Business Names Registration (Fees) Bill 2011

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Law and Bills Digest Section

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Business Names Registration (Fees) Bill 2011

Date introduced: 17 August 2011
House: House of Representatives
Portfolio: Innovation, Industry, Science and Research
Commencement: Sections 1 and 2 on Royal Assent, sections 3 to 7 at the same time as section 3 of the Business Names Registration Act 2011. Section 3 of that Act will commence on a day fixed by Proclamation.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The purpose of the Business Names Registration (Fees) Bill 2011 (the Fees Bill) is to define the term chargeable matters in the context of the registration of business names and to impose a fee for chargeable matters related to the registration or renewal of a business name as part of the national business names registration system.

Background

Current Situation in States and Territories

At present the cost of registering a business name differs between the states and territories. See Table 1.2 state and territory business registration fees contained in the report of the Senate Economics Legislation Committee.¹ A business may also be required to register a business name in two or more states depending upon the number of states that the business operates in.

Business Names Registration Package 2011

The Business Names Registration Bill and its cognate Bills will implement a national system for the registration of business names in Australia. Business names will be registered on a national basis and

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it will no longer be necessary to register business names in each state and territory. For further background, the reader is referred to the Bills Digests for the cognate Bills.²

**Basis of policy commitment**

**Intergovernmental Agreement for Business Names Agreement**

The Council for Australian Governments (COAG) in July 2008 approved the establishment of a national registration system and agreed to the necessary referral of power to the Commonwealth to enable it to implement the system.³ The Intergovernmental Agreement for Business Names (the Agreement) was signed by First Ministers in July 2009.

The objects of the Agreement are stated in the recitals to the Agreement:

A. The parties agree to establish a national system for business name registration to be implemented by Commonwealth legislation, supported by State text-based referrals of certain matters to the Commonwealth Parliament, in accordance with paragraph 51(xxxvii) of the Commonwealth Constitution.

B. The Legislative Assembly of the Australian Capital Territory and the Legislative Assembly of the Northern Territory have legislative powers in relation to business names and the registration of business names under Commonwealth self-government legislation, and therefore the Australian Capital Territory and the Northern Territory are parties to this Agreement, but having regard to paragraph 51(xxxvii) and section 122 of the Commonwealth Constitution, they will not make a referral.

C. The Commonwealth will introduce legislation to establish a national system for the registration of business names.⁴

In Part 6, the Agreement provides that the Commonwealth will levy fees on private individuals and non-government corporate entities for registering a business name. Paragraph 6.2 states:

Consistent with the objective of full cost recovery, the Commonwealth will seek to ensure that any new fee for national business name registrations will not be higher than the lowest business name registration fee currently paid by any State or Territory, taking account of the consumer

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3. Ibid., pp. 3-4.


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price index increases. ASIC will consult with the states and territories prior to recommending the level of registration fees or any change in the level of registration fees, to the Government.  

Committee consideration

Senate Selection of Bills Committee

The Senate Selection of Bills Committee resolved at its meeting of 24 August 2011 to recommend that the Business Names Registration (Fees) Bill 2011 not be referred to a Committee.  

Senate Standing Committee for the Scrutiny of Bills

The Committee drew attention to the Bill which proposes to charge fees to register business names in the new national registration system. Fees for chargeable matters are to be prescribed in the regulations.

The Committee has consistently drawn attention to legislation that provides for the rate of a fee or levy to be set by regulation. Where the rate of a fee is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power.

The Committee noted the comments in the Explanatory Memorandum concerning the imposition of fees for chargeable matters and that a fee or sum of fees must not exceed $50 000. The Committee noted that the Explanatory Memorandum also states that the fees need to be ‘viewed in light of the Intergovernmental Agreement for Business Names entered into between the Commonwealth and the states and territories.’

After noting the comments in the Explanatory Memorandum, the Committee stated that it:

leaves the appropriateness of the delegation of legislative power to set the level of fees or the method for calculating the amount of fees to the Senate as a whole.

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5. Ibid., Paragraph 6.2.
8. Ibid., p. 7.

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Senate Economics Legislation Committee

Exposure drafts of the proposed legislation were submitted to the Senate Economics Legislation Committee on 6 July 2011 for inquiry and report by 15 August 2011. Exposure drafts of the following Bills were submitted:

- Business Names Registration Bill 2011
- Business Names Registration (Transitional and Consequential Provisions) Bill 2011; and
- Business Names Registration (Fees) Bill 2011.

The Committee in its report, drew attention to a number of issues which in their view should be further considered by the Government. They noted that the Fees Bill appears ‘to be inconsistent with the intent and administration of the primary bill’. They also noted that the caps contained in proposed section 5 of $10 000 (for a single fee) and $50 000 (the sum of fees) for chargeable matters appear to be very high amounts, given the lower registration fees currently charged by states and territories.

