



DEPARTMENT OF **FAIR TRADING**
NSW Consumer Protection Agency

National Competition Policy Review

Business Names Act 1962

Final Report

March 2002



TABLE OF CONTENTS

1. EXECUTIVE SUMMARY	3
1.1 Background.....	3
1.2 Key Findings	3
1.2.1 Trader to carry on business	4
1.2.2 Display of business names and e-commerce.....	4
1.2.3 Australian Business Register	5
1.3 Recommendations.....	5
2. THE REVIEW.....	7
2.1 Background to the Review.....	7
2.2 Rationale for Legislative Review.....	7
2.3 Terms of Reference.....	8
2.4 The Review Process.....	9
3. PURPOSE OF THE LEGISLATION	10
3.1 Legislative Background.....	10
3.2 The NSW Business Names Act.....	10
3.3 Business Names Registration and Goodwill	11
3.4 Who registers?	11
3.5 Restrictions on Business Names Registration.....	12
3.6 Public Use of the Register of Business Names.....	13
4. REGULATORY ASSESSMENT.....	14
4.1 Market Failure.....	14
4.2 Regulatory Impact.....	15
4.2.1 Restriction on competition	15
4.2.2 Impact on the marketplace and the economy	16
4.3 Need for Regulatory Intervention.....	17
5. RECENT DEVELOPMENT AND ISSUES	20
5.1 E Commerce.....	20
5.1.1 Background	20
5.1.2 Registration of multiple business names for domain name registration.....	20
5.2 Registration of Multiple Business Names.....	23

5.2.1	<i>Registration of multiple business names and the requirement to display business names</i>	23
5.3	Cross border trading	25
5.3.1	<i>'Carrying on business' – a definition</i>	25
5.3.2	<i>'Carrying on business' and e-commerce</i>	25
5.3.3	<i>Resident agent</i>	27
5.4	Trademarks and business names	28
5.5	Inter-jurisdictional Uniformity	28
5.5.1	<i>Uniformity across Australian jurisdictions</i>	29
5.5.2	<i>Similar Names or Identical Names Testing</i>	29
5.6	A business identifier – the introduction of the Australian Business Number (ABN)	30
5.6.1	<i>Display of ABN with business name</i>	31
5.6.2	<i>The ABN and 'carrying on business'</i>	31
5.6.3	<i>The ABN and fraud prevention</i>	32
5.6.4	<i>The ABN and currency of business names register data</i>	33
5.7	Appeal Process for Unsuccessful Applications	33
6.	ALTERNATIVE REGULATORY MODELS	34
6.1	Option 1 – Maintain Existing Regulation	34
6.1.1	<i>Administration of the legislation</i>	34
6.1.2	<i>Net public benefit of retaining the current regulatory model</i>	35
6.2	Option 2 – Central Register	36
6.2.1	<i>A National Unified Business Names Register?</i>	36
6.2.2	<i>Net public benefit of a UBI-based central register</i>	37
6.3	Option 3 – Access to the Australian Business Register and Use of ABN	38
6.3.1	<i>An ABR-based business identification model?</i>	38
6.3.2	<i>Net public benefit of reliance upon the Australian Business Register</i>	39
6.4	Option 4 – Remove Statutory Regulation	39
6.4.1	<i>Free market for business names?</i>	39
6.4.2	<i>Net public benefit of removing formal regulation</i>	40
7.	CONCLUSION	42
7.1	Recommended Regulatory Model	42

1. EXECUTIVE SUMMARY

1.1 Background

The *Business Names Act* was enacted in 1962 to establish a mechanism by which consumers and traders may identify the entity behind a trading name of a firm. In this respect, the legislation has two principal objectives:

1. Provide information as to the identity of the legal entity, ie person or corporation, currently or previously using a name other than their own or usual name to identify a business established on carrying on business within New South Wales; and
2. Prescribe words not considered desirable for registration.

Notwithstanding these functions, a strong (but erroneous) perception exists in the business community that the legislation also safeguards the proprietary rights of the business name (ie intellectual property rights) and provides a direct mechanism for compliance and consumer redress.

In 1995, the New South Wales Government was a signatory to the National Competition Policy agreements. It is in this context that the Government approved the Review of the *Business Names Act* as part of its commitment to review all of its legislation that restricts competition by the conclusion of 2000. Terms of reference for the Review are detailed in section 2.3 of this report.

To this end, a Steering Committee was established, chaired by the Department of Fair Trading, with representation from the Cabinet Office, NSW Treasury, Department of Information Technology & Management, Australian Retailers' Association and the Institute of Chartered Accountants, to broadly oversee the Review process. The Review process was managed by the Department of Fair Trading Policy Division.

This document is the draft final report of the Review.

1.2 Key Findings

In basic terms, the Review found that the net public benefit associated with the operation of the *Business Names Act* justified its retention. That is, notwithstanding that the Steering Committee was of the view that the Act did pose regulatory costs to business with the effect of restricting competition within the marketplace, the benefit to the community of the regulatory model through the correction of marketplace failure was greater than the aggregate costs posed. In supporting the Act's retention, the Steering Committee nevertheless recommended that the legislation be amended to omit requirements that have the effect of imposing on business costs in respect of which a net public benefit could not be established.

The body of the report details these areas and the following section records the recommendations. Proposed amendments are discussed below.

1.2.1 *Trader to carry on business*

Section 5 of the Act provides that a person shall not carry on business in the State under a business name unless the business name consists of the name of that person or the business name is registered under the Act. Sections 18 and 19 provide that where a person in relation to whom a business name is registered is not carrying on business in the State under that name, the Commissioner may, by notice, revoke the business name. Whilst it is a breach of the Act to trade under a guise other than a personal name or a registered business name, it appears that the legislation is not a sufficient disincentive to dissuade traders from registering multiple business names.

Indeed, in the context of electronic commerce, there is evidence that multiple business names have been registered by single entities in order to lay claim to relevant domain names. This type of behaviour was not seen to pose any threat to the objectives of the Act and may be regarded as legitimate commercial practice. The Steering Committee was not convinced that retention of the requirement that a business name carry on business resulted in a net public benefit. Accordingly, the Review considered it appropriate to amend the section to require that a *trader* carry on business. This would permit individual traders to register multiple business names, provided that the trader engaged in some form of commerce.

1.2.2 *Display of business names and e-commerce*

The *Business Names Act* requires that a firm carrying on business within New South Wales or soliciting business within New South Wales register its business name. Section 20 of the Act provides that the certificate of registration be displayed at the physical premises at which trade is carried on. The Review found that these requirements are at odds with the realities of electronic commerce, or e-commerce.

E-commerce has emerged in the last five years as a significant development in commercial relations between traders and consumers. Its ramifications go well beyond the requirements and operation of the New South Wales Business Names legislation. Indeed, the issue is of such complexity – going to jurisdictional, consumer protection and jurisdictional issues – that consumer protection agencies around the world are currently examining the implications of virtual trade for their enforcement and redress mechanisms.

In this context, the Review concluded that businesses having a presence on the Internet should not be required to register a business name or display it in respect of that form of commerce. That is, where Internet traders merely respond to demand from consumers potentially sourced from all over the World, the Steering Committee concluded that it would not be appropriate for them to be required to register or display a business name on their Internet site.

Consistent with this proposal, the Review concluded that where traders either carry on off-line, or ‘traditional’, business within New South Wales or solicit business within the State, they should still be required to register and display a business name. In the vast majority of cases, therefore, businesses will still be required to comply with the terms of the Act unless their business is exclusively conducted over the Internet.

In reaching its conclusions, the Steering Committee was mindful of the principles underpinning National Competition Policy. That is, the Committee agreed that the restriction on the virtual marketplace – and, more particularly, the participation by NSW traders within it – was not justified on the basis of any correction of market distortion. As a corollary, the Committee was concerned that the continued regulation of virtual traders within a global marketplace by means of domestic regulation was contrary to NCP principles. In essence, ongoing regulation of Internet trade by the NSW *Business Names Act* gives rise to inequities between domestic on-line traders and overseas on-line traders who essentially compete within the same ‘boundary-less’ marketplace.

1.2.3 Australian Business Register

The Review closely examined the characteristics of the Australian Business Register and its potential as an alternative to the *Business Names Act*. In principle, the Steering Committee was attracted to the potential use of the Australian Business Register in place of the Register of Business Names. However, the Review found that it is not clear that (a) the Federal Australian Business Register legislation is sufficiently ‘bedded down’ at this stage to allow reliance upon it by the broader public sector and (b) given July 2000 amendments to the legislation, that the Department could provide all necessary information to the community to achieve the objectives of the *Business Names Act*.

In this respect, the Review concluded that the suitability of the Australian Business Register ought to be re-visited in the future and noted that the NSW Department of Information Technology & Management has initiated discussions with the Australian Taxation Office to determine the potential use that could be made of the Federal register by State agencies. However, in view of the identification information adduced through the Business Activity Statement cycle in support of the New Tax System, the Review concluded that consideration should be given to incorporating the Commonwealth data into the Register of Business Names to confirm its accuracy if possible.

1.3 Recommendations

The Steering Committee made the following recommendations.

1. It is recommended that the legislation be amended so that the requirement to ‘carry on business’ is linked to the trader and not the business name(s).
2. It is recommended that the Department consult with AusRegistry, Internet Names Worldwide, auDomain Administration, the National Office of Information Economy and any other bodies active in formulating and administering domain name allocation policies with a view to minimising potential conflict between domain name operations and the administration of the *Business Names Act* as it relates to multiple names and the currency of those registrations.

3. Because of the rate of change in Internet trading and the predicted exponential growth of e-commerce, it is recommended that the Department monitor the impact of e-commerce, related legislation and self-regulatory regimes in respect of the application of the *Business Names Act*.
4. Having regard to the emerging trend of multiple business names registration, it is recommended that traders be required to display the business name associated with the form of commerce for which business is conducted/solicited.
5. It is recommended that display of business names, registered in New South Wales, not be made mandatory in respect of trade carried on over the Internet.
6. It is recommended that the Act be amended to provide that where traders exclusively offer their goods or services on the Internet, they should not be required to register their business name. Where on-line traders also conduct off-line activities, the legislation should continue to operate.
7. It is recommended that the Act be amended to remove the resident agent provision (section 8).
8. It is recommended that the Department investigate the development of formal links with IPAustralia with a view to providing access to that agency's intellectual property registers at the time of registering a business name.
9. It is recommended that the Department monitor implementation and administration of the ABN with a view to assessing the feasibility and associated costs and benefits of the mandatory display of an ABN with the business name.
10. It is recommended that the Department of Fair Trading initiate discussions with the Australian Taxation Office with a view to establishing links between the ABR and the Register of Business Names to monitor and update information elicited through the Business Activity Statement process.
11. It is recommended that consideration be given to increasing the penalties for failure to update registration details.
12. It is further recommended that consideration be given to removing fees for lodgement of changes to registration details.
13. It is recommended that consideration be given to a formal appeal process. This amendment would provide for the Administrative Decisions Tribunal to possess jurisdiction with respect to the external review of determinations made by the Department of Fair Trading.

