

Monitor 9 of 2024 – Ministerial Responses¹

Contents

Chapter 1: New and ongoing matters

Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024.....	1
---	---

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Ministerial Responses, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 92.



THE HON TANYA PLIBERSEK MP
MINISTER FOR THE ENVIRONMENT AND WATER

MS24-001243

Ms Hannah Dibley
Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

sdlc.sen@aph.gov.au

Dear Committee Secretary

I refer to your correspondence of 27 June 2024 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) request for further information regarding the *Recycling and Waste Reduction (Export–Waste Paper and Cardboard) Rules 2024* (the Rules), as set out in Delegated Legislation Monitor 6 of 2024.

I have carefully considered the Committee's request for further information on particular issues arising from the Rules.

I am satisfied that the approach taken in the Rules would ensure that:

- the scope of discretionary powers is appropriate;
- certain matters relating to strict liability offences are appropriately provided for in delegated legislation;
- privacy concerns are sufficiently addressed; and
- certain matters relating to kinds of regulated waste material, conditions for export and record-keeping requirements are appropriately provided for in delegated legislation.

My detailed response is in the Attachment.

I thank the Committee for the opportunity to respond.

Yours sincerely

TANYA PLIBERSEK

Enc Attachment – Response to the Senate Standing Committee for the Scrutiny of Delegated Legislation

13. 8. 24

**ATTACHMENT: RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED
LEGISLATION
DELEGATED LEGISLATION MONITOR 6 OF 2024**

RECYCLING AND WASTE REDUCTION (EXPORT–WASTE PAPER AND CARDBOARD) RULES 2024

Conferral of discretionary powers; adequacy of explanatory materials

Committee comments:

The Committee requests the Minister’s advice as to:

- what factors the Minister may take into account in exercising their discretion to consider “any other matter” under subsection 21(3);
- whether examples can be provided of the kinds of matters that may be considered relevant under subsection 21(3); and
- whether there are any safeguards or limitations in relation to this discretionary power.

Response:

The *Recycling and Waste Reduction (Export–Waste Paper and Cardboard) Rules 2024* (the Rules) provides for circumstances in which a relevant Commonwealth liability of a person is taken to have been paid. A relevant Commonwealth liability includes a fee or charge, or a penalty for a late payment of a fee or charge, that is payable under the *Recycling and Waste Reduction Act 2020* (the RAWR Act).

Section 21 of the Rules has the practical effect that a fee charged for a waste paper and cardboard export licence, licence renewal, or licence variation, is taken to have been paid if the person liable to pay the fee has given an undertaking to pay the amount of the fee to the Minister, and the Minister has accepted (and not subsequently revoked) the undertaking.

This provision provides a mechanism to allow a person who has incurred a fee related to a waste paper and cardboard export licence application to be provided with the service associated with the application before that fee has been fully paid. This provision does not impose any additional obligations, rights, liberties or interests on a person, rather, it allows a person to discharge their existing Commonwealth liability in accordance with an undertaking. The intention of this provision is to benefit a person who is subject to a Commonwealth liability. The explanatory statement to the Rules outlines that although a person generally should not be able to obtain a benefit under the RAWR Act without first discharging their liabilities, it is recognised that there may be some circumstances in which it may be appropriate for allowing payment to be made in accordance with an undertaking, such as where the ability to pay is outside the control of the person who is subject to the liability.

Allowing a person to obtain a benefit under the RAWR Act without first discharging a relevant fee creates a risk that services provided by the Commonwealth may not be paid for. To reduce this risk, section 21 requires the person to provide an undertaking to the Minister that they will discharge their liability. Subsection 21(3) of the Rules sets out matters that the Minister must consider before accepting an undertaking from a person. These criteria go to the financial position of the person and whether they will be able to pay the liability in accordance with the undertaking. These criteria must be considered by the Minister in all cases.

