businesses would benefit from reduced financial and administrative obligations under the BN Act. However, the benefits would be quite small compared to the potential increase in costs from:

- any increase in litigation to protect themselves from passing off actions and trade mark infringements;
- a greater need for advertising to distinguish themselves from competitors who choose similar names, either deliberately or by chance;

- the need to strengthen measures to establish customer loyalty and create and maintain goodwill.

New businesses would benefit to a small extent through the removal of the registration fees and the greater availability of names. The greatest benefit would accrue to unscrupulous proprietors of new businesses seeking to “free ride” on existing businesses’ reputation and advertising effort. However, once established, they too would face the same additional net costs as existing businesses.

Government agencies responsible for administering other business-related regulation would face increased costs and effort to maintain their effectiveness. Similar negative impacts would be felt by investigation and enforcement agencies, such as Queensland Police and the Criminal Justice Commission.

The impact on existing business names brokers is not clear. Without the register, some brokers would cease to function, resulting in financial and job losses. However, there would be potential for brokers and others to increase their business substantially by providing services to fill the gap left by the loss of the register. The economies of scope and scale associated with the size and compulsory nature of the existing register would not be available to brokers, leading to potentially higher costs being passed through to consumer and business clients.

While deregulation would remove the requirement for professionals or others to act as resident agents, the impact is unclear. Where the resident agency role is ancillary to the provision of other services to the business, and essentially unpaid or provided at minimal cost, the impact of deregulation is likely to be small. This may not be the case where the provision of resident agency services to a number of businesses is part of a professional’s core services – even then the impact is not likely to be significant overall (see section 6.2.3 below).

### **Previous consideration**

In 1996 OFT conducted an extensive review into the desirability of maintaining the business names register and whether the BN Act could be repealed. Twenty organisations, including finance, legal, community and government agencies, were canvassed for their views on a possible repeal of the BN Act. The majority of responses expressed concern at any repeal of the BN Act and outlined fears for the success of enforcement and business activities in the absence of the business names register.

### **Conclusion(s)**

Repeal of the BN Act is not in the public interest on the basis that the potential costs to key stakeholders would be significantly greater than any small benefit which may accrue. Deregulation would not meet the objectives of the BN Act to eliminate confusion between businesses and easily and reliably determine the identity of the proprietor(s).

## **6.2 Modification of legislation**

### 6.2.1 Fully Identical Names Tests

As discussed in Section 2.3, Queensland uses the two-step names determination test, which involves testing proposed names identically against Australian corporations, and subjectively against Queensland-registered names of businesses, incorporated associations and cooperatives. Such a test is also used in every other Australian jurisdiction with the exception of New South Wales, which uses a "substantially similar test" when registering business names.

Under the fully identical names test option, a proposed name would be allowed provided it is not identical to an existing name of a business, incorporated association or cooperative on the Queensland business names register.

#### Impacts on stakeholders

Under this option, the impact on consumers in terms of benefits and costs would be similar to that which would occur under deregulation. In particular, it would increase the incidence of consumers being misled or confused about which business is providing goods or services, particularly where competitors operate in similar markets and locations. However, unlike deregulation, consumers and other key stakeholders would still be able to check the identity and address of the actual proprietor(s) of a business.

As with the impact on consumers, the impact on existing businesses in terms of benefits and costs would be similar to that which would occur under deregulation. This option would have the effect of increasing the possibility of unfair marketing practices, which can only be rectified by costly civil litigation. In the majority of cases the aggrieved party will be a small business and as such, often is least able to undertake such an action. Examples of the types of potentially misleading names that could both be registered under this option include:

- Brown Engineering Consulting and Brown Engineering Consultancy;
- Mount Mee Electrical and Mt Mee Electrical; and
- Ezy Garden Edging and Easy Garden Edging.

The only way to guarantee legal protection for a business name is by registering a trade mark under the Trade Marks Act. However, as outlined in section 3.1 above, in practical terms the Registrar indirectly exercises a degree of supervision of intellectual property rights under the BN Act by refusing to register a business name where it is considered there is a likelihood of confusion with an existing registered name. This benefit for existing businesses, albeit limited, would be significantly reduced under the fully identical names test option.

Subject to the administration arrangements and software systems being in place, all of the services currently provided in relation to the register, with the exception of initial registration, can be provided on-line -- that is, searches, lodging registration and other forms, making payments and renewals. The Government is currently in the process of preparing amendments to the BN Act to facilitate the expansion of services capable of being provided on-line.