2. THE REVIEW

2.1 Background to the Review

The objective of this Review, as set out in the terms of reference, was to fundamentally examine the purpose and need for business names registration under Competition Principles Agreement guidelines. The main aim of the National Competition Policy (NCP) is to promote and maintain competition to increase economic efficiency and community welfare, while continuing to provide for consumer protection. The Government believes that, provided the public interest is safeguarded, competition will benefit the people of NSW by creating a stronger and more vital economy.

The Competition Principles Agreement establishes principles for pro-competitive reform of government business enterprises and removal of impediments to markets where they are not in the public interest. The Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition. The Competition Principles Agreement – which forms part of the National Competition Policy – commits the NSW Government to review, and where appropriate, amend all of its legislation that restricts competition, by the end of June 2002. To meet this commitment, all NSW legislation that may potentially restrict competition is currently under review.

The purpose of this Review, therefore, was to clarify the objectives of the legislation and their continuing appropriateness with respect to the purpose and need for business names registration. The Review also sought to identify the nature of restrictions on competition, analyse the likely effect of any identified restriction on competition, assess and balance the costs and benefits of these restrictions and consider alternative (ie less restrictive) means for achieving the same outcome.

The Review considered whether the existing regulatory framework gives effect to regulatory reform policies of the New South Wales Government, taking account of industry practice and technological developments. The purpose of regulatory reform is also to ensure that Government regulatory objectives, such as protection of consumers, are met as efficiently and cost-effectively as possible having regard to NCP principles.

2.2 Rationale for Legislative Review

Given the legislative review requirements of the Competition Principles Agreement, it is useful to briefly consider the rationale underlying the reform principles in this area.

Legislative restrictions on competitive conduct by businesses pervade the economy, ranging from government-sanctioned monopolies to licensing regimes and various restrictions on business conduct. In the past, governments have chosen to intervene in

many markets to rectify some perceived market failure in order to ensure socially desirable outcomes. Often, there has been wide community support for such regulation, as it may protect consumers, public health and safety, the environment and other specific interests.

However, legislative restrictions may have been imposed without an explicit analysis of their impact on the economy and, in particular, their effect on the workings of markets. Such legislative restrictions on market behaviour are, under the NCP Agreement, subject to review to ensure that the reasons for their establishment remain relevant.

Legislative restrictions on competition may impose substantial costs on consumers and society generally. Such costs may be through either cross subsidies, barriers to market entry by new businesses, unnecessary additional business costs, or reduced incentives for firms to innovate or increase their efficiency.

An underlying principle of NCP is that legislation should not restrict competition unless there is a clear net benefit to the community and that the objectives of the legislation can only be achieved by restricting competition.

The legislation review principles require governments to undertake a systematic review of all legislative restrictions on competition, with a focus on ensuring that the retention of any legislative restrictions be properly justified. In this respect, Clause 1(3) of the Competition Principles Agreement provides that the following matters, where relevant, must be taken into account in determining the economic efficiency–public interest mix:

- Government legislation and policies relating to ecologically sustainable development;
- Social welfare and equity considerations, including community service obligations;
- Government legislation and policies relating to such issues as occupational health and safety, industrial relations, and access and equity;
- Economic and regional development, including employment and investment growth;
- The interests of consumers generally, or a class thereof;
- Competitiveness of Australian businesses; and
- The efficient allocation of resources.

2.3 Terms of Reference

The NCP Review of the *Business Names Act* was conducted within the following terms of reference:

“The Review of the *Business Names Act* shall be conducted in accordance with the terms for legislation reviews set out in the *Competition Principles Agreement* and the requirements of Premier’s Memorandum 95-11 - Regulatory Reform. The guiding principles of the Agreement are 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.

The Review should:

- clarify the objectives of legislation which requires the registration of business names;
- identify any issues of market failure which need to be addressed;
- identify the nature of the restriction on competition;
- analyse the likely effect of any identified restriction on competition on the economy generally;
- assess and balance the costs and benefits of the restrictions identified; and
- consider feasible alternative means for achieving the objectives, including non-legislative approaches.

During the Review there will be consultation with interested groups and affected parties to ensure that all aspects of the public benefit are considered.”

2.4 The Review Process

The NCP Review process is designed to take into account public costs and benefits of the legislation and relevant views before any reforms are proposed. To achieve this, a Steering Committee, chaired by the Department of Fair Trading, with representation from the Cabinet Office, NSW Treasury, Department of Information Technology and Management, Australian Retailers’ Association and the Institute of Chartered Accountants, was established to conduct the Review.

The Review was conducted in three broad stages:

- Research, preparation and distribution of an issues paper;
- Gathering and considering opinions from public consultation and submissions; and
- Preparation of the final report.

3. PURPOSE OF THE LEGISLATION

3.1 Legislative Background

Legislation covering business names was progressively introduced in all Australian jurisdictions from the early part of the 20th century.

The Act is largely based on legislation originating in Great Britain, the *Registration of Business Names Act 1916*. It was a wartime measure designed, in part, to reveal foreign proprietors of British businesses. The adoption of the *Business Names Act 1934*, replacing the *Registration of Firms Act*, brought New South Wales business names legislation into line with the law in the United Kingdom, South Australia and Victoria. Uniform business names legislation was adopted by all Australian States and Territories in 1962. Notwithstanding this common legislative history, there are differences in interpretation and local administrative policies which gives rise to different decisions in the determination of an application to register a particular business name.

3.2 The NSW *Business Names Act*

The principal objectives of the NSW *Business Names Act 1962* are to:

- provide a means to identify the legal entity, ie person or corporation, currently or previously using a name other than their own full or usual name to identify a business established within this State. Access to the register for identification of business principals can be undertaken for a number of reasons, including:
 - consumer redress;
 - debt recovery by other traders;
 - credit checks prior to goods being forwarded on consignment;
 - requests from Police Service and NSW Crime Commission for details for legal proceedings
- prescribe the business names not considered acceptable for registration.

To this end, the Register of Business Names provides access to the following publicly-available information:

- date the name was first registered;
- date business commenced under the name;
- date the name is due to be renewed;
- who the current and previous proprietor(s) of the business is/are (including the residential address, date of birth and place of birth for individuals, and the signatory, capacity of signatory, and the registered address and ACN for corporate proprietors);
- current and previous principal place(s) of business (including commencement and cessation dates);
- current and previous other places of business (including commencement and cessation dates);

- current and previous postal addresses (including commencement and cessation dates);
- details of the current and previous resident agents (including commencement and cessation dates), the residential address, date of birth and place of birth for individuals, and the signatory, capacity of signatory. Registered address and ACN for corporate resident agents;
- which documents have been lodged, when they were lodged and when they were processed; and
- copies of those documents.

3.3 Business Names Registration and Goodwill

Although it may not have been intended when the legislation was introduced, the Act also helps safeguard the goodwill associated with a business. The Act does not confer an exclusive or proprietary right to the use of a particular business name but creates a mechanism by which prospective business operators can identify and avoid names that are already in use. Inadvertent duplication of an existing business name (which could give rise to a ‘passing off’ action by the existing business), is therefore avoided.

‘Passing off’ may occur in circumstances where one business, either deliberately or without intention, ‘passes itself off’ as another firm, often one with a well-established reputation in the marketplace. The effect of this is to (a) potentially cause the established firm to lose business and/or business reputation to the less well-established firm, and (b) cause consumers confusion as to the firm with which they are trading.

3.4 Who registers?

Under the present system, a business name must be registered when commercial activity is carried out under a name that is different to the person or corporation conducting the business. Jan Smith can trade under the name “Jan Smith” without registering the name. “Jan Smith’s Newsagency”, however, must be registered. Trading names registered under the *Partnership Act 1892* do not have to be registered under the *Business Names Act*.

In order to register a business name, a trader must:

- be a legal entity;
- in the case of a natural person, live in New South Wales (or have a resident agent in this State);
- in the case of a State-based corporation, eg an incorporated association, have an office or resident agent in New South Wales;
- if operating in partnership, have a maximum of 20 members in total (professions are exempted);
- have a street address for the (intended) business;
- decide upon a business name that differs from other registrations and complies with the Ministerial Directions pursuant to section 9;
- intend to use the business name for commercial purposes;
- intend to commence use of the business name within 2 months of registration;

- provide other written information as required;
- not be convicted of prescribed offences (unless the leave of the District Court is granted); and
- pay the prescribed fee.

Users of registered names must ensure that the business name appears on any document used in relation to the carrying out of that business, including the conspicuous display of the name outside every place of that business. In addition, the legislation provides that the certificate of registration must be conspicuously displayed at the principal of business.

As at 30 June 2000, there were 455,414 business names registered in New South Wales.

3.5 Restrictions on Business Names Registration

Since 1989, section 5(B)(1) provides that business names may be registered using only letters, punctuation and numbers (which may include Roman numerals) used in the English language. Except with the consent of the Minister, the Act restricts the registration of names considered undesirable by the Director-General of Fair Trading, or that the Minister has directed shall not be registered. These include names that are likely to be confused with:

- incorporated organisations registered with the Australian Securities Investment Commission (ASIC), eg proprietary limited companies and companies limited by guarantee;
- associations, co-operatives and financial institutions incorporated in the State; or
- business names registered in New South Wales.

Current departmental policies further restrict the registration of names on practical grounds, such as limiting the number of times the letter “A” may appear at the beginning of a business name. This was considered necessary because of the increasing number of traders attempting to be the first (or amongst the first) in telephone directories and other advertising listings. The effect was to counter a large number of business names prefixed by, for example, “A.AAA...”. Other restrictions include the use of words that, when used in a particular way, imply a non-commercial activity, such as “association”, “federation”, “community” and “club”, or imply corporate status, such as “proprietary”, “limited” or “incorporated”. A final example is that a sole proprietor cannot use the word “group” in a name to suggest there are partners in the business.

