The Senate

Standing Committee for the Scrutiny of Delegated Legislation

Delegated Legislation Monitor

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Contents

Introduction

The Senate Standing Committee for the Scrutiny of Delegated Legislation, formerly the Senate Standing Committee on Regulations and Ordinances, was established in 1932. The role of the committee is to examine the technical qualities of all legislative instruments, and to decide whether they comply with the committee's non-partisan scrutiny principles or otherwise give rise to matters of interest to the Senate.

The *Delegated Legislation Monitor* (the Monitor) details the committee's views in relation to its technical scrutiny of legislative instruments registered on the Federal Register of Legislation. Part I of the Monitor details the committee's scrutiny concerns arising under the technical scrutiny principles set out in Senate standing order 23(3), extracted below. Part II of the Monitor details matters which the committee has resolved to draw to the attention of the Senate under standing order 23(4).

Committee information

Terms of reference

The committee's technical scrutiny principles are set out in Senate standing order 23(3), which requires the committee to scrutinise each instrument as to whether:

(a) it is in accordance with its enabling Act and otherwise complies with all legislative requirements;

(b) it appears to be supported by a constitutional head of legislative power and is otherwise constitutionally valid;

(c) it makes rights, liberties, obligations or interests unduly dependent on insufficiently defined administrative powers;

(d) those likely to be affected by the instrument were adequately consulted in relation to it;

(e) its drafting is defective or unclear;

(f) it, and any document it incorporates, may be freely accessed and used;

(g) the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument;

(h) it trespasses unduly on personal rights and liberties;

(i) it unduly excludes, limits or fails to provide for independent review of decisions affecting rights, liberties, obligations or interests;

(j) it contains matters more appropriate for parliamentary enactment;

(k) in the case of an instrument exempt from sunsetting, it is appropriate for the instrument to be exempt from sunsetting;

(l) in the case of an instrument that amends or modifies the operation of primary legislation, or exempts persons or entities from the operation of primary legislation, the instrument is in force only for as long as is strictly necessary; and

(m) it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate.

Additionally, Senate standing order 23(4) requires the committee to scrutinise each instrument to determine whether the attention of the Senate should be drawn to the instrument on the ground that it raises significant issues, or otherwise gives rise to issues that are likely to be of interest to the Senate.

Senate standing order 23(4A) further provides that the committee may, for the purpose of reporting on its terms of reference, consider instruments made under the authority of Acts of the Parliament that are not subject to disallowance. The committee may also consider whether it is appropriate for such instruments to be exempt from disallowance.

Nature of the committee's scrutiny

Technical legislative scrutiny

The committee operates on a non-partisan basis to scrutinise delegated legislation made by the executive branch of government against its technical scrutiny principles.

Resolving minor technical scrutiny concerns

After scrutinising a legislative instrument, the committee may initially engage in informal correspondence with agencies via its secretariat to gather information or seek clarification to identify and resolve minor technical scrutiny concerns. This engagement with agencies assists the committee in deciding whether it is necessary to seek further advice from the relevant minister about those concerns. Agency correspondence is not published; however, the relevant instruments are listed on the committee's website and in Chapter 3 of the Monitor.

Resolving significant technical scrutiny concerns

Where the committee considers that an instrument raises significant technical scrutiny concerns, it details its concerns in Part I of the Monitor for the benefit of the Senate in its oversight of delegated law-making powers. The committee generally seeks a formal response from the relevant minister in relation to concerns set out in this Part; however, in some circumstances the committee may report its scrutiny concerns to the Senate without seeking further information from the minister.

Undertakings

As a result of raising its scrutiny concerns with the relevant minister or agency, the committee may seek an undertaking for specific action to address its scrutiny concerns. The committee summarises outstanding and implemented undertakings in

Chapter 4 of the Monitor. The committee will record relevant undertakings on the *Index of Undertakings* on its website.

Matters of interest to the Senate

The committee does not scrutinise the policy merits of delegated legislation. If the committee determines that an instrument raises significant issues, or otherwise gives rise to issues likely to be of interest to the Senate under standing order 23(4), it may draw these instruments to the attention of the Senate in Part II of the Monitor.

Disallowance process[1]

The disallowance process is one of the key mechanisms by which Parliament exercises control over delegated legislation. The conditions for the disallowance process are set out in the *Legislation Act 2003* and are reflected in Senate standing order 78.

The committee will give a 'protective' notice of motion to disallow an instrument where it is unable to conclude its consideration of an instrument before the original disallowance period expires. In addition, the committee may give such a notice where the committee requires an undertaking to be implemented before it can conclude its consideration of the instrument. The committee will usually withdraw a 'protective' notice when it receives a satisfactory response to its scrutiny concerns or confirmation that any outstanding undertakings have been implemented.

The committee may also give a notice of motion to disallow an instrument where it considers that the instrument raises significant and unresolved scrutiny concerns, and the committee has therefore resolved to recommend to the Senate that the instrument be disallowed. In these circumstances, the committee will detail its significant scrutiny concerns in Chapter 1 of the Monitor.

Publications

Delegated Legislation Monitor

The committee's usual practice is to table its *Delegated Legislation Monitor* each Senate sitting week. Legislative instruments detailed in the Monitor are also listed in the *Index of Instruments* on the committee's website.

