

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

HAZARDOUS WASTES (REGULATION OF EXPORTS AND IMPORTS) BILL 1989

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for the Arts, Sport,
the Environment, Tourism and Territories,
Senator the Hon Graham Richardson)

Hazardous Waste (Regulation of Exports and Imports) Bill 1989

Explanatory Memorandum

OUTLINE

The purpose of this Bill is to enable Australia to control the import and export of hazardous wastes in order that such wastes are disposed of in an environmentally acceptable manner.

In March 1989 the 'Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal' was adopted. This Convention was drawn up principally to minimise and control international movements of hazardous wastes. (For the purposes of the Bill and the Convention, hazardous wastes do not include radioactive wastes but do include wastes usually considered hazardous such as PCBs, redundant pesticides, etc.)

Enactment of the Bill will enable Australia to meet the requirements of the Basel Convention with regard to transboundary movements.

The principal elements of the Bill are:

- . a system of permits, issued by the Minister, for the export and import of hazardous wastes under specified conditions;
- . enforcement and penalty provisions;
- . provision for the Minister to order dealings with hazardous waste in those instances where illegal export or import has taken place; and
- . provision for appeal against the decisions of the Minister in relation to import and export permits and orders.

FINANCIAL IMPACT STATEMENT

The proposed Act will have no financial implications for the Government. Provision is made in the Bill for the payment of prescribed fees of up to \$4 000 which will cover the costs of administering the Act.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Division 1 - Introduction

Clause 1 - Short title

1. This clause provides for the Act to be cited as the Hazardous Waste (Regulation of Exports and Imports) Act 1989.

Clause 2 - Commencement

2. This clause provides for the Act to commence on a day to be fixed by Proclamation or, if this does not occur within six months of the Act receiving Royal Assent, on the first day after the end of that period.

Clause 3 - Object

3. This clause describes the object of the Act. The intent of the Bill is to provide for controls on the export and import of hazardous wastes which will ensure that any such wastes that are transported between countries are disposed of in an environmentally acceptable manner. This is a fundamental objective of the Basel Convention.

Division 2 - Interpretation

Clause 4 - Interpretation - defined terms

4. This clause provides definitions of a range of terms used in the Act.

5. References to the Basel Convention in the Act relate to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal sponsored by the United Nations Environment Programme (UNEP). A prime purpose of the Act is to enable Australia to become a Party to the Convention by making provision for controlling the import and export of hazardous wastes in accordance with the requirements of the Convention.

6. Hazardous waste is defined as wastes possessing one or more of a list of characteristics contained in Annex III to the Basel Convention.

7. For the purposes of the Act, hazardous waste has also been defined to include household waste and residues arising from the incineration of household wastes. These latter categories of waste, whilst not normally considered to be hazardous, have been included in order to ensure that the Act covers all the categories of waste covered by the Convention.

8. Household waste has been defined specifically to exclude materials which are intended to be used for recycling. Therefore a permit will not be required to import or export materials such as wastepaper intended for recycling.

Clause 5 - Meaning of "dispose of safely" in relation to hazardous waste

9. Dispose of safely is defined to ensure that both the waste, and any products of its disposal, are rendered safe.

Clause 6 - When action is begun etc. under Environment Protection (Impact of Proposals) Act in relation to import or export proposals

10. The Minister may consider that certain proposals to export or import wastes are of such significance that they warrant the submission of an environmental impact statement or the holding of an inquiry under the Environment Protection (Impact of Proposals) Act 1974. This clause defines when actions are begun and completed under that Act in relation to such an import or export proposal, for the purposes of this Bill.

Clause 7 - Failure to comply with permit condition when required constitutes breach of condition

11. This clause stipulates that failure to comply with a permit condition by a certain day, if one was specified in the condition, constitutes a breach of that condition.

Clause 8 - Reference to offence against Act etc. includes reference to offence against certain provisions of Crimes Act

12. Where a person commits an offence under the Crimes Act that arises out of activities to be regulated by the Bill such an offence will be considered as an offence for the purposes of this Bill.

