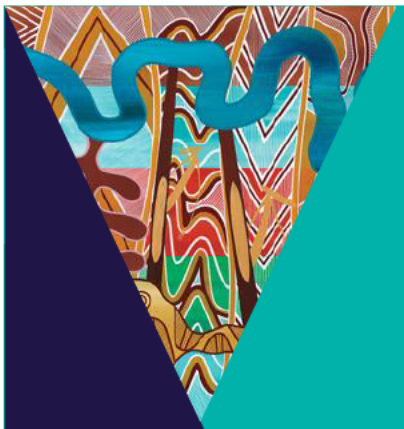

Independent Review of the Dangerous Goods Act 1985 and associated regulations

Submission by the Department of Environment, Land, Water and Planning

November 2020

VICTORIA State Government | Environment, Land, Water and Planning

Acknowledgment

We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it. We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

We are committed to genuinely partner, and meaningfully engage, with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader aspirations in the 21st century and beyond.

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Contents

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1. Introduction

The Department of Environment, Land, Water and Planning (DELWP) welcomes the opportunity to make a submission to the Independent Review of the *Dangerous Goods Act 1985* (DG Act) and its regulations (Review). This submission builds on recent targeted consultation undertaken with the Independent Reviewer, Andrew Palmer QC and the Review secretariat.

The Review is part of the Victorian Government's broader response to high profile incidents associated with illegal chemical stockpiling at several sites across Melbourne, of which DELWP plays a key role. These incidents have highlighted the importance of a strong regulatory framework for how waste is handled and stored. Waste mismanagement can result in unacceptable risks to the community and environment. A suite of policy and operational responses are required to position agencies to effectively coordinate prevention activities, and respond to underlying factors causing illegal management and stockpiling of hazardous waste.

Detecting and deterring non-compliance and illegal activity is challenging. In DELWP's view, early detection, compliance, enforcement and prosecution is essential to address non-compliance and illegal activity, which requires a strong regulatory framework. DELWP agrees with the consultation paper's assertion that it is crucial for WorkSafe to have strong surveillance, entry, inspection and response powers, accurate and up to date intelligence and information, and the ability to deter non-compliance and illegal activity through effective enforcement proceedings and strong cost recovery powers.

1.1 DELWP's interaction with the DG Act

The work of DELWP is governed by a number of acts and regulations that interact with the DG Act and its regulations, including:

- *Building Act 1993* (Building Act)
- *Environment Protection Act 1970* (to be replaced by the *Environment Protection Act 2017* alongside further changes contained in the *Environment Protection Amendment Act 2018*) (new EP Act)
- *Planning and Environment Act 1987* (P&E Act).

As part of the Victorian Government response to illegal chemical stockpiling, DELWP has partnered with key agencies including the Environment Protection Authority (EPA), WorkSafe, fire services, Victoria Police and local government to develop and implement the *Coordinated Prevention and Response Framework for high-risk waste sites* (Framework). The Framework (which is not a public document) ensures effective collaboration between agencies for the management of high-risk waste sites, including where there are instances of waste crime. The Framework applies to:

- Waste materials that are not inherently hazardous, but which can pose a significant fire risk if stored in large quantities or managed inappropriately (e.g. construction and demolition waste).
- Combustible recyclable waste materials (plastic and paper materials, tyres).
- Hazardous industrial waste (Dangerous Goods and Prescribed Industrial Waste - Reportable Priority Wastes under the new EP Act); and
- Hazardous substances as described under the Occupational Health and Safety Regulations 2017.

Under the Framework, agencies work together to exercise and enforce their regulatory powers with strengthened governance arrangements and new tools to ensure sites are brought into compliance. Multi-agency coordinated intervention and response under the Framework has enabled greater visibility of high-risk waste sites and effectively addressed risks and a number of sites to date.

2. DELWP's response to the Independent Review

DELWP notes the multiple emerging issues and challenges related to the management of DG described in the consultation paper. DELWP views the unsafe stockpiling of chemical wastes as posing unacceptable risks to the community and environment.

DELWP notes that the Independent Reviewer was tasked with considering whether the DG Act and associated regulations are fit for their intended purposes. A submission has been developed within the scope of DELWP's role as part of the Victorian Government Response to illegal chemical stockpiling, and the interaction between the Building Act, new EP Act, P&E Act and the DG Act and associated regulations. DELWP has not responded to every question posed by the Independent Review, and has combined responses to some questions where appropriate.

