

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

OZONE PROTECTION BILL 1988

EXPLANATORY MEMORANDUM

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

OZONE PROTECTION BILL 1988

OUTLINE

The purpose of this Bill is to give effect to the obligations which will arise when Australia ratifies the Montreal Protocol on Substances that Deplete the Ozone Layer, and to provide for additional controls, beyond those required by the Protocol, which will further reduce the usage, and emission to the air, of ozone depleting substances.

Australia acceded to the Vienna Convention for the Protection of the Ozone Layer on 16 September 1987. Australia signed the Protocol on 8 June 1988 and it is likely to come into effect on 1 January 1989. The intention of the Protocol is to protect the small amounts of ozone gas in the upper atmosphere from the depleting effects of certain synthetic chemicals - chlorofluorocarbons (CFCs) and halons. The Protocol places restrictions on a country's production and consumption of these substances. (Consumption is defined as production plus imports minus exports.)

The principal elements of the Bill are:

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

FINANCIAL IMPACT STATEMENT

The proposed Bill will have no continuing financial implications, after the first year of its operation (the establishment of three staff positions within the Department of the Arts, Sport, the Environment, Tourism and Territories will have a one-off financial cost of \$185,000 for 1988-89). The Ozone Protection (Licence Fees - Imports) Bill and the Ozone Protection (Licence Fees - Manufacture) Bill will 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 Bill.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Short title

1. This clause provides for the Act to be cited as the Ozone Protection Act 1988.

Clause 2 - Commencement

2. This clause provides for the Act to commence on the day it receives Royal Assent.

Clause 3 - Objectives

3. The objects of the Bill are:

- to institute a system of controls on the manufacture, import and export of ozone depleting substances, for the purpose of:
 - . giving effect to Australia's obligations under the Convention and the Protocol; and
 - . further reducing Australia's exports of such substances; and
- to institute, and provide for the institution of, specific controls on the manufacture, importation, distribution and use of products containing or using such substances.

Clause 4 - Saving of certain State and Territory laws

4. This clause indicates that the Bill is not intended to exclude the operation of State and Territory laws which are capable of operating concurrently with the Bill.

Clause 5 - Act to bind the Crown

5. This clause provides that the Bill will bind the Crown in right of the Commonwealth, the States, an internal Territory that has been established as a body politic and Norfolk Island, though it will not render the Crown liable to prosecution. (The reference to internal Territories that have been established as bodies politic will encompass not only the Northern Territory but also the Australian Capital Territory, should the Australian Capital Territory (Self-Government) Bill become law.)

Clause 6 - Extension to the external Territories

6. This clause provides that the Act is to extend to all the external Territories.

PART II - EXPLANATION OF TERMS USED IN THE ACT

Clause 7 - Definitions

1. This clause provides definitions of a range of terms used in the Bill. 'Australia' is defined as including the external Territories, and 'import' and 'export' are defined accordingly. 'Convention' is defined as the Vienna Convention for the Protection of the Ozone Layer, and 'Protocol' is defined as the Montreal Protocol on Substances that Deplete the Ozone Layer: the texts of each are set out at Schedule 2 and Schedule 3 respectively.

2. Subclauses 7(2) and (3) provide that references in the Bill to offences against it, its provisions and the regulations are to include related inchoate offences (aiding and abetting, attempt, conspiracy, etc.).

Clause 8 - Quota periods

3. This clause provides for CFC quota periods and halon quota periods, which will be of 12 months duration (subject to Ministerial extension), and will run consecutively. Subclauses 8(3) and (4) provide for the dates of commencement of the initial quota periods, if the Protocol comes into effect on 1 January 1989, but also enable the Minister to fix later dates, if it does not: subclauses 8(5) and (6) provide that such later dates fixed by the Minister must still allow minimum periods after commencement of the Protocol, which are drawn from Article 2 of the Protocol. Extension of a quota period, or deferral of commencement, are to be by notice in the Gazette, by subclause 8(7). Extension of a quota period will be subject to disallowance under the Acts Interpretation Act 1901, by subclause 8(8).