Division 3 - Operation of Act

Clause 9 - Extension of Act to external Territories

13. This clause specifies that the Act will apply in all external Territories.

Clause 10 - Act binds Crown

14. This clause provides that the Act will bind the Crown in right of the Commonwealth, the States, the Australian Capital Territory, the Northern Territory and of Norfolk Island. It will not render the Crown liable to prosecution.

Clause 11 - Relationship between Act and other Commonwealth laws

15. The Bill is not intended to displace any of the provisions of the specified laws, but rather to operate in conjunction with those laws.

PART 2 - IMPORT PERMITS AND EXPORT PERMITS

Division 1 - Applications for, and granting of, permits

The Bill provides for a permit system under which a person must have been granted a permit by the Minister before importing or exporting hazardous wastes. This Division specifies a number of criteria that will be used in deciding if a permit should be granted. A fundamental requirement is that the wastes in question are disposed of in an environmentally acceptable manner. The Minister may place conditions on any permit granted.

Clause 12 - Applications for import permits

Clause 13 - Applications for export permits

16. The Bill will require persons to apply in a specified form, and provide such information as the form specifies, if they want a permit to export or import hazardous wastes.

Clause 14 - Variation of applications

17. This clause provides for the applicant for a permit to vary the application before the Minister has decided to grant or refuse the application. This will avoid the Minister having to consider application information that is no longer current.

Clause 15 - Further information may be requested

18. The Bill allows for the Minister to require further information if it may assist the Minister to properly consider an application for a permit.

Clause 16 - Time within which applications to be decided

19. This clause requires the Minister to decide on the granting of a permit within 60 days of the application day. Provision is made for the Minister to extend this period by 60 days if it is considered that a decision cannot be made on the application within 60 days.

20. If action is taken under the Environment Protection (Impact of Proposals) Act 1974 in relation to the application, the Minister is required to decide on the granting of the permit within 30 days of the completion of the action taken under that Act.

21. Provision is made for the Minister and the applicant to agree to extend the time in which the Minister must decide on the application.

22. If the Minister does not make a decision within the period specified, he or she is taken to have decided not to grant a permit.

Clause 17 - Grant of permits

23. This clause states that the Minister must grant a permit only if certain listed criteria are satisfied

- the waste must be disposed of in an environmentally acceptable manner
- in the case of exports, the approval of the receiving country, and any countries of transit, must be obtained before a permit is issued
- the applicant must be a fit and proper person and have appropriate insurance.

These requirements directly reflect obligations contained in the Basel Convention.

24. Provision is also made for the Minister to refuse the application under certain circumstances.

- An application may be refused if the wastes could be disposed of in a different way to that proposed and the Minister considers that, having regard to Australia's international obligations, the waste should be dealt with in the other way.
- An export permit may be refused if the waste could be disposed of, in an environmentally acceptable manner, by using a facility in Australia. The Basel Convention strongly discourages the export of hazardous wastes if a country is able to safely dispose of those wastes within its own territory.
- The Minister may decide that a particular proposal is not in the public interest eg for reasons of international relations or defence. The Basel Convention recognises the right of all Parties to ban the entry of foreign hazardous wastes.

25. This clause specifically prohibits the export of hazardous waste to Antarctica. This is an obligation on all Parties to the Basel Convention.

Clause 18 - Determination of whether applicant is fit and proper person

26. This clause details criteria which the Minister may have regard to when determining if an applicant is a fit and proper person to hold a permit. This list is not exclusive or mandatory.

Clause 19 - Determination of whether applicant has appropriate insurance

27. For the purposes of defining the adequate insurance criterion in clause 17 an applicant should be considered to be adequately insured against any risk, or be capable of meeting any liability, arising in relation to the hazardous waste.

Clause 20 - Applicants to be notified of decisions

28. This clause provides for the Minister to notify the applicant of the decision to grant or refuse a permit as soon as practicable after that decision is made. Should the application be refused, the reasons for the refusal must be given to the applicant.

Clause 21 - Matters to be specified in import permits

Clause 22 - Matters to be specified in export permits

29. These clauses describe the particulars that are required to be specified on import and export permits. Provision is also made for permits to include conditions and any further information considered appropriate by the Minister.