The Act prevents the registration of names that are likely to be offensive to members of the public or members of any section of the public. Attention is given to the potential of business names to offend any sector of the community taking into consideration issues of language, religion and culture. Notwithstanding that the *Fair Trading Act 1987* prohibits conduct by a trader which is misleading or deceptive, or likely to mislead or deceive, the *Business Names Act* also prevents the registration of names that are misleading in relation to the nature, objects or purposes of the business. It requires that the “true nature of the business” (section 7(1)(b)) be

provided on the application for registration, and that any business name not misinform potential customers with regard to the nature of the business.

In addition to the provisions set down in the *Fair Trading Act*, the *Business Names Act* itself contains powers to regulate names that may be regarded as inappropriate. The Steering Committee was initially not convinced that the additional regulation associated with retention of section 7(1)(b) was justified in the context of existing powers of compliance and enforcement contained in other legislation. On further consultation, however, it was considered desirable to retain the section in its current guise so as to provide the Department with sufficient discretion to manage the Register of Business Names and determine applications for business names.

3.6 Public Use of the Register of Business Names

The business names register currently provides ready access to details of the person(s) or corporation(s) trading under a particular name in New South Wales. Details of names registered under the Act are indexed and maintained on the public register. The register may be consulted to obtain such information as the names, business and personal addresses, dates and place of birth of registered users of a business name or resident agents, nature of the business, when the name was registered and changes to details occurred, as well as copies of forms lodged. A comprehensive list of available information is included in section 3.2 of this report.

An analysis of the 1999/2000 business name register statistics indicates that 159,641 extracts from the register were obtained, either to identify the legal entity using a business name or other details on record. Of this type of search, it is estimated that over 40 per cent provide information to assist in law enforcement or consumer redress. Users of the register extracts include the Police Service, NSW Crime Commission, Fair Trading Tribunal, Fair Trading Centres, other consumer protection agencies, traders and consumers.

It was suggested in submissions that the value of the register would be enhanced by introducing a facility to search by identifier information other than the business name, for example by a trader's name. The Victorian Business Names Register and the ASIC register have this facility. Notwithstanding that the system's operation might be slowed, there would appear to be no technological impediments to searching the database by trader name.

4. REGULATORY ASSESSMENT

4.1 Market Failure

The current regulatory framework is designed to ensure that information identifying the legal entity behind a trading name is easily accessible to consumers and traders. In the absence of a business names register, the market would fail to provide consumers with information in a form and within a timeframe required to identify the legal entity behind a business name. Moreover, traders would also be disadvantaged in their commercial dealings because of the absence of necessary information to effect redress.

The register helps correct an imbalance in the availability of information to consumers and traders alike, allowing access to redress through civil and criminal actions by identifying registered traders. For example, customers (including other traders) who have received faulty goods or paid for a service that was not provided may wish to pursue a claim against the trader in a tribunal or court. The name and private address of the business proprietor may be obtained from the register to pursue that action should the business suddenly have closed down or moved to different (unknown) premises. Similarly a wholesaler who has invoiced a retailer for the purchase of goods may access the register to ascertain that the trader they have invoiced is the owner of the business or to pursue the trader for debt recovery purposes.

Equally, registration may provide evidence that an impropriety cannot be attributed to a trader, because the alleged wrongdoing was committed by another trader using a similar business name. When this occurs, there may be grounds for a ‘passing off’ action. When a trader has ‘invested’ in a name, built up a business and established an amount of goodwill over a period of time, and another trader injures that goodwill by misrepresenting an unrelated business, the owner of the original business could take private legal action against the trader who has adopted their name even if the ‘passing off’ was not deliberate.

The absence of regulation to facilitate the identification of required information might generate an increase in transaction costs. In general terms, transaction costs arise whenever an exchange takes place. The parties to a transaction have to find each other, they have to communicate and to exchange information. Goods and services must be described, inspected, weighed and measured. Contracts may be drawn up, solicitors/counsel may be consulted and records have to be kept.

As a general principle, the more complex the transaction, the greater transaction costs are likely to be—frequently passed on in pricing. It is for this reason that most transactions are bilateral. The additional costs of multilateral contracts are sufficiently prohibitive as to be uneconomic. From a theoretical perspective, transaction costs reduce economic welfare. The welfare loss arises partly as a result of resources allocated to information search and other elements of the transaction, and partly in the suppression of transactions that would otherwise have occurred in the absence of these transaction costs.

From a consumer perspective, minimisation of transaction costs represents an important and legitimate reason for government regulatory activity. The collective welfare loss as a result of high, or higher than necessary, transaction costs may outweigh the more easily identified costs associated with regulation. In the case of business names, registration represents the most desirable or efficient method of minimising transaction costs in the industry. There is little doubt that this form of regulation improves the visibility of legitimate tradespersons and this is one of the main reasons for the support of the register.

The lack of a register could also result in an increased likelihood of transactions being sub-optimal, as there will be a lack of an economical mechanism for redress, either for consumers or traders, which could result in a reduction in transactions occurring throughout the marketplace through lack of confidence. The register may, however, be limited in its effectiveness, as its integrity depends on business names being registered and changes to details being lodged within the limits prescribed by the Act. Additionally, proof of identification is not required when registering or changing details to a business name. There have been occurrences when signatures were found to have been forged, or false information was knowingly supplied about partners in a business. The Department monitors compliance with the Act, but this does not necessarily ensure that the details on the public register are correct or current and that all instances of market failure can necessarily be corrected.

4.2 Regulatory Impact

4.2.1 Restriction on competition

Any legislation that imposes constraints on the market can restrict competition and/or increase costs to business. The restrictions on a trader in registering a preferred business name and the costs involved in actually registering a name can result in restricting competition in the economy.

Whilst the merits of preventing the registration of ‘like’ business names have been discussed above as a mechanism of reducing market failure, the costs imposed on new entrants into the marketplace by the requirement to register and display a business name, and strict requirements governing the registration of particular names, may act to lessen competition within the market. These externalities are a by-product of the Act’s endeavours to correct more material failures in the operation of the market, highlighted in the preceding section. Nevertheless, having regard to the guiding principles of NCP that a net public benefit must be made out to justify regulation, it is appropriate to identify the anti-competitive aspects of the *Business Names Act*.

The restrictions on registering a business name can have the following anti-competitive effects on the general economy:

- reducing the market performance of businesses where trader goodwill is already established prior to applying for registration of a business name;
- reducing the number, range or possible performance of new/potential market players;
- inhibiting innovation;
- businesses register with other organisations that will allow registration of their preferred business name; and

- costs incurred and revenue lost by businesses delayed entry to the market as a result of applying for, and processing of, business name applications.

Moreover, it could be argued that the operation of the *Business Names Act* restricts competition by imposing the following costs:

- financial costs to business of complying with registration requirements which include:
 - \$114 to register a name for three years, then \$88 to renew the registration for a further three years;
 - accountant or solicitor charges ranging from \$100 to \$500 and \$100 to \$1,500 respectively if a business chooses to register in this manner; and
 - administrative charges for updating or changing particulars on the register of \$21 as well as a fee of \$135 when applying for the Minister's consent to register a business name.
- additional administrative costs incurred by business for registering a name such as the time and effort to complete the form; to deal with an unsuccessful name application, and submit requests for reconsideration of name application.
- costs to business that are associated with conducting cross border trading, including:
 - costs associated with requirement in the Act that businesses appoint a resident agent in each State or Territory;
 - costs of multiple registrations to comply with legislative requirements of each State.
- costs to businesses wishing to operate under multiple names within the same jurisdiction. Traders in these circumstances incur additional registration fees for the additional names registered.

4.2.2 Impact on the marketplace and the economy

Any costs borne by business in complying with business names registration are likely to be passed on to consumers, in the form of higher prices, and to have an impact on the economy at large. These impacts must be assessed against the benefits to consumers, business and the economy generally.

None of the submissions received expressed concerns with the financial and administrative costs associated with registering a business name in a single jurisdiction. However, some concerns were expressed about the costs incurred by a business that wishes to trade across the border. As mentioned in the previous section, this may include costs associated with appointing resident agents in other jurisdictions and fees for multiple registrations.

A by-product of the Act is that it offers *de facto* protection for a trader's goodwill in a name by preventing another trader from registering the same or similar name. The current registration process also prohibits the registration of offensive or misleading names and protects Crown 'intellectual property'. The submission by Davis-O'Neill-Sistrom Lawyers argued that a trader has the opportunity to develop goodwill in a name prior to its registration as a NSW business name if it is already registered in another jurisdiction. For example, the name may be registered in another State (as a company name or as a trademark), or it may be a statutory name that ceases upon

privatisation. In circumstances where a trader has already established goodwill in a name and is refused registration, the trader may accrue significant financial losses as it is prevented from transferring, for example, goodwill from one State to another. This could discourage businesses from considering expansion inter-State resulting in an overall reduction of national business activity.

By preventing the registration of a name identical to, or similar to, an existing registration and restricting certain words and characters that may be used, traders may not be able to use the name which would be most suitable to their business or use a name in which they have already established goodwill. This could be considered an anti-competitive effect of the legislation.

A further consequence could be the reduction of a trader's ability to innovate through the use of a business name by either preventing or delaying a potential trader from entering the marketplace, or by limiting the business's potential penetration into the marketplace. For example, a trader may wish to register the name 'Flubber', it being an innovative cleaning product that cleans faster and is stronger than anything else on the market. However, the current registration process prevents the registration of this name because it is too similar or identical to an existing name (which may no longer be operating but as the owner has not updated the register, it appears as currently operating on the register). Notwithstanding this impact on the marketplace, it is important to note that traders can trade names between themselves as they would in relation to other items of commercial worth.

Anecdotal evidence suggests that where a trader is restricted from registering its preferred business name, the trader will endeavour to have its preferred name registered or incorporated by some other jurisdiction. At this point, the trader may choose to seek alternative mechanisms through which to operate, including registering or incorporating the name in an overseas or inter-State jurisdiction. This could result in a loss of potential economic growth, as well as a loss of consumer choice and products benefits. Moreover, if a trader chose to register on the Internet through an overseas registration service and then operate in New South Wales, this would also raise cross-jurisdictional issues with regards to consumer protection and debt recovery.

Having regard to concerns about the protection of good-will and confusion between similar trading names, existing provisions in both the NSW *Fair Trading Act* (section 42) and the *Trade Practices Act* (section 52) already provide protection with respect to misleading or deceptive conduct. Given the redress available under both statutes, these laws are more rigorous in their approach when determining whether there has been a 'passing off' action or misleading conduct. The entire circumstance of use of the name is considered (including the nature of the business), geographical consideration, and any other ways the business presents its image to acquire goodwill.