Scrutiny News

Scrutiny News is a brief newsletter summarising significant matters arising in the Monitor, as well as in the reports of the Senate Standing Committee for the Scrutiny of Bills. Past editions, and information about subscribing to the mailing list, are available on the Scrutiny of Bills Committee's website.

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[1] For further information on the disallowance process see *Odgers' Australian Senate Practice* and *Guide to Senate Procedure No. 19 - Disallowance*.

Guidelines

Guidelines relating to the committee's scrutiny principles are published on the committee's website.

Other resources

Ministerial responses to the committee's concerns can be accessed on the committee's website through either the *Delegated Legislation Monitors* webpage or the *Index of Instruments*.

The *Federal Register of Legislation* should be consulted for the text of instruments, explanatory statements, and associated information.

The *Senate Disallowable Instruments List* provides a listing of tabled instruments for which disallowance motions may be moved in the Senate.

The *Disallowance Alert* records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.

Report snapshot[2]

Scrutiny period	
Legislative instruments registered on the Federal Register of Legislation between 26 June and 27 June 2024	20
Instruments in this period exempt from disallowance	7
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New legislative instruments commented on in report	0
Ongoing legislative instruments commented on in report	1
Chapter 2: Concluded matters	
Legislative instruments of which the committee has concluded its examination following receipt of ministerial response	0
Chapter 3: Agency engagement	
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Chapter 4: Undertakings	
New undertakings made by ministers or agencies to address the committee's scrutiny concerns	6
Undertakings which the committee was made aware had been implemented during this period	5
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Instruments that do not meet the committee's expectations regarding exemptions from disallowance under standing order 23(4A)	2
Instruments that do not meet the committee's expectations regarding exemptions from sunsetting under standing order 23(3)(k)	1

[2] This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Report snapshot, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 86.

Part I—Technical legislative scrutiny

Chapter 1
New and ongoing matters

1.1 This Chapter details the committee's significant new and ongoing scrutiny concerns in legislative instruments relating to the committee's technical legislative scrutiny principles in Senate standing order 23(3).

1.2 The committee has resolved not to raise significant technical scrutiny concerns in relation to any instruments registered in this period.

Ongoing matters

1.3 The committee requests further information from the relevant minister about its significant technical scrutiny concerns in relation to the instrument listed below.

Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024[1]

FRL No.	F2024L00491
Purpose	The purpose of the instrument is to regulate mixed waste paper and cardboard that is exported from Australia. The instrument imposes requirements that, from 1 October 2024, exporters hold a waste paper and cardboard export licence and make an export declaration for each consignment of regulated waste paper and cardboard that is to be exported.
Authorising legislation	*Recycling and Waste Reduction Act 2020*
Portfolio	Department of Climate Change, Energy, the Environment and Water
Disallowance	15 sitting days after tabling (tabled in the Senate on 14 May 2024). Committee gave notice of motion to disallow on 19 August 2024.

Overview

1.4 The Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024 (the instrument) regulate the export of mixed waste paper and cardboard from Australia. The instrument imposes requirements that, from 1 October 2024, exporters hold a waste paper and cardboard export licence and make an export

[1] This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Recycling and Waste Reduction (Export—Waste Paper and Cardboard) Rules 2024, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 87.

declaration for each consignment of regulated waste paper and cardboard that is to be exported.

1.5 The instrument also provides for mandatory and non-mandatory matters which the minister must or may have regard to in determining whether to grant, renew, vary, suspend or revoke an export licence, imposing conditions for an export licence, and deciding whether to give a direction to the holder of an export licence. The instrument also imposes obligations on licence holders, including requirements for record-keeping and notifying the minister of certain events.

1.6 The committee first raised scrutiny concerns with this instrument on 26 June 2024, in *Delegated Legislation Monitor 6 of 2024*,[2] and the minister provided a response dated 13 August 2024.[3] As the committee retains scrutiny concerns about the below matters, it has resolved to raise them with the Minister for the Environment and Water.

Scrutiny concerns

Conferral of discretionary powers;[4] adequacy of explanatory materials[5]

1.7 In *Delegated Legislation Monitor 6 of 2024*,[6] the committee raised concerns that subsection 21(3) of the instrument appears to confer broad discretionary powers on the minister.

1.8 The instrument provides for circumstances in which a relevant Commonwealth liability is taken to have been paid. Under section 21 of the instrument, a fee charged for a waste paper and cardboard export licence, its renewal or variation is taken to have been paid if the person has given - and the minister has accepted - an undertaking. Subsection 21(3) provides that the minister must not accept an undertaking unless the minister has considered the financial position of the person who gave the undertaking; the nature and likely cost of the relevant export operations; whether the person who gave the undertaking will be able to comply and meet the cost of export operations; and 'any other matter' considered relevant. However, neither the instrument nor its explanatory statement defines 'any other matter' or provides guidance on the types of matters that may be considered relevant under this provision.

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2 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 3-9.

3 This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

4 Senate standing order 23(3)(c).

5 Senate standing order 23(3)(g).

6 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 4-5.

