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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

HAZARDOUS WASTE (REGULATION OF EXPORTS AND IMPORTS) AMENDMENT BILL 1995

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the
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Senator the Hon John Faulkner)

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HAZARDOUS WASTE (REGULATION OF EXPORTS AND IMPORTS) BILL 1995

GOVERNMENT AMENDMENTS

SUPPLEMENTARY EXPLANATORY MEMORANDUM

General Outline

The purpose of the amendments the Government proposes to make to the *Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 1995* (the amending Bill) in the Spring sittings is to resolve issues which were still outstanding at the time the amending Bill was tabled in Parliament during the Winter sittings.

Specifically, the amendments to the amending Bill will:

- extend the definition of ***hazardous waste*** in section 4 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the principal Act) to allow for the creation, with advice from the Hazardous Waste Technical Group, of a national list of wastes as provided for in Article 1 and Article 3 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention);

- provide for transparency of process when the Minister is regarding other exceptional circumstances which may determine whether a hazardous waste may be exported to another country for final disposal;

- ensure that details of the facility and any process to be used in the disposal of an exported or imported hazardous waste are specified in the permit application;

- differentiate between offences in the amended Act which cause, or are likely to cause, harm to humans or the environment, and those which do not;

- require notification and control procedures where materials passing unregulated between Australia and another country are planned to transit through a country which regulates those materials as hazardous waste;

- enumerate, in the context of the amended Act, the variety of arrangements which the Minister, under the Constitution, may make to give full effect to Australia's obligations under the Basel Convention;

- more precisely define the conditions under which standing may be extended to persons or organisations to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1977* for decisions made under the proposed amended Act;

- provide for expertise in, or experience of, the environmental or public health and public safety aspects of the management of hazardous waste to be qualification for a person to become a member of the Hazardous Waste Technical Group.

Financial Impact Statement

The amendments to the amending Bill are not expected to impose significant additional costs on the Government or industry.

Notes On Amendments

Amendment (1) - Paragraph (a) of the definition of "hazardous waste"

1. This amendment omits items 7 and 8 from the amending Act and effectively re-inserts the previously deleted paragraph (a) of the principal Act's definition of ***hazardous waste.*** However, it restricts the scope of the definition by requiring that the wastes must not only have one or more of the characteristics mentioned in Annex III to the Basel Convention, but must also be prescribed in regulations. Additionally, proposed new section 58CA at amendment (48) requires that the Minister seek scientific and technical advice from the proposed Hazardous Waste Technical Group before such regulations are made.

2. The purpose of this provision is to allow for the creation of a "national list" of hazardous wastes, as is provided for in Article 1 and Article 3 of the Basel Convention. This national list will regulate materials which, for one reason or another, were not listed in Annex 1 of the Basel Convention at the time of its drafting, but which have since been determined, after a consideration of scientific and technical advice, to be hazardous wastes requiring regulation.

3. By requiring that such wastes must be prescribed in regulations made only after seeking the advice of the Hazardous Waste Technical Group, it is intended that the process of creating such a national list will be totally transparent. As regulations are disallowable instruments, a relevant regulation may be reviewed by Parliament and disallowed if appropriate. These safeguards are intended to ensure that only substances which are truly dangerous to human beings or the environment will be regulated under this mechanism.

Amendment (2) - Paragraphs (a) and (b) of the definition of "hazardous waste"

4. This item amends item 9 of the amending Bill, by omitting the phrase "(a copy of the English text of which annex is set out in the Schedule)" from both paragraphs (a) and (b) of the definition of "hazardous waste". This amendment is consequential upon amendment (1) above re-inserting the previously deleted paragraph (a) of the principal Act's definition of ***hazardous waste.***

Amendment (3) — Definition of "hazardous waste"

5. This amendment inserts an additional Note 4 after the definition of ***hazardous waste.*** This is to draw attention to proposed new section 58CA and the requirement for the Minister to consult the Hazardous Waste Technical Group before making regulations as amendment (1) above.

Amendment (4) — Section 18A

Section 18A — Export permits for final disposal may be granted only in exceptional circumstances

6. Subsection 18A(4) - this amendment adds a new paragraph 18A(4)(d) to subsection 18A(4) of the amending Bill. Section 18A provides that export permits may be granted only in exceptional circumstances. Paragraph 18A(4)(d) extends the scope of the range of factors listed in paragraphs 18(4)(a), (b) and (c) which the Minister must have regard to when determining whether there are exceptional circumstances for the purposes of subsection 18A(2). Proposed new paragraph 18A(4)(d) provides that the Minister can have regard to matters other than those identified in paragraphs 18A(4)(a), (b) and (c) providing such matters are prescribed in regulations.

