

*Department of the
Parliamentary Library*



INFORMATION AND RESEARCH SERVICES

Bills Digest

No. 4 2001–02

**Environmental Legislation Amendment Bill (No.2)
2001**

ISSN 1328-8091

© Copyright Commonwealth of Australia 2001

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

Inquiries

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database. On the Internet the Department of the Parliamentary Library can be found at:
<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2001

I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 4 2001-02

Environmental Legislation Amendment Bill (No.2) 2001

Angus Martyn
Law and Bills Digest Group
23 July 2001

Contents

Purpose	1
Background	1
Regulating imports and exports of hazardous waste	1
Fuel quality standards	2
Main Provisions	3
Schedule 1 - Amendment of the <i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i>	3
Schedule 2 - Other Amendments	5
Concluding Comments	6
Endnotes	6

Environmental Legislation Amendment Bill (No.2) 2001

Date Introduced: 28 June 2001

House: Senate

Portfolio: Environment and Heritage

Commencement: Various dates, but the major parts of the Bill commence either on Royal Assent or 28 days after Royal Assent.

Purpose

The major purposes of the Bill are:

- To partially close a loophole in the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* by making it an offence to sell hazardous waste to foreign companies under certain circumstances, and
- Introduce into the *Fuel Quality Standards Act 2000* specific provisions allowing the use of evidentiary certificates in prosecutions under the Act and also for regulations to be made to deal with handling and analysis of fuel samples.

Background

Regulating imports and exports of hazardous waste

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal came into international force in 1992. It establishes an international framework to control hazardous wastes being shipped from one country to another. Parties to the Convention must not trade in hazardous wastes with non-Parties except where this is done under other formal agreements, providing this does not reduce the level of environmental protection afforded by the Convention¹. The Basel Convention also requires parties to prevent contraventions and prosecute illegal movements of hazardous wastes.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The *Hazardous Waste (Regulation of Exports and Imports) Act 1989* establishes a regulatory regime to implement Australia's obligations under the Convention. Generally speaking, the export or import of hazardous waste, as defined by the Act, can only take place where a permit or other form of authorisation is issued. The Act only allows the responsible Minister to issue a permit in certain circumstances. Except in exceptional circumstances, no export permit can be issued by the Minister where the purpose of the export is the 'final disposal' of the waste at an overseas location.

As the Act currently stands, the major offence provisions focus on the act of importing or exporting hazardous waste without the appropriate authorisation. It is not an offence to sell hazardous waste per se, even in the knowledge that sale will possibly lead to an unauthorised export. This loophole was highlighted following an incident in September 1997, when hazardous waste in the form of computer scrap was exported from Sydney to Hong Kong in contravention of the Act. Commenting on the incident, the Environment Australia 1997-98 annual report states that:

The Australian Federal police investigated a breach of section 40 of the Act...The Director of Public prosecutions decided not to proceed with a prosecution, given that the likely exporter of the material had no presence in Australia.²

Item 10 in Schedule 1 of the Bill introduces a new offence that focuses on the circumstances of the sale of hazardous waste rather than the act of export. See the main provisions section of this digest for further commentary on **item 10**.

Fuel quality standards

The *Fuel Quality Standards Act 2000* is designed to assist the national move towards higher transport fuel quality standards and reflects an international trend aimed at reducing air pollution and improving engine efficiency. The Act includes offences such as supplying fuel that does not meet the relevant standard³ or altering fuel unless authorised to do so. Inspectors may enter and search premises and take fuel samples for the purposes of either monitoring compliance with the Act or seeking evidence of a breach of the Act. However, the Act does not prescribe any way of handling or analysing fuel samples, nor have any regulations been made in this regard.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Main Provisions

Schedule 1 - Amendment of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*

Items 1 and 2 amend the definition of hazardous waste in existing section 4. The new definition allows for the incorporation into the Act of the substances listed Annexes VIII and IX to the Basel Convention. These Annexes were added to the Convention in 1999.

Item 3 repeals existing **subsection 13(2)** and replaces it with a new version. Section 13 allows for regulations to be made to implement arrangements made under so-called 'article 11' agreements related to the Basel Convention such as the Waigani Convention, but requires that these regulations must not commence before the article 11 agreement. **Item 3** will allow regulation commencement dates to be expressed in terms of article 11 commencement rather than specific calendar dates. This has the advantage that where the commencement of an article 11 agreement is delayed for some reason, there will be no need to amend the regulations.

Item 4 inserts **new subsection 34(4)**. If a person unlawfully imports hazardous waste, section 34 allows the responsible Commonwealth Minister to order the person to deal with the waste in a specified way, such as re-exporting the waste. The new subsection simply clarifies that the Minister may require the provision of information on dealing with the waste as part of the section 34 order. While not specified in the Bill, presumably this would include information such as how the waste will be re-exported.

Item 5 inserts **new subsection 35(4)**. This mirrors **item 4**, but covers orders in relation to an unlawful export of hazardous waste.

Item 6 inserts **new subsection 35A(4)**. This mirrors **item 4**, but covers orders in relation to the unlawful import of hazardous waste as part of a transit operation.

Item 7 inserts **new subsection 38(5)**. This mirrors **item 4**, but covers orders in relation to where a person has lawfully exported hazardous waste but for whatever reason the waste cannot be dealt with in accordance with the export permit or section 34 order and as a result the Minister may agree to make an order that it be re-imported.