1.9 The committee requested the minister's advice as to what factors may be taken into account in exercising the discretion to consider 'any other matter', whether examples could be provided of the kinds of matters that may be relevant, and whether there are any safeguards or limitations on this discretionary power. [7]

Minister's response[8]

1.10 In her response of 13 August 2024, the minister noted that the matters which the minister must consider in subsection 21(3) go to the financial position of the person and their ability to pay the liability in accordance with the undertaking.

1.11 The minister advised that subsection 21(3) allows the minister to consider other factors that may be unique to an individual case and so not easily identifiable or appropriate to expressly set out in the instrument. However, she stated that this criterion is constrained by administrative law principles requiring any factor taken into account to be relevant to the decision and the determination of what is a relevant factor to be determined by reference to the scope, object and purpose of the legislation, the particular decision and what is reasonable in the circumstances.

1.12 In terms of examples of the kinds of matters that may be relevant, the minister indicated that these could 'potentially include information on the applicant's financial situation' which is relevant to whether the Commonwealth liability is likely to be paid. The minister further advised that the scope of the discretion is 'safeguarded by well-recognised principles of administrative law and statutory interpretation'. The minister noted that an administrative decision that takes account of an irrelevant consideration is an error of law.

Committee view

1.13 While the committee welcomes the minister's engagement on these matters, it retains concerns about the breadth of the discretion under subsection 21(3) of the instrument, noting the potential for discretionary decisions to impact on individuals and the need for legal certainty in terms of the rights and obligations to which users of the law are subject.

1.14 In this regard, the committee notes the minister's advice that the matters to be taken into account under subsection 21(3) go to the applicant's financial position and ability to pay the liability in accordance with the undertaking. The committee also acknowledges the advice that the discretion to consider 'any other matter' is constrained by principles of administrative law and statutory interpretation that enable only relevant considerations to be taken into account and prohibit irrelevant considerations from being taken into account. However, the committee notes that

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7 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 4-5.

8 This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

these are general principles of administrative law applying to all discretionary decisions under legislation and neither provide clarity around the specific discretion under subsection 21(3) nor operate as adequate safeguards on the exercise of such broad powers.

1.15 In addition, while acknowledging the minister's advice that other factors under this provision may be unique to an individual case and so not easily identifiable, the committee considers that a detailed explanation or substantive guidance in the explanatory statement as to the kinds of matters that might be relevant would give users of the law more guidance on the face of the instrument as to their rights and obligations under this discretionary provision.

1.16 In this regard, while the committee welcomes the minister's advice that examples of relevant factors that may be taken into account in exercising the discretionary power under subsection 21(3) could potentially include information on the applicant's financial situation, this appears to merely restate the contents of that provision and it also remains unclear to the committee specifically what this information might include. The committee considers that it would be helpful to provide substantive guidance about the kinds of matters that it was envisaged may be taken into account in exercising this discretion and notes that this is the kind of information that the committee expects would be included in the explanatory statement, to assist users to understand their rights and obligations under the instrument.

1.17 In light of the above, the committee requests the minister's further advice as to whether substantive guidance can be provided in relation to the factors that may be taken into account in determining 'any other matters' under subsection 21(3) and/or specific examples of what 'any other matters' may include.

Strict liability;[9] significant matters in delegated legislation[10]

1.18 Three provisions of the instrument appear to set out significant elements of strict liability offences and civil penalty provisions under the *Recycling and Waste Reduction Act 2020* (the Act). Specifically:

- Section 6 of the instrument prescribes export conditions, the contravention of which is a criminal offence punishable by 5 years imprisonment or 300 penalty units, or both; and a civil penalty of 600 penalty units.[11] Under the Act, strict liability applies to the criminal offence relating to the export of regulated waste material and the prohibition of that material unless prescribed export conditions are complied with;[12]

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9 Senate standing order 23(3)(h).

10 Senate standing order 23(3)(j).

11 See section 20 of the *Recycling and Waste Reduction Act 2020*.

12 Subsection 20(3) of the *Recycling and Waste Reduction Act 2020*.

- Section 10 of the instrument prescribes waste paper and cardboard export licence conditions. Similarly, the holder of an export licence may commit a criminal offence punishable by 5 years imprisonment or 300 penalty units, or both; and a civil penalty of 600 penalty units if a condition of the licence is contravened.[13] Under the Act, strict liability applies to the criminal offence relating to contravention of a licence condition during a period of licence suspension;[14]
- Section 15 of the instrument requires a waste paper and cardboard export licence holder to notify the minister of certain events set out under the provision, including where the licence holder ceases to operate the export business that carries out the export operations covered by the licence. It is a strict liability offence punishable by 60 penalty units, and a civil penalty of 250 penalty units, for a failure to comply with the notification requirements. [15]

1.19 Accordingly, in *Delegated Legislation Monitor 6 of 2024*,[16] the committee sought the minister's advice as to why it was necessary and appropriate to include the content of these strict liability offences carrying significant criminal and civil penalties in delegated legislation and whether consideration was given to the Attorney-General's Department's *Guide to Framing Commonwealth Offences* (the AGD guide).[17]

Minister's response[18]

1.20 In her response, the minister advised that the Act was intended to be framework legislation and accordingly, it was appropriate for the instrument to contain matters relating to elements of the offence contemplated that the Act allows the instrument to determine. She also confirmed that the relevant offence provisions are located in the Act rather than in the instrument and that the AGD guide had been considered, as explained in the explanatory memorandum to the Bill that became the Act.

