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## Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003



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Ozone Protection and Synthetic Greenhouse Gas  
Legislation Amendment Bill 2003

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25 August 2003

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# Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003

**Date Introduced:** 5 June 2003

**House:** House of Representatives

**Portfolio:** Environment and Heritage

**Commencement:** On Royal Assent, except that any offence provisions created by the Bill only apply to conduct after a date to be proclaimed.<sup>1</sup>

## Purpose

To amend the *Ozone Protection Act 1989* so as to extend Commonwealth regulation to (i) various ozone-benign substances that are greenhouse gases and (ii) end-uses of ozone-depleting substances.

## Background

The Ozone Protection and Synthetic Greenhouse Gas Legislation Amendment Bill 2003 (the Bill) is the main Bill of a package of three dealing with the management of ozone depleting substances and their greenhouse gas replacements. The other two are short consequential Bills dealing with licence fees.

### The Ozone Protection Act 1989

The *Ozone Protection Act 1989* (the Act) implements Australia's obligations under the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)<sup>2</sup>. The Montreal Protocol has been amended a number of times to extend its scope. Australia has ratified the 1990, 1992, 1995 and 1997 amendments but not the 1999 (Beijing) amendment. Amongst other things, these amendments have progressively tightened regulation of the manufacture, use, trade and disposal of ozone depleting substances (ODS) included in the original Montreal Protocol as well as expanding the range of ODS covered by its scope.

ODS, such as hydrochlorofluorocarbons (HCFCs), chlorofluorocarbons (CFCs), halons, and methyl bromide, are used for a variety of purposes such as refrigeration and air

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conditioning, foam manufacture, fumigation, fire extinguishing and a range of aerosol products. If released into the atmosphere, ODS damage the ozone layer which protects the earth from UV-B radiation.

The Act and other associated legislation and regulations prohibit the import, export and manufacture of those ODS that are the most damaging to the ozone layer and place various limitations on less damaging ODS with a view to a progressive phase-out of these latter substances. State and Territory legislation, on the other hand, tends to be focussed on the end-uses of ozone depleting substances, including licensing, education and training and emission control measures. This general division of responsibilities is consistent with the basic Australian policy document, the ANZECC *Revised Strategy for Ozone Protection in Australia 1994*.<sup>3</sup>

In April 2000 a Task Force consisting of representatives from Environment Australia, the Australian Greenhouse Office, the Attorney General's Department and PricewaterhouseCoopers was formed to review the impact, appropriateness, effectiveness and efficiency of Commonwealth ozone regulation. The Review also incorporated National Competition Policy (NCP) elements as to whether the legislation impeded market competition, whether any such impediments could be justified in terms of costs and benefits to the Australian community, and whether more effective measures were available to achieve the same regulatory objectives. The Review,<sup>4</sup> completed in January 2001, made positive findings in relation to effectiveness, cost-benefit analysis, effects on competition, stakeholder support etc. The major recommendations of the Review dealt with revenue matters and extending the reach of the Act. As contained in the Review's executive summary, these recommendations were:

#### *Revenue*

- the Ozone Protection Reserve be extended to include all appropriations, revenue and expenditure associated with ozone protection, including that associated with the National Halon Bank;
- Environment Australia develop longer-term budgets for its ozone protection activities;
- licence fees under the legislation be increased to reflect reasonable increases in the costs of Environment Australia's ozone protection activities; and
- a fee be introduced for processing Section 40 exemptions under the legislation.

#### *Extending the legislation*

- Commonwealth end-use powers be elaborated and exercised in a new part to the legislation;

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- the Commonwealth consider early extension of the legislation to ensure national consistency in ozone protection regulation across all States and Territories, in relation to supply and end-use; and
- noting wide-spread support from stakeholders, the Commonwealth should determine, upon direct and early advice from relevant agencies, whether the legislation should be extended to cover synthetic greenhouse gases used in Montreal Protocol industries.