Clause 9 - Scheduled substances not to include manufactured products

4. This clause provides that a reference to a scheduled substance does not include a product that contains and will use a scheduled substance, or consists in part of a scheduled substance only because it was used in the process of manufacture of the product. Containers used for the transport and storage of a scheduled substance do not come within this exemption, unless the substance can only be used in conjunction with the product.

Clause 10 - Quantity - in relation to scheduled substances

Clause 11 - Ozone depleting effect

5. These clauses provide that quantity of scheduled substances is measured in terms of ozone depleting effect, and define ozone depleting effect (the ozone depleting effect of a quantity of a substance is obtained by multiplying the mass of the substance by a dimensionless number specified in Schedule 1 for each of the scheduled substances, which relates the ozone depleting effect of one kilogram of the substance to that of one kilogram of CFC 11).

PART III - LICENCES

6. This Part makes provision in relation to applications for licences, granting and refusal of licences, renewal, cancellation and surrender of licences, and associated matters. The Part provides for the exercise of discretions in the making of certain decisions: written notice setting out the reasons for an adverse decision is to be provided to the applicant or licensee, and clause 65 provides for review of decisions under this Part, amongst others, by the Administrative Appeals Tribunal.

Clause 12 - Unlicensed manufacture, import or export

7. This is one of the principal clauses of the Bill, creating offences of manufacturing, importing or exporting a CFC, or a halon, without holding a licence issued under clause 15.

Clause 13 - Application for licence

Clause 14 - Request for further information

8. These clauses provide for applications to the Minister for licences, and requisitions by the Minister for further information, within 60 days of an application.

Clause 15 - Grant of licence

9. This clause enables the granting or refusal of licences by the Minister. The Minister can only grant a licence if satisfied that the applicant is a fit and proper person to be granted a licence - subclause 15(5) lists criteria, which are not exhaustive, to which the Minister must have regard for this purpose. Subject to this requirement, the granting of a licence is mandatory, in the case of an application within 3 months of commencement of the Act from a person who was, before commencement, conducting an enterprise which will, after commencement, require a licence.

Clause 16 - Deemed refusal of licence

10. This clause provides that if the Minister has neither granted nor refused a licence within 60 days after the making of an application, or a request for further information, that will be taken as refusal of a licence, for the purposes of clause 65 (which provides for review by the Administrative Appeals Tribunal).

Clause 17 - Duration of licence

11. This clause provides that a licence will remain valid for ten years.

Clause 18 - Renewal of licence

12. This clause makes provision in relation to applications for renewal of licences similar to those made by clauses 13-16 in relation to initial applications (except that there are no mandatory renewals for existing enterprises).

Clause 19 - Cancellation of licence

13. This clause provides that the Minister may cancel a licence if the Minister is satisfied that the licensee is no longer a fit and proper person to hold a licence. It provides for a notice period of 60 days before a cancellation takes effect.

Clause 20 - Surrender of licence

14. This clause provides for surrender of a licence, by return of the licence and written notice to the Minister.

Clause 21 - Publication of information regarding licences etc.

15. This clause enables the making of regulations providing for publication of details of licences granted, refused, cancelled and surrendered.

PART IV - QUOTAS

Clause 22 - Manufacture in excess of quota

Clause 23 - Import in excess of quota

Clause 24 - Export in excess of quota

16. These clauses are amongst the principal provisions of the Bill. By clause 22, 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 23 makes similar provision in relation to import of CFCs and halons. Clause 24 makes similar provision in relation to export of CFCs. (While the Bill prohibits the export of halons without a licence, it does not use a quota system to control the export of halons, because no halons are manufactured in Australia: possible export of halons will be controlled indirectly through quotas on production and import of halons, and monitored through licensees' compulsory clause 46 reports.)

Clause 25 - Nature of quota

17. This clause provides that CFC quota may be allocated in respect of manufacture, import and export, and that halon quota may be allocated in respect of manufacture and import. It defines the size of a CFC quota or halon quota as the quantities of CFCs or halons that a quota holder may manufacture, import or export during the relevant quota period.