7. It is recognised that subsection 18A(2) of the amending Bill provides the Minister with wide power to allow the export of hazardous wastes for final disposal overseas when there are "exceptional circumstances". Although an attempt has been made in paragraphs 18(4)(a), (b) and (c) to define "exceptional circumstances", it is impossible to look into the future and identify all possible situations which may require the export of hazardous waste for final disposal. Proposed paragraph 18A(4)(d) is intended to provide for exceptional circumstances which at this time cannot be identified or foreseen.

8. The requirement that such matters be prescribed in regulation is intended to make the process of deciding what are "exceptional circumstances" totally transparent. This requirement, together with the provision in subsection 18A(3) that the proposed export permit cannot be granted if the proposal is inconsistent with the environmentally sound management of the hazardous waste, is intended to ensure that hazardous wastes are only exported for final disposal when there is no other alternative, and then only when the hazardous wastes will be managed in an environmentally sound manner.

Amendment (5) - Section 18A

Section 18A — Export permits for final disposal may be granted only in exceptional circumstances

9. This amendment omits proposed subsection 18A(5) of the amending Bill, the provisions of which have been identified as being too wide ranging and unrestricted. The provisions of subsection 18A(5 are now replaced by the more prescriptive requirements of proposed paragraph 18A(4)(d) at amendment (5).

Amendment (6) — Paragraph 20(1)(g)

Section 20 — Matters to be specified in Basel import permits

10. This amendment omits items 69, 70, 71 and 72 of the amending Bill and substitutes these with new items 69 and 70.

11. Replacement item 69 adds a proposed new paragraph 20(1)(g) specifying particulars which must be contained in a Basel import permit. Replacement item 70 omits subsection 20(2) of the principal Act, which previously referred to these particulars in a non-mandatory sense.

12. Section 20 details the particulars required to be specified in Basel import permits. Paragraph 20(1)(g) is inserted to ensure that, when an application is made to import a hazardous waste into Australia for disposal (including recycling or final disposal), the application for an import permit must include details of the specific facility to be used in the process and details of any process to be used for the disposal. This amendment is made to strengthen the principal Act, which presently does not have a mandatory requirement for the supply of these details.

13. An import permit will not be issued unless a specific facility is identified and approved for each permit. If the nominated facility, as identified and approved in the original import permit, is changed for any reason, then an application must be made for a variation of the import permit.

14. This requirement is necessary to ensure that Australia has the information necessary to enable it to conform with its obligations under Articles 4.2(d) and 4.2(g) of the Basel Convention. Articles 4.2(d) and 4.2(g) require transboundary movements of hazardous wastes be managed in an environmentally sound manner and that import be prevented if there is reason to believe that the wastes in question will not be managed satisfactorily. The identity of the processing facility and the details of any of the processes to be used in the disposal must be supplied so that this information may be used when determining whether or not the proposed management of the hazardous waste will be environmentally sound.

Amendment (7) — Paragraph 21(1)(g)

15. This amendment omits items 75, 76, 77 and 78 of the amending Bill and substitutes these with replacement items 75 and 76.

16. Replacement item 75 adds a proposed new paragraph 21(1)(g) specifying particulars which must be contained in a Basel export permit. Replacement item 76 omits subsection 21(2) of the principal Act, which previously referred to these particulars in a non-mandatory sense.

17. Section 21 details the particulars required to be specified in Basel export permits. Paragraph 21(1)(g) is inserted to ensure that, when an application is made to export a hazardous waste from Australia to another country for disposal (including recycling or final disposal), the application for an export permit must include details of the specific facility to be used in the process and details of the process to be used for the disposal. This amendment is made to strengthen the principal Act, which presently does not have a mandatory requirement for the supply of these details.

18. An export permit will not be issued unless the specific facility and treatment process(es) is identified and approved for each permit. If the nominated facility and/or process, as identified and approved in the

original export permit, are changed for any reason, then an application must be made for a variation of the export permit.

19. This requirement is necessary to ensure that Australia has the information necessary to enable it to conform with its obligations under Articles 6.1, 4.2(d) and 4.10 of the Basel Convention. Article 6.1 requires that such declarations and information (as specified in Annex V A of the Convention) shall be supplied by the State of Export to any States concerned: Articles 4.2(d) and 4.10 require transboundary movements of hazardous wastes be managed in an environmentally sound manner and that this responsibility cannot be transferred from the State of export to the States of import or transit. The identity of the processing facility and the details of any of the processes to be used in the disposal must be supplied so that the competent authority has access to this information when determining whether or not the proposed management of the hazardous waste will be environmentally sound.

Amendment (8) — Item 110 - Sections 39, 40, 40A and 40B

General Outline

20. This amendment omits items 110 to 118 (inclusive) of the amending Bill and replaces those items with new item 110.

21. Proposed new item 110 deletes the offence sections 39, 40, 40A and 40B from the amending Bill and replaces them with a new formulation which differentiates between offences which cause, or are likely to cause, harm to human beings or the environment, and those which do not.

