

EXPLANATORY STATEMENT

Ozone Protection and Synthetic Greenhouse Gas Management Act 1989

*Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1)
Regulations 2020*

Issued by authority of the Assistant Minister for Waste Reduction and Environmental Management

Purpose and operation

The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) implements Australia's obligations under the Vienna Convention for the Protection of the Ozone Layer and its associated Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), as well as the United Nations Framework Convention on Climate Change and its associated Kyoto Protocol.

Section 70 of the Act provides that the Governor-General may make regulations required or permitted by the Act or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020* (the Amendment Regulations) amend the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Principal Regulations) to incorporate decisions made by the Parties to the Montreal Protocol, in November 2018 and November 2019, relating to the ongoing use of hydrochlorofluorocarbons (HCFCs). From 1 January 2020, the Montreal Protocol restricts the use of newly manufactured HCFCs, except for servicing refrigeration and air conditioning and fire protection equipment, solvent applications in rocket engine manufacturing, topical medical aerosol applications for the specialised treatment of burns, and laboratory and analytical uses. Use of HCFCs for servicing refrigeration, air conditioning and fire protection equipment is already permitted under the Principal Regulations. Australia has no current or expected use of HCFCs for solvent applications in rocket engine manufacturing, or for topical medical aerosol applications for the specialised treatment of burns. The Amendment Regulations allow regulated HCFCs imported or manufactured after 1 January 2020 to be used for exempt laboratory and analytical purposes.

In addition, the Amendment Regulations amend the Principal Regulations to improve the ability of the established regulatory regime to prevent environmental harm from use of ozone depleting substances and synthetic greenhouse gases in the fire protection industry, by creating offences and imposing penalties where permit holders breach fire protection industry permit conditions. The new penalties align with existing penalties for breaching refrigeration and air conditioning industry permit conditions.

Consultation

Consultation on the change to allow use of HCFCs for laboratory and analytical purposes was undertaken directly with industry through science industry associations and research institutions which advised that these substances continue to be required in Australia for research and analysis. Without this change, only HCFCs imported or manufactured prior to 2020 (virgin or used) could be used for these purposes, and these older HCFCs will become increasingly difficult to obtain.

Consultation was conducted with the fire protection industry through the Fire Protection Industry (ODS and SGG) Board, and the Industry Advisory Body, in relation to the measure to create offences with associated penalties for breaches of fire protection industry permit conditions. The Board administers the fire protection industry permit scheme under the Principal Regulations on behalf of the Australian Government. In undertaking this role, the Board works closely with the fire protection industry to encourage and facilitate regulatory compliance. The Industry Advisory Body provides industry-specific expert advice relevant to the implementation of the fire protection industry permit scheme. Industry experts advise on industry trends and developments and changes to permit and training requirements, to reduce the risk of emissions of ozone depleting substances and synthetic greenhouse gases.

The fire protection industry supports the offences and believes they are necessary to strengthen the regulations to prevent environmental harm. The new offences align with the existing offence, under Regulation 136 of the Principal Regulations, of breaching refrigeration and air conditioning licence conditions. Regulation 136 was the enabling provision under which the Australian Government fined a refrigeration company, in June 2020, for using disposable cylinders for storing a controlled substance, in contravention of conditions of its refrigerant trading authorisation. The proposed regulations would allow similar compliance action to be taken against permit holders who breach conditions of their fire protection industry permit.

Regulatory impact analysis

The Office of Best Practice Regulation advised that these regulatory amendments are likely to have a minor regulatory impact and that a Regulatory Impact Statement is not required.

Other Matters

The Amendment Regulations incorporate by reference decisions by the Parties to the Montreal Protocol. The incorporated documents are freely available online at <https://ozone.unep.org/treaties/montreal-protocol>.

Details of the Amendment Regulations are set out in Attachment A. A Statement of Compatibility with Human Rights has been completed and is at Attachment B.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence on the day after registration.

Details of the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020*

Section 1 – Name

1. This section specifies that the title of the Regulations is the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020*.

Section 2 – Commencement

2. The table in this section provides that the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020*, including all Schedules, commence the day after the instrument is registered.

Section 3 – Authority

3. This section provides that the *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020* are made under the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act).

Section 4 – Schedules

4. This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1 – Use of HCFCs for laboratory and analytical purposes

From 1 January 2020, the Montreal Protocol on Substances that Deplete the Ozone Layer restricted the use of newly manufactured hydrochlorofluorocarbons (HCFCs). Section 45C of the Act implements Australia's obligations under the Montreal Protocol by prohibiting the use of HCFCs that are manufactured or imported on or after 1 January 2020. Subsection 45C(2) provides an exemption to this prohibition if the use of the HCFC manufactured or imported after 1 January 2020 is for a purpose prescribed in the Regulations.

Decision XXXI/5 and XXXI/5 of the Meeting of the Parties to the Montreal Protocol (available at: <https://ozone.unep.org/treaties/montreal-protocol/decisions/by-meeting>) allow new HCFCs to be used after 1 January 2020 for essential uses including laboratory and analytical uses. Decision XXXI/5 allows for this use of HCFCs indefinitely but keeps open the possibility of review at a later date. Amendments to new regulation 600 would be required later if future Montreal Protocol decisions limit laboratory and analytical uses of HCFCs.

