XIII - INTERNATIONAL ENVIRONMENTAL LAW

Protection of the marine environment - pollution by ships - dumping of wastes at sea - land-based pollution - international conventions - constitutional arrangements

On 1 March 1989 the Minister for Land Transport and Shipping Support, Mr Robert Brown, explained the purpose of part of a Bill that proposed to amend the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (HR Deb 1989, Vol 165, pp 191-2), as follows:

> This Act gives effect to the International Convention for the Protection of Pollution from Ships 1973-78. Annexes III and V of the Convention relating to pollution by harmful packaged substances and by garbage will come into operation shortly. The Bill will extend the parts of the Act relating to annexes III and V to ships normally under State/Northern Territory jurisdiction, until the States and Northern Territory have parallel legislation in place. The amendments are necessary for Australia to meet its international Convention obligations and have been agreed by the State/Northern Territory marine Ministers.

On 5 May 1989 the Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator Richardson, said in part in answer to a question (Sen Deb 1989, Vol 133, pp 1912-3):

> At the time of the offshore constitutional settlement of 1979, agreement was reached in relation to ship based pollution, whereby the existing arrangements would continue so that Commonwealth legislation would apply to ships outside the territorial sea and State legislation would apply to all ships within the territorial sea.
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> The offshore constitutional settlement also included agreement that the Commonwealth should prepare legislation which would implement the provisions of the International Convention in Relation to Intervention on the High Seas in Cases of Oil Pollution Casualties and the International Convention on Civil Liability for Oil Pollution Damage. In implementing the latter Convention, a saving clause was to be inserted to allow the States to legislate to implement certain aspects of the Convention if they wished to do so. With regard to land based marine pollution and marine pollution through dumping, discussions between the Commonwealth and the States were to continue.
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> With regard to the second and third parts of Senator Coulter's question, specifically relating to ship based marine pollution, as a result of further consultation between the Commonwealth and the States, Commonwealth legislation now applies in the territorial sea but there is a roll-back clause which allows the States to legislate consistent with the relevant international Conventions. Subsequent to the offshore constitutional settlement, the Environment Protection (Sea Dumping) Act 1981 was enacted to protect the environment by regulating the dumping into the sea and the incineration at sea of wastes and other matter and the dumping into the sea of certain other objects and, as the legislation says, for related purposes.

The Act includes provisions that where the Minister is satisfied that State or Territory law will on and after a particular date make provision for giving effect to the Convention on the Protection of Marine Pollution by Dumping of Wastes and Other Matter – that is, the London Dumping Convention – the Minister may disapply the said Act in favour of corresponding State or Territory legislation. Tasmania, South Australia, Queensland and Western Australia have passed legislation. Tasmania has signed a memorandum of understanding with the Commonwealth and the ministerial disapplication – I do not like that word much, nevertheless it is the one I am supposed to use – of the Environment Protection (Sea Dumping) Act 1981 with respect to the coastal waters of Tasmania is in effect.

With regard to land-based marine pollution, a variety of State legislation is in effect but unfortunately no consistent regime yet exists. I am writing to my State ministerial colleagues on the Australian Environment Council to put to them that we ought to do more towards a national approach to water quality issues. ...

Senator Richardson was asked some supplementary questions:

Do I correctly understand the Minister to be saying that the term 'dumping at sea' refers not just to dumping from ships, as specified under the London Dumping Convention, but extends to the dumping at sea from land-based facilities? If so, does it apply, for instance, to the New South Wales situation with the dumping of large amounts of sewage at sea? Is that one of the situations to which he was referring in the latter part of his remarks?

The Minister answered:

I was referring to the question of sewage in Sydney and having an appropriate yardstick against which to measure that. Unfortunately, under the London Dumping Convention the Commonwealth has not been given power in respect of marine based pollution of the kind to which the honourable senator refers.

Protection of the marine environment – Torres Strait – cooperation with Papua New Guinea

On 28 February 1989 the Minister for the Arts, Sport, the Environment, Tourism and Territories, Senator Richardson, provided the following written answer in part to a question on notice (HR Deb 1989, Vol 165, p 129):

No formal channels of consultation between Australian authorities and the Papua New Guinea Department of Environment and Conservation concerning environmental protection of Torres Strait have yet been established. The Torres Strait Joint Advisory Council meeting in August 1988 noted that a liaison gap existed in relation to the environmental provisions of the Treaty and recommended that a consultative group be established between Papua New Guinea and Australia to receive and disseminate technical information and to discuss policy issues relating to the environmental protection requirements of the Treaty. Officials of both countries are working together to establish formal channels of consultation for environmental protection under the Treaty.