4.3 Need for Regulatory Intervention

In simple terms, the *Business Names Act* has two principal objectives. First, by establishment of the Register of Business Names, the Act provides a means to identify the legal entity (person or corporation) behind a trading name. Such information may

form the basis of legal redress in circumstances of dispute, or may contribute to the sum of information required for an efficient transaction. Second, the Act allows prescription of names not deemed suitable for registration as business names. This aims to ensure that words used in trading names are not offensive to segments of the community, or give rise to confusion in the marketplace as to the association of a name with a product, for example, 'Royal Courier Services'.

In the complete absence of regulation, the market may fail to provide information to traders and consumers about the identity of a trader owning a business name. In this respect, there is a need for regulatory intervention to address the imbalance of the information available. The business names register is the most efficient method of linking a business name with the proprietor trading under that name. It minimises transaction costs in the industry, thereby contributing to a healthy, efficient marketplace.

There are other ways of identifying business operators—landlords of rented commercial premises, banks and insurance companies could be approached to provide information about a trader¹. If the owner of a business required a licence to operate, the licensing authority could be consulted. Businesses, such as some book clubs, magazine and newspaper publishers, cable television providers and other direct sales organisations produce and sell mailing lists that may provide information. However, these methods tend to be expensive, time-consuming and raise privacy and practical considerations, and this view of alternative identification methods was not supported in the submissions received.

Alternatives to the requirement of a business names register have proven to be unsuccessful when trialed overseas. For example, the United Kingdom repealed legislation corresponding to the *Business Names Act*, in 1981. Instead, provisions were included in companies legislation requiring users of business names to disclose relevant names and addresses on all business related documents and at all business premises to which customers and suppliers have access. The repeal resulted in significant concern amongst the business and consumer community, and led to the establishment of several national business names registers by various Chambers of Commerce. These registers eventually failed for commercial and economic reasons.

Nevertheless, it is clear that the Act does impose some cost to traders and therefore, on an aggregate basis, poses a cost to the economy. The Steering Committee found, however, that this cost is outweighed by the benefits achieved by the Act's operation and by the confusion potentially prevented by the regulation of unsuitable words in business names. That is, from an efficiency perspective perspective, for an economy to operate efficiently, parties to transactions should have full and accurate information.

At a more practical level, transactions are made more efficient and effective when consumers are able to obtain relevant information about a good or service, including details about the trader. Such identification information may form the basis of a consumer's assessment of the trader's reputation in the marketplace. In circumstances

¹ In many circumstances, however, these commercial entities would themselves be subject to a duty of confidentiality with respect to their 'customer's' information.

where a dispute develops between a consumer and a trader, accurate information about the trading entity's personal identity (ie the person behind the trading name), its registered address and other relevant identification information may form the basis of speedy consumer redress.

This being the case, submissions made to the Steering Committee agreed that retention of the legislation as a basis of achieving the above objectives is desirable. In view of the net benefit achieved by the operation of the legislation, the Steering Committee accepted these submissions subject to some modification of the legislation as outlined in the next chapter.

5. RECENT DEVELOPMENT AND ISSUES

5.1 E Commerce

5.1.1 Background

The emergence of electronic commerce on the Internet has introduced a new dimension to the marketplace. It allows consumers and traders to undertake transactions by electronic means, in the convenience of their homes and workplaces, crossing geographical borders into a global marketplace. While providing a spur to competition, the electronic trading environment raises questions about the efficacy of State-based business names legislation and administration. Such issues are only some of those being examined by Australian fair trading agencies (and, indeed, those around the World) in relation to electronic commerce in the context of general consumer protection.

A web site address or domain name connects users with people and businesses that provide information, advertise and/or trade on the Internet. In Australia, most companies and businesses trading on the Internet currently register their addresses under the 'com.au' domain space, although use of '.com' has now become increasingly popular in this country perhaps reflecting the 'boundary-free' nature of commercial trade over the Internet. The registration of 'com.au' domain names has been administered by Internet Names Worldwide (INWW – formerly Internet Names Australia) that has had the exclusive right to administer com.au names. Another company, AusRegistry, has won the tender rights to provide registry services from early 2002.

In addition, in April 1999, on the recommendation of the National Office of the Information Economy (NOIE), 'au Domain Administration' (auDA) was formed with the aim of undertaking industry self-regulation of the Internet Domain Name Space.

5.1.2 Registration of multiple business names for domain name registration

The INWW has adopted a policy whereby only commercial entities registered and trading in Australia will be allocated a 'com.au' domain name. There is no formal regulatory or business link between INWW and the Australian Governments—State or Commonwealth. However, traders applying for registration of a 'com.au' domain name must provide proof that they are registered as a business name, company, association or other recognised body.

Only one domain name is licensed per registered commercial name. Traders effectively operating a single business are required under *existing* INWW policy to register multiple business names in order to secure multiple domain names². Traders may require a wide range of domain names to attract Internet 'hits', but intend to trade

²On 15 November 2000, the Acting Minister for Communications, Information Technology and the Arts, the Hon Peter McGauran, MP, issued a press release in which it was announced that the .au Domain Administration had released a public consultation report in which it was recommended that the requirement that only one domain name be issued per entity be removed.

as one business entity. For example, a trader offering multiple products or services will need to register multiple domain names to capture the maximum range of commercial enquiries. Some traders have registered over 100 business names, based on their desire for domain names, though they clearly do not intend to operate 100 businesses as separate, self-contained entities. Therefore, it is potentially a conflict between the INWW requirement to register each domain name as a business name and the *Business Name Act* requirement that each registered business name trade within two months of registration of the name.

There are administrative and enforcement difficulties associated with the registration of multiple business names for the purpose of securing domain names. Where an application for a business name is declined because an identical or very similar name has already been registered under the Register of Business Names, the Department may be required to confirm that the registered business is currently trading and, therefore, that the business name registration continues to be valid. In these 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. The trader cannot demonstrate conclusively that the business *name* is associated with carrying on business, though the trading entity is active; and the Department cannot demonstrate conclusively that the trader is not carrying on business under that business name.

In this regard, there would seem to be a trend to register business names for the purpose of securing domain names, even where there is no intention to immediately trade under the domain name. While INWW policy requires that registered domain names be linked to an 'actual trading entity', the reality would appear to differ from the policy. A survey of domain names in February 1999, found that 33 per cent of registered domain names do not maintain an active website³. Some of these dormant domain names would be linked to active businesses seeking to claim a domain name matching their business name; others would be linked to dormant business names.

It is the intention of the *Business Names Act* to maintain a register of active business names. The growth of domain names contributes to the costs of monitoring compliance with the requirement that registered businesses are actively carrying on business in the registered name. The Steering Committee considered that the cost of monitoring compliance with this aspect of the legislation arguably outweighs the benefit of ensuring that each registered business name is carrying on an independent business.

Moreover, it could be argued that the requirement for businesses to demonstrate that they are trading under each registered name is anti-competitive and could restrict the growth of e-commerce. This would be unacceptable in a commercial and legislative environment committed to promoting electronic commerce. The Commonwealth, in the *Electronic Transactions Act 2000*, and all State and Territory governments, in their in-principle support for legislation based on the *Electronic Transactions Act*, have signalled that legal impediments to e-commerce should be minimised.

³ See <<http://www.netregistry.com.au/news>>.

Whilst sections 18 and 19 make it a breach of the Act to register a business name and not trade under that name, it appears that the legislation is not a sufficient disincentive to dissuade traders from registering these business names. It may be necessary to either increase penalties for breach of this provision and/or increase resources to monitor compliance with the requirement, or to consider amendment to the provision.

In this regard, the Steering Committee considered that investing in multiple business names to secure multiple domain names could be viewed as a legitimate commercial action maximising Internet exposure, and it is not recommended that penalties and compliance resources be increased. Having regard to the costs of administering the Register and the commercial gain achieved by the registration of multiple business names, the Steering Committee considered it appropriate for application fees to apply in respect of each registered name.

Amendment of the legislation so that the requirement to ‘carry on business’ is linked to the trader and not the business name would allow a trader to register multiple names to meet the commercial needs of the business without breaching the legislation. In this regard, such an amendment would be pro-competitive and does not compromise consumer protection.

The Steering Committee considered whether the allowance of the registration of multiple business names by a trader would run contrary to the principles of the legislation especially having regard to the similar names test adopted by the Department. Moreover, it was considered whether allowing traders to register multiple business names would give rise to market failure in that their actions would have the effect of being counter-competitive by potentially reducing the stock of available names.

The Steering Committee found, however, that whilst traders had legitimate and proper commercial reasons for registering multiple business names to maximise their marketplace exposure, the objectives of the legislation would not be compromised by amendment to allow multiple registrations. That is, the anti-competitive effect of restricting the number of business names that may be registered by traders could not be justified having regard to net public benefit, especially in view of the proposals contemplated in recommendation 5 of this Report. This being the case, the Steering Committee supported amendment of the legislation to provide traders with the ability to register multiple business names.

Recommendation 1 It is recommended that the legislation be amended so that the requirement to ‘carry on business’ is linked to the trader and not the business name(s).

The e-commerce environment is changing rapidly and will continue to present challenges for business names administration and enforcement. At this point there is no central agency for the development of policy on Internet trade, regulation and domain name policy and the Steering Committee considered it necessary to clarify the administration of the regulatory relationship between business and domain names.

Recommendation 2 It is recommended that the Department consult with AusRegistry, INWW, auDA, the National Office of Information

Economy and other bodies active in formulating and administering domain name allocation policies with a view to minimising potential conflict between domain name operations and the administration of the *Business Names Act* as it relates to multiple names and the currency of those registrations.

Recommendation 3 Because of the rate of change in Internet trading and the predicted exponential growth of e-commerce, it is recommended that the Department monitor the impact of e-commerce, related legislation and self-regulatory regimes in respect of the application of the *Business Names Act*.

5.2 Registration of Multiple Business Names

Registration of multiple business names is not limited to e-commerce. For example, there have been concerns about traders registering multiple business names to capture locality listings in the Yellow Pages. It is considered that provided registered business names are not deceptive or misleading, registering multiple names to increase enquiries or exposure is a legitimate commercial practice and should not be subject to legislative constraints. Consistent with the reasoning in section 5.1.2., the Steering Committee was affirmed in the view that the Act should be amended to link the requirement to ‘carry on business’ to the trader not the business name.

