Independent Review of the Dangerous Goods Act 1985 and associated regulations

Consultation Paper questions

Term of Reference A: The extent to which the Dangerous Goods Act 1985 (DG Act) and associated regulations promote the safety of persons and property and the effective management of dangerous goods

Question 1 To what extent does Victoria's dangerous goods legislation promote the safety of persons and property?

Q 1 – 3: Dangerous Goods (DG) legislation promotes visibility of the hazards from dangerous goods, through identifying them as a small subset of hazardous chemicals (in the majority of cases) with acute physical properties that require specific management.

The legislation covers key components of the lifecycle – storage and transport for non-explosives, the additional aspect of security for security sensitive ammonium nitrate (SSAN) ,and all lifecycle aspects for explosives.

The consultation paper notes that the review was driven by illegal activities in the waste reprocessing industry. Changing the legislation will not address this issue. More visible enforcement is more likely to improve effective management of DG by all stakeholders.

Question 2 To what extent does it promote the effective management of dangerous goods?

Question 3 How could it be improved so that it better promotes these objectives?

Term of Reference B: How the DG Act and associated regulations could be enhanced to be more risk-based and prevention focused

Question 4 How could the DG Act and associated regulations be enhanced to be more risk-based and prevention-focused?

Q 4 & Q7: Explosives regulations are traditionally very prescriptive. These regulations are long overdue to change to become more risk-based and prevention focussed. For smaller organisations without the resources to assess the risks, the prescriptive aspects could be moved into guidance material.

Question 5 Should dangerous goods legislation include a broad, general principle-based duty to minimise risks of harm to persons and property?

Q 5: No. Most DG operators are also PCBU and therefore already operate under general OHS obligations within the relevant state WHS / OHS regulations. Hence, the general duties to minimise risks already apply, in addition to the more specific DG regulations.

Question 6 Broadly speaking, do the Storage and Handling, Explosives, High Consequences Dangerous Goods and Transport Regulations impose the right combination of the different kinds of duties?

Q 6: Yes.

Question 7 What role should codes and guidance material play in supporting the DG Act and associated regulations?

Question 8 Do you have any suggestions about how the codes and guidance material issued by WorkSafe could be improved?

Q 8: Victoria could consider guidance material already produced by other jurisdictions. For example, WA issues many guidance notes and information sheets on DG aspects that are well regarded by industry. Data analytics could be used to identify the most frequently accessed documents and adopt similar material in Victoria.

Frequently Asked Questions are also a great starting point for those unfamiliar with key requirements.

Question 9 Should a permissioning framework be introduced for higher-risk sites and/or activities involving dangerous goods?

Q 9: No. For those companies abiding by the existing legislation there is little evidence to suggest that there are any issues with their existing management of DGs.

In many situations, the quantity of product being stored does not reflect the risk profile of a site. The complexity of site operations is a more accurate predictor of risks, for example, manufacturing, re-processing, package filling are much riskier activities that simply storing a product in a sealed container in a warehouse. This is reflected in many of the Australian Standards. For example, AS 1940 requires much larger separation distances to the boundaries where containers may be opened.

A permissioning framework is also likely to drive business to reduce storage of DG but increase the transport of DGs – an activity that has more public exposure / risk than storage. In 2017 with no specific consultation Victoria decided to reduce the threshold quantity for explosives, above which MHF obligations apply – from 50 t (aligned with all international and inter-state schedules) to 5 t. This appears to have been done without any consideration that simply storing explosives does not represent any significant risk. Consequently, business now have the choice of storing reasonable quantities of explosives and applying a Safety Case regime for the process of moving sealed boxes in and out of a storage container; or storing smaller quantities of explosives to be below the new MHF threshold, which is highly likely to result in increased explosives transport movements.

Question 10 What kinds of incidents involving dangerous goods should duty holders be required to report to WorkSafe?

Q 10: The ideal is alignment throughout Australia of the types of DG incidents that need to be notified to regulators. Some regulators have guidance material to assist industry with incident notification, providing examples of the types of incidents that are, and are not, reportable.

Term of Reference C: The efficacy of the DG Act and associated regulations in deterring non-compliance and illegal activity in relation to the management of dangerous goods

Question 11 How could the dangerous goods legislation be made more effective in deterring non-compliance and illegal activity in relation to the management of dangerous goods?

Q 11: Effective enforcement by the regulator is required. Having the legislation is only one part of the equation. There must be visible enforcement. Compliant industry should not be made to carry the burden from the lack of regulatory oversight for illegal activities.

Question 12 What methods could WorkSafe use to identify unknown dangerous goods sites, and do those methods require additional legal powers?