As with deregulation, new businesses would benefit from the removal of registration fees and the greater availability of names under the fully identical names test. An identical names test would also allow the full range of services, including initial registration of a business name, to be provided on line. As a result, the startup costs of searching the register for available names, devising a new business name and submitting the business name application, would be reduced.

After an initial outlay to modify BACHCO and administration arrangements, the move to an automated and less labour-intensive process for assessing proposed business names should provide cost savings for the Government. However, Queensland would be out of step with the majority of Australian States and Territories if it moved towards fully identical tests.

A move to fully identical tests would not in itself have a significant impact on the activities of business names brokers, but an associated move towards expanding on-line access to the register has the potential to reduce demand for their services significantly.

### **Conclusion(s)**

The costs of moving to a fully identical names test appear to outweigh any benefits. While new businesses receive a benefit, all other key stakeholders would be disadvantaged by such a move—This option would not meet one of the objectives of the BN Act, that is, to eliminate confusion between businesses.

#### **6.2.2 Triennial business names renewals**

Under this option, business would have a choice of a one or three-yearly renewal for their registered business names. The currency of the register would be maintained as businesses would still be required to notify the Registrar of any changes of particulars to their business names as they occur within the one or three-year period. Triennial renewals would lessen administrative requirements for business and the Government without imposing any additional costs.

The Government is currently in the process of preparing amendments to the BN Act to provide for the triennial renewal option.

#### **6.2.3 Removal of resident agent provisions**

Under this option, section 8 of the BN Act relating to resident agents would be removed. Sections 12 and 30 of the BN Act would also need to be amended to remove references to resident agents.

The resident agent provision is in place to ensure there is a person in Queensland on whom notices can be served. Proprietors residing outside of Queensland must reach agreement with a person who consents in writing to be a resident agent for the business in Queensland. If a proprietor residing out of Queensland does not have associates in Queensland to call upon for this purpose, that proprietor may have to engage another business (for example, a legal or accounting practice) to be a resident agent.

As an indication of the number of businesses with resident agents, 124 out of around 205,000 businesses submitted forms to add, cease, and/or change the address particulars of a resident agent in 1999-00.

### Other jurisdictions

All other jurisdictions, except South Australia, have a resident agent provision in their business names legislation. International jurisdictions such as Ontario and California do not have resident agent provisions.

### Impacts on stakeholders

Under the BN Act, the only purpose of a resident agent is to accept any notices for the purposes of the Act and any other process. There is no requirement that the resident agent act for the business for any other purpose (e.g. consumer complaints). Therefore, consumers dealing with businesses with proprietors based outside Queensland, or corporations and own-name traders, may still need to contact the proprietors directly. In such circumstances, which are quite common, consumers would not be disadvantaged by the removal of the resident agent's provision. However, consumers may be disadvantaged and incur additional costs in serving notices on interstate or overseas proprietors.

Existing businesses would be free of the need to comply with the provision, which may result in reduced administrative costs. The removal of the resident agent provision would also create equity between business name proprietors, and other proprietors (such as corporations and own-name traders) that do not require resident agents. There are no negative impacts on existing businesses from removing resident agent provisions except where they seek to serve notices on other businesses with proprietors based outside Queensland.

For new businesses without proprietors residing in Queensland, there are costs in having to engage a resident agent, for example, the payment of a fee to have an agent agree to perform the services. For relatively new businesses based outside of Queensland, particularly those coming from overseas, it may be difficult to find a suitable resident agent in the short term. This may delay the process of registering a business name. In the absence of the resident agent provisions, therefore, new businesses could achieve cost and time savings.

If the resident agent provision is removed, government will have a minor cost saving when processing new applications for business names and changes of particulars. Some minor changes will need to be made to BACHCO at a one-off cost. There will be costs in amending legislation.

There is no discernible impact on business name brokers.

Impacts on professionals acting as resident agents may depend on whether or not they are paid for their services. If not, there will be benefits for those accountancy and legal offices that currently act as resident agents for non-Queensland resident proprietors. They will not have the responsibility of receiving notices on behalf of

proprietors. For those that are being paid, any loss of income is likely to be quite small.

