Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012

Anita Talberg
Science, Technology, Environment and Resources Section

Ian McCluskey
Law and Bills Digest Section

Contents

Purpose .......................................................................................................................... 2
Background ..................................................................................................................... 2

Main Issues .................................................................................................................... 3
  Requirement to pay fees ............................................................................................. 3
  Constitutional requirements ....................................................................................... 3
  Delegated Legislation ................................................................................................. 4

Committee consideration ............................................................................................. 4
Committee referral ......................................................................................................... 4

Position of industry groups ......................................................................................... 6

Financial implications................................................................................................. 6

Key provisions ............................................................................................................... 6
Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012

Date introduced: 30 May 2012

House: House of Representatives

Portfolio: Climate Change and Energy Efficiency

Commencement: Sections 1 and 2 commence the day after Royal Assent. Sections 3 to 10, which are the substantive provisions, commence on the day that section 3 of the Greenhouse and Energy Minimum Standards Act 2012 commences, which is expected to be 1 October 2012.¹

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/Parliamentary_Business/Bills_Legislation. 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 Greenhouse and Energy Minimum Standards (Registration Fees) Bill 2012 (the Bill) enables the Greenhouse and Energy Minimum Standards (GEMS) Regulator to charge fees for the registration of certain applications to be made under the Greenhouse and Energy Minimum Standards Act 2012 (GEMS Act) (once enacted).

Background

This Bill supports the implementation of the Greenhouse and Energy Minimum Standards (GEMS) scheme set out in the GEMS Bill. Details and background on the scheme can be found in the Bills Digest on the GEMS Bill.²

¹ The Greenhouse and Energy Minimum Standards Bill 2012 (the GEMS Bill) was introduced on 30 May 2012 and is currently before the House of Representatives. If the GEMS Bill passes both Houses of Parliament and receives Royal Assent, it will be enacted as the Greenhouse and Energy Minimum Standards Act 2012 (the GEMS Act).


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Main Issues

Requirement to pay fees

Under the GEMS scheme, businesses will be required to register certain product models. Registration fees will be charged upon registration application. These fees may vary. The monies raised will be used to offset the administrative costs of registration, as well as costs for monitoring compliance.

The main GEMS Bill allows the GEMS Regulator to charge for services related to the performance of its functions (clause 77 of the GEMS Bill). However, these charges must not amount to a taxation and are not the same as registration fees. Accordingly, they are distinguished from the requirement to pay fees for the registration of certain applications which are the subject of this separate Bill (as discussed further below).

Constitutional requirements

Registration fees are imposed as taxes (subclause 8(2) of the Bill). According to the Explanatory Memorandum:

As compliance costs may not constitute a direct fee for service but a charge to raise funds for public purposes, the GEMS (Registration Fees) Bill establishes legislative power to impose fees as taxes. Consistent with section 55 of the Australian Constitution, the power to establish fees as taxes is established separate from other provisions.

Comment

As this Bill seeks to impose a charge to raise funds for public purposes it falls within the class of a taxation Bill. As such, it is governed by section 55 of the Australian Constitution, which provides that laws imposing taxation shall only deal with the imposition of taxation.

---

3. ‘Registration application’ is defined under clause 7 of the Bill to mean ‘an application under section 41 of the Greenhouse and Energy Minimum Standards Act 2012 to register one or models of GEMS products in relation to one or more product classes’. Also see ‘Key provisions’.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Accordingly, this Constitutional restriction has necessitated the introduction of the current legislation as a stand-alone Bill.

Delegated Legislation

Under the Bill the GEMS Regulator may make legislative instruments to specify the amount of registration fees and how these amounts are to be calculated (subclause 9(1) of the Bill). While there is no upper limit on the amount which could be charged, the fact that the fees will be specified in a legislative instrument means disallowance will be an option.

Committee consideration

Committee referral

As a result of concern that the GEMS scheme may increase costs and ‘green tape’, the Bill was referred to the House of Representatives Standing Committee on Climate Change, Environment and the Arts for inquiry and report. Details of the inquiry are at:

For the same reasons, the Bill has also been referred to the Senate Standing Committee on Environment and Communications for inquiry and report by 15 August 2012. Details of the inquiry

---

6. Delegated legislation is legislation made not directly by an Act of Parliament, but under the Authority of an Act of Parliament. It includes a legislative instrument which is defined under subsection 5(1) of the Legislative Instruments Act 2003 (Cth) (the Act) as an instrument of a legislative character that is, or was, made under a delegation of power from Parliament. An instrument has a legislative character if it determines or alters the content of the law rather than applying the law in a particular case; and if it affects a privilege or interest, imposes an obligation, or creates, varies or removes a right (subsection 5(2) of the Act). Under section 42 of the Act, a disallowable legislative instrument may cease to have effect if either a Senator or Member of the House of Representatives moves a motion of disallowance within 15 sitting days of the date upon which the legislative instrument is tabled. The motion to disallow must be resolved or withdrawn within a further 15 days of the date upon which the notice of motion is given.