1.21 In relation to section 6, the minister advised that the prescribed export conditions were those expressly contemplated by the Act. Further, strict liability applied to the elements of the offence in paragraphs 20(1)(b) and 20(1)(c), namely that the waste material is regulated material; and export is prohibited unless

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13 See section 59 of the *Recycling and Waste Reduction Act 2020*.

14 Subsection 59(6) of the *Recycling and Waste Reduction Act 2020*.

15 See section 61 of the *Recycling and Waste Reduction Act 2020*.

16 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 5-7.

17 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (24 May 2024).

18 This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

prescribed conditions are complied with. For this reason, strict liability was appropriate because neither provision involves conduct; rather, paragraph 20(1)(b) concerns the legal status of waste paper and cardboard; and paragraph 20(1)(c) provides a legislative link to the prescribed conditions in section 6 of the instrument. The use of strict liability does not affect the need to prove the fault elements for other parts of the offence. Additionally, the defence of honest and reasonable mistake of fact is available in relation to the strict liability elements.[19]

1.22 In relation to section 10, the minister confirmed that it is an offence under the Act for the holder of a suspended export licence to contravene a condition that is required to be complied with during the suspension. 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, which is appropriate because the element in paragraph (d) is a matter of law and does not involve any conduct. The use of strict liability does not affect the need to prove fault for other parts of the offence, including contravention of the licence condition.

1.23 Regarding section 15, the minister advised that a person who fails to notify the minister of a relevant event would be liable to a strict liability offence under the Act and noted that the explanatory memorandum to the Bill justifies the imposition of a strict liability offence, with reference to the AGD guide. Specifically, the explanatory statement provides that the offence is not punishable by imprisonment; it is subject to a maximum of 60 penalty units for an individual; the actions triggering the offence are simple, readily understood and easily defended; offences relating to 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; and the absence of strict liability may adversely affect the capacity to prosecute offenders.

Committee view

1.24 The committee notes the minister's advice that the enabling Act was intended to be framework legislation which provided for the elements of strict liability offences to be included in delegated legislation, as explained in the explanatory memorandum to the Bill that became the enabling Act. In particular, the committee notes the minister's advice that strict liability is only imposed in relation to elements of the offences under sections 20 and 35 of the Act that do not involve conduct of the relevant licence holder, which the committee notes is in line with part 2.2.6 of the AGD guide. The committee also welcomes the minister's advice that the application of strict liability is appropriate for the offence in subsection 61(3) of the Act, with reference to the AGD guide.

1.25 Accordingly, it appears that consideration has been given to the appropriateness of imposing strict liability in accordance with the AGD guide and the

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19 Section 9.2 of Schedule 1 to the Criminal Code.

offence provisions themselves are set out in the enabling legislation, with the Act enabling the details to be set out in the instrument. However, it is the committee's view that, as a matter of principle, significant matters, such as the detailed conditions and notification requirements relating to the three relevant offences, should ordinarily be included in primary legislation, rather than delegated legislation, to ensure appropriate parliamentary oversight of the scope of the relevant offence and penalty provisions. The committee has consistently raised concerns, as a matter of principle, about framework legislation, which contains the broad principles of a legislative scheme and relies on delegated legislation to set out significant elements of its scope and operation, as this reduces the parliamentary oversight attached to those elements. In this case, the committee is particularly concerned that the instrument contains significant elements of offences under the Act.

1.26 Accordingly, the committee has resolved to draw its concerns about the inclusion of significant elements of strict liability offences in delegated legislation to the attention of the Senate under standing order 23(4).

***Privacy*[20]**

1.27 Section 19 of the instrument sets out record-keeping requirements applying to the holder of a waste paper and cardboard export licence.[21] The instrument's explanatory statement notes that section 19 may require the retention of a small amount of personal information where licence holders are individuals. However, the explanatory statement does not explain whether there are any safeguards in place to protect use, collection or disclosure of personal information, including whether the *Privacy Act 1988* (the Privacy Act) applies.

1.28 Accordingly, in *Delegated Legislation Monitor 6 of 2024*, the committee sought clarification from the minister about the nature and scope of any personal information collected under the instrument, as well as applicable safeguards.[22]

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20 Senate standing order 23(3)(h).

21 Specifically, subsection 19(1) requires the holder of a waste paper and cardboard export licence to make and retain the following records: (a) for each consignment of regulated waste paper and cardboard exported under the licence, the export declaration made for the consignment, evidence supporting the matters stated in the declaration, and photographs of the paper and cardboard in the consignment and of the consignment once packed for export; (b) a copy of the receipt for payment for the consignment issued by the holder to the importer or end user of the consignment; and (c) each other document, made by the holder or that comes into their possession, that is relevant to showing whether they have or are complying with the relevant requirements of the Act. Subsection 19(2) requires these records to be retained for at least 5 years.

22 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 7-8.

Minister's response[23]

1.29 In her response, the minister confirmed that although it is not anticipated that personal information other than a licence holder's name and personal contact details would be required to be retained under section 19, it is possible that some other personal information may be inadvertently retained and subsequently audited or required to be provided to the minister and that some personal information may be contained in documents required to be retained.