### Conclusion(s)

In retaining the resident agent provision, there is some benefit to consumers, in that it is easier to serve papers at a location in Queensland, should the need arise. However, this applies only to a very small percentage of businesses on the register. There are benefits from retention for those resident agents who are paid for their services.

In removing the resident agent provision, it becomes easier for interstate-based proprietors to register a business name in Queensland. Resident agents and professionals acting as resident agents will have fewer administrative responsibilities. There may be a negative impact for those resident agents who are being paid for their services but this is likely to be a very minor impact. Removal is also consistent with corporations and own-name traders who do not require resident agents.

On balance, it is considered that the benefits of removing the resident agent provision outweigh its retention. It is therefore recommended that the resident agent provision in the BN Act be removed.

#### 6.2.4 Registrar's discretionary power in relation to public display of details on the register

Under this alternative option, the Registrar would have discretionary power to withhold a proprietor's personal details on the register.

This discretionary power would be used in situations where the proprietor provides evidence that public display of their personal details (such as residential address) places them and/or their family at risk of violence. This power would be contrary to section 7(1) of the BN Act, which requires that a proprietor's details be given and available for public display and searching.

The option of discretionary power was highlighted by a submission made to this review. The respondent stated that due to the nature of their work, they were occasionally in a position to be threatened by aggrieved clients. To this end they had successfully applied to the Electoral Commission and the Australian Tax Office for their personal details to be withheld from public registers held by both these agencies.

#### Impacts on stakeholders

This option would not increase the regulatory burden on business name proprietors but would instead offer relief to proprietors fearful of the consequences of their personal details being made publicly available. This option would offer some partial relaxation of the restriction of section 7(1) of the BN Act. The benefit for these proprietors is that they could conduct their regular business with such fears reduced. For consumers, there is a cost in not being able to fully search the register. Unscrupulous proprietors may look at this option as a means to withhold their details

from consumers, although the burden of proof upon proprietors when making the request to the Registrar to use discretionary power would make such a situation unlikely.

This option would not appear to meet the objectives of the BN Act, as it prevents the business names register from being as accurate, transparent and searchable as it could be. Nonetheless, the benefit to proprietors in terms of their personal safety concerns is significant. It is therefore recommended that the option of giving the Registrar this discretionary power under section 7(1) of the BN Act be further investigated by OFT, taking into account the progress of other States and Territories in the matter, the number of potential beneficiaries of such an option, and the success of agencies that currently have a similar provision.

### 6.3 Uniform National Systems

Under this option, there would be a single national register of business names. Two variations within this option have been considered as follows:

- (1) a national Business Names Register administered by the Commonwealth, with assistance from the States and Territories. It would incorporate all existing registered names in the States and Territories onto a single register. Thereafter it would be the entry point for new businesses wishing to register a business name; and
- (2) a single business identifier using the Australian Business Register associated with the Australian Business Number ("ABN") introduced under the Commonwealth *A New Tax System (Australian Business Number) Act 1999 (Cth)*

#### 6.3.1 National Business Names Register

Under this variation, existing business names registered in each State and Territory would be gathered under the administration of a single body (a Commonwealth agency, with State and Territory assistance) and onto a single, national business names register.

The design of a national register would need to provide for those situations where there are identical or very similar business names registered in different States and Territories. Provision would also need to be made to actually permit the registration of very similar names for new businesses which incorporate references to towns and regions of the same name in different States and Territories. A common method, used by some national associations with separate State branches, would be to add a descriptive suffix to the names to enable them to be distinguished from each other, such as "John's Plumbing (QLD)"

#### **Impacts on stakeholders**

Under current circumstances, each jurisdiction operates a separate register under which names likely to cause confusion are not permitted. Under a single national



register, the potential for consumers to be confused would be greater, particularly where:

- businesses with similar names based in different jurisdictions compete in the same market; and/or
- over time, such businesses failed to use their proper registered name in full and were inconsistent in their use of devices such as the descriptive suffix, tending to continue to use their "old" registered name.

To the extent that a national register would increase the potential for confusion between businesses with similar names, the impacts on existing businesses would be similar to, but not as significant as, moving to an identical names test. These include potential increases in costs associated with litigation, advertising, and creating and maintaining goodwill. For those businesses operating in more than one jurisdiction, or seeking to do so, there would be savings in not having to renew their registration separately in each of those jurisdictions.

