The Development of Waste Management Law

Adam Johnson, EMRC

CONTACT

Adam Johnson
Eastern Metropolitan Regional Council
PO Box 234, Belmont, WA 6983, Australia
+61 8 9424 2223
+61 8 9277 7598
adam.johnson@emrc.org.au.

EXECUTIVE SUMMARY

The development of waste management law has followed a number of different paths around the world. There are clearly a number of reasons for this; one of the reasons considered here is the legal system in the respective States. In particular, the different trajectories followed by common law and civil law States is considered, as is the difference between federal and unitary States.

The primary conclusion drawn is that waste management law developed in common law systems tends to be formulated and administered based on particular cases, with principles drawn from the “sum” of the specifics. This can be contrasted with civil law systems which are more likely to decide individual cases based on overarching principles. In a world where waste management law is increasingly developed from a principle based approach, the typical result is resistance from common law states. This resistance is argued to be, in part, due to different world views on policy making.

INTRODUCTION

The current focus for regulatory discourse surrounding the management of municipal solid waste is one of resource efficiency. Waste management legislators see themselves as having progressed beyond simply managing municipal waste in order to address human health and environmental issues, and now focus upon avoiding waste, and recovering resources from waste that is generated.

This transition has varied between States. The American experience of state-based approaches to waste legislation can be contrasted with the European supranational legislative coordination, just as common law “bottom up” approaches can be contrasted with civil law “top down” systems.

This essay explores this variation in approach between the States, focussing in particular on the contrast between common law and civil law systems, and differences in approach between federations against unitary States. The interaction of the European Union and its member States in the field of waste law is also considered, as is the development of international law in the field of waste management.
NATIONAL WASTE MANAGEMENT LAW

United Kingdom

The history of legislation relating to waste management has been traced back to 1388 with a Act of Richard II: removal of refuse on pain of forfeits, however legislators were not particularly active in environmental law, or in waste management law as a subsidiary of environmental law, up until the mid 19th century. This is because of the dominance of the Courts in law making until the mid 19th century, at which time the focus of law making began to shift towards Parliament.

Indeed, the British common law history is not to be overlooked in considering the development of law regarding the environment broadly. The mid 19th century cases of Tipping v. St Helens Smelting Co. and Rylands v Fletcher established continuing rules in nuisance and negligence respectively. Both rules have significant potential application in the field of waste management, as they enforce the right to enjoy land without interference from another’s activities, including interference from pollution. Combined with the Pride of Derby cases in the 1950s, landholders can be afforded protection under common law from pollution, even where caused by carrying out a public duty.

At the same time as these cases were decided in the mid 19th century, legislation was also being developed and amended relating to the environment in general, and waste in particular. The Public Health Act 1848 provided, for the first time, the general public with protection from people depositing waste.

From this point, the responsibilities and powers of local government with respect to waste management grew through a series of Acts and amendments, and the relevance of common law in resolving environmental and waste management problems diminished. Whilst common law faded in its formal involvement in environmental and waste management problems, its philosophical legacy of “bottom up”, case-by-case law making lingered in the tendency of legislation to provide substantial discretion for its localised implementation.

The first waste management legislation dedicated to environmental rather than public health aspects of waste was the Control of Pollution Act 1974 (COPA), the first UK statute regarding the disposal of waste to land. This subsequently developed into the Environmental Protection Act 1990 (EPA).

The trend after the EPA has been for the UK to enact increasing legislation to implement EU Directives, with the initiative for waste policy being handed over to the EU. One particularly pertinent example is the implementation of the Landfill Directive. The Directive was implemented in the UK by the Landfill (England and Wales) Regulations 2002 instituting the Directive’s administrative controls, and the Waste and Emissions Trading Act 2003 to achieve the Directive’s targets in diversion of biodegradable waste from landfill though the innovative concept of a tradeable landfill disposal allowance.