22. This amendment proposes two separate offence structures, graded as to the degree of culpability and as to penalty level. This is in recognition of the inherent difference in degree of culpability between wilful acts which result in actual or potential harm to humans or the environment (these carrying the most severe penalties), and offences which are more of an administrative nature and do not result in injury to humans or the environment (with lesser penalties). It reflects the current practice in some States of providing two tiers of penalties in environmental legislation, and is consistent with the multi-tiered penalty approach endorsed by the Australian and New Zealand Environment and Conservation Council.

23. For the offences involving knowledge, recklessness or negligence at proposed subsections 39(4), 40(3), 40A(3) and 40B(1) which are more of an administrative nature and do not result in injury to humans or the environment, the proposed amendment allows for separate maximum penalties for a body corporate (2,500 penalty units) and an individual (2 years imprisonment). This provision includes both the fault elements of recklessness and negligence. 'Negligence' involves such a great falling short of the standard or care as to warrant criminal punishment (section 5.5 of the Criminal Code), whilst 'recklessness' requires that the person is aware of a substantial risk and acts in circumstances where it is 'unjustifiable' to take the risk (section 5.4 of the Criminal Code). This latter element would apply, for instance, to a situation in relation to section 40 of the Bill where a person was not aware of the existence or otherwise of an export permit, but did not attempt to discover whether or not a permit had been issued.

24. The use of 'penalty units' instead of a stated maximum monetary penalty of a specified dollar amount has been undertaken on the advice of the Attorney General's Department, and is consistent with Commonwealth criminal law policy (section 4AA of the *Crimes Act 1914).*

25. For wilful acts involving knowledge or recklessness which result in actual or potential harm to humans or the environment, as at proposed subsections 39(6), 40(5), 40A(5) and 40B(3), the proposed amendment allows for separate maximum penalties for a body corporate (10,000 penalty units) and an individual (5 years imprisonment).

26. The penalty provisions of the amended Act are subject to the provisions of subsection 4B(2) of the *Crimes Act 1914*.. Under subsection 4B(2) of the *Crimes Act 1914.*, the court, in sentencing an individual for an offence punishable by imprisonment only, may impose a fine instead of, or in addition to the penalty of imprisonment. The maximum fine (in penalty units) is not exceed 5 times the term of imprisonment expressed in months.

27. The proposed fines have been set to reflect the very lucrative opportunities potentially available to illegal traders. Illegal commercial activities can reap very significant financial rewards for the offender. It is essential that the monetary penalty is relevant to the reward to be an effective deterrent, otherwise it may merely become a business cost. This is especially true in the case of illegal trafficking of hazardous waste which can reap very significant financial rewards, far in excess of $1 million (10,000 penalty units). It is relevant that a fine of US $ 1 million was imposed by a US Federal District Court on Gaston Copper Recycling Company and Southwire Corporation for their involvement in the illegal shipment of 3,000 tons of hazardous waste-contaminated fertiliser to Bangladesh.

28. Injury to persons and damage to the environment resulting from the illegal dumping of hazardous waste may be quite extensive, even irreversible. That the deleterious effects on persons and the environment of an unlawful activity may not be recoverable adds to the importance of ensuring a penalty carries an effective deterrence value.

A significant penalty will also indicate to the courts the serious concern held by the Parliament and the community to protect the health of persons and the safety of the environment.

29. The proposed penalties are directly comparable with penalties for similar offences in Victoria, NSW, South Australia, Tasmania and Queensland and the United States.

Sections 39, 40, 40A and 40B

Detail

Section 39 — Regulation of import of hazardous waste

Prohibition of imports

30. Section 39 - This proposed section prohibits the importation of hazardous waste into Australia unless the importation is authorised or ordered as set out in proposed subsection (1). It also prohibits the breaching of any of the conditions of the import permit or of an order under section 38. These provisions are necessary to ensure that imports of hazardous wastes into Australia are subject to control.

31. As per paragraph 22 above, the proposed amendment sets separate penalties for knowingly, recklessly or negligently contravening proposed subsections 39(1), (2) or (3) [at proposed subsection (4)], and knowingly or recklessly contravening the provisions of proposed subsections 39(1),(2) or (3) which act results, or could result, in injury to a human being or the environment [at proposed subsection (6)]. This discrimination is in recognition of the inherent difference in degree of culpability between wilful acts which result in actual or potential harm to humans or the environment (carrying the most severe penalties), and offences which are more of an administrative nature and do not result in injury to humans or the environment (with lesser penalties).

32. As a consequence of creating the separate offence of knowingly, recklessly or negligently contravening proposed subsections 39(1), (2) or (3), proposed subsection (4) sets out the meaning of ***negligence.*** It identifies the standard of conduct necessary to avoid contravening the sections by failing to exercise proper care and attention. Paragraph 22 above also refers to the fault element of 'recklessness'.

Section 40 - Regulation of export of hazardous waste

33. Section 40 - This section prohibits the export of hazardous waste from Australia to a foreign country unless the export is authorised or ordered as set out in proposed subsection (1). It also prohibits the breaching of any of the conditions of the export permit. These provisions are necessary to ensure that exports of hazardous wastes from Australia are subject to control.