Overall, the Review presents an opportunity to simplify the classification process, and further align the permissioning frameworks and associated conditions across EPA and WorkSafe to better facilitate risk-based regulation. DELWP considers that the review presents an opportunity to consider greater clarification and alignment of powers and functions, where appropriate, between the Occupational Health and Safety Act 2004 (OHS Act), new EP Act, and the DG Act to further support co-regulatory effectiveness and address regulatory gaps and overlaps. DELWP's suggested improvements to the DG Act and regulations to address non-compliance and illegal activity are outlined below.

2.1 Term of Reference A: The extent to which the 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?

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

DELWP has no comment.

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

Broadly, DELWP considers that the key opportunities to promote the safety of persons and property and the effective management of DG through improvements to the DG Act and associated regulations include:

- improved clarity and consistency of requirements for DG across the DG Act and the new EP Act, which can improve compliance outcomes and support duty holders to understand their obligations. Non-compliant behaviours increase the risk and consequence of an incident.
- addressing legislative gaps for sharing information between regulators.
- introduction of risk-based permissioning controls and regulations, similar to those introduced by the new EP Act, that could apply appropriate levels of risk-based regulatory oversight to sites that fall below the Major Hazard Facility (MHF) thresholds.
- strengthening financial risk management tools and cost recovery powers, which can address the underlying financial risks to society and can act as a deterrent for duty holders who are non-compliant or are engaging in illegal activities.

Access to complete and up to date information about the presence of DG on site, particularly for emergency response services, should be considered and addressed. A lack of clear and easily available information relating to, for example, what materials are present on site, what materials are being transported, presents key risks to first responders who are not equipped with the information needed to ensure their safety. Any new measures to address this should aim to minimise any potential administrative burden on duty holders, where possible.

2.2 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?

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

DELWP suggests that the Review consider the application of a risk-based general duty approach for DG. As noted in the consultation paper (p.36), the General Environment Duty (GED) as the corner stone of the new EP Act, provides a new preventative approach to environment protection, as opposed to the current framework which is consequence-based, focusing on remedial action after pollution has happened.

DELWP supports the introduction of an 'as far as is reasonably practicable' test for the application of a general duty, to align with the OHS Act and new EP Act. This test ensures a proportionate response to risks. This is as opposed to the 'all reasonable precautions' test in the DG Act.

The GED establishes a continual improvement model as it requires all Victorians to understand and minimise their risks of harm to human health and the environment, from pollution and waste. This will include duty holders who deal with DG. Under s.25(4)(d) of the new EP Act, a duty holder conducting a business or undertaking an activity contravenes the GED if they fail to ensure that all substances are handled, stored, used or transported in a manner that minimises risks of harm to human health and the environment from pollution and waste.

If the DG Act were to move to a general duty-based model, there are potential overlaps with the EP Act and OHS Act requirements, in areas such as handling, storage and transport. From a duty holder's perspective, alignment and simplification of the controls required under each Act for these common activities would be highly desirable, with the aim to reduce and avoid expensive duplications or confusion.

DELWP would support as much harmonisation as possible without losing specificity to the targeted risks under each regime.

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?

DELWP has no comment.

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

Codes and guidance material can play a critical role in helping duty holders understand their obligations under the DG Act and regulations, and can improve compliance outcomes. Guidance is also an important aspect of a GED model, as it establishes State of Knowledge and helps provide the basis for a standard of 'as far as is reasonably practicable'.

Where risks of harm are high due to a high hazard classification of a dangerous good or if particular controls are deemed important due to the particular nature of the chemical or more complex technical processes, explicit, more detailed regulations or guidance may be required to remove ambiguity or potential misunderstandings.

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

Guidance material should improve alignment and further clarify the definitions of 'dangerous goods' and 'waste' for the purposes of the new EP Act. WorkSafe could co-design new guidance material with the DG industry, noting that industry and associations can play an important role in lifting standards and encouraging best practice. It is important that inconsistencies or overlaps in conditions under both the DG Act and the new EP Act are clarified for duty holders and reflected in guidance material.

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

DELWP notes that there is a highly regulated environment for MHF where in order to maintain a licence to operate, a business must meet significant prescriptive requirements contained in a safety case which is periodically and comprehensively reviewed.

Where a facility falls short of being a MHF, or does not store High Consequence DGs, there are no permissioning requirements. DGs stored at these facilities are inherently hazardous in specific circumstances and are subject to less regulatory oversight. Despite a potential legislative gap, DELWP notes that there are multiple safety duties available to WorkSafe under the DG Act and regulations, as well as under the OHS Act.

