

THE KYOTO PROTOCOL: AUSTRALIA'S COMMITMENT AND COMPLIANCE

LAURA HORN*

I INTRODUCTION

Australia has played an active role in international efforts to address the problems of climate change. In 1992 Australia became a party to the *United Nations Framework Convention on Climate Change* ('UNFCCC')¹ and undertook a number of commitments in accordance with its provisions. These include the responsibility to formulate and publish national programs with measures to mitigate and facilitate adaptation to climate change, and to cooperate with other Parties in practices that reduce greenhouse gas emissions.² Like other developed countries, Australia has additional responsibilities under the *UNFCCC* to limit greenhouse gas emissions and to protect greenhouse gas sinks and reservoirs.³ The Parties are also required to report the progress and implementation of policies and measures to the Secretariat of the *UNFCCC*, and to provide an inventory of greenhouse gas emissions. Australia has submitted two such national communications to date: the first in 1994, and the second in 1997.

Australia also signed the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('Kyoto Protocol')⁴ in 1998. The *Kyoto Protocol* is due to enter into force 90 days after it is ratified by 55 Parties, including at least sufficient Annex I Parties to the *UNFCCC* such that their emissions accounted for 55 per cent of global carbon dioxide emissions for 1990.⁵ However, the Commonwealth Government has recently indicated that it may not ratify the *Kyoto Protocol* unless the United States ('US') is involved.⁶ In fact, because the US emits approximately 22 per cent of the world's greenhouse

* BA LLB LLM (Hons) PhD (Syd); Part time Lecturer, University of Western Sydney, Australia.

1 Opened for signature 4 June 1992, 31 ILM 849 (entered into force 21 March 1994).

2 See *UNFCCC* art 4(1)(b), (c).

3 *UNFCCC* art 4(2)(a).

4 Opened for signature 16 March 1998, 37 ILM 22.

5 *Kyoto Protocol* art 25.

6 Gay Alcorn, 'President happy he has a friend in Canberra', *Sydney Morning Herald* (Sydney) 27 April 2001, 10.

gases, the decision of the Bush Administration not to ratify the *Kyoto Protocol* seriously jeopardises its entry into force.

II DOMESTIC MEASURES

The Commonwealth Government has adopted a cooperative approach in order to meet Australia's responsibilities under the *UNFCCC*. In 1992 the *National Greenhouse Response Strategy* ('*NGRS*') was established by the Commonwealth, State and Territory Governments in conjunction with the Australian Local Government Association. This strategy outlined plans to reduce greenhouse gas emissions and promoted research, education and community participation.

In 1997, the Commonwealth Government introduced the Prime Minister's package, which is a five year package of measures aimed at establishing a long-term climate change vision for Australia. The measures were incorporated into the *National Greenhouse Strategy* ('*NGS*'), which superseded the *NGRS*. Presently, the *NGS* is the main means of achieving Australia's international commitments.⁷ It was developed through a cooperative process involving the Commonwealth, State and Territory Governments and local governments. The strategy focuses on action to limit Australia's greenhouse gas emissions in accordance with the requirements of the *Kyoto Protocol*. The *NGS* is aimed not only at cooperation between governments but also at engendering support for the reduction of greenhouse gas emissions within industry and the broader community. Key measures have been developed under the *NGS* to encourage efficient and sustainable energy use and efficient transport, to foster greenhouse gas sinks and sustainable land management, to promote greenhouse gas emission best practice in industrial processes and to plan for adaptation to climate change.⁸

The cooperative agreement has advantages for the Commonwealth Parliament, given its limited constitutional powers in many of the areas that require regulation for the implementation of climate change policy, such as energy and land clearing. The *NGS* proposes principles, guidelines, goals and measures in these areas. However, this agreement does not create legally binding obligations. The management of the *NGS* is carried out by a high level group of senior officials from the Commonwealth, States and Territories, which is responsible to the Council of Australian Governments. There are no guarantees that the *NGS* will be effectively implemented by the States and presumably only political pressure can be used to influence the State Governments to take steps required by the *NGS*.