34. As per paragraph 22 above, the proposed amendment sets separate penalties for knowingly, recklessly or negligently contravening proposed subsections 40(1) or (2) [at proposed subsection (3)], and

knowingly or recklessly contravening the provisions of proposed subsections 40(1) or (2) which act results, or could result, in injury to a human being or the environment [at proposed subsection (5)]. This discrimination is in recognition of the inherent difference in degree of culpability between wilful acts which result in actual or potential harm to humans or the environment (carrying the most severe penalties), and offences which are more of an administrative nature and do not result in injury to humans or the environment (with lesser penalties).

35. As a consequence of creating the separate offence of knowingly, recklessly or negligently contravening proposed subsections 40(1) or (2), proposed subsection (4) sets out the meaning of ***negligence***. It identifies the standard of conduct necessary to avoid contravening the sections by failing to exercise proper care and attention. Paragraph 22 above also refers to the fault element of 'recklessness'.

Section 40A - Regulation of transit of hazardous waste

36. Section 40A - This proposed section prohibits a person from bringing hazardous waste into Australia in the course of carrying out a transit proposal unless the person is the holder of an appropriate transit permit. It also prohibits the breaching of any of the conditions of the transit permit. These provisions are necessary to ensure that transits of hazardous wastes through Australia are subject to control.

37. As per paragraph 22 above, the proposed amendment sets separate penalties for knowingly, recklessly or negligently contravening proposed subsections 40A(1) or (2) [at proposed subsection (3)], and knowingly or recklessly contravening the provisions of proposed subsections 40A(1)or (2) which act results, or could result, in injury to a human being or the environment [at proposed subsection (5)]. This discrimination is in recognition of the inherent difference in degree of culpability between wilful acts which result in actual or potential harm to humans or the environment (carrying the most severe penalties), and offences which are more of an administrative nature and do not result in injury to humans or the environment (with lesser penalties).

38. As a consequence of creating the separate offence of knowingly, recklessly or negligently contravening proposed subsections 40A(1),or (2), proposed subsection (4) sets out the meaning of ***negligence***. It identifies the standard of conduct necessary to avoid contravening the sections by failing to exercise proper care and attention. Paragraph 22 above also refers to the fault element of 'recklessness'.

39. The section notes that this provision does not apply to Australian waters. This is in recognition of Australia's international obligations under Article 17 of the Law of the Sea Convention, which requires that ships of all States enjoy the right of innocent passage through the territorial sea (basically 12 nautical miles from the coast). The right of innocent passage is mandatory except in specified circumstance which do apply in this instance.

Section 40B - Liability of executive officers of bodies corporate

40. Section 40B - this proposed section provides for an executive officer of a body corporate to be personally liable where the body corporate contravenes proposed sections 39, 40 or 40A and the officer knew, was reckless or was negligent as to whether the contravention would occur, or knew or was reckless as to whether the contravention would occur. All of the provisions in proposed paragraphs 40B(1)(b), (c) and (d) have to be met for the officer to be found guilty. The aim of this clause is to ensure that executive officers responsible for the company's activities in relation to this trade act fulfil their duties in a diligent manner. This type of clause is common in State and Territory legislation.

41. As per paragraph 22 above, the proposed amendment sets separate penalties for knowingly, recklessly or negligently contravening proposed sections 39, 40 or 40A [at proposed subsection (1)], and knowingly or recklessly contravening the provisions of proposed sections 39, 40 or 40A which act results, or could result, in injury to a human being or the environment[at proposed subsection (3)]. This discrimination is in recognition of the inherent difference in degree of culpability between wilful acts which result in actual or potential harm to humans or the environment (carrying the most severe penalties), and offences which are more of an administrative nature and do not result in injury to humans or the environment (with lesser penalties).

42. As a consequence of creating the separate offence of knowingly, recklessly or negligently contravening proposed sections 39, 40 or 40A, the proposed subsection (2) sets out the meaning of ***negligence***. It identifies the standard of conduct necessary to avoid contravening the sections by failing to exercise proper care and attention. Paragraph 22 above also refers to the fault element of 'recklessness'.

43. The proposed amendment includes in subsection 40B (4) guidelines for determining whether all reasonable steps have been taken to prevent a contravention of the amended Act. It is not an exhaustive list given the provisions of proposed subsection 40B(5). It is inserted to indicate to the court what factors, amongst others, it might consider to be reasonable steps. The court must consider the factors listed, but may also consider others.

44. Subsection 40B(6) defines the term "executive officer" in relation to a body corporate to mean any person who participates in the management of the corporation whether or not the person is a director of the corporation. This provision is inserted to indicate that managers at all levels have a responsibility to ensure that reasonable steps as required in subsection 40B (4) have been taken to prevent a contravention of the amended Act.