## Synthetic Greenhouse Gases

With the phasing out of some ODS during the 1990s, alternative gases were needed to replace them. Whilst ozone-benign, some of the alternatives brought in are potent greenhouse gases, ie contribute to the Greenhouse effect. These are termed synthetic greenhouse gases, or SGGs. There are two main types of SGGs that have replaced the traditional ODS, hydrofluorocarbons (HFCs) and perfluorocarbons (PFC)s. According to the 2001 Review,<sup>5</sup>

HFCs are currently the refrigerant of choice in Australia for most domestic and non-domestic air conditioning and refrigeration systems. They are also used in the manufacture of rigid polyurethane foam and metered dose medical inhalers and serve as a sterilant gas, as a solvent, as a propellant in aerosols and as a streaming agent in fire extinguishers. PFCs are used as a cleaning agent in the electronics industry, in certain fire suppression systems and in some refrigerant blends.

## Main Provisions

**Items 2-6** amend the Act to reflect the inclusion of synthetic greenhouse gases (SGGs) within its scope. From example, **item 6** amends existing section 3 to add the following two new objectives of the Act:

- to provide controls on the manufacture, import, export and use of SGGs, for the purpose of giving effect to Australia's obligations under the Framework Convention on Climate Change; and
- to promote the responsible management of 'scheduled substances'<sup>6</sup> to minimise their impact on the atmosphere. Scheduled substances are those substances listed in Schedule 1 of the Act.

**Items 7-23** add, amend or repeal various definitions and technical terms contained in existing subsection 7(1) of the Act. For example, **item 13** expands the definition of 'Montreal Protocol' to include the Protocol as affected by the Beijing amendments contained in **new schedule 3D**.

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**Item 25** amends existing section 9 to solve some drafting inconsistencies. The Act regulates ODS in 3 different forms:

- (i) When held in a container for storage or transport purposes;
- (ii) Where it is a constituent of a product by virtue of a product's manufacturing process (eg where a foam is manufactured using an ODS);
- (iii) Contained in products in the sense that it is necessary for the product's operation (eg as refrigerant that circulates around in a car's air conditioning system, or halon in a fire extinguisher).

Existing subsection 9(1) provides that none of the Act's references to 'scheduled substances' is intended to refer to a substance in forms (ii) or (iii).<sup>7</sup> However, existing Parts V and VI of the Act<sup>8</sup> actually regulate of the importation and manufacture of forms (ii) and (iii) by making reference to 'products manufactured using scheduled substances' and 'products containing scheduled substances'. Apparently the drafting of existing subsection 9(1) was an attempt at making a distinction between, on the one hand, those controls in the Act that were intended to only apply to form (i) and on the other hand, those controls intended to apply to forms (ii) and (iii). However, the result is confusing since on a plain English interpretation existing section 9(1) just seems inconsistent with the existence of the regulatory controls imposed by Parts V and VI.

**Item 25** deals with this by redrafting section 9 to specifically name those parts of the Act (Parts III, IV and VII) where there is no intention to regulate ODS (and now SGGs) in the forms (ii) and (iii). Thus these Parts will in effect only regulate ODS and SGG in form (i) – ie bulk storage or transport form.

**Item 27** inserts a **new subsection 13(1A)** to expand the range of offences in existing section 13 for the unlicensed manufacture, import or export of various substances. Specifically, it is offence for a person to manufacture, import or export a SGG unless they have a licence that allows them to do so, or the manufacture, import or export is allowed by the regulations. In line with existing section 13, **new subsection 13(1A)** is a strict liability offence provision, with a maximum fine of 500 penalty units.<sup>9</sup> However, no other section 13 provision allows for regulations to authorise manufacture, import or export. The *Explanatory Memorandum* suggests that this later provision:<sup>10</sup>

ensures that where synthetic greenhouse gases are used other than as alternatives to ozone depleting substances (such as in the manufacture of aluminium and magnesium), they can be excluded from the operation of the legislation.

