
Australia's Legislative Response to The Basel Convention and The 2019 Amendment to The Convention

✉ Emily Bradford and Matthew Grice

✉ Deakin University (221 Burwood Hwy, Burwood Victoria 3125 Australia)
Murdoch University (90 South St, Murdoch Western Australia 6150 Australia)

ABSTRACT

The Basel Convention is an international treaty which regulates the transboundary movement of hazardous waste across borders, which impacts nations waste exportation and importation policies. This paper discusses Australia's implementation of the Basel Convention for the Control of Transboundary Movement of Hazardous Wastes and Their Disposal. By analysing legislation, academia and media pertaining to the topic this Article explores the history the Basel Convention for the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, particularly emphasising the drafting process and the purpose of the legislation. Subsequently investigating Australia's legislative implementation of its obligations. Ultimately this paper investigates Australia's practices, with a particular emphasis placed on waste around Waste to Energy processes, against these obligations and the extent that Australia is upholding their obligations. This is done by exploring international trends away from plastic waste exportation the 2019 amendments of the Basel Convention. The article finds language used in the treaty impacts the ability to determine breaches of the treaty, however, notes various legislation that reinforce Australia's commitment to the treaty. This is done without ruling out possible misconduct in the past.

Keywords: Basel convention, hazardous waste, Australia

INTRODUCTION

The Basel Convention for the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (the Convention) was developed by the United Nations Environment Program to attempt to regulate and minimise international trade of hazardous waste. The Basel Convention was devised in response to deposits of hazardous waste being deported to Africa and other parts of the developing world (United Nations Environment Program, 2021). Accordingly, the convention was devised predominantly to prevent the developed countries from transfer their hazardous waste to developing countries. Australia ratified the Basel treaty on 5th of February 1992 (The Allen Consulting Group, 2001), and therefore is bound to the obligations within. Questions regarding Australia's commitment to the treaty have been raised (IPEN, 2020). This article investigates Australia's possible breaches of the Basel convention through analysis of the Basel treaty, Australian legislation, the academic

articles, and media publications pertaining to the issue.

METHOD

This study was a systematic review of legislation, academia and media, which allowed conclusions to be drawn. To provide an understanding of the scope of Australia's obligations within the Basel treaty the definitions and obligations within the treaty were identified. This provided context for investigation into Australia national waste exportation legislation and the 2019 amendment of the Basel treaty. This provided insight into Australia's legislative priorities which allowed for the analysis of various sources regarding Australia's adherence to the Basel convention. Using the information gathered conclusions regarding Australia's adherence to the Basel convention were drawn.

RESULTS AND DISCUSSION

Obligations Under The Basel Convention

✉ Corresponding author :
Address : Australia
Email : ea.bradford@outlook.com

Definitional Controversy

Drafting a definition for 'hazardous material' in the Basel Convention was a controversial and lengthy process. The convention was unusual in that it aimed to regulate transboundary movement of waste, rather than eliminate or minimise the generation of such waste as seen in the conventions. This was contrary to many other international agreements facilitated by United Nations affiliated organisations, for instance the Montreal Protocol, which focussed on eliminating the issues. Consequently, by merely seeking regulate and manage the export of hazardous waste the Basil Convention was drafted on the basis that countries would still be able to export hazardous waste. Demonstrating how Developed nations attempted to protect free trade and their economic interests in the drafting of the convention (Lucier & Gareau, 2016).

Many countries from the Global North, in addition to industry and recycling lobbies, sought to ensure the definition provided some flexibility and allowed them to continue transferring hazardous material across jurisdictions. Some observers have even stated that industrialised countries and some of the business lobbies threatened to bring actions at World Trade Organisation if the definition was too broad (Krueger, 1999). Consequently, in what was seen as a means to assuage the concerns of these developed countries and lobby groups, the drafters, eventually, construed the term by listing a variety of materials that are deemed as 'hazardous' is listed in Annex 1 of the Convention. Nonetheless reflecting the nature of the negotiations, this list was also controversial and was intensely debated by several countries from the global North, including Australia, who sought to ensure there was scope within the definition to continue to export some waste. Ultimately these parties were successful in ensuring there was some scope to continue to export some forms of hazardous waste, with 'many materials which might potentially have been banned, [were] placed on the 'acceptable' list' (Dehm & Khan, 2019). This did limit the scope, reach and parameters of Convention.