Clause 26 - Application for quota

18. This clause provides for applications to the Minister, by licensees, for CFC or halon quota.

Clause 27 - Allocation of quota

19. This clause should be read together with clauses 28 and 29. Clause 27 provides for the allocation by the Minister of quotas to particular applicants, for a particular quota period, in respect of particular "quota activities" (the activities for which quota is required, defined by clause 7), by notice in writing. Clauses 28 and 29 provide for the determination of the size of the quota to be allocated, in each case where it is in fact to be allocated (clause 28 applies to quotas for manufacture or import activities, and clause 29 applies to quota for export activities). Clauses 28 and 29 relate to the first CFC and halon quota periods only; clauses 30-32 provide for renewal of quota, and determination of the size of quotas on renewal.

20. Clause 27 provides that the allocation of a quota is mandatory if the Minister is satisfied:

- that the applicant was, before commencement of the Act, conducting an enterprise which, after commencement, requires a quota; or
- that the application is made in respect of an activity essential to Australia's defence.

21. Clause 27 also provides that the written notice of allocation of a quota is to specify various matters, including the quota activities to which it relates, and that the notice is not to specify a particular quota activity unless it was part of the applicant's pre-commencement enterprise, or the activity is essential for Australia's defence.

Clause 28 - Ascertainment of size of quota - initial allocation

22. Subclause 28(1) establishes an overall limit for determinations of the size of quotas under clause 28, 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 in, into or out of Australia during the baseline year specified by the Protocol, 1986. (Clause 45 provides for the requisition of reports which will be used in determining the 1986 quantities.)

23. Clause 28 further provides that the amount of clause 28 quota to be allocated to an applicant may comprise up to three components:

- a defence purposes component, that is, the quantity which the Minister is satisfied must be manufactured or imported during the quota period for the applicant to engage in activity essential for Australia's defence;
- a 1986 component, that is, the quantity which the Minister is satisfied was manufactured or imported by the applicant during 1986 (it is expected that this component

will account for the whole of quota allocated, in almost all cases); and

- a discretionary component (intended for use where the applicant commenced business after the base year, 1986 - subclause 28(8) requires the Minister to have regard, for this purpose, to the extent to which the applicant has engaged in the relevant quota activity between the end of 1986 and commencement of the Act, amongst other things).

24. Subclauses 28(5) and (6) provide for reduction of 1986 components (on a basis of equal proportions, so far as reasonably practicable), if required by the size of the defence components, so that in all cases, Australia will not contravene its obligations under the Protocol.

Clause 29 - Ascertainment of size of quota - initial allocation in respect of export of CFCs

25. Subclause 29(1) establishes the overall limit for export of CFCs in the first quota period as a quantity having an ozone depleting effect of 3,800,000.

26. Clause 29 further provides that the amount of clause 29 quota to be allocated to an applicant may comprise a 1986 component plus a discretionary component, which are defined in similar terms to the components under clause 28.

Clause 30 - Renewal of quota

Clause 31 - Ascertainment of size of quota on renewal

Clause 32 - Ascertainment of size of quota in respect of export of CFCs on renewal

27. These clauses generally make similar provisions to clauses 27-29, in relation to renewal of quota. A holder of quota may apply for renewal of that quota, between one and three months before the end of the relevant quota period. Renewal is mandatory, unless it would be inconsistent with Australia's international obligations.

28. Clause 31 provides that the allocation of manufacturing/importation quota on renewal is based on:

- a defence purposes component, which is to be re-evaluated for each quota period; and
- a previous quota component, which is the applicant's quota for the relevant activity for the previous quota period, excluding any defence component
 - . the previous quota component may also be reduced, again on an equitable basis, if the Minister is satisfied that not doing so could result in contravention of Australia's international obligations (the Protocol provides for staged reductions of levels of production and consumption, which may be varied by the parties to the Protocol).

