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HOUSE OF REPRESENTATIVES

OZONE PROTECTION AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of
the Minister for the Arts, Sport,
the Environment and Territories
the Hon. Ros Kelly M.P.)



OZONE PROTECTION AMENDMENT BILL 1992

OUTLINE

The main purpose of this Bill is to give effect in domestic law to the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer adopted by the Parties to the Protocol in London on 27-29 June 1990 and to enable Australia to ratify the Amended Protocol.

Australia acceded to the Vienna Convention for the Protection of the Ozone Layer on 16 September 1987. Australia ratified the Montreal Protocol on 19 May 1989. The Amendment to the Montreal Protocol adopted on 29 June 1990 will enter into force when at least twenty instruments of ratification, acceptance or approval are deposited by Parties. It is expected that the Amendment will enter into force prior to this Bill receiving Royal Assent.

The intention of the Protocol is to protect the ozone gas in the stratosphere from the depleting effects of certain synthetic chemicals - chlorofluorocarbons (CFCs), halons and other substances. The Protocol places restrictions on a country's production and consumption of these substances. (Consumption is defined as production plus imports minus exports). The amended Protocol adds additional substances which have been proven to be ozone depleting to the lists of controlled substances.

The Ozone Protection Act 1989 (the "Principal Act") has as its principal elements:

- . a system of licences and quotas for the production, import and export of scheduled substances and
- . product controls on particular applications of scheduled substances so as to limit, so far as practicable, the emission of those substances to the air.

The Bill extends the quota control system provisions of the Act to encompass ten additional CFCs and methyl chloroform, introduces a restricted licence system for carbon tetrachloride and requires that importers and manufacturers of hydrochlorofluorocarbons (HCFCs) report on quantities being imported or manufactured.

FINANCIAL IMPACT STATEMENT

The proposed Bill will impose no additional costs on Government. The Ozone Protection (Licence Fees - Imports) Act 1989 and the Ozone Protection (Licence Fees - Manufacture) Act 1989 enable the charging of fees in respect of licences under this Bill, with a view to recovery of the costs to the Commonwealth of administering this legislation.

NOTES ON CLAUSES

Clause 1 - Short Title

1. This clause provides for this Act to be cited as the Ozone Protection Amendment Act 1992. It also provides for the Ozone Protection Act 1989 to be referred to as the "Principal Act" for the purposes of this Act.

Clause 2 - Commencement

2. This clause provides for this Act to commence on a day to be fixed by Proclamation. The Proclamation must not be made earlier than the amendment to the Protocol entering into force for Australia. This Act automatically will come into force after six months if the Protocol amendments have entered into force for Australia, and if the Act has not commenced prior to that date.

Clause 3 - Definitions

3. This clause inserts into section 7(1) of the Principal Act definitions for a number of new terms used in this Act.

Clause 4 - Quota Periods

4. This clause provides, by amending section 8 of the Principal Act, quota periods for the new substances, stage-2 CFCs and methyl chloroform, which will be of 12 months duration (subject to Ministerial extension). The first stage-2 CFC period will commence on 1 July after commencement and the first methyl chloroform quota period will commence on 1 January or the first quarter, whichever is the later, after commencement. (The stage-2 CFC period will run concurrently with the stage-1 CFC quota period already operating).

Clause 5 - Scheduled substances and transitional substances not to include manufactured products

5. This clause amends section 9 of the Principal Act to provide that a reference to a transitional substance does not refer to manufactured products containing transitional substances (which are defined in clause 3 of this Act) or products that were manufactured using transitional substances.

Clause 6 - Quantity - in relation to transitional substances

6. This clause inserts a new section 10A into the Principal Act providing that quantities of transitional substances will be expressed in kilograms. (Schedules to this Act list scheduled substances and their ozone depleting potential (ODP). For all other scheduled substances reports are provided in ODP tonnes. As the ODP of transitional substances has yet to be accurately determined under the Protocol, quantities are expressed in kilograms).

Clause 7 - Recycling of scheduled substances and transitional substances

7. This clause amends section 12 of the Principal Act by specifying that recycled transitional substances are not controlled by this Act. ('Recycling' or 'reprocessing' is the process by which a used scheduled substance is made fit for re-use. This process could occur either on-site, for example in the situation where CFCs in motor vehicle air-conditioning is recycled, or where used CFCs are returned to a manufacturer for use as a feedstock in the production of CFCs).