1.30 The minister also confirmed that where a licence holder was an individual, the Australian Privacy Principles in the Privacy Act would apply to any personal information collected under section 19 and that any information collected under the Act must also be managed consistently with the Department's Privacy Policy.

Committee view

1.31 The committee welcomes the minister's clarification regarding the nature and scope of personal information that may be collected, used and/or disclosed under the instrument as well as privacy protections including the application of the Privacy Act and the Department's Privacy Policy.

1.32 The committee considers that the inclusion of this information in the explanatory statement would be helpful noting the potential impact on the rights of individuals, and in line with its expectations, as set out in Senate standing order 23(3)(h) and reflected in the committee's guidelines.

1.33 In light of the above, the committee requests the minister's advice as to whether the instrument's explanatory statement can be amended to include the details provided about the nature and scope of personal information that may be collected under the instrument and applicable privacy protections including the application of the *Privacy Act 1988.*

Significant matters in delegated legislation[24]

1.34 The committee also raised concerns in *Delegated Legislation Monitor 6 of 2024*,[25] that the instrument contains significant matters more appropriate for inclusion in primary legislation which may therefore not be subject to an appropriate level of parliamentary oversight. Specifically, the instrument prescribes the kind of material that is 'regulated waste material' for the purposes of the

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23 This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

24 Senate standing order 23(3)(j).

25 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 8-9.

regulatory scheme,[26] prescribes conditions for the export of such material,[27] and imposes requirements to make and retain records. [28]

1.35 Accordingly, the committee sought the minister's advice as to why it was considered necessary and appropriate to use delegated, rather than primary, legislation to provide for these matters. [29]

Minister's response[30]

1.36 In her response, the minister advised that that the enabling Act was designed to be framework legislation, supported by multiple pieces of subordinate legislation, and that the intention was for only waste material prescribed in rules made under the Act to be subject to the waste export regulatory framework. She also explained that, as set out in the revised explanatory memorandum to the Bill that became the enabling Act, this was to allow flexibility for different regulatory controls to be implemented for different kinds of regulated waste material and to allow the regulatory controls to adapt to changing circumstances including developments in waste processing technology and new human and environmental health challenges.

1.37 Further, the minister noted that other rules already regulate the export of waste glass, plastic and tyres, [31] which contain broadly similar provisions requiring exporters of regulated waste material to hold an export licence and make an export declaration for each consignment, as contemplated by the Act. [32] The record keeping requirements are also broadly similar. However, there are differences in the conditions that are imposed on the holder of a licence for the different regulated wastes, which reflects the different environmental and waste management challenges for each waste stream.

Committee view

1.38 The committee notes the minister's advice that the Act was designed to be framework legislation and the intention was for details as to what is regulated waste material, as well as export conditions and record keeping requirements to be set out in the relevant rules. However, as a matter of principle, while the committee considers

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26 See section 5.

27 See section 6.

28 See Part 5 of the instrument.

29 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 6 of 2024* (26 June 2024), pp. 8-9.

30 This correspondence was tabled with this monitor and will be accessible via the Delegated Legislation Monitors page on the committee's website.

31 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 the Recycling and Waste Reduction (Export-Waste Paper and Cardboard) Rules 2024.

32 Subsection 18(2) of the *Recycling and Waste Reduction Act 2020*.

that it is appropriate for delegated legislation to set out matters of detail, it appears that details of regulated waste material, export conditions and record keeping requirements may go beyond mere matters of detail and constitute significant matters of the scheme. Comments by the Scrutiny of Bills Committee in 2020 drawing this matter to the attention of the Senate,[33] which the minister cited in her response and which the committee also noted in its comments in *Delegated Legislation Monitor 6 of 2024*, only serve to further highlight the significance of this issue.

1.39 In addition, while the committee would not ordinarily consider reasons of flexibility or consistency to be an adequate justification for including such significant matters in delegated legislation, it notes on this occasion the minister's advice about the need for regulatory controls to adapt to changing circumstances including developments in technology and health challenges. The committee also acknowledges the explanation relating to consistency across a number of sets of rules which fit within the broader legislative framework.

1.40 In light of the above, while the committee is not seeking the minister's further advice about this matter, the committee has resolved to draw the inclusion of significant matters in delegated legislation to the attention of the Senate under Standing order 23(4).

1.41 In addition, the committee has placed a protective notice of motion to disallow the instrument, to provide it with additional time to consider the matters outlined above in relation to this instrument.

33 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2020* (18 September 2020), pp. 20-22.

Chapter 2
Concluded matters

2.1 This Chapter details the committee's concluding comments on significant technical scrutiny issues in legislative instruments relating to the committee's principles in Senate standing order 23(3).

2.2 The committee has resolved not to conclude its examination of any instruments raising significant technical scrutiny concerns in this Monitor.

Chapter 3
Agency engagement[1]

3.1 As part of its technical scrutiny of legislative instruments, the committee may engage with relevant agencies via its secretariat to gather information or seek clarification to resolve minor technical scrutiny concerns. While this correspondence is confidential, the committee lists the relevant instruments on its website and provides a statistical overview of the relevant scrutiny issues raised in its Annual Reports. The committee reports on matters which cannot be satisfactorily resolved via engagement with the relevant agency in Chapter 1 of the Monitor.