In addition, subsection 21(3) provides that the Minister may also consider any other matter that the Minister considers relevant before accepting an undertaking. This allows the Minister to consider other factors that may be unique to an individual case and so are not easily identifiable

or appropriate to expressly set out in the Rules. This criterion is constrained by administrative law principles that:

- requires any factor that is taken into account when making an administrative decision be “relevant” to that decision; and
- require the decision on what is a relevant consideration to be determined by reference to the scope, object and purpose of the legislation and of the particular decision and what is reasonable in the circumstances.

This means the statutory context will constrain the breadth of the Minister’s discretion under subsection 21(3). The Minister will only be able to consider additional matters that reasonably relate to a decision whether to accept an undertaking. Examples of such factors could potentially include information on the applicant’s financial situation (as this is relevant to whether the Commonwealth liability is likely to be paid pursuant to the undertaking). In this way, the scope of what the Minister can consider when deciding whether to accept an undertaking is safeguarded by well-recognised principles of administrative law and statutory interpretation. An administrative decision that takes account of an “irrelevant consideration” is an error of law.

Section 21 of the Rules is not a unique provision within subordinate instruments made under the RAWR Act, with equivalent provisions included in the *Recycling and Waste Reduction (Export–Waste Glass) Rules 2020*; the *Recycling and Waste Reduction (Export–Waste Plastics) Rules 2021*; and the *Recycling and Waste Reduction (Export–Waste Tyres) Rules 2021*.

Strict liability; significant matters in delegated legislation

Committee comments:

The Committee requests the Minister's advice as to:

- why it is considered necessary and appropriate for delegated legislation to include content of strict liability offences that carry significant criminal penalties, and significant civil penalties, through sections 6, 10, and 15 of the instrument; and
- whether consideration was given to the Attorney-General’s Department’s *Guide to Framing Commonwealth Offences*, in relation to sections 6, 10 and 15 of the instrument, and if so, to what extent.

Response:

The RAWR Act was designed to be framework legislation that would be supported by multiple pieces of subordinate legislation. The intention was that only waste material prescribed in rules made under the Act would be subject to the regulatory framework. As set out in the revised explanatory memorandum to the Bill, this was to allow different regulatory controls to be implemented as appropriate for different kinds of regulated waste material. It is therefore necessary and appropriate for these Rules to include certain matters relating to elements of an offence that the RAWR Act allows the rules to determine. The Standing Committee for the Scrutiny of Bills (Scrutiny Digest 12 of 2020) drew its concerns to the attention of senators and left to the Senate as a whole the appropriateness of leaving significant elements of the proposed new legislative framework to be determined in delegated legislation. The Bill was subsequently passed by the Senate and has been in effect since late 2020.

All offence provisions relating to regulated waste exports are located in the RAWR Act rather than the Rules. References to the Attorney General’s Department’s *Guide to Framing Commonwealth Offences* can be found throughout the explanatory memorandum to the Bill,

demonstrating that it was contemplated in the design of legislative framework and the offence provisions contained therein.

Section 6 of the Rules

Section 6 of the Rules has the effect of prohibiting the export of regulated waste paper and cardboard unless certain export conditions are met. These are generally that an exporter holds a licence and makes an export declaration for each consignment exported under the licence. Section 6 is made for the purposes of section 18 of the RAWR Act. Subsection 18(2) of the RAWR Act provides a non-exhaustive list of export conditions that may be imposed under the rules. This includes a requirement for waste material to be exported under a licence and for an export declaration to be given to the Minister before waste is exported. Although contained in subordinate legislation, the prescribed export conditions in section 6 of the Rules are those that are expressly contemplated by the RAWR Act.