Clause 8 - Feedstocks

8. This clause inserts new section 12A into the Principal Act, which provides that scheduled substances used exclusively as a feedstock in the manufacture of other chemicals are not subject to the control provisions of this Bill.

Clause 9 - CFCs for use on board ships or aircraft

9. This clause inserts new section 12B into the Principal Act, which states that a ship or aircraft containing CFC in its refrigeration or air conditioning equipment is exempt from the requirement to hold a licence under section 13, if that ship or aircraft is engaged, or will be engaged, in a journey between Australia and a place or places outside Australia.

Clause 10 - Unlicensed manufacture, import or export of scheduled substances

10. This clause amends section 13 of the Principal Act to prohibit the manufacture, import or export of stage-2 CFCs without a person holding a licence issued under section 16 of the Principal Act and provides that a person cannot manufacture or import methyl chloroform without holding a licence. This clause also provides that a person must not export halon or methyl chloroform unless they hold a restricted licence and that carbon tetrachloride cannot be manufactured or imported unless a person holds a restricted licence under section 16.

Clause 11 - Grant of licence

11. This clause amends section 16 of the Principal Act by omitting subsection 16(3) and inserting subsections 16(3A), 16(3B), 16(3C), 16(3D) and 16(3E) to enable the granting or refusal of stage-2 CFCs, carbon tetrachloride or methyl chloroform licences by the Minister. Subject to new subsection 16(3A) a licence can only be granted to a person who was during the period between 1 January 1989 and commencement, conducting an enterprise in which stage-2 CFCs, carbon tetrachloride or methyl chloroform was manufactured or imported or exported or purchased in the case of carbon tetrachloride from an Australian manufacturer. The Minister may not grant a licence to a person who applies later than six months after the commencement of this subsection.

12. This clause also inserts three provisions under new subsections 16(8), 16(9) and 16(10). Subsection 16(8) specifies that existing CFC licence holders are not required to acquire a new licence to be permitted to manufacture, import or export stage 2-CFCs. Subsection 16(9) specifies that an existing licence granted under the Principal Act does not, after commencement of this section, relate to carbon tetrachloride or methyl chloroform. Subsection 16(10) states that an existing licence granted under the Principal Act does not, after the commencement of this section, permit the export of halon.

Clause 12 - Licence conditions

13. This clause inserts new section 17A into the Principal Act to enable the Minister to specify conditions to be attached to a licence. This type of licence is to be referred to as a 'restricted licence'. (These licences will be used for those activities not controlled by a quota system, such as the import/export for reprocessing purposes, import/export for destruction purposes, import and manufacture of carbon tetrachloride and export of halon and methyl chloroform). New subsection 17A(6) creates an offence where a person contravenes a condition of a restricted licence.

Clause 13 - Duration of Licence

14. This clause amends section 18 of the Principal Act to provide that a restricted licence will remain valid for a period not exceeding 10 years, as specified in the licence. (Unrestricted licences will remain in force for ten years). It also extends the operation of section 18 to stage-2 CFCs and methyl chloroform by inserting new subsection 18(3) and 18(4).

Clause 14 - Termination of licence by regulation

15. This clause inserts new section 18A into the Principal Act which provides that, for the purpose of giving effect to an adjustment or amendment of the Protocol, regulations may provide that specific kinds of licences are to cease on a specified date and are not to be renewed after a specified date.

Clause 15 - Cancellation of Licence

16. This clause amends section 20 of the Principal Act by including a provision to enable the Minister to cancel a licence if there has been a contravention of any of the conditions applicable to that licence.

Clause 16 - Persons who do not require a quota

17. This clause inserts new section 22A into the Principal Act to specify that a quota is not required if the activity of manufacture, import or export is permitted under a restricted licence.

18. This clause also inserts new section 22B to provide that a quota is not required by a holder of a restricted licence, for the sole purpose of servicing ships or aircraft operating between Australia and a place outside Australia, or to places outside Australia.

19. This clause also inserts new section 22C. CFCs are divided into two types, stage-1 and stage-2, for the purpose of Part III of the Principal Act. (Stage-1 CFCs are those which were included in the Principal Act and have a 1986 base year. Stage-2 CFCs are those which are being added by virtue of this Act. Stage-2 CFCs have a base year of 1989).