Nonetheless a long list of materials were successfully prohibited, including forms of hazardous plastics.

Finally, under the Basel Convention, parties wishing to transport hazardous waste were required to attain informed consent prior to export. These mechanisms were designed to perpetuate the aims of the convention and prevent the export of hazardous waste.

Australian Response to Basel Convention

Australia was an initial signatory to the convention. Accordingly, to implement its obligations and ratify the Basel Convention, the Hazardous Waste (Regulation of Exports and Imports) Act came into force in 1980.

The Hazardous Waste Act's objective is to:

- Regulate the export, import and transit of hazardous waste to ensure that exported, imported or transited waste is managed in an environmentally sound manner so that human beings and the environment, both within and outside Australia, are protected from the harmful effects of the waste.
- Therefore, as clearly enunciated by the objectives of the Act, its purpose is to ensure Australia regulate the transit of hazardous waste and upholds its obligations under the Basel Convention. To accomplish this purpose the Act introduces a permit system for hazardous waste. Under the Act parties wishing to export hazardous waste are required to apply for one of two different permits. The first is for movement between parties to the convention, and for movements where the final disposal is in an OECD country. The second is more nuanced and complicated, however it is essentially for parties seeking to recover waste in OECD countries.
- To be approved for a permit, a party seeking to export hazardous waste must satisfy a variety of criteria. For instance, it must be demonstrated that no other alternative options are available to safely dispose of the waste. Further it must be proven that the facilities in the receiving country are environmentally sound and suitable to safely manage the exported waste (Wilder, 1998). Consequently, it is

apparent that through these mechanisms Australia has sought to manage the exportation of hazardous waste, as outlined in the Basel Convention.

- Nonetheless the Act initial implementation attracted critics. The Act in its initial form did not cover the export of waste for recovery and recycling the purposes. Consequently, parties supposedly exporting hazardous waste for these purposes were not required to seek a permit when the Act was initially drafted. Obviously, this created a significant loophole, allowing the continued export of hazardous waste to developing countries and failing to mitigate the harmful effects of waste as specified in the objective of the Act. Accordingly, the Act was amended to governs all transboundary movements of hazardous within and out of Australia (Wilder, 1998). Nonetheless concerns remained surrounding Australia's commitment to the Basel Convention, and thus the country has recently sought to further bolster protections with the introduction of more stringent regulations regarding waste exported for recovery purposes.

The 2019 Amendment And Australia's Policy Response

As the international commitment to minimising transboundary movement of waste grows stronger various nations have begun to implement stricter regulations. Most notably China's 2018 'National Sword' policy which banned the importation of certain materials and set strict contamination rates for waste imported for recycling purposes (Center for EcoTechnology 2018). An acceptable contamination rate of plastic imports under the 'National Sword' policy is 0.5% (Uhm, 2021), which is currently inconceivable for Australia with an average contamination rate of 6 to 10% (Manix, 2018). Following China's regulations coming into effect there was an influx of rerouted plastic imports to south east Asia from the developed world (Uhm, 2021). In response other developing Asian nations implemented similar regulations regarding waste importation (Uhm, 2021). These regulations include the tightening of permit requirement

in Malaysia, Vietnam completely halting the issue of new licenses for waste imports and plans to completely phase out plastic importation in both Thailand and Vietnam (Uhm, 2021) The 2019 amendment of Basel convention supported this international trend by created a distinction between the plastic waste that moves across borders for recycling which is also almost free from contamination and any other plastic wastes (Uhm, 2021, p14), terming some plastics as the hazardous waste (The Centre for International Economics, 2020). This amendment became effective January 1, 2021, Australia is yet to ratify the amendments but it is still bound to them (United Nations Environment Program, n.d.). Although Australia has not ratified this amendment, there has been planning and implementation new Australian regulations on waste exports.