Amendment (9) — PART 4A — TRANSPORTATION OF WASTE SUBSTANCES THROUGH TRANSIT COUNTRIES WHERE AN EXPORT PERMIT UNDER THIS ACT IS NOT REQUIRED

Sections 41A, 41B, 41C and 41D

General Outline

45. This amendment inserts a new item 119A into the amending Bill. Item 119A creates a new Part 4A which makes provision for the transportation of substances through transit countries that classify those substances as hazardous waste.

46. Article 6.4 of the Convention requires that export countries obtain written prior informed consent from transit countries before allowing a transboundary movement of hazardous waste to commence.

47. Two instances have been identified where a transit of an Australian export through a foreign country could cause Australia to fail in its international obligations to observe the sovereign rights of other countries to control the movement of substances through their territory. This amendment is proposed expressly to correct these anomalies.

48. In the first instance, section 4G of the amending Bill (inserted by item 28) ensures that if a substance is agreed under an Article 11 arrangement not to be subject to notification and control, then the substance is not a hazardous waste for the purpose of the Article 11 arrangement. For example, the OECD Council Decision C(92)39 concerning the control of transfrontier movements of wastes destined for recovery operations is an Article 11 arrangement and it specifies that green listed wastes, when transported between OECD countries, are not subject to notification and control.

49. There are, however, a limited number of wastes that are green list wastes under the OECD Decision, but which are still classified as hazardous wastes under the Basel Convention. They are thus subject to notification and control in non-OECD countries which are Parties to the Convention. If any of these wastes were to be transported without notification and control between Australia and another OECD country, and that waste were to transit a non-OECD country, a breach of the Basel Convention would occur.

50. In the second instance, the provisions of Article 3 and Article 4 of the Basel Convention enable any Party to consider a substance not identified as a hazardous waste by the Basel Convention to be declared a hazardous wastes under its own national law. If a substance, unregulated in Australia and the destination country, was to transit a country that regulated that waste as a hazardous waste, a breach of the Basel Convention would occur.

51. In both of these instances as currently regulated, or under the proposed provisions of the amending Bill, the substance being exported from Australia would not be subject to any control, and the Government

would not be aware of the shipment or of any likely illegal transit of a foreign country. There are presently no mechanisms for identifying or controlling such shipments.

52. In simple terms, Part 4A is intended to provide the Government with a mechanism for identifying such shipments so that the prior informed consent of the transit country may be sought, and the shipment refused if prior consent is not obtained.

53. The proposed Part 4A prohibits the export of a relevant substance in the above circumstances. It requires the intending exporter to notify the Minister of shipments intending to transit countries where the substance or object being transported is deemed a hazardous waste. It provides a mechanism for identifying such wastes and the transit countries for which the provisions of the Part apply. It requires the Minister to notify the competent authority of the foreign country of the proposed transit and for the Minister to refuse the transportation when no reply is received from, or consent for the transit is refused by, that competent authority. It also creates the offence of transit through a foreign country without a permit.

54. The provisions of this Part are expected to apply to only a handful of substances - those OECD green list wastes which are also Basel Convention hazardous wastes (primarily lead scrap), hazardous wastes which were not included in Annex 1 of the Convention at the time of its drafting but which have been regulated in national laws (eg, nickel, cobalt and vanadium wastes,) or those substances which are generally not regarded as hazardous wastes but regulated as such under the laws of some countries.

Sections 41A, 41B, 41C and 41D

Detail

Section 41A — Offence of transporting substance through transit country without approval

55. Subsection 41A(1) - This proposed subsection prohibits the export of a substance or an object to a foreign country if the export is to transit a third country on its way to the destination country and the conditions of paragraphs 41A(1)(b), (c) and (d) are applicable. This provision is necessary to ensure, when appropriate, that wastes which are to transit through a third country when moving between Australia and a foreign country are subject to control.

56. Subsection 41A(2) - This proposed subsection creates the offence of knowingly or recklessly contravening proposed subsection 41A(1) and sets a penalty of sets a penalty of a fine not exceeding 200 penalty units ($20,000) for any individual found guilty of the offence. Under the provisions of subsection 4B(3) of the *Crimes Act 1914* , the court is able to extend this to a penalty of a maximum fine of 1000 penalty units ($100,000) in the case of a body corporate. The provisions of subsection 41A(2) are necessary to ensure that persons contravening subsection 41A(1) above are punishable on conviction.

57. Subsection 41A(2) applies to each and every transit country through which the substance or object is transported. A separate offence is committed for each transit country that the ***notifiable substance*** passes through.

Section 41B — Approval of transportation of substances through transit countries

Application for approval

58. Subsection 41B(1) - This proposed subsection provides for a person to apply to the Minister for approval to transport a substance or object through a foreign country. This provision is necessary to enable persons wishing to transport wastes between Australia and a foreign country to comply with the requirements of Part 4A when the waste intended to transit a third country is a ***notifiable substance*** as per proposed subsection 41C(2).