Allowing HCFCs imported or manufactured from 1 January 2020 to be used for laboratory and analytical purposes allows continuation of essential scientific research and analytical work that requires these substances. Only small quantities of these substances are expected to be used for these purposes – grams rather than tonnes.

Items 1 and 2

Items 1 and 2 are required as a consequence of item 3. Item 1 repeals the existing Note 1 to regulation 500 regarding intentionally unused regulation numbers 501 to 899 inclusive.

Item 2 retitles ‘Note 2’ to the note to regulation 500 to ‘Note’ as the only note to this regulation.

Division 6A.7 – HCFCs manufactured or imported on or after 1 January 2020 used for laboratory and analytical purposes

Item 3

Item 3 inserts new regulation 600 to prescribe, for the purpose of subsection 45C(2) of the Act, that an HCFC manufactured or imported on or after 1 January 2020 may be used for laboratory and analytical purposes. Subregulation 600(2) makes clear that an HCFC may not be used for a laboratory or analytical use if that use has been specifically excluded from being an acceptable laboratory and analytical use for HCFCs in a decision made by the Parties to the Montreal Protocol that applies to Australia. Uses are so excluded if alternative substances that do not damage the ozone layer are practically available. Consistently with section 14 of the *Legislation Act 2003*, this regulation only incorporates Montreal Protocol decisions that exist at the time this regulation commences. Accordingly, further amendments to the regulations would be required if future Montreal Protocol decisions exclude additional laboratory and analytical uses.

Note 1 to regulation 600 shows the revised intentionally unused regulation numbers 601 to 899 inclusive.

Note 2 to regulation 600 directs readers to the relevant regulations that govern the use of HCFCs in refrigeration and air conditioning equipment and fire protection equipment.

Part 2 – Contravening conditions of certain Division 6A.2 permits

Items 4 and 5

Edits to subregulations 136(1) and 142(1) result in no changes to the law. The edits are designed to correct grammatical errors, in which paragraph (c) in each provision did not flow properly from the words before the colon.

Part 2 – Contravening conditions of certain Division 6A.4 permits

Items 6 – 8

Item 6 inserts new regulation 327 into the Principal Regulations. New regulation 327 creates a new strict liability offence if a person contravenes a condition of an extinguishing agent handling licence. For consistency, this is designed to mirror existing regulation 136, which makes it an offence to contravene a condition of a refrigerant handling licence.

Item 7 inserts new regulation 333 into the Principal Regulations. New regulation 333 creates a new strict liability offence if a person contravenes a condition of an extinguishing agent trading authorisation. For consistency, this is designed to mirror existing regulation 142, which makes it an offence to contravene a condition of a refrigerant trading authorisation.

Item 8 inserts new subregulations 341(6) and (7) into the Principal Regulations. These new subregulations create a new strict liability offence if a person contravenes a condition of a halon special permit.

Contraventions of the new offences at items 6, 7 and 8 carry a maximum penalty of 10 penalty units for an individual or 50 penalty units for a body corporate. Application of strict liability to these offences, and the amount of the maximum penalties, is based on *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which sets guidelines about the circumstances in which strict liability is appropriate, and the appropriate maximum penalty. The use of strict liability for these offences is necessary to ensure the integrity of the established regulatory regime to prevent environmental harm.

Items 9 and 10

Items 9 and 10 apply to special circumstances exemptions granted under regulation 342. A special circumstances exemption entitles the holder to the privileges of an extinguishing agent handling licence, an extinguishing agent trading authorisation or a halon special permit (as specified in the exemption).

Item 9 inserts new subparagraph 342(3)(b)(ia), which requires the relevant authority to specify, on the exemption itself, any conditions that are put on the exemption under new subregulation 342(4).

Item 10 inserts both new subregulation 342(4), which allows the relevant authority to put a condition on a special circumstances exemption, and new subregulations 342(5) and (6) which insert a new strict liability offence if a person contravenes a condition of a special circumstances exemption.

As with items 6, 7 and 8, contravention of the offence at item 10 carries a maximum penalty of 10 penalty units for an individual or 50 penalty units for a body corporate. Application of strict liability to this offence is based on *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which sets guidelines about the circumstances in which strict liability is appropriate. The use of strict liability for this offence is necessary to ensure the integrity of the established regulatory regime to prevent environmental harm.

Item 11

Item 11 is required as a consequence of Items 6-8, and Item 10. It amends regulation 906A to specify the new offence at subregulations 327(1), 333(1), 341(6) and 342(5) as infringement notice offences. Making these offences subject to the infringement notice provisions strengthens enforcement of, and compliance, with the Regulations as it allows an infringement notice to be given for the offences, requiring payment of 2 penalty units for an individual or 10 penalty units for a body corporate. Failure to pay the amount could result in the person being prosecuted in a court for the alleged contravention.