Clause 23 - Permits may be granted subject to conditions

30. This clause provides for the Minister to place conditions on a permit and, should the Minister consider it desirable, to specify the day on, or before which, the permit holder is to comply with such conditions.

31. Subclause 23(3) gives protection to the laws of States and Territories in that permit conditions shall not be taken to override State and Territory legislation unless this intention is specifically stated in the permit.

Clause 24 - Import of hazardous waste before disposal outside Australia

32. This clause provides that an application for an import permit may also be considered as an application for an export permit in those circumstances where the applicant proposes to import hazardous waste and to then export the waste for safe disposal outside of Australia. This will assist applicants in that they will be able to acquire the two permits required in these circumstances with only one application.

Division 2 - Revocation, surrender and variation of permits

Clause 25 - Revocation of permits

33. This clause provides for the Minister to revoke a permit if the permit holder provided false, misleading or inadequate information in applying for the permit or breached any of the permit conditions. The permit may also be revoked if new information becomes available which indicates that the permit is no longer appropriate (for example the holder may no longer be a fit and proper person). The Minister is required to advise the permit holder of the reasons for the revocation. The Minister cannot revoke a permit such as to make an act subsequently illegal that was authorised by a permit at the time it was done.

Clause 26 - Surrender of permits

34. This clause provides for a permit holder to surrender a permit prior to the import or export of hazardous wastes. A permit holder may not surrender a permit after the import or export of such wastes since this could be used to avoid an obligation to comply with certain conditions attached to the permit (eg a requirement to safely dispose of the wastes).

Clause 27 - Variation of permits

35. This clause provides for the Minister to vary a permit by imposing a condition, by varying or revoking a condition, and by varying the day on or before which a condition is to be complied with, if one is specified.

36. The Minister may not vary a permit unless:

- . the permit holder has applied for the permit to be varied;
- . the permit holder has provided false or misleading information;
- . the permit holder should have disclosed further information when applying for the permit; or
- . new information is now available which requires the permit to be varied in order to protect the environment.

37. If the Minister varies a permit other than as the result of a variation application, the permit holder must be informed of the reasons for varying the permit.

Clause 28 - Applications for variations of permits

38. This clause provides for the holder of a permit to apply to the Minister for the permit to be varied. The application is to be in an approved form and to be accompanied by supporting information.

Clause 29 - Further information may be requested

39. This clause enables the Minister to request additional information from a permit holder in respect of an application to vary a permit. Such information must be requested within 60 days of the application to vary the permit.

Clause 30 - Time within which applications to be decided

40. This clause requires the Minister to decide on the granting of a variation within 60 days of the application day. Provision is made for the Minister to extend this period by 60 days if it is considered that a decision cannot be made on the application within 60 days.

41. If action is taken under the Environment Protection (Impact of Proposals) Act 1974 in relation to the application, the Minister is required to decide whether to grant the variation within 30 days of the completion of the action taken under that Act unless the applicant agrees to extend the period.

42. Provision is made for the Minister and the applicant to agree to extend the time in which the Minister must make a decision on the application. If the Minister does not decide within the time prescribed in this clause, the Minister is taken to have decided not to grant the variation.

Clause 31 - Making of variations

43. This clause stipulates that the Minister must grant a variation to a permit if it would be appropriate to grant a new permit with terms the same as those in the varied permit. That is the Minister must use the same tests when considering a variation application as those used when considering an application for a new permit.

Clause 32 - Applicants to be notified of decisions

44. This clause provides for the Minister to notify the applicant of the decision to vary or not vary a permit as soon as practicable after that decision is made. If the Minister decides not to vary the permit, the reasons for the refusal must be given to the applicant.

Division 3 - Miscellaneous

Clause 33 - Applications and notices to be accompanied by fees

45. This clause requires any application to be accompanied by a prescribed fee (if any). If an application is not accompanied by the prescribed fee the date of the application, for the purposes of the Act, shall be the date when the fee is received.