3.2 Some instruments may be listed as both 'new' and 'concluded', where the committee via its secretariat has both raised and resolved concerns with the relevant agency in the period covered by the Monitor.

3.3 The committee has not engaged with the relevant agency via its secretariat in relation to any instruments in this reporting period.[2]

Concluded matters

3.4 The committee has concluded its consideration of the following instruments after engagement with relevant agencies via its secretariat.[3]

Instrument
CASA EX32/24 — Flight Crew Licensing and Other Matters (Miscellaneous Exemptions) Instrument 2024 [F2024L00614]
Commonwealth Procurement Rules 1 July 2024 [F2024L00627]
Family Law Amendment (Arbitration) Regulations 2024 [F2024L00668]
Farm Household Support Secretary's Rules 2024 [F2024L00767]
Federal Financial Relations (General Purpose Financial Assistance—2023-24 Payment No. 12) Determination 2024 [F2024L00704]
Financial Stability Standards for Securities Settlement Facilities Determination 2024 [F2024L00683]
Financial Stability Standards for Securities Settlement Facilities Revocation 2024 [F2024L00682]

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Agency engagement, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 88.

2 For further details, see the *Index of Instruments* page on the committee's website.

3 For further details, see the *Index of Instruments* page on the committee's website.

Instrument
Social Security (Exempt Lump Sum – Settlement of Per- and Poly-fluoroalkyl Class Actions) Determination 2024 [F2024L00780]
Social Security (Exempt Lump Sum – Youpla Support Program) Determination 2024 [F2024L00779]

Chapter 4
Undertakings[1]

4.1 This Chapter identifies the new undertakings that have been made in relation to instruments considered in this report and those that the committee is aware have been implemented as at 16 August 2024.

4.2 The committee expects undertakings to be implemented in a timely manner and to be kept informed on their progress until implemented. This Chapter lists undertakings that are outstanding for more than 90 days as at 16 August 2024.

4.3 A full list of undertakings is published on the *Index of Undertakings* on the committee's website.[2] Further information about the scrutiny concerns leading to these undertakings can be found through the links published on the *Index of Instruments* available on the committee's website.[3]

New undertakings

4.4 During this period, the following undertakings were made to address the committee's scrutiny concerns.

Instrument	Undertaking	Date made
Australian Passports (Application Fees) Amendment Determination 2024 [F2024L00618]	The department undertook to progress amendments to the instrument to rectify a drafting error.	16 August 2024
CASA EX32/24 — Flight Crew Licensing and Other Matters (Miscellaneous Exemptions) Instrument 2024 [F2024L00614]	The agency undertook to progress amendments to the instrument to address the committee's scrutiny concerns regarding principle (f).	16 August 2024
CASA EX32/24 — Flight Crew Licensing and Other Matters (Miscellaneous Exemptions) Instrument 2024 [F2024L00614]	The agency undertook to progress amendments to the explanatory statement to address the committee's scrutiny concerns regarding principle (f).	16 August 2024
Family Law Amendment (Arbitration) Regulations 2024 [F2024L00668]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns regarding principle (d).	16 August 2024

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Undertakings, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 89.

2 See the *Index of Undertakings* page on the committee's website.

3 See the *Index of Instruments* page on the committee's website.

Instrument	Undertaking	Date made
Financial Stability Standards for Securities Settlement Facilities Determination 2024 [F2024L00683]	The agency undertook to progress a replacement explanatory statement to address the committee's scrutiny concerns regarding principle (k).	5 August 2024
Financial Stability Standards for Securities Settlement Facilities Revocation 2024 [F2024L00682]	The agency undertook to progress a replacement explanatory statement to address the committee's scrutiny concerns regarding principle (k).	5 August 2024

Implemented undertakings

4.5 During this period, the following undertakings have been implemented.

Instrument	Undertaking	Date implemented
Australian National University (Governance) Statute 2023 [F2023L00867]	The minister advised that the Australian National University had undertaken to amend the explanatory statement in response to the committee's scrutiny concerns.	20 June 2024
Australian National University (Governance) Statute 2023 [F2023L00867]	The minister advised that the Australian National University had undertaken to progress amendments to the instrument in response to the committee's scrutiny concerns.	2 July 2024
Federal Financial Relations (General Purpose Financial Assistance—2022-23 Payment No. 11) Determination 2023 [F2023L00559]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	17 July 2024
Financial Accountability Regime (Consequential Amendments) Transitional Rules 2024 [F2024L00286]	The department undertook to progress amendments to the explanatory statement to address the committee's scrutiny concerns.	9 August 2024
Road Vehicle Standards Amendment (2023 Measures No. 1) Rules 2023 [F2024L00086]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	14 August 2024