Section 20 of the RAWR Act provides for non-compliance with prescribed export conditions in section 6 of the Rules. Subsection 20(1) sets out the elements of the fault-based offence, all of which must be proven beyond reasonable doubt for an offence to have been committed. Subsection 20(3) provides that strict liability applies to paragraph 20(1)(b) (the waste material is regulated waste material) and 20(1)(c) (the export of the waste material is prohibited unless prescribed export conditions are complied with). This means that for these two paragraphs, no fault element will need to be proven. As outlined in the explanatory memorandum to the Bill, it is appropriate for paragraphs 20(1)(b) and 20(1)(c) to be strict liability because they do not involve any conduct by the exporter. The element of the offence in paragraph 20(1)(b) concerns the legal status of the waste paper and cardboard, and the element of the offence in paragraph 20(1)(c) provides a legislative link to the prescribed export conditions set out in section 6 of the Rules. The use of strict liability in paragraphs 20(1)(b) and 20(1)(c) does not affect the need for the prosecution to prove fault elements for other parts of the offence, including that the exporter did not comply with the prescribed export conditions in section 6 of the Rules (paragraph 20(1)(d)). The defence of honest and reasonable mistake of fact is available to the defendant in relation to paragraphs 20(1)(b) and 20(1)(c) (see section 9.2 of Schedule 1 to the Criminal Code).

Section 10 of the Rules

Section 10 of the Rules sets out conditions of a waste paper and cardboard export licence. Section 10 of the Rules is made for the purposes of paragraph 35(1)(b) of the RAWR Act. Paragraphs 35(2)(a) and 35(3)(a) clarify that the conditions set out in the rules may relate to the holder of the export licence and may impose requirements to be complied with before or after the export of the relevant regulated waste material. The conditions in subsections 10(2) and (3) of the Rules impose requirements on the holder of the export licence to have commercial relationships with the supplier, importer or end user of the regulated waste paper and cardboard exported under the licence. The condition in subsection 10(4) imposes a contamination threshold for regulated waste paper and cardboard exported under the licence.

Section 59 of the RAWR Act provides for non-compliance with conditions of an export licence. Relevantly, subsections 59(4) and 59(5) make it an offence for the holder of a suspended export licence to contravene a condition of that licence that is required to be complied with during the suspension. Subsection 59(6) provides that strict liability applies to the element of the offence in paragraph 59(4)(d) (that the condition is required to be complied with during the period of the suspension). The effect of this is that the prosecution would only be required to prove the physical element in paragraph 59(4)(d) beyond reasonable doubt and would not be required to prove the fault element for this element. As outlined in the explanatory memorandum to the

Bill, this is appropriate because the element of the offence in paragraph 59(4)(d) is a matter of law. It concerns whether a particular condition is required to be complied with during a period of suspension and does not involve any conduct by the holder of the licence. The use of strict liability in paragraph 59(4)(d) does not affect the need for the prosecution to prove fault elements for other parts of the offence, including that the person contravened the relevant licence condition.

Section 15 of the Rules

Section 15 of the Rules requires the holder of a waste paper and cardboard export licence to notify the Minister of certain events. Section 15 of the Rules is made for the purposes of paragraph 61(1)(e) of the RAWR Act. A person who fails to notify the Minister of an event listed in section 15 of the Rules would be liable to a strict liability offence under subsection 61(3). The explanatory memorandum to the Bill provides detailed justification for the imposition of a strict liability offence in these circumstances, relevantly providing:

Strict liability is proposed for this offence having regard to *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the *Senate Scrutiny of Bills Committee Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Consistent with these documents, the strict liability is considered appropriate as:

- the offence is not punishable by imprisonment;
- the offence is subject to a maximum penalty unit of 60 penalty units for an individual;
- the actions which trigger the offence are simple, readily understood and easily defended. The offence is triggered if the holder of an export licence fails to notify the Minister of an event specified in subclause 61(1) or rules made for the purpose of clause 61;
- offences relating to the provision of information to the Minister need to be dealt with efficiently to ensure industry confidence in the regulatory regime;
- the offence will be subject to an infringement notice (see clause 102);
- the absence of strict liability may adversely affect the capacity to prosecute offenders. Whether or not a defendant intentionally or negligently did not disclose the required information to the Minister is a matter that is peculiarly within the knowledge of the defendant alone. Proving the contrary beyond reasonable doubt will require significant and difficult to obtain indirect and circumstantial evidence.

The defence of honest and reasonable mistake of fact is available for strict liability offences (see sections 6.1 and 9.2 of Schedule 1 to the Criminal Code Act 1995) and the existence of strict liability does not make any other defence unavailable (see subsection 6.1(3) of Schedule 1 to the Criminal Code Act 1995).

