

THE LAW SOCIETY OF NEW SOUTH WALES

POLICY POSITION

**THE KYOTO PROTOCOL ON UNITED NATIONS
FRAMEWORK CONVENTION ON CLIMATE CHANGE
(UNFCCC)**

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Submission in support of The Kyoto Protocol

Many environmental problems have a specific, visible relationship with the environmentally harmful activity that causes them.¹ It may be hard to get the relevant stakeholders to agree on a way to solve the problem, but at least it is possible to identify the source of the problem and the victims who suffer as a result of it.² Global climate change is different. When it comes to the so-called "greenhouse gases" there is no specific relationship between where emissions come from and where the harm is or will be felt. This is because emissions mix quickly throughout the earth's atmosphere, meaning that the actions of one country (whether they be positive or negative) will eventually result in a benefit or detriment, in terms of emission levels in the earth's atmosphere, to every other country.

Australia, as well as the Pacific Island countries (PICs) is particularly vulnerable to the predicted changes in climate over the next 50 years. Although nations cannot change naturally occurring causes of climate change, such as volcanic eruptions, they can reduce human induced causes, such as motor vehicle and industrial emissions.

During 2001 and 2002 Australia endured its most severe drought in recorded history. According to the Australian Greenhouse Office Australian average temperatures have risen by 0.7 C over the last century. A guide to Australian climate change released by the Australian Greenhouse Office in 2003 states:

“Australia is vulnerable to changes in temperature and precipitation projected for the next 50 to 100 years, because it already has extensive arid and semi-arid areas, relatively high rainfall variability from year to year, and existing pressures on water supply in many areas. In addition, vulnerability arises due to higher fire risk, Australian ecosystems sensitive to climate change, and invasion by exotic animal and plant species introduced by human activity. Australia also has a high concentration of population in coastal areas, an economy strongly dependent on world commodity prices, tourism dependent on the health of the Great Barrier Reef and other fragile ecosystems, and economically and socially disadvantaged groups of people.”³

¹ For example, damage to a river ecosystem due to damming of a river; loss of biodiversity caused by slash and burn methods of harvesting rain forest timber.

² CO2 - The International Interactive Negotiation on Global Warming (University Edition, version 2.0) 1993 Strategic Environmental Solutions Inc as cited in Macquarie University Masters Of Law Course notes 1993, School of Law Environmental Litigation and Mediation chapter 9.

³ Pittock, B (ed) "Climate Change: An Australian Guide to the Science and Potential Impacts", Australian Greenhouse Office, 2003 accessible at

In 1992 the UN Conference on the Environment and Development (UNCED) held in Rio de Janeiro, later known as the "Earth Summit", adopted the United Nations Framework Convention on Climate Change (UNFCCC). The Convention reached a consensus agreement on three issues:

- It recognised that global warming was a problem and that the nations of the world needed to reach agreement on a common course of action.
- It set as its ultimate objective the "stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system".⁴
- It directed that "such a level should be achieved within a time-frame to allow ecosystems to adapt naturally to climate change, to ensure food production is not threatened and to enable economic development to proceed in a sustainable manner".⁵

The Australian Federal Government ratified the United Nations Framework Convention on Climate Change (UNFCCC) on 30 December 1992. It was one of the first national governments to do so. As a signatory to the UNFCCC Australia has a commitment to work towards the objectives of the UNFCCC.

The development of the Kyoto Protocol in December 1997 was the culmination of the UNFCCC process. For the first time, a legal instrument had been adopted which contained legally binding targets for greenhouse gas emissions reductions. Australia's commitment under the Protocol is to reduce national emissions of greenhouse gases to a level which is equivalent to 108% of Australia's level of emissions in 1990. Most developed nations have now ratified the Protocol. In recent months Russia has publicly stated that it will accelerate the process towards ratification (although it has not yet committed to actually ratifying). If Russia ratifies, the Protocol will enter into force. Although Australia is a signatory to the Protocol, it is current Federal Government policy that Australia will not ratify the Protocol. (Although the Labor party has committed to ratifying if it wins the election this year).

The Federal Government's position in relation to the Kyoto Protocol can be summed up by the following quotations from the Federal Minister of Environment, Dr David Kemp.

<http://www.greenhouse.gov.au/science/guide/pubs/summary.pdf> page8, , accessed 13 August 2004.