29. Clause 32 provides that the size of a renewed CFC export quota is determined by reducing the previous quota by 5%.

Clause 33 - Variation of quota

30. This clause provides that quota-holders may apply to the Minister for variation of the terms of their quota, other than the term specifying a quota period. The Minister may vary the terms if the Minister is satisfied that the application is consistent with the Act and Australia's international obligations. It is envisaged that the most common form of change would be from manufacture to import, or vice versa.

Clause 34 - Quota transferable

31. This clause enables transfer of unused quotas or parts of quotas between licensees. This is an important provision for the efficient operation of the controls imposed by the Bill. It is designed to allow market-based adjustments to changing conditions over time.

Clause 35 - Publishing of quota levels

32. This clause requires the Minister to publish in the Gazette, within one month of the beginning of each CFC or halon quota period, particulars of the totals of quotas issued, and totals relating to defence purposes in particular.

PART V - CONTROL OF MANUFACTURE ETC. OF PRODUCTS CONTAINING OR USING SCHEDULED SUBSTANCES

Clause 36 - Persons to whom this Part applies, activities to which this Part applies

33. Part V of the Bill institutes, and provides for the institution of, further controls beyond those required by the Protocol. This clause sets out the limits of application of the Part, by defining the persons to whom the Part applies (foreign corporations, trading corporations, financial corporations, and bodies corporate incorporated in a territory other than the Northern Territory), and the activities to which the Part applies (trade or commerce not being intra-State trade or commerce, supply to the Commonwealth, use of postal or telecommunication services, and radio or television broadcast).

Clause 37 - Manufacture and import of products in contravention of Schedule 4

34. Clause 37 creates offences of manufacturing or importing, other than in accordance with an exemption under clause 39, a product which contravenes a provision of Schedule 4. Schedule 4 sets out specific controls on manufacture or import, after various specified commencement dates, of the following products:

- dry cleaning machinery capable of being operated using a scheduled substance;
- equipment for automotive air conditioning maintenance kits including non-refillable containers, under 5 kg in weight, of a scheduled substance;
- non-refillable containers, under 5 kg in weight, of a scheduled substance, for use in the maintenance of refrigerative units;
- polystyrene packaging or insulation containing, or produced using, a scheduled substance; and
- aerosol products containing a scheduled substance.

Clause 38 - Regulations concerning manufacture etc. of scheduled substances

35. This clause enables the future introduction of further controls similar to those in Schedule 4, by providing that the regulations may either prohibit or regulate (to the extent that the Part applies) the manufacture, import, export, distribution or use of products that contain scheduled substances, or which depend on scheduled substances for their operation.

Clause 39 - Exemptions

36. This clause provides for the granting by the Minister of exemptions from compliance with obligations imposed by Schedule 4, or clause 38 regulations, in relation to a particular product, if the Minister is satisfied:

- that the product is essential for medical, veterinary, defence, industrial safety or public safety purposes, and no practical alternative to the use of scheduled substances exists;
- that there is no practical alternative to use of scheduled substances in relation to the product because of the requirements of a law concerning the product; or
- that the product is for use in conjunction with the calibration of equipment.

37. An exemption may be granted before or after commencement of the relevant obligation. Grant of an exemption is to be by notice in writing, which must specify the period for which the exemption remains in force. Each exemption notice must be published in the Gazette, as soon as practicable after it is given to the applicant, and must be tabled in each House of the Parliament within fifteen sitting days. A decision refusing to grant an exemption is subject to review by the Administrative Appeals Tribunal, under clause 65.

PART VI - CONTROL OF IMPORTS AND EXPORTS

38. This Part generally prohibits import and export of scheduled substances, and import of products containing, manufactured with or using scheduled substances, from or to countries which are not parties to the Protocol, as required by Article 4 of the Protocol.

Clause 40 - Protocol countries

39. This clause provides for the regulations to specify all countries which are parties to the Protocol, and that these countries are to be taken, for the purposes of Part VI, to be parties to the Protocol. This is so that an importer or exporter can rely on the regulations, rather than having to investigate continually whether a particular country has continued to be a party to the Protocol.