**Item 28** inserts a **new subsection 13(6A)** which again expands the range of section 13 offences. This creates an offence of importing 'pre-charged equipment' unless allowed by the appropriate licence, or the equipment is a personal or household effect within the meaning of existing paragraph 68(1)(d) of the *Customs Act 1901*. Under **item 15** 'pre-

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charged equipment' means refrigeration and air-conditioning equipment that contain an HCFC and/or HFC. Other aspects of **item 28** offences are the same as in **item 27**.

**Item 30** substitutes a new version of subsection 13A(2) to do two things. First it clarifies that a separate licence for each substance that a person wants to import, manufacture etc. Currently if a person wants to, say, import a HCFC *and* methyl bromide, the language of existing subsection 13A(2) suggests one licence can cover both. The second thing is that it introduces SGGs into the substances for which licences may be granted.

**Item 31** will expand existing section 13A(4) to allow 'used substances licences' to be granted to cover the import or export of recycled or used HCFCs or methyl bromide. The *Explanatory Memorandum* comments:<sup>11</sup>

It is anticipated that these licences will be sought for the purpose of importing or exporting these substances for destruction; or importing these substances for recycling and/or reclamation for re-export...This represents the natural progression of the global phase-out of ozone depleting substances in accordance with the *Montreal Protocol*. As the global permissible use of these substances declines, there will be a corresponding increase in demand for destruction of surplus or contaminated used substances and recycling and reclamation of used substances for reuse in critical applications.

Existing section 14 deals with application licences. It says nothing about fees – fees are only mentioned in existing subsection 16(2), which provides a licence can only be *issued* on payment of prescribed fees, or where waived. **Item 33** inserts a **new paragraph 14(1)(a)** that specifies that an application fee must be paid, unless 'waived in accordance with regulations'. The *Explanatory Memorandum* comments:<sup>12</sup>

This clarifies the original drafting intention that fees paid by applicants are intended to cover the cost to the Commonwealth in processing them. Where the Minister refuses to grant an applicant a licence, the application fee will not be returned to the applicant as the Commonwealth has still incurred the cost of processing the application.

**Item 35** deletes existing subsection 16(2) in consequence of **item 33**.

Even where a person has a valid import licence, they may only import a scheduled substance from a country that is a Party to the Montreal Protocol: existing subsection 18(2). **Item 38** provides that this restriction does not apply to SGG licences – the rationale for this that as the Montreal Protocol does not control SGGs. **Item 40** makes a similar amendment to existing subsection 18(3), which covers to exports.

Exemptions may be given by the Minister for some obligations imposed under the Act or regulations: existing section 40. **Item 46** specifies that a fee must be paid when applying an exemption, unless waived in accordance with regulations.

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**Item 47** substitutes a new version of existing section 41.<sup>13</sup> **New section 41** requires the Minister to maintain a register of countries that are party to the Montreal Protocol on a per substance basis. The idea of a ‘per substance basis’ is that as countries progressively ratify the various amendments to the Protocol, they accept international obligations to a wider range of ODS and thus they are effect Protocol parties for the substances covered by the various amendments. The import and export of various ODS can only take place in relation to countries that are Parties for the relevant ODS being exported / imported.

The Minister may not list a country on the Register, if this would be inconsistent with Australia’s obligations under the *Montreal Protocol*.

**Items 39, 41, 43-44, 48-58, 75-76 and 81-83** all provide that references to ‘Protocol and ‘non-Protocol’ in existing sections 44 and 45 are references to the *Montreal Protocol* (as opposed to the Kyoto Protocol under the *United Nations Framework Convention on Climate Change*). The change is consistent with the new definition introduced at **item 13**.

Item 59 inserts a **new Part VIA – ‘Controls on disposal, use etc of scheduled substances’**. **New Part VIA** contains only two new provisions, **new section 45A and 45B**.

In relation to new section **45A**, the *Explanatory Memorandum* states that:<sup>14</sup>

[this will permit] the creation of Regulations relating to the end-use applications of all scheduled substances to target preventable emissions. The use of Regulations will allow the Commonwealth to flexibly adapt end-use controls to reflect changes in technologies and practices in each of the affected industries.