Term of Reference C continued: The efficacy of the DG Act and associated regulations in deterring non-compliance and illegal activity in relation to the management of dangerous goods

Question 13 Are the triggers for notification appropriate?

Q 13: Yes. The notification for DG storage is set at Manifest level, as per other Australian jurisdictions. Alignment is key to drive industry understanding of obligations as DG suppliers can assist their customers through their knowledge of obligations.

Question 14 What types of information should be notified?

Q 14: The Manifest and Site Plan, as per the Safe Work Australia guidance document for Manifests.

Question 15 What methods could WorkSafe use to monitor the dangerous goods market, and do those methods require additional legal powers?

Question 16 To what extent is the detection of unknown or illegal dangerous goods activity hampered by restrictions on information sharing by government agencies?

Question 17 What kind of information sharing should be permitted?

Question 18 What are the obstacles to the effective management of dangerous goods where the functions and powers of multiple agencies intersect and overlap?

Question 19 How could interagency coordination in relation to dangerous goods be improved?

Question 20 Should powers be delegated between agencies to improve coordination?

Question 21 Under what circumstances should a dangerous goods inspector be permitted to enter a place where dangerous goods might be stored?

Question 22 Should there be a power for inspectors to enter a residential premises? What should the threshold for these powers be?

Question 23 Does WorkSafe need broader powers to intervene at non-compliant sites?

Question 24 If so, what powers does it need, and what should be the threshold to the exercise of those powers?

Question 25 Should WorkSafe have the power to redirect body corporate obligations to their officers and controlling entities?

Q 15 – 25: The consultation paper does not fully describe the obstacles the regulator(s) faced when dealing with the illegal activities, nor what level of enforcement was in place prior to the incidents. Hence, it is difficult to respond to these questions.

Question 26 What costs should WorkSafe be able to recover, and from whom?

Question 27 Should WorkSafe be empowered to require entities engaging in dangerous goods activities to provide financial assurances, and if so, how should this be done?

Q 27: No. Financial assurances put more onus on legitimate business and are more likely to encourage illegal activities.

Question 28 Should dangerous goods operators only be permitted to dispose of their waste to accredited waste providers?

Q 28 & Q 29: No. The best disposal process will depend on the products involved and the different product risks.

Explosives waste requires specialised disposal methods that are beyond most accredited waste providers. As the entire lifecycle of explosives is regulated, this is already captured.

Question 29 Alternatively, should dangerous goods operators have a duty to undertake due diligence in relation to the disposal of their waste?

Question 30 Should officer liability for dangerous goods offences be based on a due diligence test or duty?

Question 31 Should a civil penalty regime be introduced into the dangerous goods legislation, so that WorkSafe has the option of bringing a civil penalty proceeding in relation to a dangerous goods contravention, as an alternative to a criminal prosecution?

Question 32 Should an infringements scheme be introduced for dangerous goods offences, and if so, which ones?

Question 33 Should maximum penalties be increased for (some or all) dangerous goods offences?

Q 29 – 33: DG operators are already obligated to comply with WHS regulations and are subjected to general duty obligations, enforcement proceedings, fines, etc. DG regulations should not duplicate these obligations.

The demonstrated need for any additional penalties has not been cleared put forward in the consultation paper.

Term of Reference D: Whether any amendments to the DG Act and associated regulations are required to respond to emerging issues and challenges related to the management of dangerous goods?

Question 34 How has the dangerous goods industry changed from when the DG Act was first introduced?

Question 35 Are there any other emerging issues and challenges that Victoria's dangerous goods legislation should be responding to?

Question 36 What does the future of the dangerous goods industry look like?

Question 37 What are the main challenges in the disposal of chemical waste in Victoria?

Question 38 Are there new technologies being introduced into the dangerous goods industry that will change the way the industry operates? Will this create new risks?

Question 39 How does Victoria's dangerous goods legislation need to adapt and change in order to meet these issues and challenges?

Q 34 – 39: Victoria's DG regulations should be sufficiently adaptable to: apply to new industries associated with DGs (e.g. energy storing batteries, hydrogen generation); recognise lower risks from new technologies (e.g. in-vehicle monitoring systems); and consequently provide industries with performance based regulation flexibility.

Industry is always under pressure to explore measures that reduce risks – from customers and competitors, through to regulators involved with environment protection (EPA) and worker protection (WHS).

Term of Reference E: Ways to streamline and modernise the DG Act and regulations

Question 40 Should a new DG Act adopt (as far as possible) the structure, order, language and conceptual framework of the Occupational Health and Safety Act 2004 (OHS Act)?