Existing businesses would need to have a transition period in which time they could have an opportunity to either amend or re-register their names prior to their appearance on the national register. During this transition period, existing business would also have to amend signage and advertising to add a distinguishing device such as a descriptive suffix. This may involve considerable expense.

Businesses may also feel that to add a descriptive suffix to their names is inconvenient for marketing and advertising. The descriptive suffix may create the impression that a business is confined to the State or Territory its descriptive suffix suggests, rather than trading on a national basis. This may counteract any possible benefit achieved through registering a name nationally.

Businesses could trade nationwide while only needing to register a name once. However, the significantly greater number of names already registered may reduce the availability of preferred names for new businesses, depending on the nature of any test applied to proposed names.

Amalgamating the registers should result in cost savings to government overall, but the distribution of any savings between jurisdictions will depend on how such a national register is administered and the roles and costs allocated to individual jurisdictions. For Queensland, an important consideration will be how to ensure a high standard of access to users in all regions in accordance with the Government's priority outcome of Building Queensland's Regions.

Moving to a national register may affect the operations of business names brokers in Queensland, particularly if they have to renegotiate contracts with the administrators of the central register without appropriate transitional arrangements. However, a more significant impact on brokers would occur through loss of business arising from current moves to provide on-line service options for all consumers and businesses.

Under a national register, there would no longer be a need for resident agents. This would impact negatively on those resident agents who may be paid for performing the service.

## Conclusion(s)

The potential for consumers to be confused would increase under a national registration system unless an effective system of distinguishing between similar names can be established with a suitable transition period for its introduction. There would also need to be strong enforcement of the correct use of registered names in an effort to reduce consumer confusion. The impacts on existing businesses would be similar to moving to an identical names test, although there would be savings in not having to renew their registration in separate jurisdictions. New businesses would benefit by only needing to register once. There should be cost savings to government overall, but the actual impact on Queensland is unclear.

### 6.3.2 Australian Business Register

The Australian Business Register (ABR) is an online database operated by the Federal Government that contains all the publicly available information provided by businesses when they register for an ABN with the Australian Taxation Office (ATO). The available information held by the ABR about a business includes its:

- ABN, including its status and date of effect;
- Trading name/s;
- Legal name/s;
- Entity type;
- Location (State or Territory);
- Date of effect of GST registration;
- Deductible gift recipient status;
- Superannuation compliance status;
- Australian Company Number (ACN); and
- Australian Registered Business Number (ARBN).

The application for an ABN requires similar information to that required by States and Territories when applying to register a business name.

The ABN is used to identify businesses in relation to their dealings with the ATO as well as other businesses. The ABN is a unique eleven-digit number that must be used and displayed to register for goods and services tax ("GST") purposes. To avoid duplication for those entities that currently have an ACN/ARBN (a nine-digit number), an extra two digits are added as a prefix to form the ABN.

Unlike the Queensland business names register, where a fee is payable for all searches, the ABR can be searched on-line or via telephone without payment of a search fee. Searches can be conducted by ABN or by the business name or part of the business name.

Applications for an ABN are processed within 28 days of the receipt of the application by the ATO. Changes to particulars of an ABN can also be effected on-line and without fee. The ABR allows users to determine the status of the entry on the register, for example, when the last change was effected. The ATO updates any changes to particulars in the ABR in not more than one working day.

Within the ABR, only the ABN, ACN and ARBN are unique to each entity on the register. For other information, the ABR relies on the honesty and diligence of the applicant(s). For example, the ABR relies on applicants providing the correct trading name(s) as registered in the States and Territories in which they operate. However, there is no requirement that trading names provided by applicants actually be registered as business names in the jurisdictions in which the entities operate.

There is currently no cross-checking facility within the ABR to validate information with the State and Territories' business names registers. Even where applicants provide accurate information on trading names, in many instances different entities on the ABR will have identical or very similar business names because they are registered as such in different jurisdictions.

The accuracy of information on the ABR is a significant issue. The NSW and Victorian Fair Trading agencies indicate that their test searches of the ABR showed marked differences between data on their business name registers and the information contained on the ABR.

### **Impacts on stakeholders**

In terms of its impact on consumers, the use of the ABR would meet the objective of the Queensland BN Act of allowing consumers and other key stakeholders to check the identity and address of the actual proprietor(s) of a business. However, as currently structured, it would not fully achieve the BN Act's other primary objective of helping to eliminate confusion between identical or similar names in the marketplace, particularly because of concerns about its accuracy in terms of trading names.