7. ‘Delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change frequently, and its adaptability for other matters such as those of technical detail. Once Parliament has by statute laid down the principles of a new law, the Executive may by means of delegated legislation work out the application of the law in greater detail within but not exceeding those principles.’ Source: House of Representatives practice, Chapter 10, p. 398.


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
On 4 July 2012 the House Standing Committee resolved that it would not proceed to advertise for submissions at this stage but:

...given the significant and important legislation before the House, and the current inquiry of the Senate Committee, the House Committee ... awaits with interest the outcome of the Senate inquiry. The Committee will pay particular attention to any observations made by Senators regarding the concern noted by the House Selection Committee in the recommendation of its 31 May report: ‘that the scheme may increase costs and green tape for those involved’. At the conclusion of the inquiry currently being conducted by the Senate Committee, therefore, the House Committee may seek to take further action.¹¹

**Senate Scrutiny of Bills Committee**

In Alert Digest No. 6 of 2012, the Senate Scrutiny of Bills Committee raised a significant issue in relation to specifying fees by way of legislative instrument under the Bill.¹² The Committee is concerned that under *subclause 9(3)* of the Bill:

> ‘the matters which the GEMS Regulator may consider in specifying an amount or method to calculate fees is not limited to the cost recovery matters specified in subclause 9(2). Given that the legislation contains neither a maximum level of fees nor a formula for the calculation of fees, the Committee seeks the Minister’s advice as to whether consideration might be given to an amendment to the bill which clarifies the intention that registration fees are limited to cost recovery purposes.’¹³

At the date of writing this Digest, the Committee had not made public any response from the Minister.

---


13. Further discussion of the point is included in the Committee report, ibid.

*Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.*
Position of industry groups

The Government has indicated that initial fees for registration are likely to range from $250 to $650 and will be reviewed every three years.\textsuperscript{14} Response from industry groups has been divided. Some sectors believe the proposed fees should not exceed $100, others suggest the Government’s proposed fees are reasonable. As previously mentioned, this Bill proposes no restrictions on the level of the fees.

Financial implications

As noted in the Bills Digest on the GEMS Bill, the Explanatory Memorandum to the GEMS Bill explains that:

The Australian Government committed $37.1 million over four years in the 2012―2013 Budget to fund the Australian Government’s share of the cooperative E3 Program. This funding will be supported by contributions from New Zealand and Australian state and territory jurisdictions that participate in the E3 Program.\textsuperscript{15}

In the 2012–13 Budget papers, the Government explained that the total cost of establishing the GEMS framework was expected to be $59.8 million over four years. The additional costs will be met from other sources including product registration fees and ‘contributions from other jurisdictions, which are being sought as part of negotiations on a new intergovernmental agreement’.\textsuperscript{16}

In addition to this, the Bill’s Explanatory Memorandum states that:

This Bill will authorise registration fees under the E3 Program that are forecast to accrue $11.6 million over the five financial years from 2012-2013 to 2016-2017. Fee revenue will be Budget neutral as the Australian Government directed, in the 2012-2013 Budget, that income from registration fees under this Act would offset the costs of the E3 Program.\textsuperscript{17}

Key provisions

A brief explanation of the key provisions is as follows:

\textsuperscript{15} Explanatory Memorandum, Greenhouse and Energy Minimum Standards Bill 2012, p. 2, viewed 14 August 2012, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4841_ems_1e02a482-2a91-4d59-8704-2e39338db02a%22}.

\textbf{Warning:} All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Subclause 7(1) defines ‘registration application’ to be an application under section 41 of the GEMS Act. Section 41 will provide for persons to apply to register models of products covered by ‘GEMS determinations’. The GEMS Act requires that all relevant models be registered.

The GEMS Regulator can specify fees for registration applications by way of legislative instrument. Different fees may be specified for different product classes and/or for different manners of application (i.e. paper-based or electronic). The fees are then imposed on registration applicants as taxes (subclause 8(2) of the Bill).

In calculating the amount of a fee, the GEMS Regulator is able to consider the cost of registering applications (paragraph 9(2)(a) of the Bill) and the cost of compliance monitoring, (paragraph 9(2)(b) of the Bill), although there is no limit on the factors which can be considered (subclause 9(3) of the Bill).

Subclause 9(4) of the Bill provides that the amount of a registration fee is not required to bear any relationship to the costs of providing services related to determining applications or registering GEMS models.

---

18. See sections 11(2) and 23 of the GEMS Act.
19. See sections 17 and 19 of the GEMS Act.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.