Clause 17 - Manufacture in excess of quota

20. Clause 17 amends section 23 to include stage-2 CFCs and inserts new subsection 23(3) to add methyl chloroform to these provisions. (Under section 23 of the Principal Act, a manufacturer of a CFC or a halon must hold not only a licence, but also a quota, and may not manufacture, within any quota period, an amount exceeding their quota for that period).

Clause 18 - Import in excess of quota

21. This clause amends section 24 of the Principal Act and inserts new subsection 24(3) to provide that an importer of stage-2 CFCs or methyl chloroform may not exceed their quota for a specific quota period.

Clause 19 - Export in excess of quota

22. Clause 19 amends section 25 of the Principal Act to make it clear that this provision applies to stage-1 CFCs only. The effect of this amendment is that it is not an offence under this section for licensees to export stage-2 CFCs.

Clause 20 - Nature of quotas

23. This clause amends section 26 of the Principal Act to provide that stage-2 CFC and methyl chloroform quota may be allocated in respect of manufacture and import. It defines the size of a stage-2 CFC or methyl chloroform quota as the quantities of stage-2 CFC or methyl chloroform that a quota holder may manufacture, import or export during the relevant quota period. (There are no quota provisions in respect of the export of stage-2 CFCs and methyl chloroform).

Clause 21 - Application for quota

24. This clause amends section 27 of the Principal Act to allow for applications to the Minister, by licensees, for stage-2 CFC or methyl chloroform quota.

Clause 22 - Allocation of quota

25. This clause amends section 28 of the Principal Act to provide for the allocation by the Minister of stage-2 CFC or methyl chloroform quotas to specific applicants, for a

specified quota period, in respect of particular "quota activities" (the activities for which quota is required) by notice in writing.

26. Clause 22 also inserts new subsection 28(7) which provides that an existing quota for stage-1 scheduled substances does not relate to stage-2 substances. The clause also inserts new subsection 28(8) which defines the "relevant commencing time" in relation to stage-1 and halons as the beginning of 16 March 1989 (i.e. the commencement of the Principal Act) and for stage-2 CFCs and methyl chloroform as the commencement of this Act.

Clause 23 - Ascertainment of size of quota - initial allocation in respect of manufacture or import

27. This clause amends section 29 and inserts a new subsection 29(2A). The purpose of these new provisions is to establish an overall limit for the initial stage-2 CFC or methyl chloroform quotas by requiring that the total quota allocated for each quota activity, over the first quota period, is not to exceed the benchmark in relation to that activity, which is the level of that activity manufactured or imported into Australia during the base year specified by the Protocol, i.e. 1989.

28. This clause also inserts new subsections 29(10) and 29(11) which provide the Minister with new powers by which the Minister may reduce initial quotas. In exercising these powers the Minister must have regard to Australia's international obligations and the Commonwealth Government's policies, in relation to the manufacture, importation or consumption of scheduled substances and may have regard to other relevant matters.

29. New subsection 29(12) defines the "relevant commencing time" in relation to stage-1 CFCs or halons as the beginning of 16 March 1989 (i.e. the commencement of the Principal Act) and for stage-2 CFCs and methyl chloroform as the commencement of this Act.

Clause 24 - Ascertainment of size of quota - initial allocation in respect of export of stage-1 CFCs

30. This clause amends section 30 of the Principal Act to ensure that only stage-1 CFCs are allocated a separate export quota based on the base year activity as defined in clause 3(a) of this Act. This ensures that only the export of stage-1 CFCs is covered as it is not intended to cover the export of stage-2 CFCs in this Act due to the small quantities involved.

Clause 25 - Renewal of quota

Clause 26 - Ascertainment of size of quota on renewal

Clause 27 - Ascertainment of size of quota in respect of export of stage-1 CFCs on renewal

31. These clauses amend sections 31, 32 and 33 of the Principal Act, and insert new subsections 32(7), 32(8), 33(2) and 33(3) into the Principal Act. These are similar provisions to clause 23, in relation to renewal of quota for both stage-1 and stage-2 CFCs, halons and methyl chloroform. (A holder of quota may apply for renewal of quota, between one and three months before the end of the relevant quota period). As in the Principal Act, renewal is mandatory, unless it would be inconsistent with Australia's international obligations. The Minister under new subsection 32(7) may reduce or increase the size of the quota on renewal.