5.2.1 *Registration of multiple business names and the requirement to display business names*

Under the current provisions governing the use and exhibition of business names, traders registering multiple business names are required to display all business names. With the growth of multiple registrations, this provision may prove impractical and difficult to enforce. Whilst failure to display all registered business names does not prevent consumers’ and traders’ capacity to search the Register using one business name, transparency of business activity remains a legitimate objective of the legislation.

Recommendation 4 Having regard to the emerging trend of multiple business names registration, it is recommended that traders be required to display the business name associated with the form of commerce for which business is conducted/solicited.

Concomitantly, existing provisions in relation to business name display are virtually impossible to enforce in relation to Internet trade, owing to the nature of that trade and its inter-jurisdictional/international nature. Whilst it could be argued that enforcement of the provision should be consistent for different modes of commerce, it would clearly be impracticable to require ‘virtual traders’ – whose sites are accessed by New South Wales consumers as a small pool of potential World-wide consumers – to conform to the requirements of New South Wales business names legislation.

Moreover, from a legislative perspective, sections 20(b) and 20(c) of the *Business Names Act* require display at physical premises at which the trade is carried on. To the

extent that trade of the Internet is carried on by electronic means, compliance with these provisions would not be practicable. Nevertheless, given consumers' concerns about privacy and security in electronic trade, traders may benefit from being able to demonstrate that it is registered and provide evidence of ownership.

The Steering Committee was initially attracted to the proposal that the requirement to *not* display a business name for Internet traders should not extend to on-line trade initiated by e-mail. That is, the Committee was initially influenced by documents published by consumer protection agencies that gave special emphasis to the 'scam' potential of Internet trade actively initiated by a trader, as opposed to that where a consumer voluntarily accesses a trader's web-site⁴.

Here, a distinction might be drawn between the forms of on-line trade. Whereas web page-based trade requires consumers to seek out and demand goods and services, virtual traders – who solicit business by contacting consumers by e-mail – seek to actively supply goods rather than merely 'respond' to consumers' demands—that is, they engage in direct marketing. Whilst such a distinction may appear subtle, web-based trade effectively *responds* to consumer demand (through searches and related 'hits'), whereas e-mail-based trade *initiates* supply to consumers directly.

On closer consideration, however, the Steering Committee did not consider that drawing a distinction between 'passive' on-line trade and e-mail-initiated on-line trade was practicable. It is doubtful that enforcement of the requirement for on-line traders soliciting business within NSW would be feasible; for example, how would the jurisdiction of the consumer recipient be determined?

The Steering Committee also considered arguments that not requiring on-line traders to display a business name would effectively create inequities in the NSW marketplace in relation to off-line traders. In dismissing these concerns, the Steering Committee placed great emphasis on the 'boundary-less' nature of cyberspace. That is, whereas the activities of off-line traders can be readily identified as either carrying on business within NSW or soliciting business from NSW, trade carried on over the Internet escapes such categorisation. In effect, it occurs for the most part virtually and the notion of physical location is not material. Indeed, the Steering Committee was cognisant that to require NSW traders, who carry on their business exclusively on the Internet, to display a business name would create inequities relative to other on-line traders around the World.

Accordingly, the Steering Committee was not convinced that a net public benefit was made out to warrant the continued application of sections 20(b) and 20 (c) to trade carried on over the Internet.

Recommendation 5 It is recommended that display of business names, registered in New South Wales, not be made mandatory in respect of trade carried on over the Internet.

⁴ See, for example, the July 1998 'Consumer Alert' of the Bureau of Consumer Protection within the US Federal Trade Commission outlining its 'dirty dozen' scams most likely to arrive via bulk e-mail.

5.3 *Cross border trading*

5.3.1 *‘Carrying on business’ – a definition*

Section 4(1) of the New South Wales legislation provides that the establishment of a place of business in the State, and soliciting or procuring any order from a person in the State, satisfies the definition of ‘carrying on business’. However, subsequent legal advice from the Crown Solicitor confirms that “*either* the act of establishing a place of business in the State, *or* the act of soliciting or procuring any order from a person in NSW was sufficient to constitute ‘carrying on business’ for the purposes of the Act” [emphasis provided].

This interpretation supports the stated intention of the Act to protect NSW consumers in transactions with inter-State businesses. The then Minister’s second reading speech refers specifically to salespeople who solicit business on behalf of inter-State firms. When a business outside New South Wales solicits or procures orders from a person in New South Wales, that business is subject to the New South Wales *Business Names Act*.

For the purposes of the NSW *Business Names Act*, ‘soliciting or procuring any order’ includes advertising in the press, or on radio and television, in New South Wales. Though the distribution or transmission of the advertising may be national and not directed exclusively to a NSW market, the advertising would be considered to constitute soliciting an order from a person in NSW if it were broadcast through NSW networks or published in NSW.

5.3.2 *‘Carrying on business’ and e-commerce*

It is less clear, however, how the definition of ‘carrying on business’ applies to e-commerce. Such issues are not peculiar to the administration of this legislation—consumer protection agencies have grappled with the legal (and conceptual) issues surrounding electronic commerce since the Internet’s rise as a medium of commerce. Since an Internet site can be accessed throughout the world, and as the trading entity may have no physical presence in a State, it is difficult to establish whether the transactions generated by the site constitute ‘carrying on business’ in a particular jurisdiction.

The process of advertising and soliciting orders on the Internet is unlike other advertising media and the application of the definition of carrying on business *vis-à-vis* traditional publication/broadcasting is, therefore, not as clear. When an advertisement is placed on a web site located outside New South Wales, while the advertiser might anticipate and intend that persons in New South Wales may choose to access the site through deliberate browsing or hyper-text links, the advertiser does not take ‘pro-active’ action to solicit business specifically in NSW.

Indeed, the Crown Solicitor has advised that “[w]hat the web advertiser does is to allow someone in New South Wales to down-load information by use of their own computer and a telephone line. If that is so, while such a person may solicit orders from persons in New South Wales, and does therefore ‘carry on business’ within the

meaning of the definition in sub-section 4(1), they do not so solicit in New South Wales and the *Act* does not have application”⁵.

Although the Crown Solicitor’s advice considers United States case law (which found that Internet trading does constitute ‘carrying on business’ in the State where the consumer accesses the web site), it concludes:

“The act of making a web site available for browsing exposes the business to customers in New South Wales and makes the placing of orders by New South Wales customers more likely. However, I prefer the view that the soliciting of persons in New South Wales involved therein does not occur in New South Wales and therefore, no business can be said to be carried on in New South Wales”.

This interpretation is consistent with current business practice in the broader electronic commerce environment. There is no evidence that commercial domain name operators established inter-State are applying for registration of business names in each State from which orders are solicited. Such a requirement would not be practical or enforceable, and could be viewed as excessive regulation of e-commerce. The Crown Solicitor’s advice is consistent with current administration of the Act which does not involve pursuing inter-State domain name operators whose web sites may be accessed by New South Wales consumers.

On face value, the effect of this interpretation of ‘carrying on business’ in relation to e-commerce is an inconsistency, *vis-à-vis* traditional trade. Whereas traders soliciting business by any conventional media in NSW, such as newspapers or television advertising, must register their business name in this State, traders outside New South Wales ‘advertising’ only on the Internet are not required to register a business name in New South Wales.

However, distinction between Internet and conventional media of trade for the purposes of the *Business Names Act* appropriately reflects the purpose of the legislation. That is, the Act’s Interpretation section (section 4(1)) defines “carrying on business” as “... establishing a place of business in the State and soliciting or procuring any order from a person in the State ...”. As the Internet exists as a boundary-less forum of information exchange and access, the Act’s traditional notion of ‘place of business’ is inconsistent with the reality of the World Wide Web; indeed, its very name describes its inter-jurisdictional ambit.

In effect, there is no ‘place’ of business within New South Wales in the traditional sense. To require on-line traders to register a business name would be to require traders – potentially from any jurisdiction in Australia or, indeed, any nation of the World – to register a NSW business name on the off-chance that their Web-page is ‘hit’ by a NSW consumer.

Whilst distinction between on-line and off-line traders, for the purposes of requiring the registration a business name, could be perceived on face-value as giving rise to inequity between these two classes of traders, the Steering Committee was not

⁵ Crown Solicitor’s Advice, 5 March 1998.

convinced that this was so. Rather, the Committee found that imposition of the *Business Names Act* on domestic traders, whose business is undertaken in a marketplace that extends beyond the jurisdiction of the legislation, might unfairly disadvantage NSW businesses in the international marketplace. Moreover, the continued impost of the *Business Names Act* on the business affairs of NSW traders conducted exclusively over the Internet could give rise to more pronounced inequities relative to other on-line traders from around the World (who are not required to comply with the Act).

Having regard to the principles underpinning National Competition Policy, the Steering Committee was not convinced that the net benefit achieved by the regulation of NSW on-line traders warranted the ongoing application of the legislation to this discreet group. In essence, the Committee found that the anti-competitive effect of the regulation was not outweighed by the correction of market failure achieved by the ongoing regulation, by domestic legislation, of traders operating in a medium in which other competitors are not subject to the same regulation.

Recommendation 6 It is recommended that the Act be amended to provide that where traders exclusively offer their goods or services on the Internet, they should not be required to register their business name. Where on-line traders also conduct off-line activities, the legislation should continue to operate.

5.3.3 Resident agent

One of the requirements of businesses based outside New South Wales but carrying on business within the State is that they have a resident agent in New South Wales. This requirement was introduced so that businesses could easily be served with process. A number of submissions considered the requirement onerous and argued that the costs to business (and flow-on costs to the community) of complying with this provision outweigh the administrative benefits of having a resident agent within the State.

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 New South Wales. Business name registration details are available from other State registers and the Australian Business Register (administered by the Commonwealth), and, provided that registration has occurred in another State, there should be no obstacles to identifying and locating the trader behind the business name.

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. It might be noted that the resident agent provision was repealed in the 1996 amendments to the South Australian *Business Names Act*.

The Steering Committee was not convinced that having regard to these developments in communication and information dissemination that the ongoing requirement of resident agents in NSW was justifiable from a net public benefit perspective.

Recommendation 7 It is recommended that the Act be amended to repeal the resident agent provision (section 8).