Outstanding undertakings

4.6 As at 16 August 2024, the following undertakings remain outstanding more than 90 days after they were made.

Instrument	Undertaking	Date made
Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment (Chapter 21 Amendments) Instrument 2024 [F2024L00088]	The Attorney-General undertook to codify in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* relevant exemptions intended to be enduring and to time limit those retained in delegated legislation.	20 March 2024
Bankruptcy Amendment (Service of Documents) Regulations 2022 [F2022L00528]	The Attorney-General undertook to amend the principal regulations in response to the committee's scrutiny concerns.	18 October 2022
Bankruptcy Regulations 2021 [F2021L00261]	The Assistant Minister to the Attorney-General undertook to advise the committee of the outcome of the Government's targeted review of the appropriateness of modifying provisions currently prescribed in the instrument.	26 July 2021
Bankruptcy Regulations 2021 [F2021L00261]	The Assistant Minister to the Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	17 August 2021
Civil Aviation Safety Amendment (Flight Operations—Parts 119 and 138) Regulations 2022 [F2022L01612]	The minister undertook to table the report into the review of the Franchise Disclosure Register provisions.	20 January 2023
Corporations Amendment (Design and Distribution Obligations—Income Management Regimes) Regulations 2023 [F2023L00193]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31 July 2023
Corporations Amendment (Litigation Funding) Regulations 2022 [F2022L01614]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31 July 2023
Environment Protection and Biodiversity Conservation (National Recovery Plan for Leadbeater's Possum (Gymnobelideus leadbeateri) Instrument 2024 [F2024L00270]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	3 May 2024
Environment Protection and Biodiversity Conservation (National Recovery Plan for the Swift Parrot (Lathamus discolor) Instrument 2024 [F2024L00482]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	2 May 2024

Instrument	Undertaking	Date made
Environment Protection and Biodiversity Conservation (Recovery Plan for the Spiny Rice-flower (Pimelea spinescens subsp. spinescens) Instrument 2024 [F2024L00346]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	3 May 2024
Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 [F2021L01823]	The department undertook to progress amendments to the explanatory statement to disclose funding information.	19 October 2022
Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 [F2021L01080]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns**.**	29 November 2022
Great Barrier Reef Marine Park Amendment (No-Anchoring Areas) Regulations 2021 [F2021L00843]	The minister undertook to amend the principal instrument in response to the committee's scrutiny concerns.	9 February 2022
Health Insurance (prudential standard) determination No. 2 of 2023 [F2023L00719]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023
Health Insurance (prudential standard) determination No. 4 of 2023 [F2023L00733]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023
Health Insurance (prudential standard) determination No. 5 of 2023 [F2023L00734]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023
Health Insurance (prudential standard) determination No. 6 of 2023 [F2023L00738]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023
Health Insurance (prudential standard) determination No. 7 of 2023 [F2023L00689]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023
Health Insurance (prudential standard) determination No. 8 of 2023 [F2023L00691]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023

Instrument	Undertaking	Date made
Health Insurance (prudential standard) determination No. 9 of 2023 [F2023L00695]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	27 July 2023
Higher Education Standards Framework (Threshold Standards) 2021 [F2021L00488]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	9 August 2021
National Anti-Corruption Commission Regulations 2023 [F2023L00759]	The Attorney-General undertook to amend the explanatory statement in response to the committee's scrutiny concerns.	16 October 2023
Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023 [F2023L01551]	The minister undertook to amend the explanatory statement to the instrument in response to the committee's concerns.	16 May 2024
Standards for Registered Training Organisations Amendment (Fit and Proper Person) Instrument 2023 [F2023L01182]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	31 October 2023
Telecommunications (Interception and Access) (Communications Access Co-ordinator) Instrument 2022 (No. 2) [F2022L01321]	The Attorney-General undertook to amend the instrument in response to the committee's scrutiny concerns.	13 December 2022
Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022 [F2022L01629]	The Assistant Treasurer undertook to amend the instrument in response to the committee's scrutiny concerns.	31 July 2023
Vehicle Standard (Australian Design Rule 106/00 – Side Underrun Protection) 2023 [F2023L01317]	The department undertook to progress amendments to the explanatory statement in response to the committee's scrutiny concerns.	31 October 2023
Veterans' Affairs (Treatment Principles – Extend Support Provided Under the Psychiatric Assistance Dog Program) Amendment Determination 2022 [F2022L00921]	The department undertook to consider the committee's scrutiny concerns as part of a review of the enabling Act.	7 September 2022

Part II—Matters of interest to the Senate

Chapter 5
Expenditure and taxation in delegated legislation[1]

5.1 This Chapter identifies the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) in the interest of promoting appropriate parliamentary scrutiny of Commonwealth expenditure in delegated legislation.[2] This includes expenditure-related instruments and instruments that levy taxation.

5.2 The committee did not identify any such instruments registered during this reporting period.

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Expenditure and taxation in delegated legislation, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 90.

2 Details of all instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) are published on the committee's website.

Chapter 6
Exemptions from disallowance and sunsetting[1]

6.1 This Chapter lists the instruments which the committee has resolved to draw to the attention of the Senate under standing order 23(4) because they are exempt from disallowance and sunsetting and do not satisfy the committee's expectations in relation to the source and appropriateness of the exemptions following the committee's scrutiny under standing orders 23(4A) and 23(3)(k).

Exemptions from disallowance

6.2 On 16 June 2021, the Senate resolved that delegated legislation should be subject to disallowance to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from disallowance will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.[2]

6.3 Senate standing order 23(4A) provides that the committee may consider instruments that are not subject to disallowance, including whether it is appropriate for these instruments to be exempt from disallowance. Noting the Senate's concern about the exemption of delegated legislation from disallowance, this section identifies the instruments which do not satisfy the committee's expectations regarding the circumstances of their exemption from disallowance.