Protection of the marine environment – Ashmore Reef National Nature Reserve.

For material on action taken by Australia during 1988–89 to protect and preserve the marine environmet of the Ashmore Islands, see above under Part VI Law of the Sea.

Transboundary movement of hazardous waste – Basel Convention – implementing legislation

On 6 September 1989 the Minister for Arts, Tourism and Territories, Mr Holding, introduced the Hazardous Waste (Regulation of Exports and Imports) Bill 1989 into Parliament (HR Deb 1989, Vol 168, pp 1060–3), and explained the purpose of the Bill in part as follows:

> The purpose of this Bill is to control the export and import of hazardous wastes in order to protect human health and the environment. The Act will enable Australia to take part in international measures to control the movement of hazardous wastes which also have this objective. ...
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> The international body which acted first in this area was the Organisation for Economic Cooperation and Development (OECD). In 1984 it began developing international agreements to control hazardous wastes when moved, to ensure their satisfactory disposal. However, it became clear that a global agreement was necessary, and in 1987 the initiative was taken by the United Nations Environment Program (UNEP). In the light of these developments, the Government decided in March 1988 to control this trade in order, amongst other things, to take part in international control arrangements.
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> On 22 March 1989, at a UNEP conference held in Switzerland, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was unanimously adopted by all governments represented. Australia was active in drawing up the Convention. Australia can become a party to the Convention once this legislation has been put into effect. Before becoming a party the Commonwealth will consult with the States and Territories. Fundamental features of the Basel Convention include: the requirement that parties shall prohibit the export of hazardous wastes from their jurisdictions to States that do not consent to the import; the requirement that countries treating and disposing of wastes do so in an environmentally sound manner; and the tracking of wastes to acceptable disposal, when moved across borders.
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> In essence the Bill before us provides for the issuing of permits to control both the import and export of hazardous wastes to ensure that they are disposed of by an environmentally acceptable method. The legislation has been designed to control the movements of wastes as required by the Convention. However, several of the obligations in the Convention, such as the requirement to minimise waste production and the provision of acceptable disposal facilities, fall within the responsibilities of State and Territory Governments. Therefore the controls introduced by this Bill will be complemented by State and Territory waste management legislation.

At present, a few hundred tonnes of hazardous waste are exported from Australia each year. These wastes fall into the category of intractable wastes for which the only widely acknowledged environmentally acceptable method for disposal is high temperature incineration. The majority of those wastes that have been exported have been sent to Pontypool in the United Kingdom for destruction in a high temperature incinerator. As far as is known no hazardous wastes have been imported into Australia.

As I mentioned, hazardous wastes are generally defined as those wastes that cannot be disposed of in the usual way such as to municipal landfill or the sewer. They present a potential threat to the environment or human health and therefore require special treatment. However, in addition to what are usually considered to be hazardous wastes, the Basel Convention also controls the movement and disposal of wastes collected from households and residues arising from the incineration of household wastes. Accordingly, the definition of hazardous wastes in the Bill has been expanded to include these categories of wastes.

The Bill provides that the Minister must issue a permit for the export of wastes only if he or she is satisfied, amongst other things, that the hazardous waste will be permitted to enter the proposed country of import and that any exported waste will be disposed of in the receiving country in a manner that will not be harmful to the environment. It will be necessary for the applicant for either an import or export permit to demonstrate that he or she has adequate insurance or is able to meet any liability arising in relation to the activity proposed.

Other matters that the Minister may take into account when considering an export application are whether there are facilities for disposal of wastes in Australia which could be used for the disposal of the exports. This ground could be used to make more viable Australian treatment facilities. It is also consistent with the Basel Convention, which seeks to minimise movements whenever possible. The Minister may also take into account Australia's international relations, when considering issuing permits. ...

Under the Bill, the Minister may make orders to deal with the wastes and recover costs if the orders are not complied with. This power will include the power to order wastes illegally imported to Australia to be returned to the country of origin. This is consistent with the Basel Convention. Principal offences under the Bill will be punishable by up to five years imprisonment. Enforcement of the Act will be by inspectors with appropriate powers. ...