Under the new EP Act, expanded permission tiers that sit below licensing, including permits and registrations, provide lower burden options to better manage activities that are predisposed to stockpiling or abandonment. The EPA also has the ability to reject applications for permissions.

DELWP suggests that the Review consider introducing a risk-based tiered permissioning system for DG, whereby less burdensome lower tier permits or registrations, which are simpler and less expensive for duty holders to obtain, could be used to improve and clarify outcomes for keeping and reporting information, or tracking all DG. A risk-based tiered permissioning system has different requirements for duty holders depending on the level of risk to human health and the environment, which can improve the management of DG activities through greater visibility and oversight by regulators.

If a facility stores high consequence DG that require a licence, the DG Act requires a licensee to notify WorkSafe upon the grant of a licence, and at three monthly intervals, of the technical names and quantities of any DG at the premises. If false or misleading information is provided an offence is available. It is unclear how this provision is implemented and operationalised by WorkSafe. The DG Act should clarify whether the notification triggers an inspection by WorkSafe if the quantity of DG was to change.

The review could also consider tiered requirements for controls as seen in New Zealand, where the controls assigned to hazardous substances vary, depending on the hazard classification of the substance and on the type of hazard involved. (https://www.epa.govt.nz/industry-areas/hazardous-substances/rules-for-hazardous-substances/controls-for-hazardous-substances/). For example:

- Some controls, such as secondary containment and signage apply when hazardous substances are present above a certain threshold quantity.
- More highly hazardous substances have a greater number of controls, as well as more stringent controls, such as certified handler and tracking requirements or emergency management requirements.

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

DELWP supports broadening the requirement for duty holders to report DG incidents to WorkSafe in circumstances where the incident had the potential to cause harm. This may assist WorkSafe to prevent and address unsafe conditions and work practices, and identify any trends occurring. WorkSafe should have flexibility in determining when to intervene, and should not need to wait for a risk to materialise arise, particularly for a low likelihood but high consequence event. WorkSafe should ensure that it has appropriate monitoring, compliance and enforcement systems to follow up on any notifications that may indicate risks to human health or the environment.

2.3 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?

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

DELWP suggests that the Review consider a new periodic self-reporting obligation by operator/owner of either a change, or no change of circumstances. The self-reporting requirement should be supported by an offence provision for failing to notify of a material change at the site.

Additionally, a 'registration' permissioning tier, with simple electronic application and low transaction cost for duty holders could be established for storage and movement of lower risk DG. This would capture storage of DG that are lower consequence, lower hazard, and at smaller sites with requirements commensurate to their risk. If DG are to be stored on site, a 'registration' could be required before a lease for property is able to be signed. This could enable tracking and mapping of sites but also deter illegal storage of DG, deter operators from establishing many smaller sites to avoid licence requirements, and establish a level playing field discouraging illegal storage activity. This idea would need to be tested with co-regulators.

Additionally, the Review could consider a similar requirement to the 'fit and proper person' requirements under the new EP Act, where the EPA can consider compliance history and financial capacity beyond the prohibited person criteria and undesirable operators can be prevented or removed from holding a permission. This is a potential mechanism to address phoenix activity and can include consideration of the history of the officers of a body corporate (i.e. establishing whether an applicant has been insolvent or disqualified from managing corporations under the Corporations Act 2001 (Cth), or has been an executive officer of a corporation while it was placed into administration, receivership or liquidation).

Ultimately, a data system should be developed and shared between regulators that enables spatial mapping, site identification and hazardous inventory or DG registry. For duty holders, the aim would be that data would be entered once but the data could be used by multiple regulators. This should avoid the situation of duty holders providing the same information to multiple regulators.

Local councils may be in a position to identify when a building is being used to store DG that would require WorkSafe's involvement. Improved information sharing between WorkSafe and local councils may support the earlier detection of unknown or illegal DG activity.

Question 13 Are the triggers for notification appropriate?

Question 14: What types of information should be notified?

There could be improved provisions that direct early notification of matters which may affect emergency response to specific premises, to enable emergency response planning and risk mitigation. This may include sharing personal and commercial information that may assist fire agencies, WorkSafe, and EPA (such as contact details and photographs of site owners or managers).