There would be advantages for existing and new businesses in terms of compliance costs and for all stakeholders if an effective national register could be developed which addresses the problems of accuracy and duplication or similarity of business names. The ABR has a clear advantage over the proposal outlined in section 6.3.1 because it is already operating and familiar to businesses. For this reason, it is recommended that further investigations be conducted into the feasibility of streamlining the registration processes for the purposes of the BN Act and the ABN.

## **7.0 PREVIOUS CONSULTATION**

As part of the work of its ongoing Red Tape Reduction Taskforce, the Business Regulation Reform Unit ("BRRU") of the Department of State Development released a Policy Review Paper in September 2001 which canvassed a number of amendments to the regulation of business names in Queensland. This followed the earlier release of an Issues Paper in December 2000.

The policy paper released by BRRU review focused on improvements to service delivery for business names, particularly the availability of on-line services for business names. One of the proposals canvassed in the Policy Review Paper was a move to a fully identical names test as outlined in section 6.2.1 above. Specifically, the paper asked respondents:

*Do you agree that the existing Subjective Names Test should be replaced with an Identical Names Test to allow Business Names applications to be processed and determined on-line by the applicant?*

Almost 150 submissions were received prior to and immediately following the closing date for submissions – 2 December 2001. 74 submissions indicated “yes” to the above question, 66 indicated “no” while 6 indicated neither answer. The responses indicate that there is no overwhelming preference of stakeholders for one names determination test or the other.

Respondents who favoured a move to the identical names test generally provided little in way of supporting comments. Those who did suggested there would be a timesaving in the identical test.

Respondents who favoured retention of the subjective names test generally provided more detailed comments, focusing on the potential for increased consumer confusion as a result of a fully identical names test. Some respondents also supported the subjective names test based on the suggestion that it somehow protects the proprietary rights of business operators and that such protection would be lost under a fully identical names test.

The results of the BRRU consultation process were taken into account in the preparation of a draft PBT report, which was released for public consultation on 15 December 2001 via an advertisement in *The Courier Mail* and on the OFT website. Submissions closed on 14 January 2002. Two responses were received. One response endorsed the recommendations of the draft PBT report and offered no other comments. The other response was received on the issue of the restriction in section 7(1) of the BN Act that requires proprietors to provide personal details. This issue is addressed in section 6.2.4 of this report. No comments were made in relation to the draft report’s findings or recommendations.

## 8.0 CONCLUSIONS AND RECOMMENDATIONS

- All States and Territories administer business names legislation similar to that in Queensland;
- The BN Act in Queensland contains a number of restrictive provisions in relation to registration, renewal and cancellation of names, restriction on use of certain names and display and usage of names;
- Deregulation is not a viable option as it would impose net costs on most stakeholders and would not meet the objectives of the BN Act;
- The benefits in Queensland’s two-step names determination test, as compared to the fully identical names test, outweigh the costs because of the additional protection the two-step test affords both consumers and businesses;
- The Government is currently in the process of preparing amendments to the BN Act to provide for triennial renewals and expanded on-line access;
- The benefits in retaining the resident agent provision are outweighed by the benefits in removing it;
- A centralised business names register administered at Commonwealth level does not at this time appear to be viable. However, the notion of a single business

identifier, based upon the current ABR system, does appear to have some public benefit, but requires further investigation into its viability;

- It is therefore recommended that the *Business Names Act 1962* be retained, with removal of the resident agent provisions contained in sections 8, 12, and 30;
- It is recommended that OFT continue to investigate the viability of prescribing discretionary power to the Registrar under section 7 of the *Business Names Act 1962* to withhold proprietor's personal details upon request; and
- It is recommended that OFT continue to investigate the viability of national registration options for business names based on the existing ABR.

## Appendix A: Partnerships (Limited Liability) Act 1988 and potential exemption under the BN Act

OFT recently conducted its NCP review of the *Partnerships (Limited Liability) Act 1988* ("the PLL Act"). It was recommended in this review that consideration be given to exempting applicants under the PLL Act ("limited partnerships") from the registration provisions of the BN Act.

The current situation in Queensland is that, in addition to registration requirements under the PLL Act, a limited partnership must register under the BN Act if it fulfils the definition in s5 of the BN Act.

