



# Legislative Council

## Business Names Bill Hansard - Extract

21/11/2002

### Second Reading

**The Hon. IAN MACDONALD** (Parliamentary Secretary) [9.28 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech in *Hansard*.

**Leave granted.**

The Bill I introduce today takes into account the dramatic changes that have occurred in the way that business is conducted across the globe and completely updates the existing legislation. The Bill will help Internet-based businesses in NSW to compete on a more level playing field in the international marketplace.

Business names have been regulated in NSW and across Australia for many years. In NSW, business names are regulated by the *Business Names Act 1962*. Registering business names allows people to identify business proprietors, thereby facilitating consumer protection. It also allows the Government to prevent businesses from using names that are offensive or misleading. It is therefore appropriate that the legislation is administered by the Department of Fair Trading.

The *Business Names Act 1962* allows consumers and traders to identify and locate those trading under a business name through the Register of Business Names. This is a publicly accessible record of the names and addresses of the registered users of a business name. It also provides information about the nature of the business itself.

To demonstrate the practical value of the Register, Members might consider the case where a consumer has received faulty goods and wishes to pursue a claim against the trader in a tribunal or court. If the trader's business has suddenly closed down or moved to an unknown location, the name and private address of the business proprietor may be obtained from the Register of Business Names, allowing the consumer to pursue legal action.

The Register of Business Names also helps safeguard the goodwill built up by a business.

Whether deliberately or accidentally, businesses sometimes "pass themselves off" as - and take customers from - more established firms, taking advantage of the reputation, or "goodwill" that has been painstakingly built up. The Register safeguards goodwill by allowing businesses to identify and avoid business names that are already in use. In this way, accidental 'passing off' is avoided.

The Department of Fair Trading has completed a review of the operation of the Act, consistent with the Government's commitments under the Competition Principles Agreement.

It is the Government's policy to ensure that the review process considers the full range of public benefits of legislation, and that all views are considered before any reforms are proposed. To achieve this, a Steering Committee, chaired by the Department of Fair Trading was established to conduct the Review. The Steering Committee comprised representatives from a number of Government Departments including the Department of Information Technology and Management, as well as industry associations like the Australian Retailers' Association and the Institute of Chartered Accountants.

The Review examined a range of issues relevant to the operation of the Act, notably the exponential growth in the use of electronic commerce and the Internet that has occurred over the past decade.

These issues were of particular importance because the emergence of electronic commerce over the Internet has introduced a new dimension to the NSW marketplace. Consumers and traders now conduct many transactions by electronic means, in the convenience of their homes and workplaces, crossing geographical borders into a global marketplace.

Undoubtedly, electronic commerce has triggered rapid improvements in productivity and has intensified competition. However, the electronic trading environment also raises valid questions about the effectiveness of State-based business names regulation.

It was with these questions in mind that the Review examined the costs and benefits of the Business Names Act.

The Review found any costs arising from the Act to be outweighed by the benefits delivered. The Act prevents the use of unsuitable words in business names and allows consumers to obtain relevant information about a good or service, namely, details about the trader's identity. Where a dispute develops, accurate information about the

trader's identify is necessary if there is to be a speedy resolution of the dispute.

Because the Act produces a net benefit, the Review concluded that it should be retained. However, the Review recommended that the legislation be fine-tuned to remove those provisions that could not be shown to produce a public benefit.

This Bill gives effect to the Review's recommendations by maintaining the best features of the current legislation and removing provisions that are outdated or that could not be shown to produce a net public benefit. The Government has also taken this opportunity to completely redraft the existing legislation so that it is expressed plainly in contemporary English.

I now turn to the details of the Bill.

The first provision of the Bill that I will discuss is an important one. It exempts businesses that are based on the Internet from having to register and display a business name. In effect, Internet-based businesses will be permitted to carry on business under an unregistered business name. In order to be eligible for this exemption, a business must take orders for its goods or services only over the Internet.