The UK hopes that a tradeable landfill disposal allowance will facilitate the cheapest means of achieving the required waste diversion targets. It also reflects a UK preference for non-prescriptive approaches to environmental objectives, a preference also reflected in the tendency for administrative discretion and highly devolved decision making. This appears radically at odds with the EU preference to centralise and formalise decision making. These differences can, in turn, be traced to their different legal systems.
The UK’s common law system places substantial emphasis upon the individual facts of cases, drawing general principles from the accumulation of judgments on the facts. It is thus a “bottom up” system, modified in part by the introduction of statutes. It therefore follows that, if the preference in legal decision making is to consider each case on its merits, and applying flexible rules to the facts, then this preference will also be reflected in the administrative practices.

This can be contrasted with the civil law system, a system shared by all other EU members. The civil law system is centrally conceived and designed, with specifics flowing from general principles. Rather than having a body of judgments that form the law, individual judgments merely shape the interpretation of existing codes. Where this interpretation is not agreed to by the code designers, the executive and legislature, then the code is amended. With a legal system that prefers a central body of law that is intended to take into account all circumstances, one would expect substantial activism in the creation and amendment of such laws, as well as a general preference for “uniformity” and “harmonisation” of outcomes.

Naturally, the distinction between the common and civil law traditions is not as stark as portrayed above. Common law, along with the administrative practices of a common law State, is modified by the harmonising tendencies of statutes. Similarly, civil law and the administration within such States is modified by the body of case law pertaining to particular facts. Nevertheless, the distinction between legal tradition is a useful distinction to hold in considering the origins of different approaches to waste management law.

**Germany**

Up until the early 1970’s, the responsibility for waste management in Germany rested with the municipalities, and federal responsibility for the environment rested with the Minister of Health. The German Constitution prescribed broad legislative roles for the states, with the federal government to only legislate where explicitly provided for. The management of waste was not one of these roles. This arrangement became untenable in the 1970’s, and the Constitution was amended in 1972 to include “garbage collection” as an area of concurrent (shared with the states) legislation. Shortly thereafter, the federal *Waste Disposal Act 1972* was introduced.

Amongst other things, the Act required waste to be treated at large, centralised waste disposal plants, made waste management a regional concern by shifting responsibility from the municipality to the district, and required states to meet federally mandated minimum standards for environmental protection. This saw a substantial reduction in the number of waste disposal facilities, but also created problems for siting new, larger facilities. This led to a “waste crisis”.

The period between 1976 and 1991 saw the German legislature and executive strive for a range of approaches to resolve the “waste crisis”. These included further legislation (the *Waste Avoidance and Waste Management Act 1986*, – AbfG) and voluntary agreements with the packaging industry.

The AbfG was the first attempt in German legislation to valorise resource recovery over disposal. Unfortunately, the AbfG was not as successful as the legislators had hoped, as it neither reduced waste generation nor diverted waste from incineration, both stated objectives of the legislation.

Voluntary agreements were acknowledged as being both important and difficult to attain (Bonomi and Higginson at 60). The voluntary agreements were eventually abandoned when it became clear that
industry was only prepared to take action to reduce waste or encourage recycling where it was economically viable, rather than incurring costs to achieve the agreed waste management outcomes.

The critical step adopted by Germany, and the legislation for which Germany is most renowned in the field of waste management, is the 1991 Packaging Ordinance. With this step, Germany abandoned attempts to achieve voluntary approaches to the management of packaging. Notable elements of the legislation were the establishment of targets for the proportion of beverage packaging to be reused or recycled, and making industry entirely responsible for its packaging waste through a requirement to “take back” packaging used. The Ordinance led to the development of the Duales System Deutschland, effectively an industry run waste management system for packaging that exists alongside the municipal system for solid waste.

Whilst the Packaging Ordinance was being developed and implemented, German primary legislation was also amended. The Closed Substance Cycle Waste Management Act 1994 (KrW-/AbfG) was the outcome of these amendments. The KrW-/AbfG expands the power of the Federal Government to make ordinances relating to waste management, and is a clear expression of a centralised waste management system, notwithstanding the fact that Germany is a federation.

The centralising and prescribing trajectory of the German waste management experience can be seen to have commenced very early with the constitutional amendment in the early 1970s. Over time, as various different approaches were attempted, shortcomings were increasingly rectified with an increase in central control, and an increase in prescription.