40. Subclause 40(4) provides that the regulations may also specify other countries, that are to be taken to be Protocol countries for the purposes of Part VI (other than clause 42, concerned with exports). This is consistent with Article 4 of the Protocol, which allows for imports from countries recognised as complying with the Protocol, though not being parties to it. Subclause 40(6) prevents the regulations from doing this if it would be inconsistent with Australia's obligations.

Clause 41 - Import of scheduled substances from non-Protocol countries

Clause 42 - Export of scheduled substances to non-Protocol countries

Clause 43 - Import of products containing scheduled substances from non-Protocol countries

Clause 44 - Import of products manufactured using scheduled substances from non-Protocol countries

41. These clauses variously prohibit the import of scheduled substances, products containing scheduled substances, and products manufactured using scheduled substances from non-Protocol countries, and the export of scheduled substances to non-Protocol countries.

42. Different dates of effect are given for these prohibitions. Clauses 41, 43 and 44 provide for the Minister to fix the implementation days for the relevant prohibitions, by notice in the Gazette.

43. Clauses 43 and 44 also provide that they apply only in relation to products specified by the Minister, which must be listed in annexes elaborated under the Protocol - this specification is also by notice in the Gazette.

44. Clause 44, in relation to products manufactured using scheduled substances, also provides that the Minister may specify, by Gazette notice, conditions under which the importation of such a product will be permitted, although not so as to contravene Australia's international obligations.

Such a Gazette notice will be subject to disallowance under section 46A of the Acts Interpretation Act 1901. Subclause 44(8) provides for a variation of the normal operation of the Acts Interpretation Act in relation to the date of effect of a disallowable instrument, so that a notice of conditions under which importation will be permitted, pursuant to subclause 44(4), takes effect on the first day on which the notice is no longer able to be disallowed, rather than any date specified in the notice, or the date of the notice.

PART VII - REPORTS AND RECORDS

Clause 45 - Initial report on 1986 activity

45. This clause requires persons who manufactured or imported scheduled substances during 1986 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 baseline needed for allocation of quotas under clause 28).

Clause 46 - Quarterly reports by licensees

46. This clause requires licensees to report to the Minister the quantities for each of their quota activities, including nil returns, for each quarter, within 15 days of its end.

Clause 47 - Records to be kept by licensees

47. This clause enables the making of regulations concerning the keeping of records by licensees in relation to their quota activities, the retention of such records, and how they may be dealt with.

PART VIII - ENFORCEMENT

DIVISION 1 - INSPECTORS

Clause 48 - Appointment of inspectors

48. This clause sets out the classes of persons whom the Minister may appoint as an inspector, and ensures that the Minister may not appoint an officer or employee of a State or Territory Public Service, or a member of a State or Territory Police Force, other than in accordance with an arrangement made by the Minister with a Minister of that State or Territory.

49. Subclause 48(2) provides that where officers of State authorities are to be appointed as inspectors, the appointment shall be in accordance with arrangements made between the relevant ministers.

Clause 49 - Identity cards

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

Clause 50 - Searches to monitor compliance with Act etc.

51. This clause confers on an inspector a general power of entry and search etc., without warrant, in relation to premises at which the inspector has reasonable cause to believe quota activities, or other activities the subject of regulation under Part V, are engaged in, or records relating to such activities are kept, provided that where the premises is a residence, the occupier's consent must be obtained first.

Clause 51 - Offence-related searches and seizures

52. This clause provides for search for, and seizure of, particular articles which an inspector has reasonable grounds to suspect may afford evidence in relation to an offence against the Act, either with the relevant occupier's consent, or pursuant to a warrant issued by a Magistrate on the basis of an information on oath setting out reasonable grounds for the relevant suspicion. A search warrant pursuant to this clause is to name the inspector authorised by it, and to state certain other matters, such as the purpose for which the warrant is issued, including a reference to the nature of the offence in relation to which the entry and search are authorised.