Australia has as its near neighbours many small nations, such as the Pacific countries, which may well have relatively small quantities of hazardous wastes which they wish to dispose of safely. Australia has a responsibility to assist these countries to dispose of their wastes in an environmentally acceptable manner. It is inconceivable that these nations could justify the building of a high temperature incinerator given the small amount of wastes that would need to be incinerated. Accordingly, if the wastes are to be disposed of safely in our region it may be necessary to import those wastes into Australia for incinera-

tion. Through the adoption of the measures contained in the Bill, Australia will be in a position to control the movement of hazardous wastes into and out of Australia and to require that these wastes are only treated and disposed of using methods of the highest standard. In this way we can demonstrate to the rest of the world our commitment to the protection of the global environment.

Protection of migratory birds and endangered species – international agreements – implementation

On 4 April 1989 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (Sen Deb 1989, Vol 132, p 898):

Australian obligations under the Treaties with Japan and China for the protection of migratory birds and their environments are implemented through legislation and administrative arrangements already in force in the States and the Northern Territory, with coordination being effected through the Council of Nature Conservation Ministers (CONCOM). The CONCOM Working Group on International Agreements Relating to Migratory and Wetlands Birds advises the CONCOM Standing Committee on implementation of the Treaties. The Australian National Parks and Wildlife Service provides the convener of the CONCOM Working Group and has an overall coordinating role in the implementation of the Treaties. New South Wales is represented on the Working Group by the NSW National Parks and Wildlife Service. ...

While my Department, when asked, provides advice on the interpretation of these and other treaties, it is inappropriate for my Department to be involved in issues relating to particular wetland areas before such assessments have been made and before the matter has been considered through agreed procedures.

Protection of the ozone layer – Vienna Convention and Montreal Protocol – implementing legislation

On 10 November 1988 the Minister for the Arts and Territories, Mr Holding, introduced the Ozone Protection Bill 1988 into Parliament (HR Deb 1988, Vol 163, pp 2841–3), and explained the purpose of the Bill in part as follows:

The purpose of this Bill is to give effect to the provisions of the Montreal Protocol on Substances that Deplete the Ozone Layer: Australia can then ratify the Protocol. Also, the legislation will put in place measures whereby the emissions to air of substances that deplete the shield of ozone gas in the upper atmosphere will be substantially reduced beyond the minimum requirements of the Protocol, thereby safeguarding to the maximum practicable extent human health and the environment.

Protection of the ozone layer is one of the Government's highest environmental priorities. While the Montreal Protocol requires a 50 percent reduction in the use of ozone depleting substances over 10 years, the proposals contained in the Bill should enable Australia to achieve those reductions in half that time.

...

Protection of the ozone layer is an environmental issue of world importance which requires urgent action. The implications for Australia arising from

ozone depletion are especially important in terms of a possible increase in the already high incidence of skin cancers, possible damage to primary industries, and our interest in preservation of the Antarctic environment.

In 1987 Australia became a party to the Vienna Convention for the Protection of the Ozone Layer. In June 1988 Australia signed the Montreal Protocol on Substances that Deplete the Ozone Layer. The Protocol which is due to take effect from 1 January 1989 establishes a requirement to limit the domestic supply of the specified CFCs according to a tightening program which will freeze supply at the 1986 level, with effect from mid-1989; reduce supply by 20 percent from 1993; and reduce supply by a further 30 percent from 1998. The Protocol also requires that the supply of halon gases be frozen at the 1986 level, with effect from 1990. The commencement date for the first control action for both the CFCs and halons will be delayed if the Protocol does not enter into force on 1 January 1989. ...

The Bill provides for a system of licences and tradeable quotas for the production, import and export of scheduled substances, and controls on the applications of scheduled substances so as to limit, so far as is practicable, the emissions of these substances to the air. The licence and quota provisions relate to Australia's obligations under the Protocol. Licences will be granted to persons who produced, imported or exported scheduled substances during the year 1986. Quota will be granted to the same persons according to their market share in 1986. Once they have their quota, they will be free to buy and sell their share of quota on the open market. Total quota on issue will be adjusted according to the provisions of the Protocol. ...

The Protocol generally has no controls on exports and in fact allows production to be increased by up to 15 percent under certain circumstances. However, the Government proposes that exports first be frozen and then gradually reduced by 5 percent a year. If this was not done, industry could simply convert Production for domestic consumption into exports.