5.4 Trademarks and business names

The purpose of a trademark is to indicate ownership of the intellectual property associated with a good or service. Trademarks are registered with IPAustralia, an agency under the Commonwealth's administration, which also registers patents and designs. Registration of a trademark gives the owner legal rights to exclusive use or control of the use of the mark under the *Trade Marks Act 1995*.

If a business name is used to describe a product or service as well as to identify the business, it may infringe the rights of owners of trademarks. The Department has no formal link with IPAustralia, and does not search the Trade Marks database for identical or similar names. It is considered the responsibility of the applicant to ensure that the registration of a business name does not contravene the civil proprietary rights of a third party, in respect of which private litigation for breach of intellectual property rights could give rise. The Department does, however, actively encourage applicants for business names to conduct a search of the Trade Mark database to ensure that a breach of another's intellectual property rights does not inadvertently occur⁶.

That the Department does not conduct a cross-check against the IPAustralia registers at the time of registering a business name was considered by some submissions to be a weakness in the administration of the Act. The Steering Committee found that business registration practice is to provide traders with information about trademark registration, although it is ultimately the responsibility of private traders to ensure that the use of words in business names does not breach others' intellectual property rights.

Whilst the Steering Committee did not consider it necessary to establish formal links with IPAustralia at this time, it was mindful of the 'value-added' service that would be provided to traders should such a function be introduced.

Recommendation 8 It is recommended that the Department investigate the development of formal links with IPAustralia with a view to providing access to that agency's intellectual property registers at the time of registering a business name.

Such consultation might give rise to legislative amendment in the future.

5.5 Inter-jurisdictional Uniformity

⁶ In addition to the Department providing copies of IPAustralia's pamphlets to business names applicants, the Department publishes a *Business Names Fact Sheet*, available from all Fair Trading Centres and the Business Registration Branch, which emphasises that registration of a business name is a separate process to intellectual property ownership. The Fact Sheet provides the contact details of IPAustralia.

5.5.1 Uniformity across Australian jurisdictions

Many submissions supported a central register of business names and a ‘one-stop-shop’ for applications for business names across jurisdictions. This would require a uniform business names test across Australia. This has not been achieved, although recent changes in the rules for registration of Company Names (Schedule 5, 6 and 7 of the Corporations Regulations) make company and business names testing very similar. Differences in business names testing exist from State to State and submissions indicated that there is widespread support for a uniform, national approach. Whilst such an outcome would be beyond the terms of this Review, it is significant to note that as States and Territories move towards automated business names testing, the bases of their assessment are becoming similar.

5.5.2 Similar Names or Identical Names Testing

Under the administrative mechanism of the Minister’s Directions, the Department has traditionally refused to register business names that are too similar to business names already registered pursuant to the legislation. However, this similar names test is not based on legislative prescription. The basis of the similar names test policy is that to register names which are too similar may give rise to confusion in the marketplace and intentional or unintentional passing off. Administration of this policy requires that departmental officers exercise discretion in determining whether a proposed name is too similar to a business name already registered.

On the other hand, ASIC has adopted an identical names test for the registration of company names. That is, a name will not be registered unless it is identical to a company name already registered or if the proposed name is so similar to a registered name as to be construed as identical.

Whilst somewhat beyond the terms of reference of the review, the Steering Committee considered whether the Department should adopt an identical names test to administer the Register of Business Names. Such a move would be in keeping with the Department’s move towards an automated business names registration process whereby discretion exercised by departmental officers in determining the similarity of proposed business names to those already registered may, eventually, decline.

Additionally, the Steering Committee considered whether government ought to be playing any role in regulating the similarity of business names (via a similar or identical names test) and whether traders, as commercial entities, ought to rely upon alternative regulatory options such as section 52 of the *Trade Practices Act* (misleading and deceptive conduct) or broader equitable remedies available under the common law. Essentially, the Steering Committee considered whether the costs and regulatory impost associated with the regulation of similar names were outweighed by the correction of marketplace anomalies.

The Review found that it was appropriate for the Department to maintain its current similar names testing processes for the present time. Whilst the Committee was cognisant that advances in electronic service delivery might, in the future, require that the exercise of discretionary assessments by departmental officers during the automated business names process be modified, it agreed that the current policy effectively and efficiently achieved the objectives of the legislation.

In dismissing considerations of whether reliance ought to be placed by traders upon broader commercial remedies – such as the *Trade Practices Act* and the common law – the Steering Committee noted that the Department’s regulation of similar names is not so much to protect goodwill associated with a firm’s registered business name but rather to avoid confusion in the marketplace. That is, similar names testing prevents the registration of business names that are so similar to existing business names as to potentially confuse consumers and traders about the identity of a trader, thereby defeating the intention of the legislation.

In this respect, the Steering Committee agreed that any competitive restriction associated with similar names testing procedures was exceeded by the role played by the processes in addressing market failure.

5.6 A business identifier – the introduction of the Australian Business Number (ABN)

There was support in a number of submissions for a registration number attached to the business name. The Australian Business Number (ABN), established under the Commonwealth Government’s administration, could potentially achieve this objective. *A New Tax System (Australian Business Number) Act 1999* establishes a Register of Australian Businesses and provides for the issue of a nationally unique identifier for businesses, the ABN, which will ultimately allow for the collection and distribution of information through a single entry point and the streamlining of registration processes. The ABN is linked to the trading entity (proprietor, company, partnership, etc), not the business or company name.

Under A New Tax System, businesses operating without an ABN trade with significant commercial disadvantage. Businesses dealing with a supplier that does not quote an ABN are required to withhold 48.5 per cent from the payment to the supplier. The ‘no ABN withholding amount’ is forwarded to the ATO by the business registered with an ABN. Under these conditions, it is understood that most traders have applied for an ABN.

In the context of public controversy about the release of information provided by entities for ABN registration, the Commonwealth Government amended the *A New Tax System (Australian Business Number) Act 1999* in early July 2000 to prescribe information which could be made publicly available. Schedule 4C of the *A New Tax System (Tax Administration) (No 2) Act 2000* amended section 26 of the principal legislation to provide that the following fields of information could be made available about an ABN entity:

- (a) entity’s name;
- (b) entity’s ABN;
- (c) date of registration;
- (d) registered business name or name used for business purposes;
- (e) date of effect of GST registration;
- (f) date of effect of any GST cancellation;
- (g) statements required to be entered in the Australian Business Register;
- (h) entity’s ACN and, if applicable, Australian Registered Body Number;

- (i) kind of entity;
- (j) State or Territory, and postcode, of entity's principal place of business; and
- (k) other information prescribed by the Regulations.

The information available from the Australian Business Register can be compared with that available under the NSW Register of Business Names (see section 3.4 of the Report). In terms of the Act's objective to provide consumers and traders with a ready means by which a trader may be personally identified (and potentially located), the Register of Business Names provides information as to who the current and previous proprietors are, their residential address, date of birth and place of birth for individuals, and registered address and ACN for corporate proprietors.

In this regard, the information provided by the State register is a good deal more 'content rich' in terms of a trader's identity and location. Whereas information provided under the ABN prior to the July 2000 amendments was of a similar level of detail to that provided by the State Register, some of this information is now not available to the public. This recent development reduces the usefulness of the Australian Business Register for the purposes of identifying traders.

In view of its current limitations, the ABR could not supplant the role played by the Register of Business Names at present. Nevertheless, it is possible that the ABR could be used as a platform to achieve the objectives of the NSW Business Names legislation in the future. This would require extension of the breadth of information currently available to the public under the Australian Business Register.

To this end, some potential costs and benefits of linking the ABN to business names are identified and discussed in the following paragraphs.

5.6.1 Display of ABN with business name

The display of the ABN with the business name may reduce the risk of fraudulent use of business names and minimise opportunities for 'passing off'. Should the business names registration system move towards identical names testing over time, there may be an increased opportunity to register names with the intent of 'passing off'. This increases the risk of fraud as traders register names similar to those already on the register and conduct business or criminal activities using these names. In this respect, the display of an ABN would distinguish similar names as different trading entities.

Recommendation 9 It is recommended that the Department monitor implementation and administration of the ABN with a view to assessing the feasibility and associated costs and benefits of the mandatory display of an ABN with the business name.

5.6.2 The ABN and 'carrying on business'

On application for an ABN, the ATO takes at face value the applicant's stated intention to 'carry on an enterprise' and on that basis provides an ABN. In the same way, a business name is registered with the Department of Fair Trading on the basis of the applicant's declared intention to trade, and an undertaking to commence trade within two months of registration of the name.

As discussed above, monitoring and enforcement of this provision by the Department is resource-intensive and proving increasingly difficult to police. Potentially, however, monitoring and enforcement of the *Business Names Act* requirement to 'carry on business' could be linked to the monitoring and enforcement of the equivalent provision in *A New Tax System (Australian Business Number) Act 1999*.

A number of conditions would need to be met for this proposal to be considered. The requirement in the *Business Names Act* to 'carry on business' would need to be linked to the trader and not the business name. If the requirement to carry on business continues to be linked to the business name, there is no equivalence between the requirement under *A New Tax System* and that under the *Business Names Act*. In this respect, the Department would need to consult with the ATO to be satisfied that ATO policies, guidelines and practices in assessment of whether a trader is 'carrying on business' are consistent with the policies, guidelines and practices of the Department of Fair Trading.

If these conditions are met, the monitoring and enforcement of the 'carrying on business' provision in the *Business Names Act* could be strengthened by access to the ABR data. The ATO has access to more detailed information about the financial position of the trader. Where a trader is deregistered under the *A New Tax System* legislation based on their failure to demonstrate that they are carrying on an enterprise, business names registered by that trader could be marked for possible de-registration, or automatically deregistered after the ATO appeal period. Moreover, possible concerns about the current surge in business name applications as traders register multiple names for commercial purposes could be offset by the potential strengthening of the Department's monitoring of traders' business activity.

Recommendation 10 It is recommended that the Department of Fair Trading initiate discussions with the Australian Taxation Office with a view to establishing links between the ABR and the Register of Business Names to monitor and update information elicited through the Business Activity Statement process.

5.6.3 The ABN and fraud prevention

Linking the registration of a business name to the registration of an ABN would address some concerns about the fraudulent use of business names. Applicants for an ABN are already required to provide a Tax File Number or 100 points of identification.⁷ Any trader applying for business name registration who has already been issued with an ABN would meet more stringent identification standards than Business Registration procedures could realistically provide.

⁷ Such a requirement is consistent with current practice adopted by, for example, financial institutions to ensure that the person applying for a credit or savings facility is the person in whose name the facility will be executed. Each form of identification are allocated varying 'points', with Australian Passports, Driver's Licences and Birth Certificates weighted with a high number of identification points and addressed letters from utilities allocated the lowest identification points.

