A BREATH OF FRESH AIR - LAWS TO PROTECT THE OZONE LAYER

Stephen Hibbert, partner, and Rosemary Martin of Allen Allen & Hemsley, Solicitors, outline new Commonwealth laws which will have a major impact on any business involved in the manufacture, import or export of substances which may harm the ozone layer.

On 7 March 1989 the Commonwealth Parliament passed the Ozone Protection Act 1989 (the "Act"). In doing so the government displayed its concern over pressing environmental issues as well as its resolve that Australia fulfil its obligations under international law.

The ozone layer

The Act is subtitled "An Act to provide for measures to protect ozone in the atmosphere". The ozone layer is a thin veil found between the troposhere and the stratosphere (between 20 and 50 km above the earth's surface). Its primary functions are to filter harmful ultraviolet radiation present in sunlight and to assist in regulation of the earth's temperature.

In 1974, two Californian scientists identified chlorofluorocarbons ("CFCs") as a threat to the ozone layer. These particular synthetic chemicals are used in the following ways: propellants in some aerosol spray products; refrigerants in refrigerators, freezers and air-conditioning systems; degreasing solvents in electronic and other industries; and, in plastic foams. Halons, which are mainly used in specialised fire-fighting applications, also harm the fragile atmosphere. The depletion of the ozone layer has serious implications for human health, the maintenance of ecosystems and global warming (the "greenhouse effect").

International initiatives

The gravity of the problem has prompted the development of well-supported international initiatives which aim to minimise ozone depletion. The Vienna Convention for the Protection of the Ozone Layer (the "Convention") was concluded in March 1985. The Convention established the general principles that countries would take appropriate measures to protect the ozone layer and would co-operate in scientific studies and exchange relevant information.

The Montreal Protocol on Substances that Deplete the Ozone Layer (the "Montreal Protocol"), signed in September 1987, amplifies the Convention by placing specific controls on CFCs and halons. It requires a 50% reduction in the use of ozone depleting substances over 10 years.

Australia's response

Promulgation of the Act gives effect to Australia's obligations under the Montreal Protocol, which Australia signed in June 1988 and ratified in May of this year. The Montreal Protocol itself entered into force on 1 January 1989, while the Act commenced on 16 March 1989. Most Australian States already have in place legislation dealing with substances which deplete the ozone layer.

The Act is part of a legislative package comprising the following Commonwealth Acts and Regulations:

- Ozone Protection Act 1989
- Licence Fees (Imports)Act 1989
- Licence Fees (Manufacture) Act 1989
- Ozone Protection Act Regulations 1989

The Act has two main elements:

- It provides for a system of licences and tradeable quotas for the import and export of scheduled substances.
- It controls the use and manufacture of scheduled substances in order to limit the emissions of those substances into the air.

Applicability of the Act

Scheduled substances are listed in Schedule 1 of the Act and are listed in two parts, one dealing with CFCs and the other with halons. In order to ascertain whether or not the manufacture, export or import of a certain product is prohibited or regulated under the Act, Section 9 and Schedule 4 must be read together.

Section 9 states that a reference to a scheduled substance does not include a reference to a manufactured product that contains, and will use in its operation, a scheduled substance or, consists in part of a scheduled substance only because the substance was used in the manufacturing process. However, unless an exemption is obtained, the manufacture, import or export of products listed in Schedule 4 is prohibited after specified dates, all of which have now passed except in relation to extruded polystyrene packaging and insulation and aerosol products (31 December 1989).

Now prohibited products include:

- drycleaning machinery
- automotive air conditioning maintenance kits
- disposable containers of refrigerants

Exemptions may be granted if the Minister is satisfied either that:

- the product is essential for medical, veterinary, defence, industrial safety or public safety purposes, and no practical alternative to the scheduled substance exists; or
- the product is for use in conjunction with the calibration of scientific, measuring or safety equipment.