Clause 52 - Warrants may be granted by telephone

53. This clause makes provision for the issue of warrants by telephone, with standard formalities by way of written records to be prepared in virtually the same manner as would be required in conjunction with a normal application for, and grant of, a warrant. Subclause 52(8) provides that where a question has been raised in court as to whether a search or other procedure was duly authorised in accordance with this clause, if the warrant signed by a Magistrate is not produced in evidence, the court shall assume the search or procedure was not authorised, until the contrary is proved.

Clause 53 - Power to require information

54. This clause enables an inspector, on production of his or her identity card, to require a person to answer questions and produce documents, to the extent reasonably necessary for the purpose of ascertaining whether the Act has been complied with.

Clause 54 - Retention of books and documents

55. This clause provides for the retention of documents by an inspector for a necessary and reasonable period, so long as the inspector permits inspection of the material by a person who would otherwise be entitled to have possession of it.

DIVISION 2 - INJUNCTIONS

Clause 55 - Injunctions

56. This clause makes very broad provision to enable the Federal Court to grant injunctions and interim injunctions restraining a person from contravening, or requiring them to do a thing so as not to contravene, the Act or regulations, on the application of the Minister or any other person, without requiring undertakings as to damages, and without certain other limitations which might otherwise apply in relation to injunctions.

DIVISION 3 - FORFEITURE OF GOODS

Clause 56 - Forfeitable goods

Clause 57 - Goods forfeited to Commonwealth

Clause 58 - Power to seize forfeitable goods

Clause 59 - Persons not to move etc. seized goods

Clause 60 - Disposal of forfeited goods

57. These clauses provide that goods in respect of which a person has been convicted of an offence (against any of clauses 12, 22-24, 37-38, or 41-44 of the Bill) are forfeited to the Commonwealth, and may be seized by an inspector. Once seized, such goods are to be dealt with and disposed of only in accordance with the Minister's directions.

DIVISION 4 - OFFENCES

Clause 61 - False statements

58. This clause creates offences of knowingly or recklessly making false statements, in or in relation to an application, to an inspector or in a report pursuant to Part VII. (It is not an offence to provide false information if this is indicated at the time, and correct information is provided to the extent of the person's capacity.)

Clause 62 - Obstruction of inspectors etc.

59. This clause creates an offence of wilfully obstructing, hindering or resisting an inspector.

Clause 63 - Failure to answer questions etc.

60. This clause creates an offence of refusing or failing, without reasonable excuse, to provide information to an

inspector. The clause provides that tendency to self-incrimination is a reasonable excuse, but also makes provision for the giving of undertakings to a person (by the Director of Public Prosecutions, a State Attorney-General, or a person authorised by a State Attorney-General) to the effect that an answer given, or document produced, will not be used in evidence in proceedings against the person (other than proceedings in respect of any falsity of evidence given).

Clause 64 - Conduct by directors, servants and agents

61. 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, by reference to the actual or apparent authority, and states of mind, of directors, servants and agents that there is a nexus between the state of mind of a body corporate and that of its directors, servants and agents. Subclause 64(5) has the effect that a natural person is not liable to imprisonment, where they would not have been convicted but for this clause.

PART IX - MISCELLANEOUS

Clause 65 - Review of decisions

62. This clause provides for the review by the Administrative Appeals Tribunal of certain decisions by the Minister under the Bill.

Clause 66 - Statements to accompany notification of decisions

63. This clause provides that where notice of a decision reviewable under clause 65 is given to a person whose interests are affected by the decision, the notice must include a statement of the person's rights under the Administrative Appeals Tribunal Act 1975.

Clause 67 - Collection of licence fees

64. This clause is concerned with licence fees, which will be established by the Ozone Protection (Licence Fees - Imports) Bill 1988 and the Ozone Protection (Licence Fees - Manufacture) Bill 1988. The clause provides that licence fees are due and payable at the end of 15 days after the end of the quarter to which they relate, that there will be a penalty on fees remaining unpaid thereafter, compounding at the rate of 30% per annum, and that these amounts are recoverable as debts due to the Commonwealth.

Clause 68 - Regulations

65. This clause enables the Governor-General to make regulations as required or permitted by the Act, or necessary or convenient for giving effect to the Act, including regulations prescribing penalties for offences against the regulations.