Privacy

Committee comments:

The Committee requests the Minister's advice as to:

- The nature and scope of personal information that may be collected, used or disclosed under section 19 of the instrument, particularly whether this is likely to include personal information beyond an individual's name and contact details; and

- Whether any safeguards apply to protect any personal information collected, used or disclosed under section 19 of the instrument and whether these are set out in law or policy, including whether the *Privacy Act 1988* applies.

Response:

Section 19 of the Rules sets out record-keeping requirements that apply to the holder of a waste paper and cardboard export licence. These requirements include retaining export declarations and supporting evidence, copies of receipts for payment of consignments, photographs of waste paper and cardboard that has been packed for export, and other documents relevant to showing compliance with the RAWR Act.

Although it is not anticipated that personal information other than the licence holder's name and personal contact details would be required to be retained under this provision, it is possible that some other personal information may be inadvertently retained and subsequently audited or required to be provided to the Minister. It is also possible that a small amount of personal information could be contained in documents required to be retained under paragraph 19(1)(c), the intent of which is to ensure that all documents relevant to demonstrating compliance are retained.

As noted in the explanatory statement, it is anticipated that most licence holders would be bodies corporate. However, where a licence holder was an individual, the Australian Privacy Principles contained in Schedule 1 of the *Privacy Act 1988* would apply to any personal information collected under section 19. Any information collected under the RAWR Act must also be managed consistently with the Department's Privacy Policy.

Significant matters in delegated legislation

Committee comments:

The Committee requests the Minister's advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for matters relating to:

- Prescribing the kind of material that is "regulated waste material";
- Conditions for export of waste material; and
- Requirements to make and retain records.

Response:

The RAWR Act was designed to be framework legislation that would be supported by multiple pieces of subordinate legislation. The intention was that only waste material prescribed in rules made under the Act would be subject to the waste export regulatory framework. As set out in the revised explanatory memorandum to the Bill, this was to allow flexibility for different regulatory controls to be implemented as appropriate for different kinds of regulated waste material. It allows the regulatory controls to adapt to changing circumstances, including developments in waste processing technology and new human and environmental health challenges.

Given the framework nature of the RAWR Act, it is necessary and appropriate for the rules to include certain matters that the RAWR Act is designed to allow the rules to determine. This includes prescribing the kinds of waste material that is "regulated waste material", conditions for export of regulated waste material and record-keeping requirements. The Standing Committee for the Scrutiny of Bills (Scrutiny Digest 12 of 2020) drew its concerns to the attention of senators and left to the Senate as a whole the appropriateness of leaving significant

elements of the RAWR legislative framework to be determined in delegated legislation. The Bill was subsequently passed by the Senate and the Act has been in effect since late 2020.

Other rules under the RAWR Act already exist to regulate the exports of waste glass, plastic and tyres. Collectively, the existing rules relating to waste exports are:

- *Recycling and Waste Reduction (Export–Waste Glass) Rules 2020*;
- *Recycling and Waste Reduction (Export–Waste Plastics) Rules 2021*;
- *Recycling and Waste Reduction (Export–Waste Tyres) Rules 2021*; and
- *Recycling and Waste Reduction (Export–Waste Paper and Cardboard) Rules 2024*.

The four sets of Rules contain broadly similar provisions that require an exporter of regulated waste material to hold an export licence and to make an export declaration for each consignment. These are kinds of prescribed export conditions that the RAWR Act contemplates would be set out in the rules (see subsection 18(2)). The record-keeping requirements under each set of Rules are also broadly similar. However, there are differences in the conditions that are imposed on the holder of an export licence for the different regulated wastes. This reflects the different environmental and waste management challenges for each of these waste streams.

The RAWR Act implements the commitment of the former Council of Australian Governments (COAG) to ban the export of waste glass, plastic, tyres and paper. Waste paper and cardboard is the final waste stream to be regulated under former COAG's commitment.