Item 8 inserts **new sections 38A and 38B**. **New section 38A** provides that any Part 3 order (such as to re-export in situations mentioned in item 4) must provide for a reasonable time for compliance 'having regard to the circumstances'. **New subsection 38B(1)** provides that a failure to comply with a section 34, 35 or 35A order to deal with waste is punishable by imprisonment up to 2 years in the case of an individual or 2500 penalty units (\$275 000) in the case of a corporation. Where the failure is one of not supplying information required by the Minister under **items 4-7**, the fine is only 30 penalty units (\$3300).

Item 9 inserts a new heading for Part 4 of the Act. The new heading includes the word 'sale' to reflect to proposed insertion of **item 10** into the Act.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Item 10 inserts **new section 40AA** that creates the offence of unlawful sale of hazardous waste. A person is guilty of the new offence if all four of the following elements are proved:

- the person sells hazardous waste to a body corporate incorporated outside Australia (whether the sale occurs within or outside Australia)
- the body corporate does not have a registered office or a principal office in Australia
- the person sells the waste knowing, or being reckless as to whether, the waste is to be exported by the body corporate, and
- an export permit authorising the export of the waste is not in force when the sale occurs.

It would not be an offence to sell waste to a private individual, nor to a foreign corporation with a registered Australian office. Thus in relation to this second circumstance, the Parliamentary Secretary's second reading speech which states that the Bill⁴

[make] it an offence to sell hazardous waste to a foreign company unless an export permit is in place.

is not strictly correct if the foreign corporation in question has an office in Australia.

While obviously the presence of an Australian office provides a more solid jurisdictional footing for Australian authorities to pursue a prosecution against the foreign corporation, there is no guarantee the corporation would have any significant assets in Australia upon which a fine could be levied. Under section 40B of the Act, corporate executive officers can be held criminally liable for unlawful exporting of hazardous waste, although these officers would presumably have to be Australian-based if jurisdictional problems are not to arise.

It is also curious why someone selling hazardous waste in the possible knowledge that sale could lead to an unauthorised export should escape prosecution merely because they sold the waste to either a private individual or to a foreign corporation with a registered Australian office. Such loopholes do not seem to have much relevance to a persons moral culpability if they have failed to take reasonable steps to verify that a permit authorising the export of the waste is not in force when the sale occurs.

Items 11-13 are consequential amendments on **item 10**. **Items 11-12** provide that the existing liability provisions for corporate executive officers extend to **new section 40AA** offences. **Item 13** allows injunctions to be granted in relation to actual or apprehended breaches of new section 40AA

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 2 - Other Amendments

Items 2-13 amend the *Fuel Quality Standards Act 2000*.

More specifically, **items 2-3** and **8-13** replace 'Administrative Review Tribunal' with 'Administrative Appeals Tribunal'. However, **new subsection 2(3)** of the Bill means that these changes will only apply if the *Administrative Review Tribunal Act 2001*⁵ fails to come into force before this Bill.

Item 7 inserts **new sections 58A and 58B**.

New subsections 58A(1)-(2) provide that regulations may prescribe procedures dealing with samples of fuel or any other 'evidential material', including that testing may be done by persons other than inspectors appointed under the Act.

New subsections 58A(3)-(5) allow for flexibility in how closely various procedures prescribed by regulations under 58A(1) must be followed. Specifically, regulations may allow that substantial compliance, rather than strict compliance, is adequate for some so-called 'routine' procedures. This type of provision has precedent in for example, section 13 of the *Australian Sports Drug Agency Act 1990*, which deals with drug-testing samples. Note that regulations cannot allow the lower standard of compliance to apply to procedures for ensuring that a sample is not interfered with by anyone who is not authorised to do so: **new subsection 58A(4)**. If the relevant standard of compliance is not followed in relation to a sample, any **new section 58B** evidentiary certificate relating to the sample is 'of no effect' - ie of no evidentiary value.

New section 58B provides for the production of 'evidentiary certificates' by persons or laboratories accredited by regulations. Such types of certificates, which are admissible as prima facie evidence of the content of samples etc, seem to be a fairly common device in recent legislation in which the nature of a substance must be generally be proved in order to gain a conviction, eg the *Petroleum Excise Amendment (Measures to Address Evasion) Act 2000*. The standard conditions applying to such certificates are contained in the **new subsections 58B(4)-(7)**: the certificate will only be admitted if a copy is given to the defendant or their legal representative 14 days before the certificate is tendered as evidence in proceedings, the person signing off on the certificate may also be required by the defendant to attend the court hearing into the offence and be cross-examined on the evidence contained in the certificate, evidence can be given in support or rebuttal of a certificate and any such evidence must be considered on its merits.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Concluding Comments

See comments on item 10 of Schedule 1 in the main provisions section.

Endnotes

- 1 For example, the South Pacific Waigani Convention, which is likely to come into force around 2002.
- 2 Environment Australia, *1997-98 annual report*, p. 210.
- 3 The first standards introduced under the Act come into force on 1 January 2002.
- 4 Senator the Hon Ian Campbell, *Senate Debates*, 28 June 2001 p. 25316.
- 5 The Act has yet to be passed by Parliament.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.