In line with the premise of the Basel convention the Australian Hazardous Waste (Regulation of Exports and Imports) Act 1989 was introduced. This regulation banned exporting waste for final disposal of waste, this includes both landfill and incineration methods (Hazardous Waste Act 1989). However, allows for the exportation of waste for recycling and reclamation under certain conditions (Hazardous Waste Act 1989). As the standards for transboundary movement of waste have been changing, Australia has implemented Recycling and Waste Reduction Act 2020. Which aims to 'contribute to Australia meeting its international obligations' to reduce the human and environmental health impact from the wastes (Recycling and Waste Reduction Act, 2020) This bill establishes a framework to: regulate the export of waste materials, in line with the agreement to ban the export of waste materials, in line with the agreement to ban the export of waste plastic, paper, glass and tyres [and to] manage the environmental, health and safety impacts of products, in particular those impacts associate with the disposal of products. (Parliament of Australia, 2020).

Additionally, this act states liability of civil penalty for persons who either violate export conditions by exporting regulated waste material or that export waste material

under misleading or false representation (Recycling and Waste Reduction Act, 2020). Australia has begun to implement the legislation in line with the 2019 amendment of the Basel convention. As of July 2021, mixed plastics can generally not be exported from Australia (Australian Department of Agriculture, Water and Environment, n.d.a). This however does not apply to plastics that are mixed for the purpose of creating the processed engineered fuels (PEF) (Australian Department of Agriculture, Water and Environment, n.d.a), which has created some concern across international community.

Possible Breaches Of The Convention

Moving forward it is necessary to note that while some implications will be made, due to the brief definitions within the Basel Conventions interpretations vary and impact the difference between breaching or not breaching the convention. As was established earlier, there was debate over the definition of 'hazardous' waste, which resulted in the implementations of annexes. One concern regarding language is that the convention lacks a clear definition of what constitutes 'contamination' (Uhm, 2021). Additionally, the convention states 'that taking all the practical steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against adverse effects which may result from such wastes' constitutes 'environmentally sound management' (ESM) (Uhm, 2021), which is unclear without further explanation of what specific 'practical steps' are. Without clarification of these terms, it becomes difficult to hold states accountable for breaches. For example, there is an obligation to:

Ensure that persons involved in management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management (the Basel Convention, 1989)

Without a scope for what 'practical steps' states must take in ensuring that persons involved in waste management take steps to prevent pollution, states decided for them-

selves what constitutes 'practical steps' and 'steps to prevent pollution'. Despite the statistical probability that most south east Asian countries are mismanaging imported waste (Uhm, 2021, p.7) and known pollution issues that mismanagement of waste can cause, waste importation trade continues. While interpretation of terms may vary there is one strong case that that Australia is breaking the convention. This is Australian exportation of waste for waste to energy (WtE) processes.

Waste-to-Energy (WtE) is the process that treats waste and creates energy, such as electricity or transport fuel (World Energy Council, 2013), therefore WtE processes and technologies create PEF. PEF is created by burning waste, usually in a cement kiln. PEF is usually made up of materials such as plastics, cardboards and timber (MRA Consulting Group, 2021) but can contain hazardous wastes within (International Pollutants Elimination Network (IPEN), 2020). PEF is commonly known as resource derived fuel (RDF) and has been suggested as an alternative to fossil fuels (MRA Consulting Group, 2021). Currently, Australian legislation allows plastic exportation for PEF, with no change in the foreseeable future despite more stringent regulations coming into effect 1 July 2022) (Australian Department of Agriculture, Water and Environment, n.d.a). Australia's continuation of exporting waste for WtE processes has prompted questioning of their commitment to the Basel convention (International Pollutants Elimination Network, 2020) due to the toxic substances it produce (Global Alliance for Incineration Alternatives, 2019, p.1). Article 4.2d of the Basel convention states the obligation to:

Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement'