As you can imagine, only a very small percentage of NSW businesses will be eligible for this exemption. This is because traders who conduct their business in NSW off-line as well, for example by setting up a shop to sell their products, will still be required to register and display a business name.

You may ask why we are exempting Internet-based businesses in this way. We are doing so because although there may not be many of them, their nature makes traditional methods of regulation clumsy and ineffectual.

Traditional methods for regulating business names tend to focus on locating where business is being carried on. Depending on where the 'place of business' is or where orders are being solicited from, the responsible jurisdiction can then apply the appropriate regulation.

Internet-based trade is characterised by complex, cross-boundary transactions that make it extremely difficult to determine which jurisdiction is responsible for regulating a particular transaction. Internet-based businesses may have no 'place of business' in the traditional sense of the word. Even if a place of business can be established, it may not be in Australia. Indeed, many Internet-based companies are only a part of the NSW marketplace because their web site can be accessed by NSW consumers.

An article in the October 7 online edition of the New York Times illustrates my point. The article concerns a music-swapping program called Kazaa. According to the article, Sharman Networks, the distributor of the program, is incorporated in the South Pacific island of Vanuatu and is managed from Australia. Its computer servers are in Denmark and the source code for its software was last seen in Estonia. Kazaa's original developers, who still control the underlying technology are thought to be living in the Netherlands but lawyers seeking to have them charged with violating US copyright law have been unable to find them.

The jurisdictional problems involved in trying to regulate Internet-based trade are reflected in the statistics.

Of the approximately 29,000 complaints received by the Department of Fair Trading in the 2001/2002 financial year, only 57 related to e-commerce. I have seen no evidence to suggest that the online marketplace is less problematic than other trading environments. In fact, the relatively low complaint statistics are in all likelihood due to the fact that many consumers are simply unsure about where to go for help when they get into trouble.

The Review noted that the current administration of the Act does not involve pursuing domain name operators who are not based in NSW but whose web sites may be accessed by NSW consumers. As such, the Review found that the requirement to register and display a business name disadvantages NSW Internet-based traders compared with other Internet-based businesses from around the world who are not required to comply with this requirement.

If all Internet-based businesses were required to register a business name it would mean that traders - potentially from any jurisdiction in Australia or indeed, any nation of the World - would have to register a NSW business name on the off chance that their web site may be accessed by a NSW consumer.

Accordingly, the Review concluded that the benefits of ongoing regulation in this area are outweighed by the anti-competitive effects of the legislation. The Review recommended that all Internet-based businesses be exempt from the requirement to register and display a business name. This Bill gives effect to that recommendation.

That is not to say that we have given up trying to ensure fair trading over the Internet. Far from it. Just because the Internet has a global reach does not relieve the Government of its responsibility to protect NSW consumers. What we are doing is recognising that the Business Names Act is not the place to regulate the Internet.

One important step that we can take is to make sure that the Business Names Act complements the mechanisms that are being put in place to regulate the Internet. To this end, the Department of Fair Trading will be asked to consult with AusRegistry, A.U. Domain Administration and the National Office of the Information Economy. The consultations will focus on minimising potential conflicts between the administration of the Act and those organisations' policies in relation to web site addresses (or 'domain' names) and the regulation of the Internet.

Another feature of the Bill is that it links the requirement to carry on business to the trader rather than to the business name.

As it stands, the Act only allows a trader to register a business name if the trader carries on business under that name. This Bill implements the Review's recommendation that the requirement to "carry on business" be linked to the trader. As long as a trader is carrying on or intends to carry on business - any business - in NSW within the immediate future, they will be able to register multiple business names.

At the time of the Review, traders applying for registration of a ".com.au" domain name had to provide proof of registration as a business name, company, association or other recognised body. Only one domain name could be licensed per registered commercial entity. As a result, traders operating a single business had an incentive to register multiple business names in order to secure multiple domain names (to increase their exposure on the Internet).

However, there are administrative and enforcement difficulties associated with traders registering multiple business names for the purpose of securing domain names. In certain circumstances it has been difficult to determine whether a trader is 'carrying on business' where multiple business names are linked to the one business entity.