Item 12

The application provision at regulation 973 clarifies that none of the amendments in Part 2 (including the amendments of 136(1) and 142(1)) apply to contraventions that start to occur before the amendments commence. The intention is to make it clear that none of the new offences apply retrospectively.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) implements Australia's obligations under the Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol on Substances that Deplete the Ozone Layer and the United Nations Framework Convention on Climate Change and its Kyoto Protocol.

The *Ozone Protection and Synthetic Greenhouse Gas Management Amendment (2020 Measures No. 1) Regulations 2020* (the proposed Regulations) amend the *Ozone Protection and Synthetic Greenhouse Gas Management Regulations 1995* (the Principal Regulations) to make the following changes to the regulation of scheduled substances:

- Allow regulated hydrochlorofluorocarbons (HCFCs) to be used for laboratory and analytical purposes, in line with international agreements; and
- Create offences and impose penalties where permit holders breach fire protection industry permit conditions, to align with penalties for breaching refrigeration and air conditioning industry permit conditions.

Human rights implications

The Amendment Regulations engages the following human rights:

- The right to an effective remedy in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR);
- The right to a fair trial in Article 14(1) of the ICCPR;
- The right to the presumption of innocence in Article 14(2) of the ICCPR.

Right to an effective remedy

Article 2(3) of the ICCPR ensures that any person whose rights or freedoms are violated shall have an effective remedy, and that a person in claiming such a remedy shall have his rights determined by a competent judicial, administrative or legislative authority.

If a permit holder were to be charged with contravening a condition of their fire protection industry permit under the new offence provisions in the Amendment Regulations, the relevant permit could be suspended or cancelled. The Principal Regulations already provide that a decision to suspend or cancel a fire protection industry permit may be reconsidered upon application to the relevant authority using processes outlined in Regulation 316. The process involves the affected person applying directly to the relevant authority for a reconsideration of the decision within 21 days of the day on which the notice of the decision was issued by the relevant authority.

If the person is not satisfied with the outcome of the reconsidered decision, existing Regulation 317 allows the affected person to apply to the Administrative Appeals Tribunal for review of the reconsidered decision. This two-stage process provides two mechanisms for affected persons to seek an effective remedy.

Right to a fair trial

Article 14(1) of the ICCPR guarantees the right to a fair trial and fair hearing in relation to both criminal and civil proceedings.

Infringement notices

Regulation 906A lists offences in the Regulations for which an infringement notice may be issued. The offences of extinguishing agent handling licence contravention, extinguishing agent trading authorisation contravention, halon special permit contravention, and special circumstances exemption contravention, created by the Amendment Regulations, have been included in the list at regulation 906A. These provisions will enable an appointed inspector to issue an infringement notice under Part 8 of the Regulations where the inspector believes, on reasonable grounds, that any of these offences have been contravened.

An infringement notice issued under Part 8 of the Regulations is a notice of a pecuniary penalty imposed on the person. It sets out the particulars of an alleged contravention the offence. An infringement notice gives the person to whom the notice is issued the option of paying the penalty set out in the notice, or electing to have the matter dealt by a court. If the person does not pay the amount in the notice, they may be prosecuted for the alleged contravention. This engages the right to a fair and public hearing and the other criminal process rights and minimum guarantees in Article 14 of the ICCPR. As the person may elect to have the matter heard by a court, rather than pay the penalty, the rights to a fair and public hearing are not limited. Therefore, the minimum guarantees in criminal proceedings or other process rights provided for by Article 14 of the ICCPR are not limited.

Right to the presumption of innocence

Article 14(2) of the ICCPR protects the right to be presumed innocent until proven guilty according to law.

Strict liability

Strict liability offences engage and limit the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault. However, the defence of mistake of fact is still available to the defendant. This ensures that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations.

The Amendment Regulations applies strict liability to a number of new offence provisions, each with a maximum penalty of 10 penalty units:

- Regulation 327 (Offence—contravention of licence condition). An offence is committed if a person contravenes a condition of their extinguishing agent handling licence.
- Regulation 333 (Offence—contravention of condition of authorisation). An offence is committed if a person contravenes a condition of their extinguishing agent trading authorisation.
- Regulation 341 (Halon special permit). An offence is committed if a person contravenes a condition of their halon special permit.
- Regulation 342 (Special circumstances exemption). An offence is committed if a person contravenes a condition of their special circumstances exemption.

Application of strict liability to these offences has been set with consideration given to the guidelines regarding the circumstances in which strict liability is appropriate as set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The penalties for the strict liability offences do not include imprisonment and do not exceed 50 penalty units for an individual.

Strict liability offences are used throughout the Act and Regulations and are necessary to ensure the integrity of the established regulatory regime to prevent environmental harm and to ensure compliance with Australia's obligations under the Montreal Protocol.

Conclusion

The Amendment Regulations is compatible with human rights because it promotes the right to an effective remedy under Article 2(3) of the ICCPR. To the extent that it engages and limits other human rights (including Article 14(1) and 14(2)), those limitations are reasonable, necessary and proportionate to achieve the legitimate aims and the ongoing efficient and effective operation of the Regulations.

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