WtE processes release 'substances such as dioxins, furans, lead, mercury, acid gases, and particulate matter' (Global Alliance for Incineration Alternatives, 2019) which create

health risks from the toxic wastes: ash, wastewater and air emissions. The health risks posed by these processes are so great that there is significant reluctance to build facilities for these purposes in Australia (GHD, 2009) IPEN even suggested the Australian government was 'fast tracking approvals for this industrial threat without adequate' impact assessments, leaving local governments without any protection (IPEN, 2020). It could be argued that by continuing to export waste for WtE purposes that Australia is breaching the Basel Convention, as it does not 'protect human health' due to the significant health and environmental risk that it poses to local communities. This argument could be strengthened by the lack of WtE energy facilities in Australia and the failure to conduct impact assessments and therefore perform due diligence. Another contentious topic is the acceptable contamination rate of exported waste, which has further reflected possible breaches of the convention by Australia.

As noted previously, within the Basel convention there is no specifications on what constitutes the 'contamination' of waste. In effort to combat this some importing nations have set their own standards. Such as Indonesia, which allows for a maximum 2% contamination rate of waste imports (Basel Action Network, 2021) and reserves the right to return wastes which go over. Under the convention waste that is obtained through 'falsification, misrepresentation, or fraud; or that does not conform in a material way with the documents'(the Basel convention, 1989) is illegal and therefore Australia has a duty to re import said waste (the Basel convention, 1989) There have been a number of reports indicating that Australian companies continue to send contaminated waste to south east Asia (Conley-Tyler & Hawkins 2020 & Diss 2019). Most notably in 2019, 210 tonnes of waste which was transported to Indonesia as paper waste for recycling was rejected. Indonesian customs deemed the waste to be contaminated by hazardous materials, including motor oil containers, nappies, and electronics (Lipson, 2019). Although several Australian shipments of waste have been deemed hazardous, there is yet to be significant repercussions for

companies illegally exporting hazardous waste in the guise of recycling. It could be argued that Australia at most has broken the treaty by failing to ensure that Australian waste exports conform to the information of permits through pre-export inspections; or at very least this shows a lack of commitment from the Australian government to champion the treaty.

As established earlier, the Basel convention was primarily established to regulate the transport of hazardous wastes to developing countries, in effort to protect both human health and the environment. It needs to be noted though, that within the treaty is the term 'other wastes'. Other wastes are considered to require special consideration and include wastes collected from municipal solid waste (MSW) processes (the Basel Convention, 1989), which Australia exports as waste for recovery through recycling. Therefore, the sound management of Australian waste exports for recovery through recycling does come under the scope of the treaty; the question is if the exported waste is being disposed of or treated in a sound manner. As noted earlier, article 4.2d specifies the obligation of states to take appropriate measures to;

Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement'. (the Basel Convention, 1989, S 4.2d)

Once again brief terms such as the 'appropriate measures' and 'efficient management' create a grey area which makes it difficult to make unequivocal statements. It is however unlikely that the Australian government is unaware of the waste management issues in states that they export waste to. For example, an investigative report concluded that most ASEAN countries have the insufficient waste management policies including lack of integrated waste management, training programs and policies on private sector participation (Uhm, 2021). Considering this among significant concerns regarding pollution, such as over 50% of plastic ocean

pollution comes from five countries, all within Asia (the World Bank, 2018). It is incredibly unlikely that developed nations, such as Australia are unaware of the risks posed by exporting their waste to south east Asia. For example, there are reports that in Indonesia imported plastic waste is being sold to power tofu factories, through unsound burning of the waste, which creates significant concern in regard to the health and environmental risks that accompany these activities waste (The Centre for International Economics, 2020, p.74).

Which indicates that imported waste from Australia has been disposed of unsound manner and it is likely government is aware of the likelihood of improper waste management, however the grounds to hold Australia accountable is weak.