**Netherlands**

Whilst the Nuisance Act 1875 is reported to be the first piece of Dutch legislation to deal with the issues arising from waste management, waste was not explicitly dealt with in legislation until the Waste Substances Act 1977 (WSA). The WSA was part of a broad suite of legislation developed to cover discrete sectors of the environment such as surface waters, air, chemical waste and noise.

Environmental regulators soon came to recognise that sectoral environmental legislation served to inhibit the resolution of increasingly inter-related environmental problems. As a result, an integrated approach was developed for the management of the environment. This was expressed in the Environmental Management Act 1993 (EMA). The EMA was first proposed in 1990, and was developed in a period of considerable environmental policy activity in the Netherlands during the period 1988 to 1991.

Waste is represented in the EMA as Chapter 10, a chapter which provides a mix of broad framework type provisions through to the highly specific. In particular, the EMA creates a framework for the type of centralised extended producer waste legislation that is in place in Germany. The Packaging and Packaging Waste Regulation 1997 is an expression of the extended producer responsibility approach.

Whilst Dutch legislation creates the framework for centralised rule-making, the Dutch approach has developed based on a conceptual framework of “chain responsibility” where responsibility is shared amongst all actors in the product chain. The concept of “chain responsibility” was enshrined in the Packaging Covenant which set out voluntary actions that would be taken by all concerned to achieve the desired reductions in packaging, and an exemption from the Packaging and Packaging Waste Regulation 1997 for all producers that were signatories to the Covenant. The requirements of the
Regulation were more onerous than the agreed measures of the Covenant, creating a “carrot and stick” approach.

The Packaging Covenant approach continued for 15 years, with the three Packaging Covenants agreed over this time. The third and, to date, final Covenant ended on the 31st of December 2005. A new Covenant was not developed due to an inability for all stakeholders to agree on what should be required of the new Covenant. In particular, the Dutch targets are more ambitious than those of the European model, making a Covenant less attractive for Dutch industry, and the Covenant is voluntary, making it unattractive for environmental NGOs seeking binding targets and action.

In lieu of agreement on a Packaging Covenant, the management of packaging waste reverts to the requirements set out in the Packaging and Packaging Waste Regulation 1997, and the Dutch approach of chain responsibility is replaced with the producer responsibility approach. Discussion now centres on the questions of a centrally regulated waste management system, such as whether or not to introduce deposits for packaging, how to fund infrastructure and so on. This reflects debate across Europe, and would appear to be a result of the drive for harmonisation across Europe.

In considering the system of waste law developed in the Netherlands, and contrasting it with the UK (another unitary State), it becomes apparent that the Netherlands takes a community wide consensus based approach to policy development. This then also appears to be implemented on decentralised basis within the broad strategy agreed. The UK is similar in its preference for a decentralised implementation, but fundamentally different in its reluctance to formulate a centralised policy, and where such a policy is developed, it is typically driven by policy “elites”.

**European Union**

The first piece of EU law relating directly to waste management was the 1975 EC Directive on Waste, 75/442/EEC. As with all directives, the Waste Directive established the outcomes to be achieved by member States, but did not specify the measures to be adopted to achieve these outcomes.

The Wallonia Waste case in 1992 was a landmark case interpreting the Waste Directive. This case utilised the principle that “environmental damage should as a priority be rectified at source”, introduced in the Single European Act in 1987, to overturn a free trade precedent established in a similar case in the Interhuiles case in 1983. This underlines the EU tendency to favour principle over precedent.

The importance of the judgment in the Wallonia Waste case was reflected in Directive 91/156 which amended the Waste Directive, amongst other things to codify the decision of the Wallonia Waste case for localised waste disposal, but confirming that waste recovery operations are to be unfettered by national boundaries.

The EU has also extended its legislative capacity into a number of detailed aspects of waste management. Of the directive issues, the packaging and landfill directives are of particular interest because they demonstrate salient points of the EU’s unique approach to waste management.