Form of application

59. Subsection 41B(2) - This proposed subsection specifies the form of the application and the details to accompany the form when applying for the Minister's approval to transit a substance or object through a foreign country. This provision is necessary to enable the administration of applications under Part 4A.

Minister must notify foreign country of application

60. Subsection 41B(3) - This proposed subsection specifies the period of time within which the Minister must notify the competent authority of the foreign country of the application to transport a substance or object through the foreign country. The time period stipulated is a maximum period of time, and although not the normal time expected to be required for processing, is necessary to allow for contingencies during the administration of applications under Part 4A.

If the foreign country consents, Minister must approve transportation

61. Subsection 41B(4) - This proposed subsection specifies that if the competent authority of the foreign country agrees to the application to transport a substance or object through the foreign country, the Minister must approve the application.

62. The intent of this proposed subsection is to ensure conformity, where ever possible, with an Article 11 arrangement that a particular substance, deemed not to be a hazardous waste for the purpose of that Article 11 arrangement, not be subject to notification and control. The minimal controls envisaged by this section are implemented only because of Australia's international obligation to recognise a country's sovereign right to control movements through its territory.

If the foreign country refuses consent, Minister must refuse approval of transportation

63. Subsection 41B(5) - This proposed subsection specifies that if the competent authority of the foreign country does not consent to the transportation, the Minister must notify the applicant in writing that the application is refused. This provision ensures that Australia recognises a country's sovereign right to control movements through its territory.

If the foreign country does not reply within 60 days, Minister must refuse approval of transportation

64. Subsection 41B(6) - This proposed subsection specifies that if the competent authority of the foreign country does not indicate either that it has consented or refused consent for the transportation within 60 days, the Minister must notify the applicant in writing that the application is refused.

65. This proposed subsection recognises Australia's international obligation to conform with the requirements of Article 6.4 of the Basel Convention that a Party to the Convention exporting a hazardous waste shall not permit the transboundary movement to commence unless it has received the written consent of the State of transit.

Section 41C — Notifiable substances in relation to transit countries

General

66. This proposed section creates the concept of a ***notifiable substance***. A ***notifiable substance*** is any substance or object which is intended to be moved between Australia and a foreign country when the substance or object is deemed not to be a hazardous waste for the purposes of the export under the amended Act (but is a hazardous waste for other countries), and the movement is proposed to occur via a transit of a third country.

67. When the substance or object is classified as a waste under Annex I of the Convention, (and possesses hazardous characteristics as set out in Annex III of the Convention), the substance or object is a hazardous waste under the Convention and is deemed to be a ***notifiable substance*** in relation to a transit through the third country.

68. The provisions of this section ensure that all substances which are defined under the Convention as hazardous wastes automatically become ***notifiable substances*** for the purpose of all transit countries.

69. This provision ensures that the circumstances creating the type of anomaly mentioned in paragraph 47 above will be covered in the amended Act.

70. There are some substances which do not possess hazardous characteristics but have been declared under a country's laws to be hazardous wastes, as is allowed by the Convention. There are also a small number of hazardous wastes which, for one reason or another, were not listed in Annex 1 of the Basel Convention at the time of its drafting, but which have since been determined in many countries, after a consideration of scientific and technical advice, to be hazardous wastes

requiring regulation (for example, nickel, cobalt and vanadium wastes). These substances may also be declared under a country's laws to be hazardous wastes.

71. When identified, such substances must be declared by the Minister, in writing, to be ***notifiable substances.*** This means that any anomalous circumstances of the type mentioned in paragraph 49 are also covered by the legislation.

72. The declaration that ***Annex I/III wastes*** (ie, the core Basel Convention wastes) are automatically ***notifiable substances*** is intended to simplify the administration of this provision. It means that it is only necessary to identify those substances (which are not ***Annex I/III wastes)*** which are classified as hazardous wastes under the national laws of transit countries. Transit countries which are Parties to the Convention must inform the Secretariat of the Convention of all such wastes, and Australia can easily access this information.

73. The intent of these provisions is to allow the identification of substances which are ***notifiable substances*** and the particular countries for which they are notifiable. By knowing the identity of these substances, and the transit countries to which they apply, Australian organisations which are trading, or intend to trade, in such substances with a foreign country are able to ascertain when a proposed transit requires a notification. They can then either proceed with the notification or, by choosing a different route for the substance to travel to the foreign country, avoid the requirement to notify the Minister.

Section 41C — Notifiable substances in relation to transit countries

Detail

74. Subsection 41C(1) - This proposed subsection identifies the circumstances under which a substance or an object is subject to the control provisions of proposed Part 4A. It sets up the first part of the system by which ***notifiable substances*** will be controlled. This provision, together with that of subsection 41C(2), will result in the identification of countries for which prior informed consent will be required for a transit.