In light of these factors, the National Competition Policy Review found that the cost of monitoring compliance with this aspect of the legislation outweighs the benefit of ensuring that each registered business name is being used.

The Review concluded that traders have legitimate commercial reasons for registering multiple business names to maximise their marketplace exposure and that allowing them to do so would not compromise the objectives of the legislation. In fact, the Review concluded that such an amendment would be pro-competitive and would not compromise consumer protection.

I should point out that A.U. Domain Administration, the agency responsible for administering Australia's domain space, subsequently amended its policy to allow multiple domain names to be derived from a single business name. This development strengthens the rationale for the proposed amendment. Just as A.U. Domain Administration has found that there is little reason to limit domain names to one per entity, the Government believes that the interests of consumers are not served by limiting the number of business names that a trader may register.

Some will suggest that allowing the registration of multiple names will allow traders to prevent other companies from entering the NSW market, or will allow traders to sell business names at exorbitant prices.

In response, I would like to make a number of points.

The most important protection stopping traders from registering a business name to frustrate another trader's entry into the market, or selling the name at a huge cost, is the fact that the Register of Business Names does not confer any exclusive rights to a name. If a trader wants to gain exclusive or proprietary rights to the use of a particular business name, then they should approach Intellectual Property Australia (IP Australia) - the Federal Government agency that grants rights to trade marks - rather than simply registering a multitude of business names under the Act. The Department of Fair Trading will be asked to explore the development of formal data sharing arrangements with IP Australia with a view to providing access to that agency's intellectual property registers at the time of registering a business name.

In addition, the Bill will prohibit the registration of a business name if it is identical to or closely resembles an existing registered business name under which business is being carried on, and if the public would be likely to be misled if business were carried on under both names.

The Bill will allow someone to apply to register a business name that is similar or identical to an existing registered business name if the existing name has not been used in the previous two months. In these circumstances, the Director-General may cancel the registration of the existing name if satisfied that the public would be likely to be misled if business were to be carried out under both names in NSW.

There are also consequences for misrepresentation and misleading conduct under the Fair Trading and Trade Practices Acts. These factors will further limit the ability of those wishing to register business names for vexatious purposes.

I would like to reiterate that the intention of the Act is allow the identification of the person or company using a registered business name. As long as a trader is carrying on or intends to carry on business in the immediate future, and that trader provides correct and up to date contact details, I can see no problems allowing them to register as many names as they like.

The fees charged to register and maintain the registration of a business name will impose a limit on the number of business names that any one trader will be willing to register.

The Bill will also abolish the requirement that inter-state traders must have a resident agent in NSW.

The Act currently requires traders based outside NSW that are carrying on business within the State, (defined as establishing a place of business in NSW and soliciting or procuring business from a person in the State) to have a

resident agent in NSW who accepts on their behalf any notices served.

The Review found that since the introduction of the Act in 1962, advances in communication and database technology have made it easy to locate and contact businesses based outside NSW.

Having a contact address within the State and access to trader details in other State and Commonwealth registers would ensure that there are no significant costs associated with removing the requirement to have a resident agent within the State. Accordingly, the Review recommended that the requirement be removed.

The Bill provides the Administrative Decisions Tribunal with the jurisdiction to review determinations made by the Department in relation to the registration of business names.

Presently, should a trader object to the Department's determination, the only avenue of review is through internal re-assessment by a more senior officer. This is inadequate considering the significant commercial value that is often attached to business names, as well as developments in administrative law since the Act's commencement. This change will provide for a more equitable and contemporary review mechanism.

Finally, the Bill will improve the usefulness of the Register of Business Names by removing the fee to update details on the Register and doubling the penalty for failing to update details. I am sure that these changes will assist in achieving a higher level of accuracy.

In summary, the Bill brings the regulation of NSW business names into the new millennium. It unshackles the State's Internet-based businesses from anachronistic requirements, increases the integrity of the Business Names Register, and removes anti-competitive restrictions on the number of business names that a trader may register.

I commend the Bill to the House.