

**Independent Review
Dangerous Goods Act & Associated Regulations
Consultation Paper**

**CCF Victoria Submission
November 2020**



Purpose

In April 2020, the Hon Jill Hennessy MP, then Minister for Workplace Safety, announced a comprehensive review of Victoria’s dangerous goods laws and appointed Andrew Palmer QC as the Independent Reviewer to conduct the Review.

The Review is part of the Victorian Government’s response to high profile incidents associated with illegal chemical stockpiling at several sites across Melbourne. The Review will consider contemporary issues and challenges in the management of dangerous goods, including emerging risks and issues and their impact on the safety of persons and property. Extensive stakeholder consultations with key stakeholders were held from May to September 2020 to assist in the formulation of this Consultation Paper.

The primary purpose of the Consultation Paper is to facilitate broader public discussion about the management of dangerous goods in Victoria. All interested individuals and organisations have been invited to comment on the issues raised in the Paper by making a submission to the Review by 30 November, 2020.

Further consultation will occur following receipt of the submissions, and during the process of drafting a final report. This report is due to be provided to the Minister for Workplace Safety in mid-2021.

Background

The Civil Contractors Federation (CCF) is the peak industry body representing Australia’s civil construction industry in this State. The CCF has branches in all states and territories representing more than 1,700 contractor and associate members nationally.

CCF members are responsible for the construction and maintenance of Australia’s infrastructure, including roads, bridges, pipelines, drainage, ports and utilities. Our members also play a vital role in the residential and commercial building industry by providing earthmoving and land development services including the provision of power, water, communications and gas.

In Victoria, CCF membership comprises approximately 400 contractors and 120 associate members. The contractor organisations annually build \$13bn of Victoria’s public and private civil construction and in turn employ in excess of 42,000 civil construction workers in this state.

What are dangerous goods?

Generally speaking, chemicals are classified as “dangerous goods” if they pose an immediate physical hazard to persons or property. This includes substances that are corrosive, flammable, explosive, spontaneously combustible, toxic, oxidising, or water reactive.

Dangerous goods are considered dangerous due to their inherent nature which, if not controlled effectively, can cause serious or fatal injuries and large-scale damage to property and the surrounding environment.

Whilst a number of dangerous goods are used in industrial settings in large quantities, many are also every day products used in the home, office or workplace.

Categories for dangerous goods follow the Australian Code for the Transport of Dangerous Goods by Road and Rail (ADG Code), with some exceptions.

Categories are:

- *Class 2: Gases*
- *Class 3: Flammable liquids*
- *Class 4: Flammable solids, substances liable to spontaneous combustion and substances which in contact with water emit flammable gases*
- *Class 5: Oxidising substances and organic peroxides*
- *Class 6.1: Toxic substances*
- *Class 8: Corrosive substances*
- *Class 9: Miscellaneous dangerous substances and articles*

The DG Act uses its own definition of “explosives”, instead of including ADG Code Class 1 (explosives).

The DG Act definition also includes combustible liquids having a flash point of higher than 60°C, HCDGs, goods too dangerous to be transported, and any other chemicals declared to be dangerous goods.

Most dangerous goods can also harm a person’s health if they are inhaled or absorbed through the skin, causing both immediate and/or long-term health effects. These dangerous goods are also considered to be “hazardous substances” and are regulated under both the DG and OHS frameworks.

Hazardous substances are divided into 11 classes based on the type of harm each can cause to a person’s health. The classes are divided into categories based on their potency and extent to which they cause harm.

The 11 classes in are:

- *Acute toxicity*
- *Skin corrosion/irritation*
- *Serious eye damage/eye irritation*
- *Respiratory sensitizer*
- *Skin sensitizer*
- *Germ cell mutagenicity*
- *Carcinogenicity*
- *Toxic to reproduction and effects on or via lactation*
- *Specific target organ toxicity following single exposure*
- *Specific target organ toxicity following repeated exposure*
- *Aspiration hazard.*

There are various risk categories within each of the classes.

The lifecycle of dangerous goods

Dangerous goods in Victoria generally progress through five key stages of their “product life” – raw material extraction, manufacture/import, sale/distribution, use, and disposal.

The lifecycle commences when the dangerous goods (or the materials from which they are made) are extracted in their raw form. Dangerous goods will become a consumable product after they have been manufactured from those raw materials or have been imported into Victoria.

DG Act, s 3 defines “manufacture” as including any part or whole of the process of: making non-dangerous goods from dangerous goods; making non-dangerous goods from non-dangerous goods, where in the course of the process dangerous goods are made; and the unmaking, altering, repairing or remaking of dangerous goods.

These products will then be supplied through a wholesale/distribution process where they may be used in other manufacturing or production activities, or to fulfill a range of other purposes across various industries.

When dangerous goods products are damaged, unwanted, or no longer usable they become waste. This waste must be treated so it can be safely reprocessed, disposed of at an approved facility or exported.