The Committee report highlighted also the copying of sections 5 and 6 of the Corporations (Fees) Act 2001 as proposed sections 4 and 5 of the Fees Bill, which the Committee considered ‘may be problematic because it appears to blur the distinction between ASIC’s database management role for business names and ASIC’s regulatory role in monitoring companies’.

However the Treasury, in a letter to the Committee pointed out that the Corporations (Fees) Act 2001 was a model for fees imposition and had been used in other contexts as well. The Treasury did acknowledge:

However, as to the large caps assigned to the bill...’it is not contemplated that any fees under the Business Names register would ever reach this sum’.

The Committee report made the following comments in relation to the detail concerning fees being contained in the regulations and not in the Fees Bill:

Flexibility is needed for fee structures, hence their usual inclusion in regulations. However, there has been a tendency to include too much in regulations and not enough detail in primary Acts. The Senate Standing Committee for the Scrutiny of Bills has stated its view that excessive use of regulation-making power diminishes the ability of Parliament to scrutinise legislation and increases reliance on the disallowance process in the Senate. Of relevance to this issue, the Senate Standing Committee for the Scrutiny of Bills has written:

10. Senate Economics Legislation Committee, Inquiry into the exposure draft of the Business Names Registration Bill 2011 and related bills, report, August 2011, paragraph. 4.44, p. 55, viewed 6 September 2011,
11. Ibid., paragraph 4.44, p. 55.
12. Ibid., paragraph 4.45, p. 55.
13. Ibid., paragraph 4.46, p. 55.
14. Ibid., paragraph 4.47, p. 56.

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Where the rate of a charge is to be set by subordinate legislation, the Committee expects that there will be some limits imposed on the exercise of this power. For example, the Committee expects the enabling Act to prescribe either a maximum figure above which the relevant regulations cannot fix the charge, or, alternatively, a formula by which such an amount can be calculated. The vice to be avoided is delegating an unfettered power to impose fees.  

Financial implications

The Explanatory Memorandum states the following in relation to the financial impact of the Business Names Registration package:

The 2010-11 Budget allocated $125.2m over four years to implement the Registration System. These funds were distributed between the Department of Innovation, Industry, Science and Research (DIISR), the Australian Securities and Investment Commission (ASIC) and the Australian Taxation Office (ATO). This amount is being fully offset in unspent funding.

The National Partnership Agreement to deliver a Seamless National Economy committed the Commonwealth and the States and Territories to delivering on agreed implementation milestones and deadlines, which are tied to reward payments under the National Partnership Agreement.

Compliance cost impact: No net increase in compliance costs. The replacement of the existing State and Territory business names regimes with a single new Commonwealth business regime will result in a net reduction in compliance costs for businesses and those transacting with businesses.

The Senate Economic Legislation Committee’s report notes that the Fees Bill and the proposed Business Names Registration (Fees) Regulations 2011 will ‘provide substantial financial savings for businesses by providing a one off fee for nationwide business registration, as opposed to the current system under which businesses may be required to pay up to eight different registration fees depending on the number of states and territories they wish to trade in’.

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15. Ibid., paragraph 4.50, p. 56.

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Key provisions

Definition of Chargeable Matter

Subclause 3(1) defines a chargeable matter. Under the proposed Business Names Registration Act 2011 or the Business Names Registration (Transitional and Consequential Provisions) Act 2011, a chargeable matter will be defined as:

- the registration of a business name,
- a renewal of a registration of a business name,
- an application for an extract of the Business Names Register.

Subclause 3(2) states that terms defined in the proposed Business Names Registration Act 2011 will have the same meaning as terms used in the proposed Business Names Registration (Fees) Act 2011.

Fees imposed are taxes

Clause 4 imposes a fee for chargeable matters. Subclause 4(1) provides that the regulations may prescribe the fees for chargeable matters. Subclause 4(2) states that the fees prescribed by the regulations are imposed as taxes. A chargeable matter may have two or more fees prescribed for it (subclause 4(3)).

Fees Prescribed in the Regulations

Clause 5 deals with matters relating to fees. Subclause 5(1) provides that regulations may prescribe a fee for a chargeable matter by specifying an amount that does not exceed $10 000 or a method for calculating the amount. If there are several fees for a chargeable matter, the limit applies to each fee that is imposed individually. Subclause 5(2) states that a fee for a chargeable matter should not bear any relationship to the cost of providing any service, that is part of or related to the chargeable matter. A fee or sum of the fees for a chargeable matter must not exceed $50 000 (subclause 5(3)).

Clause 6 provides that the regulations may prescribe different fees if the chargeable matter is dealt with by electronic means. This section does not limit the operation of proposed sections 4 and 5.

Regulation Making Power

Proposed section 7 inserts the regulation making power enabling the Governor-General to make regulations for the purposes of proposed sections 4, 5 and 6. Draft regulations have been released setting out the proposed fees. For example, schedule 1, item 1 sets a $30 fee for one year’s registration.

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