The Packaging Directive mandates targets for the proportion of packaging to be recovered, importantly including a maximum recovery rate. The maximum is legislated for in order to avoid market distortions due to one State subsidising recovery, and depressing prices for recovered materials to the detriment of other States.
The Landfill Directive is detailed and prescriptive, with the only real discretion left in terms of how the required reduction in biodegradable waste to landfill is to be achieved. Based on the recitals, much of the justification for the Landfill Directive appears to rest on three elements: the need to avoid cheap, polluting landfills distorting the market by attracting waste to them at the expense of well managed landfills, reduce the global warming potential of landfills, and reduce the long term risk presented by landfills and abandoned dump sites.

Both directives attempt to control market distortions, and both reflect a particular aspect of the European perception of the free market. In seeking to assure both free trade and a minimum level of environmental quality across the Community, instruments such as the Landfill Directive enable freer trade than a system of local rules would. Attempting to achieve the principle of universal environmental quality in the context of a myriad of local rules would require consideration and comparison of the environmental standards at the source and the destination. Instead, by establishing minimum standards for environmental protection, the EU can be assured that the environment is protected at all potential destinations. Thus, trade can occur on a “level playing field” and can be unfettered, operating without the scrutiny of the EU.

The development of the EU can be seen to reflect its increasing competence in the field. In a similar vein to Germany, the EU has adopted an increasingly centralised and prescriptive approach to waste regulation, with failings typically rectified by an increased assertion of central authority. Waste law has also been increasingly shaped by the principle driven approaches with which civil law systems appear to be comfortable, but which are anathema to common law systems.

**United States of America**

The American experience in waste management demonstrates the strength of the states within its federal system, and sheds light on its unique conception of governance, the environment and their interaction. It also demonstrates the importance of the Courts in a common law system.

The law around waste management in the US began to slowly crystallise with the litigation between the State of New Jersey and the City of New York in the early 1930s. It wasn’t until the 1960s that the federal legislature decided to get involved in waste management. Rather than centralising waste planning, the federal Solid Waste Disposal Act 1965 provided for “a national research and development program into improved methods of disposal”, and a programme of technical and financial assistance to state and local governments. The real work was to remain with the states.

This response was further strengthened in 1970 with the Resource Recovery Act 1970, which required an extensive investigation into resource recovery by the executive branch of government. The investigation requirements anticipated the European approach of a federal authority developing a model of waste generation, and more importantly, controlling the generation of waste through a series of tools.

The executive branch was slow in conducting this investigation, taking the stance that “the Federal Government has no business being in the garbage business”, and a federal authority never really developed. Indeed, this attitude persisted for the next thirty years of federal legislation, though during this time the Supreme court was very active.

In a series of judgments in the late 1970s and the early 1990s, the Supreme Court regularly overturned attempts by the states to restrict the interstate movement of waste on the grounds that they presented
barriers to interstate trade. This might be contrasted with the position adopted by the ECJ in upholding restrictions on interstate movements of waste. Whilst both the ECJ and the Supreme Court maintain that waste constitutes “goods”, the ECJ considers that waste represents “goods” that may be regulated in its movement to protect the environment, and principles such as the self-sufficiency and proximity principles become important considerations.

The Supreme Court has maintained a clear preference for the maintenance of free trade between states, building upon a long judicial tradition of valuing the Union over the individual states. In the absence of radical Congress action and, in particular, a Constitution that is only infrequently amended, this approach is unlikely to change. The EU, on the other hand, encourages local difference at the expense of integration, and has a highly active legislature with an explicit mandate within the EC Treaty to regulate environmental matters. The EC treaty is amended frequently and extensively, providing more scope for the legislature to shape the policy arena.

The US has chosen not to centralise waste management. This is largely due to the very strong legal basis of the states and the common law legal tradition. The former suggests that, where apparently equal outcomes can be achieved from state and federal measures, the state based measures will be preferred. The latter indicates that the US, like the UK, prefers a “bottom up”, case-by-case decision making process to a “top down”, principle driven process. Under such a system, state based decision making is likely to be closer to the individual circumstances that the federal government.

**Australia**

Australian waste law followed a similar trajectory to that of all other jurisdictions. Initially waste was of minimal concern. Population densities were low and the health impacts of poor waste management were minimal. As populations increased, local laws were introduced to control the public health aspects of waste, and later the environmental aspects.