Question 41 Should dangerous goods legislation be incorporated within the OHS Act?

Q 40 & 41: It is unclear if this would lead to any significant steam-lining of DG regulations, given that the majority of DG operators already operate under the OHS / WHS regulations. However, some duplications would be removed (e.g. safety data sheet obligations). It is unlikely that explosives or high consequence dangerous goods (HCDG) regulation would neatly fit under this framework.

Question 42 Should DG Act and Transport Regulations apply to the transport of prescribed industrial waste?

Q 42: The overlap between the transport of waste and transport of DG has always been difficult to reconcile in a logical manner. Reviewing interstate approaches to this issue may assist with determining the best pathway.

Question 43 Should amendments to the Australian Dangerous Goods Code (ADG Code) come into force automatically?

Q 43: A harmonised approach across Australia would be good.

Question 44 Should the detailed regulations and offence provisions in the Transport Regulations be replaced by a single offence of failing to comply with the ADG Code?

Q 44: No. The ADG Code is very complex, with several subsections that reflect varying levels of risks. For example, the lack of providing transport documents represents a significant increase in risk compared to some package labelling with text slightly smaller than the minimum size requirement.

Question 45 How can the way in which dangerous chemicals are classified and captured be streamlined?

Question 46 Should Essential Safety Measures compliance be a condition of operating a dangerous goods site or facility?

Question 47 Should occupiers be required to implement the advice given by emergency services authorities, rather than simply "have regard to" it?

Q 47: No. The DG operator is in the best position to know the product hazards and the overall risk levels. For example, providing fixed fire fighting equipment (hydrants, etc.) near the storage of ammonium nitrate or explosives is not recommended as this encourages emergency services to remain in close proximity to a fire, where they will be exposed to a potential explosion risk. This occurred in the West, Texas explosion, where 12 of the 15 fatalities were emergency services personnel.

Question 48 Should Victoria recognise interstate dangerous goods licences?

Q 48: Yes. Industry continuously advocates for the recognition of equivalent inter-state licences, so that trained experienced personnel are able to relocate to meet obligations.

Question 49 Should ammonium nitrate be regulated by the Explosives Regulations?

Q 49: No. Ammonium nitrate (AN) is not an explosive. This has been looked at many times, by many jurisdictions and we acknowledge there is no consistency between Australian jurisdictions.

The introduction in the consultation paper has a key point that reflects the issues with AN being considered as an explosive.

"The regulatory frameworks that apply to dangerous chemicals are complex and overlapping, and the areas of overlap add to the complexity. This is partly due to the fact that ***the same chemicals can, at varying points in their life cycle, be classified in different ways under different regulatory frameworks, with each framework giving rise to distinct but overlapping duties….."***

Regulators consistently do not know where to put the additional security controls for AN. Over the years other security risk substances have been identified and regulators are happy with a self-regulating approach for these products, without needing to change the product classification and apply extra regulations.

The difficulty with putting AN into Explosives legislation is that fundamentally it is not an explosive. This is proven by the required testing and classification identified at the United Nations level, which cascades to DG transport requirements across all modes of transport: shipping, road, rail and air transport. By cross referencing to the ADG Code many storage regulations by default also pick up this classification.

Consistent classification needs to be used across the whole lifecycle of the product. It should not be 5.1 for manufacture (i.e. as an MHF) and import (i.e. AS3846), packaging and labelling (i.e. 5.1 as per ADG Code) and then magically become both

an explosive (for security purposes only) and a 5.1 DG (for safety aspects), for both transport, storage and use.

Term of Reference F: Other relevant matters

Question 50 Are there any other relevant matters that the Review should consider?

Q 50: Under the Explosives regulations and the HCDG regulations there is a need to identify and verify a person responsible to maintaining security of these products. NB: industry has a preference for the 'natural person' to reside in Victoria – to speed up the assessment process which can take several months.

Explosives and HCDG licences (sell, import, storage, transport) are issued on a five-yearly basis. At each renewal, the verification of this person's identity needs to occur. As explosives service providers hold a range of licences (reflecting the regulation across the explosives and HCDG lifecycle), this becomes an administrative burden as the verification process is time consuming.

Despite regulation 201 (3) noting that security assessments do not need to be repeated if already conducted for another licence or interstate equivalent licence, the Department still maintains this process needs to occur for each licence renewal, if the renewal occurs more than 6 months from the last licence renewal, even if the same person is being verified.

The frequency of security assessments for the Natural Person / 'person responsible to maintaining security of explosives' should be amended to align with the licence expiry timeframes, i.e. be valid for a period of five years, in order to minimise this administrative burden and licence renewal delays.