5.6.4 The ABN and currency of business names register data

The Register of Business Names is an information source and its usefulness is largely determined by how reliable the information is. Its value to traders, consumers and other agencies is seriously impaired when traders do not update data.

The Act requires that businesses provide updated information when any of the registered details change. There is a small fee for updating information and penalties apply for failure to provide current information. Since registration lasts for three years, and it is common for details to change within this period, currency of data is an issue. Submissions commented that this is a significant shortcoming of the current system. There is evidence that current penalties do not play an effective role in persuading traders to update records as their details change and that payable fees may actually act as a disincentive to the updating of records by traders.

Recommendation 11 It is recommended that consideration be given to increasing the penalties for failure to update registration details.

Recommendation 12 It is further recommended that consideration be given to removing fees for lodgement of changes to registration details.

In so far as the New Tax System is concerned, it is intended by the Commonwealth, as a general principle, that the ABN constitute a single entry point of contact with government for business. This would be achieved by facilitating the exchange of data to improve administrative systems and reduce the compliance load and costs on businesses. Information updated at one source should be accessible to other government systems so that businesses are not required to update details with multiple agencies. Where businesses have an ABN, and updated registration details are lodged with the ATO under the auspices of the quarterly Business Activity Statement cycle, transfer of this information to the Business Registration System could greatly improve its currency.

Moreover, where current registration details are downloaded from one database to another, the administrative costs would be a fraction of those incurred when individual traders provide the information on prescribed forms, and the data has then to be manually entered into the business names registration system. The Steering Committee noted that if ATO data is available to the Department, only those businesses without an ABN will require monitoring for currency of registration details, so enforcement resources could be more efficiently targeted.

5.7 Appeal Process for Unsuccessful Applications

Submissions recommended the introduction of an appeal process for unsuccessful applications. The current practice is for unsuccessful applicants to request a review of the application within the Department. However, it is argued that this process is not sufficiently rigorous or transparent and that, having regard to the tenor of the submissions, a formal, external appeal process should be introduced.

In considering the formal submissions, the Steering Committee was cognisant of two factors. First, notwithstanding that the Act does not provide for the 'ownership' of a

registered business name, exclusive nomenclature associated with a trader's commercial activities does attract a value. Indeed, there is evidence that businesses trade registered names for commercial consideration in much the same manner as they would chattels or other forms of property. Second, with the increasing role played by administrative law in the exercise of discretionary powers, the Steering Committee considered that an external avenue of appeal ought to be introduced to provide for review, on appeal, of the Department's administrative determination of business names applications. The Steering Committee noted that a similar amendment was introduced in the South Australian *Business Names Act 1996* (section 16(1)).

Recommendation 13 It is recommended that consideration be given to a formal appeal process. This amendment would provide for the Administrative Decisions Tribunal to possess jurisdiction with respect to the external review of determinations made by the Department of Fair Trading.

6. ALTERNATIVE REGULATORY MODELS

Section 4.3 of this report concluded that retention of the Register of Business Names is warranted to correct marketplace failures that would otherwise cause greater detriment to the efficient and effective operation of the economy than if the legislation were not to operate. That is, whilst recognising that the *Business Names Act* does pose cost on business and therefore represents a restriction on competition, the Steering Committee found that this cost was outweighed by the net public benefit achieved by the operation of the legislation.

Having explored the relationship between marketplace failure and competition restriction to make out a net public benefit, this section canvasses four principal regulatory options considered in the Issues Paper and identified throughout the review process. These options have also been developed in light of recent issues discussed in the preceding chapter of this Report. This chapter considers existing regulation, a possible central register, use of the Australian Business Register and removal of regulation of business names.

6.1 Option 1 – Maintain Existing Regulation

6.1.1 Administration of the legislation

Under the present system, a person wishing to operate a business using a name other than his or her own personal name must register the business name under the *Business Names Act*.

Details of names registered under the Act are indexed and maintained on the public register. The register may be consulted to obtain such information as the names, business and personal addresses, dates and place of birth of registered users of a business name or resident agents, nature of the business, when the name was registered and changes to details occurred, as well as copies of forms lodged to notify changes of these details and renewal of registration of the business name.

Business names and State-based corporations (eg. incorporated associations and solicitor corporations) registered only in other jurisdictions are not taken into account when an application to register a business name is considered. Other restrictions are listed in the Ministerial Directions made pursuant to section 9, published in the New South Wales Government Gazette.

The Act additionally provides for the integrity of the public register by requiring the users of registered business names to inform the Department when changes occur to details held on public record.

Users of registered names must ensure their business name clearly appears on any document used in relation to the carrying out of that business, including the conspicuous display of the name outside every place of that business, and that the certificate of registration is displayed at the principal place of business.

The current regulatory system as described above could be enhanced by,

- including a requirement in the legislation to display the registration number together with the business name;
- using existing technology to connect jurisdictions' databases to potentially allow registration in multiple jurisdictions; and
- amending a trader's identity at the point of registration.

Notwithstanding these possible enhancements of the existing regulatory platform, the Steering Committee was satisfied that the legislation, and its administration, appropriately reflects the objectives of the legislation, subject to slight modification recommended throughout the body of this Final Report. In declining to recommend major changes to the *Business Names Act*, the Steering Committee was mindful of potential impact on business names registration of the Australian Business Register.

6.1.2 Net public benefit of retaining the current regulatory model

As detailed in the introductory sections of this Report, the *Business Names Act* has two principal objectives. First, by establishment of the Register of Business Names, the Act provides a means to identify the legal entity (person or corporation) behind a business name. Such information may form the basis of legal redress in circumstances of dispute, or may contribute to the sum of information required for an efficient transaction. Second, the Act allows prescription of names not deemed suitable for registration as business names. This aims to ensure that words used in trading names are not offensive to segments of the community, or give rise to confusion in the marketplace.

There are a number of benefits associated with maintaining the existing regulatory scheme. These include an easily accessible mechanism for identifying or verifying a trader behind the business name, the reduction in the potential for 'passing off' actions and the provision of *de facto* protection of a trader's good-will.

In the complete absence of regulation, the market might fail to provide information to consumers and traders about the identity of a trader operating a business in a name other than his/her personal name. In this respect, there is a need for regulatory

intervention to address the imbalance of the information available. However, there are other ways of identifying business operators—landlords of rented premises, banks and insurance companies, licensing authorities and direct sales organisations that produce and sell mailing lists could be consulted. However, the Steering Committee agreed that these *ad hoc* mechanisms of information retrieval would give rise to a far greater degree of both market failure and anti-competitive conduct.

As section 4.2 of this Report has demonstrated, however, it is clear that the Act does impose cost to traders and therefore, on an aggregate basis, poses a cost to the economy. The legislation *does* impede competition within the marketplace. These competitive restrictions include maintaining the Register, including costs to business of registering and maintaining their registration, costs to business wishing to operate in more than one jurisdiction (and therefore needing to register individually in other States or Territories), and administrative costs to the Government and, therefore, to the community in general.

The Steering Committee found, however, that these costs are outweighed by the benefits achieved by the Act's operation and by the confusion potentially prevented by the regulation of unsuitable words in business names. That is, from an economic perspective, for an economy to operate efficiently, parties to transactions should have full information and the Steering Committee considered that the legislation contributed to achieve this fundamental principle.

At a practical level, transactions are made more efficient and effective when consumers are able to obtain relevant information about a good or service, including details about the trader. Such identification information may form the basis of a consumer's assessment of the trader's reputation in the marketplace. In circumstances where a dispute develops between a consumer and a trader, accurate information about the trading entity's personal identity (ie the person behind the trading name), its registered address and other relevant identification information may form the basis of speedy consumer redress. Just as the operation of the courts and tribunals impose costs on the economy, their role in independently and objectively resolving disputes between parties to commercial dealings outweighs their economic impost.

Having regard to the net regulatory benefit achieved by the *Business Names Act*, the Steering Committee concluded that it ought to be retained, subject to minor amendment outlined in the preceding chapters of this Report. The Steering Committee was, nevertheless, mindful that as the implications of the Australian Business Register are realised, and electronic service initiatives develop, it might be necessary to re-visit the necessity of retaining the Register of Business Names in its current form.

6.2 Option 2 – Central Register

6.2.1 A National Unified Business Names Register?

The option of a central, possibly national, register was also canvassed in the Issues Paper. A central register would allow for national recognition of a registered business name. Such a system would provide uniformity of national registration policy and portability of names.

A feature of this system, could be an automated names testing process with a policy reflecting that of ASIC. To maintain consistency with ASIC, business names would be required to be shown together with their registration number in order to distinguish between similar names. An extension of this is a Unique Business Identifier (UBI), such as is used in Washington State, USA. UBIs could be allocated by the State or Commonwealth. A national UBI system would have the advantage of having a single registration that could be used in dealings with all levels of government, including payment of rates, payroll and income taxes. The UBI would also serve as identification when dealing with other organisations.

Whether State or national, a UBI system would ideally involve a central database with a link to participating government departments. Other considerations include the drafting and enactment of model legislation to operate the system (if necessary), who would administer it, construction of the system, allocation of costs among system users, ease of access by the public and privacy issues, amongst others.

Having regard to the business identification value of the ABN, consultation between the Department and the ATO could be initiated to explore the possibility of exchanging identification information. There is the potential to have the system operated by a nationally-based organisation such as the ASIC or the Australian Tax Office (ATO) which already collect much of the information required, such as trader's name and address. This approach could have substantial financial savings for government, and, ultimately, traders and consumers, but would have to be negotiated at a national level amongst government administrations.

6.2.2 Net public benefit of a UBI-based central register

In one sense, the Steering Committee was attracted to the notion of the establishment of a national register of business and/or company names. Such a register would, theoretically, transgress the current strictures caused by the operation of multiple business names registers across Australia. Businesses would be saved the administrative burden of potentially having to register business names in each of the jurisdictions in which they are trading or in which they are soliciting business.

However, such a proposal would require agreement amongst all State and Territory Governments for the establishment of model with features acceptable to all administrations. Whilst it is possible that the operation of national business names administration would achieve savings to State and Territory Governments in the longer-term, the mechanism associated with the establishment of a unified business names administration may pose significant costs to both the economy and public sector in the short to medium term.