‘End-use’ in this context includes sale, purchase, disposal, storage, use, handling, labelling etc. In relation to end-use controls, the 2001 Review referred to earlier contains the following discussion:

8.60 The issue of whether Commonwealth regulation should extend beyond the control of ODS at the points of import, wholesale and distribution to controls at the point of end-use emerged as an important issue in the review. If the need exists for the Commonwealth to introduce end-use controls, its regulatory coverage will expand to include a broader range of regulatory instruments than currently applies. As instrument numbers increase, stricter forms of regulation such as legislation emerge as the most effective means to ensure consistent outcomes.

8.61 It is clear that State and Territory based legislation and regulations for ozone protection are not applied uniformly across jurisdictions despite consultation through the Ozone Protection Consultative Committee (OPCC) and the 1994 *ANZECC Revised Strategy on Ozone Protection*.

8.62 It is worth noting that Australia’s obligations under the *Montreal Protocol* require national action on supply and end-use. The *Ozone Protection Act 1989* provides for both supply and end-use controls as these are ‘part and parcel’ of

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consumption and production processes. However, traditionally the States and Territories have legislated and provided regulation in relation to end-use controls.

8.63 In recommending a more national approach to ozone protection, the Task Force believes that the end use powers of the Commonwealth be elaborated and exercised in a new part to the legislation to clarify Commonwealth coverage and responsibility. Attachment E to this report provides a preliminary assessment of the benefits and costs of this approach. In practice this would require the establishment of a single national ozone protection authority.

Note that in respect to paragraph 8.63 above, the Bill does not create a single national ozone protection authority. **New Part VIA** will overlap existing end-use controls in State and Territory legislation. Whilst some jurisdictions may repeal their end-use controls once this Bill comes into force, presumably any inconsistency between **new Part VIA** and State and Territory legislation will be resolved in favour of **new Part VIA** through the override mechanism in section 109 of the Commonwealth Constitution.

**New section 45B** creates an offence of conduct that results in the discharge of scheduled substances to the atmosphere except as allowed by the Regulations. It is a strict liability offence carrying a penalty of 100 units.<sup>15</sup> No offence occurs where the discharge results from a product containing the scheduled substances is 'being used for its designed purpose' except where the product is a halon fire extinguisher discharged 'during a training exercise'. An offence also does occur where the relevant conduct happens before a date to be proclaimed.<sup>16</sup>

**Item 68** substitutes new '**Part VIIIA - Ozone Protection and SGG Account**' to replace the 'Ozone Protection Reserve'. The old Part VIIIA Reserve will continue to exist, but under the new 'Account' name. Besides covering SGG matters, the Account will be used for the revenue and costs involved the National Halon Bank. **Item 68** also specifies that Division 1A of Part 4 of the *Financial Management and Accountability Act 1997* applies to the Ozone Protection and SGG Account. Division 1A covers 'special accounts'. Since the commencement of the *Financial Management Legislation Amendment Act 1999*, the Ozone Protection Reserve has in fact been a special account so **item 68** seems to continue the status quo in this regard.

**Item 70** substitutes a new version of section 67A which deals with the Minister's ability to delegate any of his or her powers and duties under the Act to an SES employee, or acting SES employee of the Department. **New section 67A** increases the range of powers that may be delegated, leaving only the Minister's powers under sections 19A and 20. The *Explanatory Memorandum* comments that:<sup>17</sup>

[sections 19A and 20] deal with the cancellation and termination of licences. Due to the severely detrimental impact created by the exercise of these powers (a licensee's loss of livelihood) it is appropriate that the Minister retain responsibility for them.

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No rationale is given in the *Explanatory Memorandum* for the increased range. However, given that the Bill introduces two new proposed licences – those relating to synthetic greenhouse gases and pre-charged refrigeration and air-conditioning equipment – there may be a substantial number of applications for these and so overall the workload for the administration of the Act’s licensing and quota system will increase. Thus it would appear that the Bill is aiming to minimise any delays in the granting of licenses etc by enabling the Minister to be removed from the routine decision making process<sup>18</sup>.

