

## Is your business name really protected?

One of our clients recently rebranded her business, changing its name in the process. Her accountant had diligently registered a new business name for her. Unknowingly, she'd chosen a name that is similar to a competitor's name – but different enough for the Australian Securities and Investments Commission (ASIC) to allow both registrations. Inevitably, the competitor threatened legal action.

This is a common problem we encounter. More often than not, it's followed by:

*"ASIC accepted the registration, so I'm in the clear, right?"*

*"I have an extra two words in my name, how can that infringe?"*

Simply put, business name registrations do not provide protection. They do not give exclusive rights to use the name and they are not a defence to an infringement claim. They are an administrative step required if you want to trade under a name that is not a company name or your personal name. There are two key points to remember.

### **1. Do not rely on your business name registration for protection.**

ASIC only prevents someone from registering a new business name if it is 'identical' or 'nearly identical' to an existing name. Here is a recent example.

In 1999, B & L Whittaker registered the business name "Cairns Concrete Pumping". Last year, a competitor applied for the business name "Cairnscrete Pumping". Whittaker sought to prevent the registration and requested a review.

ASIC and the Administrative Appeals Tribunal found that the business names were not identical, and both were registered.

### **2. Do not take a business name registration as clearance you won't infringe third party rights.**

Obtaining a business name registration is not clearance – use of the name may still infringe someone else's rights. There are other rights that trump a business or company name registration, the main one being the rights obtained by registering a trade mark.

Example: ASIC does not consider the name 'adidas' to be identical or nearly identical to 'adidas Melbourne' or 'adidas t-shirts', meaning these business names are up for grabs. Quite clearly, someone could not start selling T-shirts under 'adidas t-shirts', even if they had a business name. Adidas would rely on its extensive trade mark registrations to prevent use of the name.

If you want protection for use of a name, you should file a trade mark. It's the only registration that will give you the exclusive right to use a name and the ability to prevent another party from using it. The test for similarity in the trade mark space is broader than that applied by ASIC, so a registration can also deter businesses looking to enter the market with a similar name.

Our [trade mark services brochure](#) outlines further information on trade mark registration, or contact Jeremy Weeks or Michelle Dowdle to find out how we can help ensure your business is protected.

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