32. The Minister, under new paragraph 32(8)(b), may take into account reduction or increase in demand for specific scheduled substances in making a decision on the quantity by which a quota may be adjusted. (This provision is necessary to prevent the transfer of quota entitlements from one CFC to another as demand is reduced. This may have the effect of reducing some licensees' quotas at a faster rate than those of other licensees, depending on the demand for the specific CFC. It is not intended that the Minister will use these powers to increase quotas other than in exceptional cases. For example, an increase may be warranted in a situation where the demand for a particular scheduled substance was nil in a previous quota period but is now required for an unanticipated essential use).

Clause 28 - Publishing of quota levels

33. This clause amends section 36 of the Principal Act to require that the Minister publish in the Gazette, within one month of the beginning of each methyl chloroform quota period, the totals of the quotas issued. (There is already a requirement under section 36 for the Minister to publish a notice giving details of CFC and halon quotas issued in any quota period).

Clause 29 - Exemptions

34. This clause inserts new subsections 40(6A), 40(9) and 40(10) into the Principal Act to provide that the Minister may specify that an exemption is granted subject to conditions. The exemption may be cancelled by the Minister if there has been contravention of any of the conditions applied to that licence. (Under section 40 a person has to demonstrate that a product is essential and that no practical alternative exists to the use of scheduled substances. These new provisions enable the Minister to make any exemption granted conditional on the applicant ensuring that the product containing a scheduled substance is only used in the manner specified in the exemption application).

Clause 30 - Protocol countries

35. Clause 30 amends section 41 of the Principal Act by providing that a regulation may be made to specify Protocol countries that are non-Parties for the purposes of Part VI. (This provision is necessary to provide for a situation where

the Parties decide that a country is to be deemed a non-Party as a result of a refusal of that country to meet its obligations under the Protocol).

Clause 31 - Import of scheduled substances from non-Protocol countries

36. Clause 31 inserts a new subsection 42(4) into the Principal Act to prohibit the import of stage-2 substances from non-Protocol countries commencing one year after the Protocol comes into force for Australia and makes necessary consequential amendments to subsection 42(1) and 42(2).

Clause 32 - Export of scheduled substances to non-Protocol countries

37. This clause amends section 43 of the Principal Act to prohibit the export of a stage-2 scheduled substance to non-Protocol country commencing on and after 1 January 1993. It also adds new subsection 43(2) which prohibits the export of stage-2 substances to a non-Protocol country commencing one year after the Protocol comes into force in Australia.

Clause 33 - Import of products containing scheduled substances from non-Protocol countries

Clause 34 - Import of products manufactured using scheduled substances from non-Protocol countries

38. Clauses 33 and 34 amend sections 44 and 45 respectively of the Principal Act to prohibit the import of a product either manufactured with or containing stage-2 scheduled substances to a non-Protocol country commencing one year after the Protocol comes into force for Australia.

Clause 35 - Initial report on base year activity - stage-1 scheduled substances

Clause 36 - Initial report on base year activity - stage-2 scheduled substances and transitional substances

39. These clauses amend section 46 and insert a new section 46A into the Principal Act to require persons who manufactured, destroyed, exported or imported specific scheduled substances during the base year to report to the Minister, within one month of commencement of the Act, particulars of their activities and the quantities involved. The clause also requires the Minister to publish in the Gazette, within two months of commencement, a list of total quantities for these activities. This will provide the base needed for allocation of quotas. (In respect of Annex C substances i.e. transitional substances, there are no licences and quotas. The Protocol however, requires that Parties report to the Secretariat within three months of the provisions of the Protocol coming into force for that country).

Clause 37 - Quarterly reports by manufacturers, importers or exporters of scheduled substances

40. This clause repeals section 47 of the Principal Act and substitutes a new section 47 to require licensees to report to the Minister on the quantities of each of their quota activities, including nil returns for each quarter, within 15 days of its end. (In respect of the manufacture, import and export of carbon tetrachloride licensees, data is required, irrespective that no quota will be issued).

41. Licensees are required by this clause to specify the country of origin of the scheduled substance and country of destination. (This provision is to regulate the provision of the Protocol relating to the bans to and from non-Protocol countries).

Clause 38 - Annual reports by manufacturers, importers or exporters of transitional substances

42. This clause inserts new section 47A into the Principal Act to require manufacturers, importers and exporters of transitional substances (i.e. Annex C substances), to provide to the Minister annually, commencing on 1 January after commencement of the Act, an annual report of activities.

