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LAWYERS

RENEGOTIATING THE KYOTO TREATY



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The Prime Minister and senior ministers have spoken frequently of their wish to renegotiate the 1997 Kyoto Protocol which 'blossomed' into an international treaty in 2005 when ratification by Russia ensured that a sufficient acceptance of the document had occurred to meet its legal requirements. Of the nations who were entitled to ratify the treaty, the United States and Australia are the only significant nations which refused to do so.

Australia in fact signed the treaty in 1997 when it was the Kyoto Protocol. The then Minister for the Environment Robert Hill was most enthusiastic about it on his return from the Kyoto conference. He said it was a "win win win for Australia". But signing of the Protocol, which Australia had a major share in promoting, and ratifying it into Australian law are two different things. Shortly after the newly elected President George W Bush made it clear the United States would not be ratifying, the Australian Prime Minister Mr Howard made similar statements citing the fact that the protocol was, "not in Australia's interests", as his reason.

Australia, of course, does not have to ratify the treaty in order to comply with it. There are examples in international law of nations, including the US, that have refused to ratify an international treaty but nevertheless, on a de facto basis, have accorded with its provisions just as if ratification had occurred. In respect of Kyoto, Australia says it is attempting to comply with its target of "reducing" its carbon gas emissions to 108% of what they were in 1990. This can be taken as a de facto acceptance of the treaty, at least for the time being. By refusing to ratify Kyoto, Australia leaves it open to criticize the treaty which the Prime Minister and senior ministers regularly refer to as "flawed". Australia suffers no penalty from its stance other than that its participation in the decision

making processes under the treaty are largely reduced to a non-voting 'observer' level.

Australia was one of the nations generally regarded as having come away from Kyoto with a really good deal. This was because of the insertion in the treaty of the so called 'Australian clause' dealing with land use change (forest clearing) and also because of the generous target of 108% referred to above. These concessions alone have enabled Australia to come anywhere near its target as we approach 1 January 2008 which is the commencement date for the commitment period by which targets must be achieved. Without their application Australia's rapidly increasing consumption of fossil fuel energy and equally increasing emission of carbon gases would be far more apparent.

As it is, the Minister for the Environment is able to boast that the country is 'on target' to meet its commitment without having to refer to the fact that we are nowhere near curbing our output of greenhouse emissions nor likely to become so for many Kyoto commitment periods yet to come. Put bluntly, based on present policies, and depending on the rate at which targets are reduced, Australia has no hope of meeting its de facto Kyoto commitments until about the middle of the century, at the very earliest. In international terms that means Australia is risking retaliation by those nations that are complying with their Kyoto obligations. After all one can hardly expect a nation to require its manufacturers to comply with emission reduction requirements that cause their products to become more costly and at the same time allow the import of cheaper Australian goods to which no such requirements apply. The likelihood of countervailing tariffs being applied has recently been called for by the French and Australia must expect their introduction in the foreseeable future unless it changes its current policies.

Currently Australia is pressing to renegotiate Kyoto because it will soon be in de facto breach of the treaty's target obligations and exposed to new tariff barriers unless the treaty is altered substantially. Initially the government appeared to be demanding a change from those treaty terms that require the provision of mandatory targets (such as the 108%

referred to in Australia's case) and the substitution of 'voluntary' targets. The mandatory targets were set in 1997, by agreement, to apply to all participating industrialised nations and are intended during the first commitment period (2008 – 2012), to be re-set, by agreement, at lower levels for the second commitment period (2013 – 2017). Such a change would benefit Australia considerably by preventing other nations from 'punishing' it because of its mandatory target breaches. So far, the Minister does not appear to have been able to achieve support from any other industrialised nation – except the US.

Australia also objects to the fact that the developing nations such as China, India, Brazil and Indonesia are not required to submit to mandatory targets at all for the first commitment period although developing nations are expected to take measures to reduce carbon gas emissions, as China has by agreeing to increasingly use natural gas in place of coal. The clear understanding beyond that point is that the developing nations will submit to targets for the second commitment period.

The temporary exclusion of the developing nations from the application of mandatory targets was part of the trade-offs agreed at Kyoto in 1997. The delegates accepted that the developed nations were historically and by far, the most significant contributors to global warming and financially able to take the lead. It was also clearly unreasonable to ask developing nations, only then moving significantly into the industrial age, to bear the brunt of the initial onslaught on reducing carbon gases.

Subsequently, the industrialisation of these nations, particularly China, has progressed very rapidly and Australia, which has been tardy in getting its own house in order, is fearful that more of its industries will feel it advantageous to manufacture offshore (in China?) if, by so doing, they escape the cost of a greenhouse emissions market or a greenhouse tax. In retrospect, things would have been far easier and the likelihood of industries 'jumping ship' substantially reduced, had Australia commenced a glidepath approach to greenhouse emissions trading just as the European Union did at the commencement of 2005.

The Prime Minister and his ministers have recently made far less of their previous suggestion that the Kyoto Treaty should be torn up and an acceptable replacement negotiated without mandatory targets. This is because the practicalities of the situation are clearly engulfing that suggestion to the extent it is likely to sink out of sight very soon. Mandatory targets are perfectly acceptable to all the industrialised nations except two - the US and Australia. Global warming is now seen as a reality already upon us and worsening daily at a rate far in excess of the general run of previous predictions.

The time for remedial action in consequence, is clearly running out. The fact that Kyoto itself took about 7 years to negotiate and another 8 years to ratify certainly deters other nations from travelling the same path again without any certainty that at the end any agreement can be reached. As has been frequently said, Kyoto's proponents find very little wrong with it and, in the case of the Europeans, have been successfully operating an emissions trading market for almost two years, so why would they want to change now? Taking all this into consideration therefore it appears clear that the chances of a renegotiated treaty are negligible. This, of course, does not rule out structural amendments from time to time.

So Australia is currently left with only one objection that is capable of being realistically pursued, namely that of whether developing nations should, at this early stage, be tied to mandatory targets. Here, although the problem to Australia of "greenhouse leakage" (ie manufacturing moving offshore to countries without mandatory target obligations) is real enough, it appears that in the short term (ie before about 2017) little can be done about it. The developing nations will certainly accept Kyoto targets soon enough. They have accepted the role of manufactures for the world; it is their pathway out of poverty. Consequently they have no option but to comply with whatever restrictions on carbon gas emissions their "customers" insist upon, after all, the customer is always right. But to allocate targets for these nations from 2008 to 2012 at this late stage would be unrealistic and even if targets could be applied from 2013 to 2017, they would need to be 'generous'.

The conclusions then are firstly that the Australian Government should not allow itself to drift into an impossible position by maintaining a ridged insistence on developing nations being allocated significant targets too early. Secondly it must now be clear that Australia's arguments would be far more acceptable to other nations if it simultaneously agreed to ease its way into greenhouse emissions trading now so as, at least, to demonstrate its good faith.

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