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

Early detection, compliance, enforcement and prosecution is essential to address non-compliance and illegal activity. Mixed methods are required to monitor the DG market, including information sharing, data collections and analysis, monitoring market trends, future infrastructure needs, industry risks, supply chain trends, persons of interest, and technological innovations. Further information is provided in the response to Question 37.

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

The DG framework needs to enable and better encourage sharing of information.

Challenges arise not only due to legislative and organisational barriers to information sharing, but also a lack of clear triggers that can be used to justify sharing of specific categories of information. DELWP suggests

considering a process that triggers or enables the automatic sharing of relevant information between relevant agencies in some circumstances.

There are some constraints in DG legislation regarding sharing of information such as DG locations and volumes that can prevent a clear, common operating picture of the DG lifecycle by other regulators and emergency response services. WorkSafe can only share information with another agency if the information is needed for a comparable purpose.

WorkSafe can share DG information with agencies if they have functions in relation to matters concerning DG safety – as EPA and fire agencies have functions in relation to the safety of DG, this enables sharing with WorkSafe. However, local government, the Victorian Building Authority or Victoria Police may be precluded from DG information sharing. DELWP notes that EPA and WorkSafe currently operate under a Memorandum of Understanding (MoU) which describes how the organisations will work together to share information and cooperate on joint regulatory activity where there are overlapping responsibilities in relation to chemical waste and recyclable material. This MoU encourages information sharing. MoUs also exist with fire agencies and Victoria Police.

As legislative barriers to sharing information can impede effective regulation, consideration could be given to amending the DG Act to include mirror provisions to those contained in the new EP Act.

The new EP Act includes broad information sharing provisions. It may be useful if WorkSafe's relevant legislation regarding waste and DG reflected Part 14.5 of the new EP Act as appropriate to enable a clear and simple pathway for information sharing.

Work is progressing to improve intelligence and information sharing as part of a commitment under *Recycling Victoria*. These improvements will enable timely information, data and intelligence flow between State and local agencies, including WorkSafe, enhancing the regulation and prevention of high-risk waste sites.

Question 17: What kind of information sharing should be permitted?

Access to information about type and volume of DG kept on site or maximum allowable under licence conditions on site would be useful for coregulators or in emergency situations. In many cases this information would not be public but useful for other government agencies.

Under the new EP Act, s455 and 456, the EPA is required to establish a public register with the following types of information:

- any enforceable undertaking that is in force
- any licence issued by the Authority that is in force
- any permit or registration issued or granted by the Authority
- exemptions
- audits
- environment management plans.

DELWP suggests that the Independent Review consider a similar sort of public register as required in the new EP Act for DG. Combined with a registration requirement for all sites that store DGs as part of a possible DG permissioning framework, this could potentially make site identification easier for WorkSafe.

Establishing a public register for DG which requires all sites to be published may make it more difficult for rogue operators to 'slip the net'.

Alternatively, a legislated requirement under the DG Act (which could also be shared with emergency management or fire response authorities) for information to be made available on a 'regulators register', as opposed to a public register would align with current Government data sharing requirements. This idea would need to be tested with co-regulators.

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

Ineffective management by agencies can lead to poor regulatory outcomes. Examples of some obstacles include.

- Requirements of duty holders to provide the same information to multiple regulators

- Information sharing between regulators, emergency response services and local government is not clearly enabled by the regulatory frameworks.
- The thresholds for establishing a clear pathway for information sharing can be difficult to achieve and generally depend on imminent risk. This is a barrier to preventative action.
- Lack of clarity around roles and responsibilities of regulators, particularly in the case of determining a lead regulator where there is mixed or unknown categories of waste and DG. Although this issue is partially addressed by the Coordinated Prevention and Response Framework, which clearly sets out a decision-making process for determining lead and support agencies for high-risk waste sites, including where DG are present.

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

DELWP considers that interagency coordination has been improved through implementation of the Coordinated Prevention and Response Framework, which was developed in 2019 to ensure effective collaboration between key agencies including the EPA, WorkSafe, fire agencies, local government and Victoria Police.

To improve the effectiveness of the Coordinated Prevention and Response Framework, DELWP supports a greater alignment of the surveillance, entry, inspection and response powers of EPA's authorised officers and WorkSafe inspectors to support more effective co-regulation and enable prompt decision-making.

Co-regulatory efforts could be further improved through early and consistent consultation by proponents with emergency response agencies and regulators, especially for DG sites and MHFs. This could include an agreed process for pre-planning approval consultation by the proponent with emergency response agencies, ensuring that the relevant technical skills and knowledge are considered early into planning proposals.