Protection of Antarctica – Antarctic Minerals Convention – proposals for a World Park and a Wilderness Reserve – possibility of United Nations mandate to administer Antarctica – comprehensive Convention for the protection of the Antarctic environment

On 2 June 1988 the Acting Minister for Foreign Affairs and Trade, Mr Duffy, issued a news release which read in part:

The Acting Minister for Foreign Affairs and Trade, Michael Duffy, and the Minister for the Arts, Sport, the Environment, Tourism and Territories (ASETT), Senator Graham Richardson, today welcomed the successful conclusion of negotiations for a Convention to regulate any future minerals activity in the Antarctic.

Representatives of the twenty Antarctic Treaty Consultative Parties (ATCPs) and a number of Non-Consultative Parties signed the Final Act of the Convention this afternoon in Wellington, New Zealand.

Negotiations for the Convention, which will fall within the framework of the Antarctic Treaty system, have been in progress since 1982. The Australian delegation included officials from Foreign Affairs and Trade, ASETT, Primary Industries and Energy, Treasury, the Attorney-General's Department and the Tasmanian Government (representing the Australian States), as well as representatives of non-government environmental organisations and the mining industry.

Mr Duffy said that Australia had placed a high priority on the early conclusion of such a Convention because of the need to have an effective international system of control in place well in advance of any minerals activity in Antarctica. Until the Convention came into force, the present moratorium on minerals activity would continue.

He said that Australia's claim to Antarctic territory was reflected in the role Australia would play in decisions under the Convention, particularly those concerning the Australian Antarctic Territory (AAT).

On 21 December 1988 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (HR Deb 1988, Vol 164, pp 3919-20):

Australia has supported and participated in negotiations aimed at establishing an Antarctic Minerals Convention within the framework of the Antarctic Treaty system. The aim of the negotiations was not to encourage minerals activity in Antarctica, but to ensure that, if exploitation of Antarctic minerals should ever be feasible, effective mechanisms would be in place to protect the environment and to prevent disputes and political discord. The negotiations took place on the basis that Antarctica would remain closed to minerals exploitation unless a specific decision were taken to open it.

The Government has not yet made a decision on signing the Convention that has emerged from these negotiations. There are different views within the Australian community on its merits and demerits. With that in mind, the text of the Convention was tabled on 22 November to facilitate public discussion before a Government decision on signature is made.

Consideration of the feasibility of the World Park concept should not be inhibited by the recent conclusion of a Minerals Convention, which has as a major objective the preservation of the Antarctic environment. ...

We see no need for or benefit in any UN mandate to administer Antarctica. The Antarctic Treaty system, which is based on the principles of the United Nations charter, has for thirty years provided an outstanding example of international cooperation in environmental protection and scientific research as well as ensuring that the continent has remained free of military weapons, nuclear explosions, and political contention. Governments representing more than three-quarters of the world's population are now parties to the Treaty. Accession is open to all countries prepared to accept the obligations of the Treaty. Moreover, the Treaty system has shown itself capable of evolving and adapting to meet changing circumstances.

On 22 May 1989 the Government decided not to sign or ratify the Antarctic Minerals Convention but to seek instead a ban on mining in Antarctica and the negotiation, within the framework of the Antarctic Treaty system, of a comprehensive Convention for the protection of the Antarctic environment. On 28 September 1989 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in part in answer to a question without notice (Sen Deb 1989, Vol 136, p 1482):

> On 18 August the Australian and French Prime Minister here in Canberra announced that Australia and France would propose jointly that the Treaty parties negotiate a comprehensive environmental protection Convention to turn the Antarctic into a wilderness reserve. Since that joint statement a number of approaches have been jointly made at official levels within the various countries that are being targeted in this initiative seeking support for that approach. Now the joint initiative will be considered at the next meeting of Antarctic Treaty Consultative parties in Paris, which is to take place in October, just next month. At that meeting we will seek support for a special consultative meeting next year committed to develop urgently a comprehensive environmental protection regime.