Licences (Part III of the Act)

As from 1 July 1989, a person cannot manufacture, import or export a scheduled substance without a licence. The penalty for non-compliance is $50,000 for a natural person or $250,000 for a body corporate. A licence will be granted by the Minister to a fit and proper person, who, immediately before the Act commenced, conducted an enterprise in the course of which scheduled substances were being manufactured, imported or exported, and who applied for a licence within 3 months after the date of commencement of the Act.

Licences have a term of ten years and may be renewed

provided certain procedures are followed. They may also be cancelled if, in the opinion of the Minister, the holder ceases to be a fit and proper person to hold a licence.

Quotas (Part IV of the Act)

A quota on the licensed manufacture, import and export of scheduled substances is calculated in accordance with provisions detailed in the Act. Separate quotas exist in respect of CFCs and halons. The first CFC quota period commenced on 1 July 1989 and the first halon quota period commences on 1 January 1992.

The size of the CFC manufacture or import quota is ascertained by adding together as many of the following components as are applicable in relation to the activity:

- any defence purposes component;
- the total quantity of CFCs manufactured or imported during 1986 (the "1986 component"), and
- the discretionary component

The size of quotas in respect of the export of CFCs is calculated by adding together the 1986 component and the discretionary component. Quota periods have a duration of twelve months unless they are extended by the Minister. The Minister may reduce the quota if maintaining previous quota components could result in Australia's contravening its international obligations in relation to the manufacture, importation or consumption of scheduled substances.

Reports and records

An obligation is placed on persons who manufactured or imported any scheduled substance in 1986 to provide the Minister with a written report detailing their activities and the quantity of scheduled substances manufactured or imported during 1986. Manufacturers, importers and exporters of scheduled substances are also required to provide a quarterly report to the Minister. Records outlining transactions on a monthly basis are also required to be kept.

Control of imports and exports

After 1 January 1990 the importation of a scheduled substance from a non-Protocol country is prohibited. Similarly, export of a scheduled substance to a non-Protocol country will be illegal after 1 January 1993.

Further review

The Protocol is due to undergo its first periodic review in 1990. As further scientific and technical knowledge comes to hand, tighter controls may well be called for. The Australian legislation is therefore likely to be modified to maintain its compliance with the Protocol.

A NEW MEANING FOR "THE ENVIRONMENT"

- Karen Trainor, Associate and Stephen Nall, Solicitor, Henderson Trout, Solicitors.

A recent Supreme Court decision has narrowed the meaning of "the environment".

In the recent decision of *D R Murphy & Cove House Australia Pty Ltd v The Crown*, unreported, Misc No 335 of 1986, Full Court of the Supreme Court of Queensland, 11 August, 1989, considered the obligation of a local authority to decide whether a proposed development would have any deleterious effect on the environment. In particular, the Court discussed the meaning of "*the environment*".

The case arose out of the National Parks and Wildlife Service decision to resume land at Mon Repos for the protection and preservation of a turtle rookery. The proprietor had sought to develop the land for residential purposes prior to the resumption and was seeking compensation which took into consideration the land's value as a potential residential sub-division.

In determining the amount of compensation, the Court rejected argument that the land could not properly be considered as potential residential land because any such rezoning would not have been approved as it would have a deleterious effect on the environment (i.e. the turtle rookery).

In the Court's view, the well being of a particular species was not a proper matter for a local authority to consider when deciding under the Local Government Act whether or not the proposal would be deleterious to the environment. The majority of the Court went on to say that the appellants in the case were entitled to have an application for rezoning to allow residential subdivision decided without regard to the possible impact of the proposed subdivision upon the turtle population.

This decision has far-reaching consequences for town planning approvals, particularly given the growing focus on environmental impact.

It is understood that the Crown now intends to appeal to the High Court in this matter and its decision will be awaited with interest.

If the Court's views are followed, then a council when determining a rezoning or development approval cannot refuse a proposal as having a deleterious effect on the environment on the ground that the proposal may impact on the well-being of a particular species of flora or fauna. Further, an environmental impact statement required by council under Section 32A of the Local Government Act need not address the impact on flora or fauna.

- Reprinted with the permission of Henderson Trout, Solicitors, from HT Update.