6.4 Subject to exceptional circumstances, the committee's expectations will not be met where the instrument:

- is exempt from disallowance under one of the broad classes of exemptions in section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015;[3]

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1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Delegated Legislation, Exemptions from disallowance and sunsetting, *Delegated Legislation Monitor 9 of 2024*; [2024] AUSStaCSDLM 91.

2 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, *Resolutions relating to oversight of delegated legislation*.

3 Items 1 to 4 of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from disallowance: instruments requiring the approval of either or both Houses of Parliament; instruments that are directions by a minister to any person or body; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- is exempt from disallowance under the blanket exemption for instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 44(1) of the *Legislation Act 2003*;[4]
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money, including Advance to the Finance Minister determinations; or
- otherwise contains a matter requiring parliamentary oversight.

6.5 To assess whether an instrument is appropriately exempt from disallowance, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from disallowance.

6.6 Further information about the committee's expectations regarding the exemption of delegated legislation from disallowance are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.[5]

Instruments which do not meet the committee's expectations

6.7 The following instruments do not meet the committee's expectations under standing order 23(4A):

Instrument	Source of exemption
Automatic Mutual Recognition (New South Wales) (Exemption—Various) Declaration 2024 [F2024L00806]	Subsection 44(1) of the *Legislation Act 2003*
Industrial Chemicals Environmental Management (Register) Amendment (2024 Measures No. 1) Instrument 2024 [F2024L00744]	Subsection 44(1) of the *Legislation Act 2003*

4 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) pp. 50–53 and 106–107.

5 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 3rd edition (July 2024) pp. 43-45; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report* (December 2020) pp. 61–72; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) pp. 99–123.

Exemptions from sunsetting

6.8 Senate standing order 23(3)(k) requires the committee to scrutinise instruments which are exempt from the sunsetting provisions of the *Legislation Act 2003* (the Legislation Act), including whether it is appropriate for these instruments to be exempt from sunsetting.

6.9 The sunsetting framework established under section 50 of the Legislation Act provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. Sunsetting provides the opportunity for Parliament (as well as ministers and agencies) to ensure that the content of delegated legislation remains appropriate, and for Parliament to maintain effective, regular oversight of delegated powers.

6.10 On 16 June 2021, the Senate resolved that delegated legislation should be subject to sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances and any claim that circumstances justify exemption from sunsetting will be subjected to rigorous scrutiny with the expectation that the claim will only be justified in rare cases.[6]

6.11 Where an instrument is exempt from sunsetting, Senate standing order 23(3)(k) requires the committee to scrutinise each instrument as to whether the exemption is appropriate. Noting the Senate's concern about the exemption of delegated legislation from sunsetting, this section identifies instruments which do not satisfy the committee's expectations regarding the appropriateness of their exemption from sunsetting.

6.12 Subject to exceptional circumstances, the committee's expectations will not be met where the instrument:

- is exempt from sunsetting under one of the broad classes of exemptions in section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015;[7]

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6 For further information on the resolutions adopted by the Senate on 16 June 2021, see the committee's website, *Resolutions relating to oversight of delegated legislation*.

7 Items 1 to 7 of section 11 of the Legislation (Exemptions and Other Matters) Regulation 2015 exempt the following classes of instruments from sunsetting: instruments giving effect to international obligations of Australia; instruments that establish a body having power to enter into contracts; instruments that are directions by a minister to any person or body; instruments which confer power on a self-governing Territory; ordinances made under a power delegated in an Act providing for the government of a non-self-governing Territory; instruments (other than a regulation) relating to superannuation; and instruments made under annual Appropriation Acts.

- is exempt from sunsetting under the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme in section 54(1) of the *Legislation Act 2003;*[8]
- overrides or modifies primary legislation;
- triggers, or is a precondition to, the imposition of custodial penalties or significant pecuniary penalties;
- restricts personal rights and liberties;
- facilitates the expenditure of public money on an ongoing basis; or
- otherwise contains a matter requiring parliamentary oversight.

6.13 To assess whether an instrument is appropriately exempt from sunsetting, the committee expects that at a minimum, the explanatory statement will contain a statement that provides the source and the exceptional circumstances that justify the exemption from sunsetting.

6.14 Further information about the committee's expectations about the exemption of delegated legislation from sunsetting are contained in the committee's guidelines and the reports of its inquiry into the exemption of delegated legislation from parliamentary oversight.[9]

Instruments which do not meet the committee's expectations

6.15 Instruments listed below do not meet the committee's expectations under standing order 23(3)(k).

Instrument	Source of exemption
Industrial Chemicals Environmental Management (Register) Amendment (2024 Measures No. 1) Instrument 2024 [F2024L00744]	Subsection 54(1) of the *Legislation Act 2003*

8 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) pp. 50–53 and 106–107.

9 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Guidelines*, 3rd edition (July 2024) pp. 37–38; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report* (December 2020) pp. 89–90; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) pp. 87–88 and 99–123.

Senator Deborah O'Neill
Chair