Work is being undertaken by DELWP and WorkSafe to create a planning scheme provision for MHFs.

DELWP is also examining planning tools to better manage encroachment of incompatible use and development on industry, infrastructure and other uses. Public consultation was recently completed on a draft Buffer Area Overlay (https://engage.vic.gov.au/planning-amenity-health-and-safety-buffers). The draft overlay relies on evidence about potential risks to surrounding areas to guide decisions about appropriate use and development to protect future communities and the ongoing operations of facilities.

Further work is also being undertaken to determine whether there is a need to include planning provisions for combustible recycling and waste materials facilities in the planning system, including whether referral authorities should be specified for planning applications for these sites.

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

There are some potential operational benefits of third-party authorisations, delegations and/or appointments for the effective management and improved coordination of DG, which was an action identified through development of the Coordinated Prevention and Response Framework. It would be beneficial for WorkSafe to have the legislative flexibility to confer powers to third parties under the DG Act based on a clearly defined gap or business need.

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

Given the risks to human health and the environment associated with storage of DG, WorkSafe inspectors should have the power to enter a place where DG might be stored at any time, which reflects the powers of entry for EPA authorised offers under the new EP Act.

Question 22: Should there be a power for inspectors to enter 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?

EPA authorised officers can enter commercial and residential premises to conduct inspections and assess compliance with the duties and other obligations and determine whether there is a risk to human health or the environment from pollution or waste. A similar power for WorkSafe inspectors should be considered.

DELWP understands that there is a reliance on Commonwealth agencies to provide regulatory oversight for some sites. WorkSafe has no jurisdiction to enter sites self-insured and regulated through Comcare, which reduces ability of the State agencies to respond in certain circumstances. This should be considered and addressed if possible through the review.

As noted in the consultation paper, the new EP Act will provide authorised officers with broader inspection powers and increased scope for issuing notices.

It is appropriate to further align entry powers of WorkSafe inspectors and EPA authorised officers to support more effective co-regulation and quicker action when on-site, noting that these powers are used as an example in the consultation paper.

The DG Act could be amended to allow for WorkSafe's step in power to be exercised in broader circumstances, for example where there is a reasonable belief that the DG pose a risk to health and safety. The provision could be similar to that contained in the new EP Act – if WorkSafe considers there is an immediate risk of serious harm to human health or the environment arising from the context of the DG. This amendment would ensure that WorkSafe can exercise its powers in broader circumstances without needing to establish damage or a spillage.

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

As noted on p.50 of the consultation paper, Part 10.7 of the new EP Act will allow the EPA to redirect an environmental action notice or site management order to the controlling entity if the subsidiary has been wound up or has failed to comply with the notice or order.

This redirection to individual officers of the body corporate is qualified by several important criteria to safeguard individual officers. For example, s284 of the new EP Act enables the EPA to direct a person to comply with a specified environmental action notice or site management order if:

- the body corporate is being or has been wound up within the 2-year period before the direction is made; or
- has failed to comply with the environmental action notice or site management order.

However, in exercising this power to redirect obligations, the EPA must meet several criteria that seek to ensure the redirection to an individual is just and not oppressive. For example, the EPA must be satisfied that:

- the person was an officer of the body corporate at the time the direction was issued; and
- the person knew or ought reasonably to have known of the circumstances that resulted in the issuing of the environmental action notice or site management order; and
- the person was in a position to influence the body corporate in relation to its compliance with the environmental action notice or site management order; and
- in the case of a failure to comply with an environmental notice or site management order, the person failed to exercise due diligence to ensure that the body corporate complied with the environmental action notice or site management order; and
- it would not be oppressive, unjust or unreasonable for the Authority to give the direction.

DELWP suggests similar powers be explored for Worksafe, with consideration given to the importance of the criteria such as those set out above, which are included to protect individual officers.

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

DELWP suggests that the Review consider the strength of WorkSafe's financial risk management tools and cost recovery powers, noting that WorkSafe cannot recover costs from a generator or transporter except where they have been found guilty of an offence in relation to the DG Act. WorkSafe should continue to apply a 'polluter pays' principle and recover costs from non-compliant operators.

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?

As not all licence categories require a financial assurance under the existing *Environment Protection Act 1970* and the new EP Act, some DG operators may be licensed under environment protection legislation but

not be required to hold a financial assurance. Most sites that handle DG under the DG Act will not be required to have an EPA licence, and therefore are also not required to hold a financial assurance under the new EP Act. If there is overlap with a Prescribed Industrial Waste site (licensed by EPA), the financial assurance is only intended to address environmental risk.