These costs, of themselves, were not the only material considerations. In declining to recommend the establishment of a separate, national business names administration, the Steering Committee closely examined the Australian Business Register. In view of the status of the *Business Names Act* in the context of the Australian Business Register, the Steering Committee did not consider it feasible to establish a separate UBI platform for the central registration of registered business names.

That is, whilst supporting the retention of the *Business Names Act* and the continued operation of the Register of Business Names, the Steering Committee was cognisant of the potential use to be made of the Australian Business Register for the purpose of identifying the legal entity behind business name. This is discussed in detail in section 5.6 and re-examined as a potential regulatory option in the following section.

6.3 Option 3 – Access to the Australian Business Register and Use of ABN

6.3.1 An ABR-based business identification model?

The Steering Committee examined how objectives of the *Business Names Act* could possibly be achieved by public access to information contained on the Australian Business Register, discussed in section 5.6.

Having regard to the principles underpinning NCP, the Steering Committee was initially attracted to the proposal that reliance be placed upon the Australian Business Register to achieve the objectives of the *Business Names Act*. In this regard, the Review considered that whether, in the context of reliance upon the Federal register, the *Business Names Act* could be repealed. In these circumstances, it was suggested that consumers and traders could access the Australian Business Register to identify information about a trader's legal entity.

In relation to the Act's regulation of undesirable business names, the Steering Committee considered whether these provisions could be maintained under the existing Business Names legislation or transferred to other State legislation, possibly the *Companies (New South Wales) Code* or perhaps as a section under the misleading conduct provisions of the *Fair Trading Act* or Regulations thereto.

However, following the July 2000 amendments to the *A New Tax System (Australian Business Register) Act 1999*, the usefulness of the Commonwealth Register as a tool *accessible by the general public* to identify and locate traders is now limited. That is, the amended section 26 now provides that in so far as a trader's physical location is concerned, members of the public can only access a trader's name, State and postcode. This being the case, it is likely that reliance by the public upon the Australian Business Register to achieve the *Business Names Act's* identification objectives would not be satisfactory. Should the ambit of information available to the public pursuant to the Australian Business Register legislation be subsequently broadened, this assessment could be reviewed.

Having said this, section 3(3) of the Australian Business Register legislation provides that the Register may provide to State and Territory Governments information contained on the Register, collected pursuant to the legislation. Presumably this information would include an entity's *full* address details, information which could not be provided to the general community. Whilst section 3(3) of the legislation would facilitate the provision of full ABR information to the NSW Department of Fair Trading, whether section 26 of the ABR legislation would prevent the 'on-supply' of those details to members of the public for the purposes of the business names legislation is unclear. Discussions are currently under-way between the Australian Taxation Office and State Governments to clarify these important issues.

In summary, whilst acknowledging the potentially far-reaching role to be played by the Australian Business Register, the Steering Committee was unconvinced that it was either sufficiently implemented or that its data would provide the required information to discharge the objectives of the *Business Names Act* at this time.

6.3.2 *Net public benefit of reliance upon the Australian Business Register*

In relation to the first of the *Business Names Act*'s objectives, providing a mechanism to identify the legal entity behind a trading name, had the *A New Tax System (Australian Business Register) Act* not been amended (with the effect of limiting the community's access to information about registered traders), the Steering Committee considered whether the Federal register could, potentially, have supplanted the role played by the State business names register.

The Steering Committee found that traders might not have been required to register business names on the State register. Reliance, therefore, upon the Federal register would have reduced the impost on business activity of the operation of the *Business Names Act* with the consequent effect of improving the operation of the marketplace. That is, in the context of consumers and traders being able to access the same type of information from the Australian Business Register, and in the same manner as that available from the Register of Business Names, retention of the State register would be unlikely to have been justifiable in the public interest.

However, given the July 2000 amendments, the Steering Committee concluded that the Australian Business Register could not achieve the intention of the Register of Business Names to provide consumers and traders with information about the legal entity behind a business name. Having regard to the net public benefit made out in relation to the *status quo* operation of the *Business Names Act* (discussed in section 6.1.2., above), the review found that the Register of Business Names and its enabling legislation ought to continue to operate.

6.4 Option 4 – Remove Statutory Regulation

6.4.1 *Free market for business names?*

The Issues Paper examined the option of legislative repeal. Accordingly, the Steering Committee also considered the option of repealing the *Business Names Act*, quite separate from the option considered in the preceding section to repeal the Act and rely upon the Australian Business Register.

The Committee considered whether legislation governing the current regulatory system could be repealed, eliminating registration requirements and restrictions on the type of name a business operator could use. In this context, business operators would be responsible for disclosing their details on all business documents and displaying their name on all premises from which the business is conducted, such as in the British model. This system was required before the current Act took effect.

The Steering Committee was not convinced that in the absence of legislative prescription, traders would display their business name in a manner consistent with the current operation of the legislation. In addition, adoption of such a system without a register would result in historical data being unavailable and no central location from which to obtain information about the users of business names. Although information may be available elsewhere, it could be difficult or expensive to obtain. This would cause difficulties in identifying the proprietor of a business that has ceased or changed proprietors.

Such issues could be overcome with an open register, such as that in Ontario Province, Canada, which allows for the registration of all names irrespective of whether they are similar or identical. This would be a more liberal system than that currently used by the Australian Securities and Investment Commission, and could create conflict with existing corporations particularly if the business registration number is not required to be displayed with the name. In addition, issues relating to passing-off may be exacerbated.

6.4.2 *Net public benefit of removing formal regulation*

Having regard to the net public benefit made out in relation to the retention of the Business Names Act discussed in section 6.1. of the Report, the Steering Committee did not consider it necessary to assess, in great detail, the net benefit of repealing the *Business Names Act*.

That is, unless an alternative model could be developed which would achieve the principles under the *Business Names Act*, the Committee considered that section 6.1. demonstrated the necessity of maintaining the legislation in its current form, subject to minor amendments to improve its operation. Nevertheless, in view of the principles governing the NCP review process, the Steering Committee briefly considered the net costs of repealing the *Business Names Act*.

Some of the costs associated with the removal of the current regulatory scheme would include:

- increased costs to business because operators could be exposed to a greater risk of litigation for “passing off”;
- increased risk of fraudulent or unfair practices by hiding behind the ‘veil’ of a business name if ownership details are not disclosed;
- the practice by financial institutions and other organisations of verifying the identity of the legal entity behind a business name by requiring the production of a business name certificate of registration or registration number when establishing an account would be compromised; and
- more scope for use of a business name that confuses, misleads or is offensive, leading to consumer and trader disadvantage.

Whilst repeal of the legislation would reduce or eliminate the cost of registration, and attendant maintenance costs, the Steering Committee found that these savings could be negated, many times over, by litigation costs as a result of ‘passing off’ action or, in the absence of that, detriment to business and/or goodwill. More broadly, the Steering Committee found that the negative externalities associated with the operation

of the legislation would be far outweighed by a consequent reduction in economic effectiveness and efficiency should the costs outlined above occur.

Given the Act's objectives, the Steering Committee did not consider that the removal of the regulation of business names registration was a realistic option or could be justified on a net public benefit basis.

7. CONCLUSION

7.1 Recommended Regulatory Model

It is recommended that the current regulatory model, with its attendant legislative and administrative arrangements, be maintained but enhanced by several amendments to the legislation to refine its operation within the marketplace some 38 years after its commencement.

Although on face-value it appears that a central register could be the optimal regulatory scheme, the infrastructure necessary for the implementation of such a scheme does not currently exist and the attendant costs of its development (assuming inter-jurisdictional agreement) could outweigh its benefit to the economy. It is therefore recommended that in the absence of a central register and the required infrastructure, the existing regulatory scheme could incorporate some of the features of the central register, the Australian Business Register, operated under the auspices of the New Tax System legislation.

The Steering Committee considered whether the Australian Business Register could substitute for the NSW Register of Business Names. Initially, it was thought that given the Australian Business Register's UBI characteristics, a compelling argument could be mounted to supplant the State Register. Following amendments to the Commonwealth legislation in July 2000, however, the breadth of information available to members of the public about registered business entities has been restricted. It is now clear that reliance upon that legislation to achieve the objectives of the *Business Names Act* is not possible, at this time.

It should also be noted that the Commonwealth does not test names added to the Australian Business Register and this could increase the incidence of unintended or deliberate passing off actions. There are also concerns about the accuracy of information provided to the ATO by entities in so far as their exact trading names are concerned. This potentially limits the usefulness of the ABR.

This is not to say, however, that should the Australian Business Register legislation be subsequently amended to (a) extend the range of information available to the public about a trader and/or (b) establish names test procedures, that the ongoing necessity to maintain the Register of Business Names and its enabling legislation, the *Business Names Act*, should not be re-assessed by the New South Wales Government.

Nevertheless, in the mean-time, some difficulties identified by the Review in the administration of the *Business Names Act*, such as failure by traders to notify change of details, could be overcome by access to the Australian Business Register.

Accordingly, the Steering Committee recommended that the Department of Fair Trading initiate discussions with the Australian Taxation Office to explore data exchange protocols. Information contained on the Australian Business Register about an entity, updated quarterly through the Business Activity Statement cycles, could be provided to the Department for the purposes of updating information contained on its

Register of Business Names. Such an exchange would be consistent with the purposes of the *Business Names Act*.

Sections 5.1 and 5.2 of this report analysed the increasing practice of the registration of multiple business names. This trend has increased, and is likely to continue to do so, in the context of electronic commerce. In this respect, investment by traders in multiple business names to secure increased marketplace exposure can be viewed as legitimate commercial activity. Having regard to the principles underpinning the purpose of this Review, it is therefore proposed that the Act be amended to require that the business *entity*, not the individual business name, 'carry on business'.

The Steering Committee also concluded that given the limited ambit of the NSW *Business Names Act*, it was not appropriate to apply its provisions to trade carried on over the Internet. Essentially, the Steering Committee was concerned that NSW on-line traders would be disadvantaged relative to other on-line traders from other jurisdictions who are not required to comply with the terms of the NSW legislation.

These observations aside, the Steering Committee agreed that retention of the *Business Names Act 1962* is justified in the public interest and that the operation of the legislation generates a net public benefit. This net public benefit was made out having regard to the positive impact that the legislation has on the operation of the marketplace from both a competition and effectiveness perspective. Nevertheless, the Steering Committee observed that it is possible that in the future, arrangements may be entered into whereby the legitimate objectives of the Act may be achieved by reliance upon the Australian Business Register rather than the operation – with its attendant economic costs – of a separate Register of Business Names.