### Background and requirements for registration under the PLL Act

The broad objective of the PLL Act is to provide a business vehicle that has the severalty feature of a partnership but limits the liability of limited partners. Another objective of the legislation is to ensure that adequate information is available to the public about limited partnerships formed under the legislation. A result of this objective is the formation of a register of limited partnerships. However, this register is different to the business names register. Because of the very small number of business involved, the limited partnerships register is not maintained on a computerised database as happens with business names. Additionally, the purpose of the business names register is to enable identification of the proprietor of a business name, while the purpose of the limited partnerships register is to alert consumers and businesses to the limited liability status of a partnership business.

A limited partnership is formed upon registration in the Office of the Registrar (within OFT), of a statement in the prescribed form signed by each person who is to be a partner in the partnership.

Information contained in the statement includes:

- the firm name;
- the full address, in Queensland, of the registered office of the firm;
- the full name and address of each partner;
- a statement that the partnership is to be a limited partnership; and
- a statement in relation to each limited partner to the effect that he or she is a limited partner whose liability to contribute is limited to the extent of an amount of money specified in the statement.

The registration fee for a limited partnership is \$80.

To be eligible to be a registered limited partnership, the PLL Act stipulates that a limited partnership shall keep, in Queensland, at the place shown in the register as the address of the partnership, an office to which all communications with the firm may be addressed. There are no ongoing registration requirements once a limited partnership is registered, aside from being required to register any changes in the limited partnership. The cost of

registering changes is currently \$40, while a fee of \$12.70 is applicable for the registration of a dissolution or cessation of a limited partnership.

A searchable public register of limited partnerships, similar to the business names register, results from registration of limited partnerships. However, the limited partnerships register is currently not integrated with BACHCO.

These requirements, combined with the requirements for registration under the BN Act, form the "base case".

### Market snapshot

There are currently 169 limited partnerships operating in Queensland, approximately 85% of which are located in South East Queensland, predominantly in the Brisbane metropolitan area. Of these 169 limited partnerships, a wide range of industries are represented, predominantly the real estate and property sector which accounts for 31% of limited partnership firms. In comparison, there are in excess of 205,000 registered business names. These figures indicate that limited partnerships occupy a very small part of the market.

The turnover rate of limited partnerships is very small. In 99/00, for example, there were just seven new limited partnerships registered.

The number of partners making up limited partnership firms varies from 2 to 92 partners. The majority of limited partnership firms, 60% in total, are made up of between 2 and 5 partners. Most firms, 94% in total, only have one general partner.

Approximately 59% of limited partners are resident in Queensland, while 31% are resident in other jurisdictions around Australia. Overseas investors account for about 10% of limited partners. The total value of limited partner liability within firms ranges from as little as \$1 to over \$5 million.

The stakeholders under the PLL Act are current limited partnerships, new limited partnerships (including firms considering becoming a limited partnership), government (OFT) and consumers.

### Comparison of requirements between BN Act and PLL Act

To register under both the BN Act and the PLL Act, applicants are required to supply some common information such as: the name of the business, the Queensland address of the business, and the full names and signatures of persons carrying on business.

In terms of ongoing requirements, both Acts require notification of any changes to particulars.

In terms of current fees, there is a \$95.40 registration fee under the BN Act and an \$80 registration fee under the PLL Act. There are no renewal fees under the PLL Act, but there is a notification of changes fee (\$40) and a notification of cessation fee (\$12.70). Similar fees under the BN Act only apply for when notification of the changes to OFT occur after the event.

### Interstate comparisons

There is no partnerships legislation in either the Northern Territory or the ACT.

- New South Wales and Victoria: limited partnerships are not required to register under the business name legislation of those states if the firm name of that limited partnership is already registered under the partnerships legislation (s59 of both the New South Wales and Victorian partnerships legislation);
- Tasmania: s10 of the Tasmanian partnerships legislation states that the provisions of Tasmania's business names legislation "shall not apply in the case of a limited partnership registered under this Act, whilst it continues to be a limited partnership as defined by this Act."; and
- South Australia: an application for registration as a limited partnership is also taken to be an application for registration under the business names legislation. Any fee that would have been payable under the business names legislation is waived. In addition, the partnerships legislation provides that an application for registration as a limited partnership may be delayed pending the availability of registration of the proposed business name.