WorkSafe could give consideration to applying financial assurances to particular classes of DG operators that are not already captured under the EP Act, noting that WorkSafe does not currently have the legislative power to do so. However, DELWP notes that it may be difficult to establish which classes of DG operators present the greatest financial risk. Introducing a financial assurance scheme for DG operators should be underpinned by evidence demonstrating that such a scheme is needed.

Financial assurances have some limitations, namely, that they do not provide a sufficient means of recovering the full clean-up costs to the State as the result of a fire occurring at a site and cannot address financial risks associated with illegal activities.

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

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

The consultation paper notes that the new EP Act will place duties on producers of industrial waste to dispose of it at a lawful place. The Review asks whether DG operators should only be permitted to dispose of their waste to an accredited waste provider.

A range of new upstream waste duties in the new EP Act in essence achieve the outcomes sought under Questions 28 and 29 of the consultation paper. Where DG become waste, the new EP Act introduces a number of 'upstream' waste duties, that complement the GED but enable the 'duty to follow the waste'. The duties are applicable to depositing, transport and receipt of industrial waste.

DELWP considers that these duties will manage the issues raised with regards to disposal of DG. These upstream duties place requirements on waste producers, transporters and receivers. If a DG operator is disposing of DG, these new duties will require the operator to ensure that their waste is managed accordingly. In meeting the GED and 'upstream waste' duties, operators would need to undertake due diligence in order to adequately meet those duties.

There is also a provision in the new EP Act (s88) for the appointment by the Authority of 'accredited consignors'. While the consignment scheme is still to formally commence and will be developed in the future, the concept is that accredited consignors can:

- perform the duties involved in transportation of industrial waste under s135 and perform the duties for managing priority waste under s139 of the new EP Act;
- undertake a prescribed notification under s142(1) of the new EP Act, that is a reportable priority waste transaction
- cause or permit the transport of reportable priority waste.

Where the upstream waste duties become complex – such as for large sites with multiple waste types and industrial processes, the accredited consignor scheme will support duty holders to meet their waste duties under the new EP Act.

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?

DELWP has no comment.

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

If penalties imposed by the DG Act and regulations are not sufficiently high, they could be considered a 'cost of doing business', rather than providing a strong deterrent. Where there are similar levels of risk and

comparable offences between the new EP Act and the DG Act, penalties could be aligned. DELWP notes that some penalties under the DG Act were significantly increased in 2019 to align with similar penalties under the OHS Act.

2.4 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?

DELWP has no comment.

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

The Commonwealth, in partnership with States and Territories, is developing a National Standard for the Environmental Risk Management of Industrial Chemicals. The National Standard will be established under new Commonwealth legislation. Jurisdictions will give it effect through their statutory frameworks and be responsible for ensuring compliance. This should provide for a cooperative and consistent national approach.

The National Standard will schedule industrial chemicals into one of seven categories, depending on their environmental risk. Each chemical will have risk management measures assigned to it by the Commonwealth. Jurisdictions will need to ensure compliance with these.

As a result of the National Standard, DELWP and EPA will need to develop an implementation strategy for Victoria. The general environmental duty under the Environment Protection Amendment Act 2018 provides the required statutory underpinning for implementation and compliance. This will be supported by EPA guidance so the regulated community clearly understands its obligations.

The Commonwealth is giving statutory effect to the Draft National Standard through the Industrial Chemicals Environmental Management (Register) Bill 2020 (ICEMR Bill). The Commonwealth intends to table the ICEMR Bill in Parliament in the spring 2020 session.

The National Standard will take a chemical lifecycle approach, seeking to manage risk to the environment at all stages of a chemicals use. The Standard is not intended to duplicate or replace existing management systems that are already in place, rather it is intended to be compatible and complementary.

One of the critical challenges for the National Standard is developing alignment and sound coregulatory approaches with other regulatory schemes (such as the DG Act) to avoid duplication.

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

DELWP has no comment.

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

The costs of lawful treatment and disposal for chemical waste is high as a result of necessarily strict regulation and a concentrated market for management services in Victoria. This context can create an incentive for some rogue waste managers to operate outside the regulatory framework for financial gain. In the most extreme cases this can lead to illegal dumping or dangerous stockpiling of chemical waste.