It is important to note that despite the questionable Australian regulation regarding exportation of wastes for recovery that the Australian plan to ban most exports for recovery creates a good argument for Australia's commitment to Basel convention. Concerns regarding the contamination of waste exports can for the most part, be relieved when the full bans of mixed wastes come into effect. New waste export regulations that came into effect 1 July 2021 include (the Australian Department of Agriculture, Water and the Environment, n.d.b):

- Only glass cullet or fines can be exported
- Only plastics sorted into a single resin or polymer type (other than PEF) can be exported

Other impacting regulations include:

- Only paper or cardboard which is processed and sorted can be exported as of 1 July 2024
- Only tyres that have been processed can be exported from 1 December 2021
- Only plastic that has been sorted into a single resin or polymer type (other than PEF) and is processed into pallets can be exported as of 1 July 2022.

These regulations should allow for the more transparent and sound management of Australian waste when exported overseas. There is, however, still no plan to stop exportation of waste for PEF, which has caused concern amongst the international

community in regard to the long-term impacts this will have on local communities (IPEN, 2020).

It is necessary to note that in general academia regarding states adherence to the Basel convention is extremely low, Australia included. There is opportunity for further academia to focus on the legislative responses of developed states and how these may impact developing nations. This work has used the limited academia available, media articles and legislation to best gauge how Australia's legislative response adheres to and contradicts the Basel convention. However, future research is needed to confirm the conclusions drawn within this article.

CONCLUSION

The Basel convention is an international treaty that Australia is bound to and therefore must adhere to the obligations which regulate the movement of hazardous waste across the international borders. Australia's commitment to this treaty has been questioned (IPEN 2020, p2) for various reasons including their failure to ratify the 2019 amendment of the treaty (). While there are indications of possible breaches of the treaty by Australia, due to the language used within the convention it is difficult to determine the legality of exports for PEF processes, with high contamination percentages or the export to nations which lack sound waste management facilities. However, we were able to determine that the implementation of more stringent regulations across Australia should reduce the possibility of breaches in the future. While this work aims to address Australia's adherence to the Basel Convention this is extremely difficult due to the lack of academia surrounding adherence to the Basel convention. Moving forward further academic research would assist in creating stronger cases against developed nations, like Australia, in hope to hold them accountable.

REFERENCES

Australian Department of Agriculture, Water and Environment. (n.d.a). Exports of plastic waste. <https://www.environ>