Clause 39 - Division does not apply to obligations relating to transitional substances

43. This clause inserts new section 48A which provides that inspections under this Division will not apply in relation to transitional substances.

Clause 40 - Forfeitable goods

44. This clause amends section 57 of the Principal Act to allow scheduled substances regulated under restricted licences to be forfeited after conviction under section 17A.

Clause 41 - False statements

45. This clause inserts a new subsection 62(4) into the Principal Act to provide that a person must not knowingly or recklessly provide a false or misleading statement to the Minister in any reports.

Clause 42 - Review of Decisions

46. This clause adds to the decisions of the Minister which are reviewable under section 66 of the Principal Act, the decisions to specify, impose, revoke or vary a licence condition under a restricted licence, a decision to specify an exemption condition, a decision to cancel an exemption and a decision to reduce the size of a quota under new sections 17A, and subsections 29(10), 32(7) and 33(2).

Clause 43 - Delegation

47. This clause inserts new section 67A into the Principal Act which provides that the Minister may delegate to a Senior Executive Service officer in the Department all or any of the

Minister's powers under section 19, 34 (except for the power to increase the size of a quota), 49, 50 or 61. (These sections relate to the renewal of licences, variation of quota, appointment of inspectors, issue of identity cards and the power to move seized goods).

Clause 44 - Implementation of Protocol - supplementary regulations

48. This clause inserts new section 69A into the Principal Act which provides for the making of regulations to extend the list of substances included in this Act where such an extension is required for Australia to give effect an adjustment or amendments to the Protocol.

49. This clause also limits the commencement date of section 69A to a date no earlier than the date on which the adjustment or amendment enter into force for Australia.

50. Clause 44 also inserts proposed section 69B. The primary constitutional basis of the amended Act is that aspect of the external affairs power which enables the Commonwealth to give effect to the Convention and the Protocol. That aspect authorises legislation which is reasonably appropriate and adapted to giving effect to the Convention and the Protocol. Section 69B will apply in the event that some or all of the provisions of the amended Act (other than Parts V and VI) are construed as going beyond giving effect to the Convention and the Protocol, and section 15A of the *Acts Interpretation Act 1901* is insufficient to enable the provisions to be read down to be within the relevant legislative powers. (Parts V and VI rely on powers other than the external affairs power). Section 69B is designed to assist the courts to read down the provisions to specified heads of legislative power.

51. In particular, section 69B provides that the provisions are to be read so that their application is limited to, or in relation to:

- (a) three specified aspects of the external affairs power, namely:
 - (i) giving effect to the Convention and the Protocol;
 - (ii) matters external to Australia;
 - (iii) matters of international concern; or
- (b) conduct engaged in by the following types of corporations:
 - (i) corporations covered by the corporations power;
 - (ii) corporations incorporated in a Territory other than the Northern Territory; or
- (c) specified activities covered by other heads of legislative power, namely:
 - (i) trade or commerce between Australia and places outside Australia;
 - (ii) trade or commerce among the States; or

- (iii) trade or commerce within a Territory other than the Northern Territory, between a State and a Territory or between two Territories; or
- (iv) the supply of goods or services to the Commonwealth; or
- (v) the use of postal, telegraphic or telephonic services; or
- (vi) the making of a radio or television broadcast.

Clause 45 - Schedule 1

Clause 46 - Schedule 3

52. These clauses amend Schedules 1 and 3 to the Principal Act to include stage-2 CFCs, methyl chloroform and carbon tetrachloride.

Clause 47 - Schedule 4

53. This clause amends Schedule 4 to the Principal Act to include stage-2 CFCs, methyl chloroform and carbon tetrachloride in the control of manufacture of products containing or using scheduled substances. (This includes dry cleaning machinery, automotive air conditioning maintenance kits, extruded polystyrene packaging and thermal insulating material and aerosol products). In respect of aerosol products the use of methyl chloroform is prohibited after the first 31 December after the commencement of this Act or after the commencement of this Act whichever is the later date.

Clause 48 - Amendments relating to penalties

54. This clause amends the penalties in the Principal Act consistent with subsection 4B(3) of the Crimes Act 1914 which allows a court to impose a penalty on a body corporate up to 5 times the penalty provided for a natural person.

Schedule 1 - amends Schedule 1 to the Principal Act.

Schedule 2 - substitution of new Schedule 3 to the Principal Act.

Schedule 3 - amendments relating to penalties.

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