### Regulatory option: exemption for limited partnerships under the BN Act

The proposed regulatory option is to exempt limited partnerships from compliance under the BN Act if that limited partnership would otherwise have to register under s5 of the BN Act. The objective of such a regulatory option would be to decrease the administrative and financial obligations of a limited partnership by having the limited partnership comply simply with obligations under the PLL Act and not the BN Act as well.

The PLL Act would need to be amended to clarify the new position, and a new direction under s9 of the BN Act would also need to be issued to take into account limited partnerships.

### Impacts on stakeholders: moving from base case to regulatory option

#### Impacts on current limited partnerships:

Current limited partnerships that are registered under s5 of the BN Act would no longer have to pay business name renewal fees, and comply with renewal and changes of particulars requirements under the BN Act. This is a benefit to limited partnerships. Exempting limited partnerships that are currently required to be registered under s5 of the BN Act from the provisions of the BN



Act would give them an advantage over individual and corporate businesses that choose to operate under a business name other than their own.

#### Impacts on new limited partnerships:

New limited partnerships will only have to register once, pay one application fee and complete one set of paperwork. This is beneficial to them, but any benefits need to be contextualized by the knowledge that there are only a very small number of new partnerships registering in any year. As such any benefits are only experienced by a very marginal sector of the market. There are no costs to new limited partnerships in moving to this option.

#### Impact on government:

There are few costs for government in moving to this option, mainly, the cost of advising current limited partnerships of a change and the cost of amending legislation. With a combined registration fee, Government would stand to have a very minor reduction in revenue, which is a cost for Government. These costs are minimal, given the small number of limited partnerships. Whilst there are minimal costs for government, there is also minimal benefit, save for the benefit of reducing administrative requirements of a relatively minor segment of business stakeholders. In summary it is considered that moving to this proposal has a minor cost for government.

#### Impact on consumers:

The primary issue for consumers is one of consistency. That is, if a consumer were to search the business names register for details of a limited liability partnership, under the base case this could happen. Under the proposed option, however, the business names register would be incomplete with the absence of limited partnerships that currently need to register under s5 of the BN Act. Though the degree to which the register would be incomplete is small, an incomplete register of any status is contrary to the objective of the BN Act that is to provide an accurate register that consumers (and business) can search. There is therefore an overall cost to consumers, albeit minor, in moving to this option.

#### Overall Analysis of Impacts:

There are benefits in this option for new partnerships, but due to the extremely small number of new partnerships registering in a year, the benefits will be felt by very few in the marketplace. For existing partnerships, this option gives them an advantage over corporate and individual businesses. There are few, if any, impacts on consumers. For government, changes would need to be made within OFT to databases, receipting, and changes to forms. This would involve both initial and ongoing costs to OFT. Given that the number of limited partnerships is so small (approximately 0.09% of all registered business names are limited partnerships), moving to this option is not considered cost effective at this time. **It is therefore recommended that**

the current arrangements be maintained, that is, limited partnerships which fulfil the definition in s5 of the BN Act will continue to be required to register under the BN Act and renew that registration and pay the fees prescribed by the BN Act.

Red tape could be reduced and NCP objectives could be met if an arrangement was met whereby persons applying for limited partnership registration could have that application considered as their concurrent application for business name registration. The PLL Act could be amended to provide that an application for registration as a limited partnership made on a form that has been approved by the chief executive for that purpose pursuant to the BN Act is deemed to be an application pursuant to the PLL Act. In practical terms, this means one form for registration as both a limited partnership and a business name. Post-registration, limited partnerships would comply with the normal requirements in relation to renewals and changes of particulars to business names. A further amendment to both Acts that a form used to change particulars or to cease a business name could be used to change particulars to or cease a limited partnership would also reduce the administrative requirements for limited partnerships.

Changes to fees could be considered. In the first instance, an amendment could be considered to have one fee for registration as a limited partnership and as a business name. Such a fee, to be attractive to business, would need to be less than the combined fee currently applicable for registrations as a limited partnership and a business name separately. In addition, consideration could be given to a review of fees payable under the PLL Act for changes and cessation. As the databases and systems (including receipting functions) used for business names and limited partnerships undergo review and development in future years, it may become a more viable option at that time to consider combined fee and forms recognition under both Acts.

It is recommended that OFT examines the viability of providing for simultaneous registration, renewal and payment of fees for limited partnerships under the BN and PLL Act, including the use of combined forms and fee options, revenue impacts and suitable administration arrangements.



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