Dangerous stockpiling is not always driven by intentional illegal behaviour. Examples of other relevant drivers include limited end-markets which would incentivise more recycling or recovery; and low costs (barriers to entry) for chemical storage. These drivers pose a significant challenge to the safe management of chemical waste in Victoria.

Recycling Victoria, the Victorian Government's policy to better manage waste and transition to a more circular economy, provides $11.5 million in funding to support an increase in safe and viable infrastructure to better manage hazardous wastes. The first round of this fund is dedicated to increasing solvent recycling capacity, to tackle a particularly problematic chemical waste which has been discovered in dangerous stockpiles in Victoria. Outcomes of this process are expected to be announced in the near future.

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?

DELWP has no comment.

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

Similar to the new EP Act, Victoria's DG legislation needs to remain flexible, with a strong preventative and risk-based focus for the safe management of DG.

Any changes to DG legislation that increase the regulatory burden on industry must be considered against how they could impact on industry viability, particularly with any impacts arising from COVID-19.

2.5 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?

DELWP has no comment.

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

Consistent conditions for the transport and handling of DG, regardless of whether they are considered to be waste, would make it easier for transporters to understand the requirements. Confusion around what conditions apply can lead to poor compliance outcomes.

The consultation paper notes that DG Act and Transport Regulations do not apply to the transport of prescribed industrial waste for which a permit or a transport certificate under the EP Act is required. This is the case even when the waste being transported are DG under the ADG Code.

Under the new EP Act and proposed Environment Protection Regulations (EP Regulations), prescribed industrial waste is replaced by the category 'reportable priority waste'.

Following consultation on the proposed EP Regulations, consideration is being given to ensure the permissioning system aligns with the with the Dangerous Goods (Transport by Road or Rail Regulations) 2018 and responds to the anomaly in the consultation paper.

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

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?

DELWP has no comment.

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

Wastes that are a DG, due to their original composition, or as result of a process, application or activity, under EPA legislation are classified as prescribed industrial wastes (PIW).

DELWP is supportive of improving alignment with, and further clarifying the definitions of DG and waste, which was a key issue identified through development of the Framework. However, DELWP notes that it is important to maintain a distinction between the definitions to ensure clear roles and responsibilities between WorkSafe and EPA when managing risks and issues through a co-regulatory approach.

DELWP considers that harmonisation of classification systems for DG would assist duty holders, as current definitions and determination of classifications of DG can be confusing.

Waste holders have a duty to classify their waste under Part 6.4 and 6.5 of the new EP Act. This involves understanding the waste, its nature, source, composition, and how to identify the most appropriate waste code and waste classification under the proposed Environment Protection Regulations.

The proposed Environment Protection Regulations set out the process and criteria for classification of industrial waste and reportable priority wastes. The Waste Classification Assessment Protocol has been prepared for use with these regulations and is an incorporated document under the proposed Environment Protection Regulations (see table below).

The classification process outlined in the assessment protocol references DG Act definitions of DG and the criteria for hazard class in the Occupational Health and Safety Regulations 2017 (being the GHS classifications) in a conscious effort to move towards harmonisation.

Table from Waste Classification Assessment Protocol

Item	Criteria	Hazard	Waste Classification
1	If any constituent of the waste or the waste itself: • can be classified as dangerous goods under the *Dangerous Goods Act 1985* and falls within one or more of the classes under that Act [1].	Very high	Reportable priority waste
2	Where the above condition(s) do not apply, if any constituent of the waste or the waste itself: • meets the criteria for a hazard class in the Global Harmonised System of classification and labelling of chemicals (GHS)[2]; and/or • has persistent, bioaccumulative and/or toxic properties, as per The National Industrial Chemicals Notifications and Assessment Scheme (NICNAS) criteria[3].	High	Reportable priority waste

[1] See Appendix A.

[2] Third revised edition, fourth revised edition or Fifth revised edition, published by the United Nations, as modified under Schedule 7 of the Occupational Health and Safety Regulations 2017 (OHS Regulations). See Appendix B.

[3] NICNAS criteria – National Industrial Chemicals Notification and Assessment Scheme (Aus.). See Appendix C.

One example of this sort of harmonisation that could be possible is demonstrated under the NZ Hazardous Substances and New Organisms Act (HNSO). Under this Act, the Globally Harmonised System (GHS 7) has been adopted as New Zealand's official hazard classification system. It takes effect from 30 April 2021 (https://epa.govt.nz/industry-areas/hazardous-substances/new-zealands-new-hazard-classification-systeWeb page accessed 9 November 2020).

