

What's in a name? Confusion reigns in Australian business names registration

The registration of business names in Australia was nationalised in 2011 with the enactment of the *Business Names Registration Act 2011* (Cth). The Act was supposed to prevent the confusion caused by too many similar business names in use across the country – in fact, avoiding confusion is expressly stated as one of the objects of the Act. Unfortunately, the Act fell short of the mark and things just appear to be getting worse.

Under the new regime, responsibility for administering the National Business Names Register fell upon ASIC, who promptly automated the whole process. Business name registration is now done entirely online – you can literally register a business name from the comfort of your own living room. This convenience does, however, come at a price. Computers cannot discern between two similar, but nuanced, words. And, [while science is advancing in this way](#), I am not aware of the development of a common sense algorithm yet.

The way it works

Under the Act, ASIC must register a business name to an entity if the business name is available to that entity. There are a number of rules dealing with the availability of business names but the one I want to focus on is that a business name is not available if it is *identical or nearly identical* to an existing registered business name or company name. Whether a business name is identical or nearly identical to an existing name is informed by rules set out by the responsible Minister in the [current version](#) of the *Business Names Registration (Availability of Names) Determination*.

The Determination sets out certain matters to be disregarded (such as plurals, capitalisation, formatting, company suffixes such as "Pty" and "Ltd", etc.), and contains a schedule that sets out a list of words and expressions taken to be the same when comparing a proposed business name to an existing name. For example, under the Determination, the word "bakery" is taken to be the same as "bakehouse" but it is not taken to be the same as "hot bread shop", which apparently warrants its own category. Unsurprisingly, this has produced some questionable results.

The early decisions

ASIC have consistently applied the Determination as an exclusive and exhaustive code i.e. if the Determination doesn't say that the names are identical or nearly identical, then the names are not identical or nearly identical. Two early decisions (in which ASIC's application of the Determination was upheld) highlight the potential for absurd results.

In *Smith v ASIC* [\[2014\] AATA 192](#), the Administrative Appeals Tribunal held that the business name "Central Coast Surf School" was not identical or nearly identical to "Central Coast Surf Academy". Essentially, the Tribunal found that, because "school" and "academy" are not taken to be the same according to the Determination, the two business names cannot be identical or nearly identical. Despite one of the Act's objectives being to avoid confusion, Senior Member McNab begins his reasons by saying:

"While I accept that the two names are so similar they might confuse or mislead, that is not the test."



The Tribunal followed the reasoning in **Smith** shortly afterwards in **B & L Whittaker Pty Ltd v ASIC** [\[2014\] AATA 302](#). In **Whittaker**, Deputy President Hack SC determined that the business name “Cairns Concrete Pumping” was not identical or nearly identical to “Cairnscrete Pumping”. Notwithstanding the result, the first two paragraphs of the Deputy President’s reasons neatly encapsulate the problems presented by the application of the Determination in the manner suggested by ASIC:

1. *"The issue in this case is whether the business name "Cairnscrete Pumping" is "nearly identical" to the business name "Cairns Concrete Pumping". Intuitively, it seems to me that it must be, but an intuitive answer is no longer permitted. The answer, and in this case a counter intuitive answer, is determined by a statutory scheme which allows a computer operated by the regulator to determine what is, and what is not, identical or nearly identical.*
2. *As will appear, I am driven to conclude that the conclusion reached by the regulator, the Australian Securities and Investments Commission, was correct. It is neither a pleasing nor a sensible outcome. Additionally, I have considerable doubt whether the legislation, and its implementation, achieves one of its stated objects which is "to avoid confusion by ensuring that business names that are identical or nearly identical are not registered."*

In those cases the Tribunal applied the Determination as an exclusive and exhaustive code but, in the same breath, criticised the result as counter intuitive or even absurd. I find it difficult to reconcile the results in these cases with the Act’s objective of avoiding confusion.

A return to common sense?

In **Swinburne & Anor v ASIC** [\[2014\] AATA 602](#), Deputy President Alpins found that, whilst the meaning of the terms “identical” and “nearly identical” is necessarily informed by the Determination, ultimately the natural and ordinary meaning of the words must prevail. In that case, the Tribunal determined that the names “Melbourne Child Psychology” and “Melbourne Child Psychology Services” were identical or nearly identical to the pre-existing business name of “Melbourne Children’s Psychology Clinic”. It should be noted that the Determination requires that pluralisation of a word (such as child to children) be ignored for the purpose of comparing the names.

Earlier this year, in **Stasiw v ASIC** [\[2015\] AATA 328](#), I argued that the business name “Solar Repairs Perth” was identical or nearly identical to the company name “Solar Repairs Pty Ltd”. The Tribunal agreed, finding that the wording of the Determination itself demands a comparison of the two names beyond just those matters set out in the Determination. This was especially true in this case because the Determination’s schedule (of words taken to be the same) expressly does not apply to the comparison of proposed business names to existing company names.

The 2015 Determination: a retrograde step?

In July 2015 the responsible Minister issued the *Business Names Registration (Availability of Names) Determination 2015*. The only material change from the 2012 Determination that I can discern is the insertion of section 5A, which provides that a business name is identical or



nearly identical to another name (other than a company name) if, and only if, the names are the same after the Determination has been applied i.e. there can be no consideration of any matters that are not expressly set out in the Determination. Clearly, the sole purpose of this insertion was to nullify the Tribunal's decision in **Swinburne**.

As the new Determination was issued very shortly after the decision in **Stasiw**, I suspect that it is only a matter of time before the Minister issues a new Determination in response to that decision as well. Although, in the very recent decision of **Boyce v ASIC** [2015] AATA 768, Senior Member Cotter disagreed with the decision in **Stasiw** and determined that the business name "Rainbow Beach Plumbing" was not identical or nearly identical to the company name "Rainbow Beach Plumbing Services Pty Ltd".

Where to from here?

Business name holders would be forgiven for feeling a bit anxious because the law is presently unsettled in this area. The Tribunal has been inconsistent in its application of the legislation and the Minister seems intent on making ASIC's job as easy as possible, despite the possibility of absurd results. At some point, this issue must be taken on appeal to the Federal Court (and perhaps beyond). ASIC chose not to appeal the decisions in **Swinburne** and **Stasiw**, so it appears that the responsibility for seeking badly needed clarification in this area will fall to a member of the public instead.

It would be remiss of me not to point out, of course, that registering a business name does not give the holder any proprietary rights in that name (like a trademark would). However, not all words can be trademarked, especially descriptive words (ironically, such as those set out in the schedule to the Determination).

In my view, business owners should be able to enjoy the use of their business name, while they are the registered holder of that name, to the exclusion of all others. They should not have to worry about a competitor setting up shop just down the street with the same, or a very similar, business name. It must be remembered that, for many small and medium enterprises, the goodwill and reputation built up in their business name is often their most valuable business asset.

If you think that someone else is using a business name that is identical or nearly identical to yours, or if you have any questions about a business name you wish to register, please do not hesitate to contact Murfett Legal on (08) 9388 3100.

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