Environmental damage – claims for compensation – visits to Australia by nuclear powered or armed vessels – possible legal avenues

On 16 August 1989 the report of the Senate Standing Committee on Foreign Affairs, Defence and Trade on *Visits to Australia by nuclear powered or armed vessels: Contingency planning for the accidental release of ionizing radiation* was presented to Parliament (Parliamentary Paper No 399/1989). Following is an extract from a background note on compensation issues, prepared by the Committee Secretariat, which appeared as Appendix 4 to the Report (at pp 501 to 518):

Introduction

A4.1 This note addresses legal issues relating to compensation for injury and loss caused by a reactor or nuclear weapon accident on a visiting warship. The threshold issue is determining the most suitable avenue for bringing compensation claims. Within whatever avenue is chosen issues arise with respect to: proving causation; the standard of liability to be applied; and possible time limits for the bringing of claims. Only with respect to the standard of liability is there a formal difference between weapon and reactor accidents with respect to the issues discussed in this note. ...

Avenues for Claiming Compensation

Official Statements

A4.5 In March 1986, the Government repeated its earlier statement relating to weapon accident compensation claims:

> Any claims for compensation resulting from a nuclear weapons accident would be dealt with through diplomatic channels in accordance with customary procedures for settlement of claims under generally accepted principles of law and equity. In the case of the United States, settlement of claims would take place in accordance with Article 12 of the Agreement

between Australia and the US concerning the Status of US Forces in Australia.

A4.6 A year later the Government modified the last sentence of this statement, saying instead that the 1963 SOFA 'contains provisions regarding claims arising from the activities of United States forces in Australia'. Australia has no SOFA with the United Kingdom or with France.

A4.7 For reactor accident compensation claims relating to their respective warships, the United States and United Kingdom "Standard Statements" both state that claims 'will be dealt with through diplomatic channels in accordance with customary procedures for the settlement of international claims under generally accepted principles of law and equity'.

Government to Government Claims

A4.8 It is helpful to distinguish between the avenues open to an aggrieved individual to seek compensation and those open to the Australian Government to seek damages from the foreign country to which the warship belonged. The latter category of compensation might include any sums that the Australian Government had spent in compensation to individuals.

A4.9 The Committee might choose not to address the issue of inter-government compensation, regarding it as beyond the scope of its inquiry. It should be noted that warship visits are seen as beneficial to both the sending and receiving countries by the governments concerned. It is not inconsistent with this premise that both governments share the burden of providing compensation for accidents relating to the visits.

A4.10 The Victorian Government submission raises the issue of the present lack of contingency arrangements under which the Commonwealth would indemnify a State in respect of costs incurred by the State arising from a nuclear accident involving a visiting warship. The Committee might also choose not to consider this issue. Investigation and resolution of compensation issues arising between the States and the Commonwealth would involve broad questions of policy going well beyond the Committee's terms of reference.

Individual Claims

A4.11 Individual compensation claims can be brought in a number of ways, either through the courts or administratively. ...

A4.18 A third avenue for those seeking compensation would be to ask the Australian Government to take up their claims with the foreign country. The Australian Government would negotiate through diplomatic channels for settlement. There is at least one precedent for settling radiation damage claims in this way. The Australia-United States SOFA would provide a framework. In any large-scale accident it is likely that a special claims settlement procedure would be agreed, possibly with an ad hoc tribunal to resolve contested issues. ...

Conclusions

A4.23 There are good grounds on which the Committee could conclude that following any major accident a special claims settlement procedure would be established to meet the specific needs of the claimants. Further, it would not appear to be useful to attempt to establish this procedure in advance. Such a procedure would probably be out of date if the need to use it ever arose. It might also not be optimum for the features of the particular accident.

A4.24 If the belief is incorrect that a specific procedure could be instituted following a major accident, it is nonetheless properly arguable that existing avenues give plaintiffs adequate opportunity to pursue their claims.

Standard of Liability

... A4.36 For claims taken up through the diplomatic channel, it would be open to Australia to agree with the other country to apply a strict liability (or some other) standard. In the absence of agreement the standard imposed by public international law is likely to be one of strict liability, again assuming that the issue of whether negligence led to the accident is in issue.

A4.37 It should be noted that any agreement between the nuclear weapons country and Australia that the standard should be one of strict liability would not be effective of itself to make the standard applicable in an action brought under Australian law. It might well be, however, that that country would feel morally or politically obliged not to plead its case in such a way as to require the plaintiff to prove more than would be called for under the strict liability standard. That standard would apply where the claim was brought subject to the agreement through the diplomatic channel. It would also apply as part of the law of the foreign country if made part of that law, as has been done in the United States in respect of warship reactor accidents.