Clause 34 - Publication of certain particulars in Gazette

46. This clause requires the Minister to publish in the Gazette particulars about permit applications, permits granted and permit variations and revocations. This will allow member of the public to be aware of the movements taking place and will thus enable them to appeal to the AAT against decisions of the Minister (see Clause 58). The Minister is not required to publish the information if he determines in writing that to do so would be contrary to the public interest.

PART 3 - MINISTERIAL ORDERS IN RELATION TO HAZARDOUS WASTE

Clause 35 - Orders where section 40 contravened

47. This clause provides for the Minister to make orders to deal with unlawfully imported wastes, including the power to order the export of the wastes. This provision will enable Australia to meet the obligation in the Basel Convention that wastes illegally imported into a country are required to be returned to the country from which they were exported, or to be otherwise dealt with in an environmentally sound manner.

Clause 36 - Orders where section 41 contravened

48. This clause provides for the Minister to make orders to deal with unlawfully exported wastes, including the power to order the import of the wastes. This provision will enable Australia to meet the obligations of the Basel Convention relating to these circumstances.

Clause 37 - Orders to remedy or mitigate damage

49. This clause provides for the Minister to order a person who has contravened sections 40 or 41 to take steps to remedy or mitigate any damage resulting from the contravention.

50. The Minister must not order a person to pay compensation.

Clause 38 - Minister may take action and recover costs if order under sections 35, 36, or 37 not complied with

51. Where an order made under sections 35, 36, or 37 is not complied with, the Minister is empowered to arrange for the carrying out of the actions required by the order. Any costs incurred as a result of arrangements made by the Minister under this clause can be recovered by the Commonwealth from the person who failed to comply with the order.

Clause 39 - Orders authorising import of exported hazardous waste where it cannot be dealt with as intended

52. This clause empowers the Minister to make an order for wastes to be imported in those circumstances where wastes exported legally from Australia cannot for some reason be disposed of in accordance with the export permit or order. This provision will enable Australia to meet the obligations of the Basel Convention relating to these circumstances. The Minister may require that the wastes be imported and dealt with in a specified way.

PART 4 - REGULATION OF IMPORT AND EXPORT OF HAZARDOUS WASTE

Clause 40 - Regulation of import of hazardous waste

Clause 41 - Regulation of export of hazardous waste

53. These clauses prohibit a person from importing or exporting hazardous waste without being the holder of an appropriate permit or order. The holder of a permit or order must comply with the conditions of the permit or order.

Clause 42 - Injunctions

54. This clause makes provision for the Federal Court, on application from the Minister or any other person, to grant injunctions and interim injunctions restraining a person from engaging in conduct, or requiring that the person do a specified act or thing, in order to prevent the occurrence of offences against Part 4 of the Act.

PART 5 - ADMINISTRATION

Clause 43 - Appointment of inspectors

55. This clause sets out the classes of persons whom the Minister may appoint to be inspectors under the Act. Members of a State or Territory Public Service or Police Force may be appointed as inspectors with the agreement of the appropriate State or Territory Minister.

Clause 44 - Identity cards

56. This clause provides for the issuing of identity cards to inspectors.

Clause 45 - Proof of authority

57. This clause prevents inspectors from exercising powers under the Act against any person without having first produced their identity cards.

Clause 46 - Power to control movement of vessels and aircraft etc.

58. This clause provides for an inspector to take action against a vessel or aircraft where there are reasonable grounds for suspecting that the vessel or aircraft has or will import or export hazardous waste. This will allow inspectors to take action to prevent waste being brought into the country in those circumstances where it is believed that an illegal import is about to take place.

Clause 47 - Entry and search of searchable places - monitoring compliance

59. This clause confers on inspectors the right to enter and search premises to determine compliance with the Act.

60. Entry to and search of a place is not permitted without the consent of the person who occupies or is responsible for the place or possession of a warrant.

Clause 48 - Entry and search of searchable places - evidence of offences

61. This clause confers on inspectors the right to enter and search premises in order to seize any thing that may afford evidence of the commission of an offence against the Act.

62. Entry to and search of a place is not permitted without the consent of the person who occupies or is responsible for the place or possession of a warrant.