⁴ Article 2 UNFCCC

⁵ Article 2 UNFCCC

*"Australia has not ratified the Kyoto Protocol and at present has no plan to do so, but we are still actively engaged in promoting truly global action. The Protocol is not in our national interest and will remain that way without a clear pathway for the involvement of developing countries, and without the United States."*⁶

*"We are committed to our Kyoto target on emissions of greenhouse gases, and we are developing a national climate change forward strategy that will help position Australia as a strong, competitive economy with a lower greenhouse signature."*⁷

The Australian policy position is based on:

- (i) the Federal Government's view that the Protocol would adversely affect the competitiveness of certain export exposed energy intensive industries. In particular aluminium smelting, paper manufacturing and cement production, industries which collectively employ more than 35,000 people mainly in regional Australia.⁸
- (ii) the decision of the world's largest emitter of greenhouse gases, the United States not to ratify the Kyoto Protocol; and
- (iii) the fact that the Protocol does not impose binding commitments on major developing countries (such as China and India) to reduce their national GHG emissions during the Protocol's first commitment period (2008 to 2012).

The Australian Federal Government alone holds the constitutional power to adopt international treaties. However, it is the Australian State governments that hold the power to regulate many key sectors of the Australian economy responsible for greenhouse gas emissions, including energy, land ownership and use, planning, infrastructure and natural resources.

There have been several State Government initiatives introduced to address climate change in the last few years. The NSW government has established a greenhouse gas emissions trading scheme for electricity retailers and large electricity users known as the Greenhouse Gas Benchmark Scheme.⁹ All States in Australia have enshrined carbon sequestration rights in their legislation, allowing land owners to create and register these rights over titles to land (although there is some variability between the States).

⁶ July 2003

⁷ December 2003 COP9 Media Release

⁸ Securing Australia's Energy Future. June 2004. Department of Prime Minister and Cabinet

⁹ Electricity Supply Amendment (Greenhouse Gas Emission Reduction) Act 2002 (NSW), Electricity Supply (General)

The Federal Government has resisted implementing a national emissions trading scheme under Federal law, although it has introduced several national schemes to stimulate growth in renewable energy generation capacity in Australia, and voluntary schemes for greenhouse gas emission reduction. Spurred on by this lack of national leadership, the environmental Ministers from each State Government are currently examining the legal and procedural options for an interjurisdictional greenhouse gas emissions trading scheme. Such a scheme would allow trading to occur between Australian States and Territories.

There are many other factors that require National leadership and consistency. There has been much debate as to which sources and sectors should participate in trading, and in particular who should receive permit allocations (if the system adopted operates by allocation of permits). Australia's 2002 National Greenhouse Gas Inventory indicates that our emissions come from a variety of sources, namely¹⁰:

- stationary energy being 47.6% of net emissions;
- agriculture 19.2%;
- transport energy 14.4%
- fugitive emissions 5.5%
- land use change and forestry 5.3%
- industrial processes 4.8%
- waste 3.2%

Households account for about 11% of the above greenhouse gas emissions, mostly from heating and motor vehicle use;

Achieving comprehensive coverage by monitoring all tiers of the production chain would result in all Australians appreciating the ramifications of emitting carbon-dioxide and other greenhouse gases. The cost of monitoring and regulating this approach in an ad hoc, state by state manner would however, be prohibitive.

Clearly the Federal government needs to provide guidance and consistency for the states and industry as well as showing leadership for all Australians. We all need to own the problem and participate in the solution. Without ratifying the Kyoto Protocol, Australia's approach will be half hearted and piecemeal. The Government is of the view that Australia will meet its Protocol target without the assistance of the Protocol flexibility mechanisms.¹¹ This view

¹⁰ Securing Australia's Energy Future. June 2004. Department of Prime Minister and Cabinet

¹¹ Ibid

however is not shared by all, and relies on significant reductions in land use emissions without effectively tackling wastage in other sectors.

To date, there have been many greenhouse gas transactions entered into by international and Australian companies, based on the mechanisms of the Kyoto Protocol and either anticipating eventual ratification or relying on connections to countries that have ratified the Protocol. However, unless Australia ratifies, Australian companies cannot directly participate in Joint Implementation (JI) or Clean Development (CDM) project activities as defined under Article 6 and 12 of the Protocol or international Emissions Trading established under Article 17 under the Protocol.

Although the State initiatives have created, and will continue to create local Australian markets for the trade of carbon rights and emission reduction rights, the rights created will not be eligible instruments for trade within the Protocol framework without a change of national policy regarding the ratification of the Kyoto Protocol.

The Law Society of New South Wales Environmental Planning and Development Law Committee therefore requests that the Council write to the Federal Government in order to urge the Government to assume leadership in climate change policy and legislation and ratify the Kyoto Protocol on behalf of Australia.