Notifiable substances — Annex I/III wastes

75. Subsection 41C(2) - This proposed subsection applies a presumption that, if a substance is an Annex I/III waste, it is automatically a ***notifiable substance.*** As explained in paragraph 71 above, this provision simplifies the administration of this Part.

76. This proposed subsection also provides that the above rule does not apply to substances exempted in relation to the transit country by regulation. This provision is to ensure, when a country does not regulate an ***Annex I/III waste*** under its legislation, that that waste is not a ***notifiable substance*** for the purpose of Part 4A of the amended Act and is therefore not subject to control under that Part.

77. The note to this subsection refers the reader to subsection 41C(7) for definition of an ***Annex I/III waste***.

Declarations that substance is notifiable substance

78. Subsection 41C(3) - This proposed subsection classifies the circumstances under which a substance which is not an ***Annex I/III waste*** but is classified (under the provisions of Article 1.1(b) of the Basel Convention) as a hazardous waste by the domestic legislation of a foreign country, must be declared by the Minister to be a ***notifiable substance***. This provision, together with that of subsection 41C(2), will result in the identification of the complete set of substances which are not subject to control or notification between Australia and the destination country (for example, under a particular Article 11 arrangement), but which are classified as hazardous wastes under the law of the transit country and will thus be ***notifiable substances*** for the purposes of the amended Act.

79. This proposed subsection also provides that the above rule does not apply to substances exempted in relation to the transit country by regulation. This provision is to ensure, when a country does not regulate an ***Annex I/III waste*** under its legislation, that that waste is not a ***notifiable substance*** for the purpose of Part 4A of the amended Act and is therefore not subject to control under that Part.

Declaration has effect accordingly

80. Subsection 41C(4) - This proposed subsection gives effect to the determination at subsection 41C(2).

Revocation of declaration

81. Subsection 41C(5) - This proposed subsection allows the Minister to revoke a declaration under proposed subsection 41C(2) if the Minister ceases to be satisfied that a particular substance or object is classified as a Basel Convention hazardous waste in the transit country. This provision is necessary to allow for changes in national legislation, international Conventions or Memorandums of Understanding between nations.

Gazettal of declaration

82. Subsection 41C(6) - This proposed subsection requires the Minister to arrange for a copy of any declaration or revocation of a declaration to be published in the Government Gazette. This provision ensures the transparency of any arrangements made under this section.

83. Subsection 41C(7) - This proposed subsection defines the meaning of an ***Annex I/III waste*** as used in subsection 41C(2).

Amendment (10) — Part 5A - ARRANGEMENTS BY MINISTER

84. This amendment inserts a new item 126A in the amending Bill. Item 126A inserts a new Part 5A in the principal Act. Part 5A will provide a statutory framework for administrative arrangements within the limits of the constitutional heads of power. It sets out the scope of

Commonwealth involvement in voluntary cooperative arrangements which may be undertaken to fulfil Australia's obligations under the Basel Convention. Such arrangements may only be made to the extent necessary to achieve the object or aims of the Principal Act. Such arrangements may be used to facilitate further discussion with the Australian and New Zealand Environment and Conservation Council. This amendment reflects both the General Obligations clause of Article 4.2 and the Transmission of Information to the Basel Secretariat obligations of Article 13.3 of the Basel Convention, but does not go beyond them.

85. Subsection 56A(1) - This proposed subsection lists the types of voluntary arrangements the Minister may make to achieve the object or aims of the amended Act.

86. Subsection 56A(2) - This proposed subsection provides that arrangements under Part 5A may only be made to the extent necessary to achieve the object or aims of the Principal Act .

87. Subsection 56A(3) -This proposed subsection indicates that arrangements under subsection 56A(1) above may be made in co-operation with other governments, administrations, organisations and persons.

88. Subsection 56A(4) - This proposed subsection requires that the Minister, when making arrangements under proposed paragraphs 56A (1)(c), (d) or (e), must consult with relevant governments or administrations before making such arrangements. This provision is to ensure that the Commonwealth takes into account the intentions, desires and/or priorities of governments or administrations of States or Territories likely to be involved in or affected by such arrangements.

89. Section 56A(5) - Proposed subsection 56A(5) provides that the Minister can only make an arrangement under proposed section 56A if the arrangement relates to matters within the Commonwealth's legislative powers. This ensures that proposed section 56A would not be vulnerable to challenge on the grounds that it confers functions that are outside the scope of the Commonwealth's powers.

Amendment (11) — Section 57(k)

90. Paragraphs 57(l) and (m) - This amendment extends the scope of section 57 of the principal Act (to allow applications for review by the Administrative Appeals Tribunal) to provide that an application may be made to review decisions made by the Minister under section 41B (dealing with the approval of the transportation of notifiable substances through transit countries) and under section 41C (dealing with declarations of notifiable substances). It is inserted to ensure that decisions to grant a permit under proposed sections 41B and 41C are subject to review in the same way as other decisions listed in section 57.