Australian legislation in the field of waste management remains largely the jurisdiction of the states. The preferred federal approach is a coregulatory approach of a voluntary agreement underpinned by a regulatory system. This can be seen in the National Packaging Covenant and associated National Environment Protection (Used Packaging Materials) Measure.

The legislative approaches adopted within the different states reflects notable nuances. The Victorian Environment Protection Act 1970 is centred on integrated environmental management, whereas New South Wales developed sectoral legislation, including the Waste Disposal Act 1970. South Australia took a different approach again, as remains the only state in Australia to have container deposit legislation with its Beverage Container Act 1975.

An amendment to the Act in 1986, intended to impose a higher deposit on single use glass bottles than refillable glass bottles deposits, brought about the only waste related case in the High Court of Australia (HCA): Castlemaine Tooheys v. South Australia (1990). This can be contrasted with the US Supreme Court case Minnesota v. Clover Leaf Creamery Co. (1981), as the Courts drew opposite conclusions on similar facts.

The HCA decided that the amendment was unconstitutional based on a challenge to the legislature’s rationale. The HCA argued that the legislation was unlikely to achieve its stated environmental intent of energy efficiency, as single use bottles would actually improve the energy efficiency of South Australia since these bottles were manufactured outside of South Australia.
With similar facts, the US Supreme Court (on appeal from the Minnesota Supreme Court) drew the opposite conclusion to the HCA. It rejected the Minnesota Supreme Court’s initial ruling regarding energy efficiency, arguing that only the legislature can form an opinion on that matter. Similarly, it decided that impacts on interstate trade were “not ‘clearly excessive’ in light of the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems”. These conclusions reflect a reluctance for the judiciary to “second guess” the legislature, and may stem from the US system of checks and balances between the various branches of government.

To summarise, the Australian situation with regard to waste law is very similar to that of the US. This is unsurprising, as both States share a federal structure, and both have a common law past. Where differences are observed, such as in the decisions relating to container deposit legislation, this may in part be attributable to the strong separation of powers doctrine in the US, and the contrasting parliamentary system of Australia.

INTERNATIONAL LAW

There is limited specific action on waste management in international law, with two key sources of international law being suggestive of the international waste management law regime: international custom and treaties.

International Custom

International custom ranges in a spectrum from general principle to customary rule, with a customary rule being a strong form of a general principle of law. State sovereignty is considered a customary rule, and is represented in Principle 2 of the Rio Declaration. This principle gives States the right to exploit their own natural resources provided they do not cause transboundary environmental damage, thus impacting on another State’s right to exploit its own natural resources. According to principles of State sovereignty, a State can not only generate waste as abundantly as it wishes, but it can also dispose of its waste in whatever manner it sees fit with the key proviso that the waste must remain within its territory.

The principle of preventative action is one of preventing damage to the environment, and reducing and controlling activities that may cause environmental harm. In the field of waste management legislation, the principle of prevention has become more and more deeply ingrained in the thinking of regulators and policy makers. A trend can be seen where regulation deals with increasingly abstract notions of “prevention”. This continuum starts with the very concrete concept of preventing pollution at the point of waste disposal, and progresses towards preventing the pollution associated with the consumption of the goods which generates the waste.

The precautionary principle has a strong and strengthening influence on international law, and in a separate opinion to the ICJ *Gabcikovo-Nagymaros* case, Judge Weeramantry affirmed that the precautionary principle is a constituent of the broader legal concept of sustainable development which has worldwide acceptance. Notwithstanding this opinion, the behaviour of a number of States suggests that it is not yet a customary rule, a position likely to be strongly influenced by a State’s legal tradition.
Treaties

The two primary multilateral treaties concerned with the management of waste are the London Convention 1972 and the Basel Convention 1989. The development of the London Convention demonstrates an interesting trend in the development of international law. The Convention is based on the premise that dumping is permitted unless explicitly prohibited. A 1996 protocol reverses the approach of the Convention, prohibiting the dumping of all waste at sea except for a small group of wastes. These wastes are generally inert or generated from sea based activities such as fishing.