- [ment.gov.au/protection/waste/exports/plastic](https://www.environment.gov.au/protection/waste/exports/plastic)
- Australian Department of Agriculture, Water and the Environment. (n.d.b). Waste exports. <https://www.environment.gov.au/protection/waste/exports>
- Basel Action Network. (2021, July 19). Indonesia to allow waste imports with 2% contamination limit. <https://www.ban.org/news/2021/7/19/indonesia-to-allow-waste-imports-with-2-contamination-limit>
- Basel Convention for the Control of Transboundary Movement of Hazardous Wastes and Their Disposal 1989
- Center for EcoTechnology. (2018, 9 May). What is the National Sword?. <https://www.centerforecotecology.org/what-is-the-national-sword/>
- Conley-Tyler, M and Hawkins, R. (2020, July 8). Australia's Asia Diplomacy in the Recycling Bin. Asialink. <https://asialink.unimelb.edu.au/insights/australias-asia-diplomacy-in-the-recycling-bin>
- Dehm, J., & Khan, A. (2019). "North-South Transboundary Movement Of Hazardous Wastes – The Basel Ban And Environmental Justice". In Research Handbook on Law, Environment and the Global South. Cheltenham, UK: Edward Elgar Publishing.
- Diss, K. (2019, July 16). Recycled electronics are turning Thailand into a 'dumping ground for hazardous waste'. ABC news. <https://www.abc.net.au/news/2019-07-16/recycled-tech-from-western-nations-destroying-thai-villages/11274578>
- GHD. (2009, August). Waste Technology and Innovation Study Final Report. <http://www.environment.gov.au/system/files/resources/4e70769b-1802-42c3-96d7-5ee3874c821f/files/waste-technology.pdf>
- Global Alliance for Incineration Alternatives. (2019). We have too much plastic that has nowhere to go... can we just burn it? <https://www.no-burn.org/wp-content/uploads/Plastic-x-Incineration-2019.pdf>
- Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth). <https://www.environment.gov.au/protection/hazardous-waste/about>
- International Pollutants Elimination Network (IPEN). (2020, November 10). South East Asian Regional Groups Condemn Australia's Stealthy Waste Export Plans. <https://ipen.org/news/south-east-asian-regional-groups-condemn-australia%E2%80%99s-stealthy-waste-export-plans>
- Krueger, J. (1999). International Trade and The Basel Convention. Earthscan
- Lipson, D. (2019, July 19). Indonesia to send back Australian paper waste 'contaminated' by dirty nappies and electronics. ABC news. <https://www.abc.net.au/news/2019-07-09/indonesia-to-ship-back-contaminated-australian-waste/11292540>
- Lucier, C. A., & Gareau, B. J. (2016). Obstacles To Preserving Precaution And Equity In Global Hazardous Waste Regulation: An Analysis Of Contested Knowledge In The Basel Convention. International Environmental Agreements : Politics, Law and Economics, 16(4), 493-508
- Mannix, L. (2018, February 23). \$13m recycling rescue package announced, but rates will rise. Sydney Morning Herald, <https://www.smh.com.au/national/13m-recycling-rescue-package-announced-but-rates-will-rise-20180222-p4z18u.html>
- MRA Consulting Group. (2021, March 31). Waste Plastics Industry Standards: A Submission to the Department of Agriculture, Water and the Environment. <http://www.environment.gov.au/system/files/resources/57f17e26-bac0-44f4-a827-bd348478ef3b/files/waste-plastics-industry-standards-report.pdf>
- Parliament of Australia. (2020). Recycling and Waste Reduction Bill 2020. https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6573
- Recycling and Waste Reduction Act 2020 <https://www.legislation.gov.au/Details/C2020A00119>

- The Allen Consulting Group. (2001). The Hazardous Waste (Regulation of Exports and Imports) Act 1989 A National Competition Policy Review. <http://ncp.ncc.gov.au/docs/AG%20Review%20of%20the%20Hazardous%20Waste%20%28Regulation%20of%20Exports%20and%20Imports%29%20Act%201989%2C%20February%202001.pdf>
- The Centre for International Economics. (2020). Costs and benefits of banning exports of Waste. <http://www.environment.gov.au/system/files/resources/1927a4eb-a3cb-457b-a695-9fc62e064444/files/costs-benefits-banning-exports-waste.pdf>
- Uhm, Y. (2021). Plastic Waste Trade in Southeast Asia After China's Import Ban: Implications of New Basel Convention Amendment and Recommendations for the Future. *California Law Review*, 57(1) article 9, <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1713&context=cwlr>
- United Nations Environment Program. (2021). "Basel Convention Overview" <http://www.basel.int/TheConvention/Overview/tabid/1271/Default.aspx>
- United Nations Environment Program. (n.d.). Questions and answers related to Basel Convention Plastic Waste Amendments. <http://www.basel.int/Implementation/Plasticwaste/PlasticWasteAmendments/FAQs/tabid/8427/Default.aspx>
- Wilder, M. (1998). The International Movement Of Hazardous Waste: Making A Permit Application Under Australian Law. *Australian Mining and Petroleum Law Journal* (1997-2002), 17(4), 391-412.
- World Bank. (2018). Indonesia - Marine debris hotspot rapid assessment : synthesis report. <https://documents1.worldbank.org/curated/en/983771527663689822/pdf/Indonesia-Marine-debris-hotspot-rapid-assessment-synthesis-report.pdf>
- World Energy Council. (2013). Waste to Energy. https://www.worldenergy.org/assets/images/imported/2013/10/WER_2013_7b_Waste_to_Energy.pdf
- United Nations Environment Program. (c.2021). Amendment to Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. <http://www.basel.int/Countries/StatusofRatifications/BanAmendment/tabid/1344/Default.aspx>