Clause 49 - General powers of inspectors in relation to searchable places

63. This clause describes the powers of an inspector when exercising powers under clauses 47 or 48.

64. A person is not required to answer a question or provide a document if to do so would incriminate that person.

Clause 50 - Monitoring warrants

65. This clause provides for a magistrate to issue a warrant where it is necessary for an inspector to gain access to a place in order to ascertain compliance with the Act. The warrant may authorise the use of appropriate force and must state the time when the entry will take place.

Clause 51 - Offence related warrants

66. This clause provides for a magistrate to issue a warrant, where there is, or will be within the next 72 hours, in or on a place a thing which may provide evidence of an offence against the Act. The warrant may authorise the use of appropriate force and must state the time when the entry will take place.

Clause 52 - Offence related warrants may be granted by telephone

67. This clause enables an inspector to apply for a warrant to search for evidence of an offence, by telephone, in circumstances of urgency.

Clause 53 - Production of permits and orders

68. This clause empowers an inspector or a customs officer to require a person to produce a permit or order where it is suspected that that person has engaged, is engaging, or intends to engage in the import or export of hazardous waste.

Clause 54 - Assistance of inspectors

69. This clause requires that inspectors be given reasonable assistance by the occupier or person responsible for a place to be searched, in exercising their powers under the Act.

Clause 55 - Obstruction of inspectors etc

70. This clause prohibits a person from obstructing an inspector in exercising powers under the Act.

Clause 56 - False statements

71. This clause prohibits a person from making false or misleading statements, or providing false or misleading material in either an application or a notice, or to an inspector taking action, under the Act.

Clause 57 - Part does not limit power to impose permit conditions

72. This clause stipulates that none of the provisions of Part 5 of the Act shall be taken to limit the powers of the Minister in imposing permit conditions. For example, notwithstanding the warrant provisions, a permit may require the holder to allow an inspector to enter and search premises.

PART 6 - MISCELLANEOUS

Clause 58 - Review of decisions

73. This clause provides for the review by the Administrative Appeals Tribunal of decisions of the Minister under the Act.

Clause 59 - Statements to accompany notification of decisions

74. This clause provides that where a person whose interests are affected by a decision made under section 58 is given notice of that decision, the notice shall include a statement to the effect that the person may apply to the Administrative Appeals Tribunal for review of the decision and may request a statement giving reasons for the decision.

Clause 60 - Conduct of directors, servants and agents

75. This clause makes provision generally in relation to means of establishing the state of mind of a body corporate, or other person, in proceedings for an offence against the Act. Subclause 60(5) has the effect that natural persons are not liable to imprisonment, where they would not have been convicted but for this clause.

Clause 61 - Delegation by Minister

76. This clause provides for the delegation of any or all of the Minister's powers under the Act to the Secretary to the Department or a Senior Executive Service officer within the Department.

Clause 62 - Annual Report

77. This clause stipulates that the Minister must, annually, present a report on the operation of the Act to both Houses of the Parliament.

Clause 63 - Regulations

78. This clause enables the Governor-General to make regulations as required or permitted by the Act or as necessary or convenient for giving effect to the Act.

79. Regulations may amend the Schedule which contains Annex III of the English text of the Basel Convention (list of hazardous characteristics). This will permit the Schedule to be amended immediately whenever the Annex is revised.

PART 7 - AMENDMENT OF THE CUSTOMS ACT 1901

Clause 64 - Principal Act

80. This clause defines the Customs Act 1901 as the 'Principal Act' for the purposes of amending that Act.

Clause 65 - Forfeited Goods

81. Section 229 of the Customs Act is amended by this clause to prevent hazardous wastes being forfeited to the Crown simply because they have been imported or exported in contravention of the Act. This amendment has been made since a person who has contravened the Act should not be able to escape all responsibility for the wastes simply by forfeiting them to the Commonwealth.

SCHEDULE

82. The Schedule contains Annex III to the Basel Convention. The Annex contains the list of hazardous characteristics which will be used to determine if a waste shall be defined as hazardous for the purposes of the Act.