As an alternative to this cooperative approach, it would be possible for the Commonwealth Parliament to introduce legislation in order to implement the

7 Australian Greenhouse Office, *The National Greenhouse Strategy* (1998), <<http://www.greenhouse.gov.au/pubs/ngs/ngs.pdf>> at 20 April 2001, iii.

8 *Ibid.*

obligations under both the *UNFCCC* and the *Kyoto Protocol* (once it has been ratified). The High Court in *Commonwealth v Tasmania*⁹ and *Richardson v Forestry Commission*¹⁰ adopted a broad approach to the interpretation of the external affairs power under the *Australian Constitution* s 51 (xxix), and held that the Commonwealth Parliament could legislate to implement any international obligation which had been assumed bona fide under an international treaty, provided that the legislation conforms to the treaty.

III AFTER RATIFICATION

Australia's target after ratification of the *Kyoto Protocol* will be to limit its greenhouse gas emissions to eight per cent above its 1990 levels during the first commitment period (2008-12). However, even this target will be difficult for Australia to achieve. A 1999 report reviewing Australia's second national communication under the *UNFCCC* indicated uncertainty about Australia's ability to reach this target:

Including all emission sources and sinks (except land clearing), and without any measures in place, Australia's net emissions growth was projected to increase by 43 per cent over the 1990 level by 2010. With some measures already in place, total GHG emissions are projected to increase 28 per cent (equivalent to 110 000 Gg of CO₂) between 1990 and 2010. The 1997 package of greenhouse measures restricting emissions growth to 18 per cent over the same period (the latest projection) and to meet Australia's *Kyoto Protocol* target of limiting this growth to eight per cent relative to 1990 in the commitment period 2008-12, includes, among others, increasing Australia's sink capacity by trebling plantation forestry estate by 2020, expanding the Greenhouse Challenge Program with industry, to cover over 500 industries by 2000 and 1 000 by 2005, achieving greater fuel efficiency improvements in automobiles and implementing a policy mandating electricity suppliers to derive an additional two per cent of their supply from renewable sources. However the review team felt that there is still large uncertainty as to the future CO₂ emission reductions associated with energy supply reform ... Similarly, the team believes that measures outlined for GHG reduction in the transport sector may have to be strengthened to achieve expected emission reductions.¹¹

It is likely that Australia will rely upon the three mechanisms provided in the *Kyoto Protocol* to assist it in reaching its target emission levels. The first of these mechanisms is Joint Implementation. This mechanism allows developed countries which are Parties to the *UNFCCC*¹² to invest in projects with other developed countries and credit the emission reductions towards their emission reduction targets.¹³

The second mechanism is emissions trading, which creates a system of buying and selling emissions credits among developed country Parties. Quotas will need

9 (1983) 158 CLR 1.

10 (1988) 164 CLR 261.

11 UNFCCC Secretariat, *Australia: Report on the In-Depth Review of the Second National Communication of Australia*, 94, UN Doc FCCC/IDR.2/Aus (1999), (also at <<http://www.unfccc.de/resource/docs/idr/aus02.pdf>> at 30 April 2001).

12 These Parties are listed in Annex I of the UNFCCC.

13 *Kyoto Protocol* art 6.

to be set for each country participating in the trading as to the amount of greenhouse gases they can emit. If the country does not use its full quota, it can sell the remainder to another country involved in emissions trading, which can offset the purchased credits against its emissions. For example, if Australia were at risk of exceeding its emission quota under the *Kyoto Protocol*, it could purchase some or all of the quota from another developed country.

The final mechanism under the *Kyoto Protocol* is the Clean Development Mechanism ('CDM'). Under the CDM, developed country Parties take credit for 'certified emission reductions' which result from projects undertaken in developing countries.¹⁴ The requirements for eligibility are that there must be voluntary participation, real long-term benefits related to the mitigation of climate change and additional reductions of emissions to those that would otherwise have taken place.¹⁵ Developing countries may obtain benefits such as the transfer of technology and financial assistance, while the advantage of the CDM for developed nations is that projects to reduce greenhouse gas emissions may be cheaper to finance in developing countries.