Existing section 69B provides that should the effect of any part of the Act go beyond what is necessary to give effect to Australia’s relevant international obligations, that part should ‘read down’ so that it is within the legislative power of the Commonwealth. This is a fairly standard provision to ensure any unconstitutional parts of the relevant Act can be severed so as not to render the whole Act inoperative. **Item 77** simply amends existing section 67B so as the severability provision also applies to regulations made under the Act. No reason for this amendment is given in the *Explanatory Memorandum* but it may have been prompted by **new section 45A** (which enables the creation of Regulations to control end-use applications). **Items 78** and **79** also amend subsection 69B to include the *Framework Convention on Climate Change* as one of Australia’s international agreements to which the Act is intended to give effect.

**Item 80** inserts **new Parts VIII-X** to Schedule 1 of the Act. Schedule 1 lists the various substances covered by Montreal Protocol and its various Amendments. **Part VIII** contains only one substance, bromochloromethane, which is covered by 1999 *Beijing Amendment*. **Parts IX** and **X** contain various HCFs and PCFs, which are SGGs.

**Item 84** inserts **new Schedules 3D** and **3E** into the Act. These contain the text of the *Beijing Amendment* and the *United Nations Framework Convention on Climate Change* respectively.

**Item 85** makes a consequential change by altering a reference in the *Trans-Tasman Mutual Recognition Act 1997* from the *Ozone Protection Act 1989* to the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*. This preserves the current situation that Commonwealth ozone regulation requirements still apply to ODS and SGG that are, for example, imported into Australia from New Zealand.

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## Endnotes

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- 1 See: Clause 4.
- 2 The 1987 Montreal Protocol contains specific obligations that build on the original framework agreement, the 1985 Vienna Convention for the Protection of the Ozone Layer. The relationship between the Vienna and Montreal agreements is similar to that between the 1992 Climate Change convention and 1997 Kyoto Protocol. See: <http://www.unep.org/ozone/aboutsec.shtml> for more background.
- 3 Policy 11, p. 5.
- 4 See: <http://www.ea.gov.au/atmosphere/ozone/review/index.html>
- 5 *Paper 6 - Synthetic greenhouse gases used in Montreal Protocol Industries.*
- 6 As noted in relation to item 80, the SGGs HFC and PFC are added to schedule 1, Parts IX and X, and thus become scheduled substances.
- 7 By comparison form (i) *will* be included with the meaning of ‘scheduled substance’ *except* where the substance in question is inside the container not only for the purpose of transport and / or storage, but also for their end-use purpose (eg a fire protection system consisting of cylinders of halon connected to a network of piping that runs through a building): existing subsection 9(2).
- 8 **New Part VIA** will also regulate the end-uses of forms (ii) and (iii).
- 9 Due to section 4B of the *Crimes Act 1901*, the maximum penalty for a corporation is 2500 penalty units, ie \$275 000.
- 10 P. 118
- 11 At p. 119.
- 12 P. 119.
- 13 Amongst other things, existing section 41 provides that in relation to the regulation of the import / export of an ODS, ‘a country is a non-Protocol country if the country is not a party to the Protocol [and that] regulations may specify all the countries that are parties to the Protocol.’ No regulations specifying such countries have been made.
- 14 P. 122.
- 15 500 penalty units for a corporation.
- 16 Subclause 4(1) of the Bill.
- 17 P. 125.
- 18 Although **new section 67A** does not specify that the exercise of delegated power is subject to Ministerial direction, paragraph 34AB(a) of the *Acts Interpretation Act 1901* allows delegations to ‘be made either generally *or as otherwise provided by the instrument of delegation*’ [emphasised added]. Thus the Minister, in the relevant instrument of delegation under **new section 67A**, could make the delegation subject to certain conditions.

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