The shift from dumping being permitted unless explicitly prohibited, to prohibited unless explicitly permitted is a reflection of the growing importance of the precautionary principle. The burden of proof is no longer on demonstrating that a waste will have an impact, rather it is to demonstrate that the waste will not have an impact. Of the States considered in this essay, all have ratified the 1972 Treaty but neither the Netherlands nor the US have ratified the 1996 Protocol (as at the end of June 2007).

The London Convention and its 1996 Protocol demonstrates one trajectory in the development of international waste management law, a trajectory built upon precaution. The Basel Convention continues with this principle, but tightens it to a principle of prevention.

The Basel Convention as originally agreed and ratified seeks to control the transboundary movement of hazardous waste and ‘other waste’. The Convention prohibits the shipment of hazardous waste to non-Parties, as well as prohibiting shipments of waste to States that have prohibited the import of such waste. Where the shipment is not prohibited, the Convention establishes a system of control. It is notable that, with the exception of Antarctica, the Convention does not prohibit any particular hazardous waste destinations.

The proposed amendment to the Convention takes the Convention substantially further from this value-neutral system of control. Rather than leaving it for States to decide if they do not want to import waste, the amendment proposes to prohibit the disposal of hazardous waste from developed in developing States, and to phase out this export where the waste is to be recycled. Through this ban, the Basel Convention moves from a system of control to a system of prevention.

It is notable that all of the States whose waste legislation is considered above objected to the initial ban proposal. Over the course of negotiations, and following the development of European unanimity in support of the ban, the opponents were reduced to Canada, Japan, the US and Australia, who continue to push for provisions for recycling.

The continued opposition of Australia and the US to the Convention is a demonstration of important philosophical differences between these States and the EU. Australia and the US, as demonstrated in their case law, have a long history of upholding the principles of interstate free trade, including the trade in waste. The EU, on the other hand, is increasingly in favour of the precautionary principle, is more comfortable with notions of restricting trade where the goods traded are wastes, and sees the uniform protection of the environment in different States to be a legitimate goal.

CONCLUSIONS

The development of waste management law has taken different trajectories in different States. Common law States such as the US, UK and Australia have indicated an aversion to the development based on principle, generally preferring to proceed from a case-by-case consideration of the facts.
Such an approach lends itself to a perpetuation of traditions of decentralised management, and eschews the development of innovative strategy in favour of optimising existing conditions. Courts, institutions and legislation all combine to maintain a system where waste management is reduced to a series of technical, environmental pollution control questions.

This can be contrasted with the civil law approaches of the Netherlands and Germany, which have been far more comfortable with an approach driven by rationally derived principles. Since the field of waste management is becoming increasingly shorn of its directly observable environmental impacts, this principle driven approach is fundamental for the realisation of far-reaching responses to waste. In civil law systems, the development of a coherent strategy at a national level is more likely than in a common law system; this strategy will typically be informed by a logical development of principles.

The development of waste law internationally has two potential strands to follow. A “bottom up” consideration of the facts in each case and a “top down” implementation of broadly adopted principles. The latter approach has been increasingly dominant, both in the case of EU law pushing aside the UK common law approaches, and internationally with the assertion of principles of prevention and precaution. It would seem that a principle driven approach is becoming the standard for waste management law.

Notwithstanding this broad trend observed, and acknowledging the current practice of waste management as being somewhat divorced from direct environmental impact, a State’s structure and legal history remains significant. In a system such as the common law system, a system that does not like to make decisions in the vacuum of abstraction, the creation of a legal framework around a series of principles appears decidedly flimsy. To then determine the particular based on these generalities then appears further “divorced from reality”.

This, then, informs the resistance underlying the British bewilderment at the apparent imposition of an alien EU legal order, and the US and Australian responses to initiatives such as the Basel Ban amendment. In short, the initiatives are resisted because they don’t make sense. Acknowledging this will enable an inclusive framework for waste law to be developed, a framework that recognises the apparently a priori world views of participants. Such acknowledgment would avoid the thoughtless transposition of approaches to waste law from one system directly into another, instead reconstituting it within the terms of the receiving system. This essay attempts to set out some of the considerations to be borne in mind in forming this reconstitution.

REFERENCES