The problem facing the Parties to the *Kyoto Protocol* is how to establish a system of enforceability in the international legal system, incorporating sufficient monitoring and supervision, to ensure that the developed countries are taking adequate action to reduce greenhouse gas emissions. It was anticipated that the final details about these mechanisms would have been clarified at the Sixth Conference of Parties to the *UNFCCC* ('COP 6'), held in The Hague from 13-25 November 2000. However, these negotiations failed and will be resumed from 16-27 July 2001 in Bonn, Germany. At COP 6 there was discussion about the consequences of non-compliance for Parties to the *Kyoto Protocol* who fail to meet their assigned targets. The negotiators indicated that penalty rates would be an essential element of the compliance system.¹⁶ The details are likely to be further clarified when COP 6 resumes in Bonn.

IV CONCLUSION

The 'quantified emission limitation and reduction' commitments in the *Kyoto Protocol* account for only about 5.2 per cent of reductions in collective emissions by the developed countries.¹⁷ The *Kyoto Protocol* targets fall well below the reductions that will be needed to achieve the objective stated in art 2

14 *Kyoto Protocol* art 12(3)(b).

15 *Kyoto Protocol* art 12(5)(a)-(c).

16 *UNFCCC Secretariat, Report of the Conference of the Parties on the first part of its sixth session, held at The Hague from 13 to 25 November 2000*, UN Doc FCCC/CP/2000/5/Add.2 (2001), (also at <<http://www.unfccc.de/resource/docs/cop6/05a02.htm>> at 3 June 2001).

17 See *Kyoto Protocol* art 3.

of the *UNFCCC*.¹⁸ Article 2 sets out the objective of the *UNFCCC*, which is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climatic system. Obviously if countries are concerned to ensure that the adverse effects of climate change do not occur, the first stage towards emission reductions should be implemented together with the readiness to commit to increased reductions in the future.

The Preamble to the *UNFCCC* acknowledges 'that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective international response'.¹⁹ There is evidence that most of the observed warming during the last 50 years is likely to have been due to increases in greenhouse gas emissions attributable to human activities.²⁰ Current predictions are that global average surface temperature could increase by 1.4-5.8 degrees Celsius from 1990 to 2100.²¹ Even though Australia produces approximately one per cent of global greenhouse gas emissions, it has a very high ratio of carbon dioxide emissions per head of population.²² Australia has a responsibility as a member of the international community and as a Party to the *UNFCCC* to continue to make efforts to reduce greenhouse gas emissions. Australia is not obliged to ratify the *Kyoto Protocol*. However, having undertaken the commitment to cooperate and be guided by the principles in the *UNFCCC*, including intragenerational and intergenerational equity, the precautionary principle and sustainable development,²³ Australia should endeavor to be in a position to ratify the *Kyoto Protocol* as soon as possible.

18 Intergovernmental Panel on Climate Change, *IPCC Second Assessment Synthesis of Scientific-Technical Information relevant to Interpreting Article 2 of the UN Framework Convention on Climate Change* (1995), (also at <<http://www.ipcc.ch/pub/sarsyn.htm>> at 30 April 2001) 13, which states: 'Carbon cycle models show that immediate stabilisation of the concentration of carbon dioxide at its present level could only be achieved through an immediate reduction in its emissions of 50-70 per cent and further reductions thereafter'.

19 *UNFCCC* Preamble para 6.

20 Working Group I, 'Climate Change 2001: The Scientific Basis – Summary for Policy Makers', Vol I in *Intergovernmental Panel on Climate Change, IPCC Third Assessment Report: Climate Change 2001* (2001) 10.

21 *Ibid* 13.

22 *Above n 7*, 1.

23 *UNFCCC* art 3.