While the remit of the NZ EPA is wider (being a national regulator and includes pesticides and household hazardous substances), the single classification system for hazardous substances may be worth examining in the Victorian context. NZ has tailored GHS 7 for New Zealand with some carve outs and cut offs. The GHS 7 system allows regulators some flexibility when they adopt certain hazard classifications and concentration cut-offs. NZ follows the GHS 7 approach and assigns classifications to a substance based on its:

- physical hazards (such as flammability)
- human health hazards (such as acute toxicity)
- environmental hazards (such as whether it is hazardous to the aquatic environment).

Currently neither the DG Act nor OHS Act (or WHS regulation nationally) include GHS hazard classes for ecotoxic substances making comparable harmonisation harder.

On 1 January 2021, for workplace hazardous substances, Australia will begin a two-year transition to the 7th revised edition of the GHS (GHS 7). During the transition, manufacturers and importers may use either GHS 3 or GHS 7 to prepare classifications, labels and SDS for hazardous chemicals. From 1 January 2023, only GHS 7 may be used. (see https://www.safeworkaustralia.gov.au/ghs-7-transition)

Despite this transition to GH7, the Australian national WHS regulation excludes ecotoxic or ozone depleting substances from the labelling requirements for workplace hazardous substances.

Inclusion of GHS ecotoxic hazards classes in all classifications systems, along with other alignment (such as requirements for inclusion of ecotoxic hazard information in safety data sheets (DSD) or inclusion of ecotoxic

pictograms on labelling) would begin to move towards a single definition of hazardous substances that could be used across the OHS Act, DG Act and the new EP Act. The aim of this approach would be to use a single classification approach with flexibility for different regulators being used across all three Acts, in order to make the system more practical and easier to use by duty holders.

DELWP supports long-term reform to harmonise the OHS Act, DG Act and the new EP Act classification of hazardous substances.

There are three particular areas where improved alignment of hazard classification system between DG Act and EP Act could assist:

- EPA and Worksafe have different definitions of 'asbestos in fill', that is asbestos fibre contaminating soils or spoils being disposed of to landfill. In order to align approaches, EPA will use guidance and an incorporated document but the new regulations will not change.
- Transport of DG – The consultation paper (p 74) notes that DG Act and Transport Regulations do not apply to the transport of prescribed industrial waste for which a permit or a transport certificate under the EP Act is required. This is the case even when the waste being transported are DG under the ADG Code. Consideration is being given to how the proposed Environment Protection Regulations can align better with the DG Act, particularly in the areas of DG training, load restraint requirements, and onboard record-keeping.
- The new EP Act looks at aligning packing groups (i.e. groups into which DG classes and divisions are divided which specify the degree of danger associated with the substances with the class) with the DG Act as fully as possible. However, there is difficulty with aligning thresholds between EP Act framework and DG Act framework. It is possible to align both regulatory frameworks in terms of substances. However, it is difficult to do so on toxicity levels as DG Act is concerned with promoting the safety of people and property while the EP Act is concerned with minimising risk of harm to human health and the environment.

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

The Building Act and Building Regulations 2018 set out requirements for the installation, inspection, testing and maintenance of essential safety measures (ESM) for buildings, including those storing DG. These requirements are already mandatory for the owners of buildings and failure to comply is an offence.

The owner is also required to record the inspection, testing and maintenance of ESMs and to provide those records upon request to the Chief Fire Officer, the local council or the Victorian Building Authority.

The building regulatory framework places the primary obligation for ESM compliance on the owner of the building. Although a non-owner occupier also has obligations, DELWP would not support the DG framework imposing a new set of obligations on non-owner occupiers that is inconsistent with their responsibilities under the building regulatory framework.

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

As stated above the building regulatory framework already places obligations on the owner of the building to arrange for the regular inspection, maintenance and reporting on ESMs. If the emergency services identify non-compliance with any of these requirements the owner should be notified and there is already an enforcement framework to address the non-compliance.

If the advice is more expansive, for example the installation of additional ESMs, this may not be within the power of occupier to comply with. The Building Regulations 2018 require that any building work that impacts on an ESM requires a building permit and only the owner of the building can apply for such a permit.

Question 48: Should Victoria recognise interstate dangerous goods licences?

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

2.6 Term of Reference F: Other relevant matters

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

DELWP has no further comment.