Amendment (12) — Subsections 58A(2) and (3)

Extended standing of individuals and organisations to seek judicial review

91. This amendment omits the provisions of subsections 58A(2) and (3) of the amendment Bill and substitutes new provisions. The amended subsections more precisely define the conditions under which standing to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1977* for decisions made under the amended Act may be extended to persons or organisations.

92. Subsection 58A(2) - Under the proposed clause, an individual is taken to be a 'person aggrieved' by a decision if, in the two year period immediately preceding the decision, he or she has engaged in a series of activities related to various aspects of the management of wastes or pollution (where the pollution results from the disposal of waste).

93. This proposed amendment is intended to ensure that only individuals who have demonstrated a genuine and abiding interest and involvement in the issues of the management of wastes and pollution may have standing extended to them under the *Administrative Decisions (Judicial Review) Act 1977*. This requirement is expected to discourage or prevent mischievous or vexatious litigation by individuals attempting to use the standing provisions for matters of insufficient cause.

94. Subsection 58A(2A) - Under the proposed clause, an incorporated or unincorporated organisation or association is taken to be a 'person aggrieved' by a decision if, in the two year period immediately preceding the decision, it has engaged in a series of activities related to various aspects of the management of wastes and pollution where the pollution results from the management of waste and the objects or purposes of the organisation or association include various aspects of the management of wastes or pollution (where the pollution results from the disposal of waste). In this context, a reference to 'a person' includes reference to a body corporate as well as an individual (section 22 of the *Acts Interpretation Act 1901*).

95. This proposed amendment is intended to ensure that only organisations or associations who have demonstrated a genuine and abiding interest and involvement in the issues of the management of waste and pollution may have standing extended to them under the *Administrative Decisions (Judicial Review) Act 1977*. This requirement is expected to discourage or prevent mischievous or vexatious litigation by organisations or associations attempting to use the standing provisions for matters of insufficient cause.

96. Subsection 58A(2C) - This proposed subsection ensures that standing is not extended to organisations or associations in regard to decisions made before their objects or purposes included reference to the matter concerned. This is to prevent an organisation or association attempting to gain standing in regard to a decision about a particular matter by, at that time, amending their objects or purposes to incorporate reference to such matter.

97. Subsection 58A(2C) - This proposed subsection extends the coverage of proposed subsection (2) and (2A) above to matters both inside and outside Australia. This ensures that standing may be extended to appropriate individuals, organisations or associations whether based in Australia or overseas.

Amendment (13) — Section 58CA

Regulations defining *hazardous waste* — Minister to consult Hazardous Waste Technical Group

98. This proposed amendment inserts a new section 58CA in the amending Bill at item 131. Proposed section 58CA requires the Minister to consult with the Hazardous Waste Technical Group before regulations are made for the purpose of proposed paragraph (a) of the definition of ***hazardous waste*** in section 4 of the principal Act (creating a national list of wastes).

99. The purpose of this proposed amendment is to ensure, by requiring that such wastes must be prescribed in regulations made only after seeking the advice of the Technical Group, that the process of creating such national list will be totally transparent. As regulations are disallowable instruments, a relevant regulation may be reviewed by Parliament and disallowed if appropriate.

Amendment (14) — Subsection 58D(2)

100. Subsection 58D(2) - This proposed amendment extends the range of expertise in, or experience of, matters relevant to the management of hazardous waste which will qualify a person to be eligible to become a member of the Hazardous Waste Technical Group.

101. The range has been extended to include expertise in, or experience of, the environmental or public health and public safety aspects of the management of hazardous waste.

102. This proposed amendment, by extending the potential range of professional expertise and experience of members of the Group, will now go even further to ensure that certificates are issued on the basis of the most competent and credible advice. This expertise will also offer greater certainty to industry as to the validity of the information contained in the certificates and help to ensure that the certificates are less likely to be challenged in court.

Amendment (15) — Subsection 59B

Service of summons or process on foreign corporations — criminal proceedings

103. This proposed amendment inserts a new section 59B in the amending Bill under item 132. Proposed section 59B makes provision for criminal proceedings to be taken against foreign corporations by deeming service on the agent of a corporation to be effective service on the corporation.

104. This provision is inserted because of the difficulties that may be occasioned in terms of enforcement when dealing with foreign corporations. Practical difficulties such as service of the criminal process, and the enforcement of any penalty imposed may arise in the case of a foreign corporation which does not have a legal presence in Australia. This paragraph deems service on the agent of a corporation to be effective service on the corporation.

105. Subsection 59B (3) provides that subsection 59B (2) has affect in addition to the provisions of Section 28A of the *Acts Interpretation Act 1901*. The Note to section 59B indicates that section 28A of the *Acts Interpretation Act 1901* deals with the service of documents. The effect of subsection 59B (3) is to ensure that the special provisions for service under section 59B apply in addition to the normal provisions for the service under the *Acts Interpretation Act 1901* .


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