Dangerous goods are likely to be transported by road or rail at various points throughout their lifecycle. To transport dangerous goods or explosives both the vehicle and the driver must be licensed by WorkSafe.

Storage and handling of dangerous goods is subject to regulations and safety standards which increase as quantities increase. Although licences are not always required to handle or store dangerous goods, WorkSafe must be notified for quantities which exceed specified thresholds. Licences are required for a number of activities. In the years to June, 2019 WorkSafe has issued 15022 licences/permits across all dangerous goods licence classes. Large quantities may require a Major Hazard Facility (MHF) licence.

When dangerous goods reach the end of their “product life” they are disposed at an EPA licenced facility, reprocessed or exported.

Dangerous goods regulatory framework

In Victoria, dangerous goods are primarily regulated by the *Dangerous Goods Act 1985*. The DG Act is supported by four sets of regulations:

1. Dangerous Goods (Transport by Road or Rail) Regulations 2018
The Transport Regulations give effect to the *Australian Code for the Transport of Dangerous Goods by Road & Rail* (ADG Code). The ADG Code is adopted by all Australian jurisdictions to ensure national consistency.
2. Dangerous Goods (Storage and Handling) Regulations 2012
The Storage and Handling Regulations promote the safe handling and storage of dangerous goods by imposing labelling, packaging and storage requirements on manufacturers, suppliers, occupiers of dangerous goods storage facilities and workers, with the obligations increasing according to the quantity of dangerous goods stored.

3. Dangerous Goods (Explosives) Regulations 2011
The Explosives Regulations control access to and use of explosives in Victoria by imposing a range of duties, including a strict licensing framework, on anyone involved in the manufacture, storage, sale, transport and/or use of explosives. The Explosives Regulations also give effect to the *Australian Code for the Transport of Explosives by Road and Rail* (AE Code), which sets out requirements for the transport of explosives.
4. Dangerous Goods (HCDG) Regulations 2016
The HCDG Regulations control access to, and use of, HCDGs. The HCDG Regulations prohibit the sale and supply of HCDGs, and impose a strict licensing framework on anyone involved in the import, export, manufacture, sale, supply, use, handling, transport, transfer or disposal of HCDGs. The only substance that is declared to be HCDGs, and therefore captured by these regulations, is ammonium nitrate.⁸ Ammonium nitrate is the main ingredient of the most common type of explosives used in Australia. It can also be used as a fertiliser.

An overview of Victoria's existing dangerous goods framework follows:

Principal Legislation

Dangerous Goods Act 1985

- Aims to promote the safety of persons and property in relation to the manufacture, storage, transport, transfer, sale and use of dangerous goods and the import of explosives into Victoria.
- Provides WorkSafe inspectors with inspection and enforcement powers.
- Imposes responsibilities on duty holders and establishes offences and penalties.

Subordinate Legislation

<u><i>Transport Regulations</i></u>	<u><i>Storage and Handling Regulations</i></u>	<u><i>Explosives Regulations</i></u>	<u><i>HCDG Regulations</i></u>
Manage the risks arising from the transport of dangerous goods over land and ensure consistency with other Australian jurisdictions.	Provide for the safe storage and handling of dangerous goods.	Manage the risks of explosives to ensure the safety of people and property.	Regulate access to HCDGs (ammonium nitrate).
Set out the obligations of persons involved in the transport of dangerous goods over land and give effect to the ADG Code.	Impose packing, labelling and storage obligations on manufacturers, suppliers and occupiers of dangerous goods storage facilities.	Impose duties on people involved in the manufacture, sale, storage and use of explosives, including licensing.	Impose a licensing requirement for anyone who has access (including manufacture, sale, use, storage, etc).

Supporting documents

<u><i>ADG Code</i></u>	<u><i>Storage and Handling Code</i></u>	<u><i>AE Code</i></u>	–
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Other Legislation

The regulation of dangerous goods interacts with other legislation, including the *Environment Protection Act 1970* (the EP Act), the *Occupational Health and Safety Act 2004* (the OHS Act), the *Planning Act*, the *Building Act 1993* and the *Work Health and Safety Act 2011* (Cth)

The general duties in the OHS Act are supported by the OHS Regulations, which set out detailed requirements that relate to specific work, such as construction, certain workplaces such as Major Hazard Facilities, and the use of certain materials, including asbestos, lead and “hazardous substances”.

Similarly, the general duty of the soon to be implemented Environmental Protection Act 2017, and the Environment Protection Amendment Act 2018 will be supported by EPA Regulations with requirements relating to construction and the storage and transport of prescribed industrial waste.

There are currently separate but overlapping regulatory requirements from each of these Acts relating to the management of different risks and which apply at different points within the dangerous goods lifecycle.

An important consideration is that the review has already identified significant differences in the attitude and competence of businesses and other entities that must manage dangerous goods. Willingness and capability to comply must be considered

For the purposes of the review, duty holders could be considered:

Willing and able

- *Take all reasonable steps to comply with the law and have access to expert compliance advice when they need it.*
- *Typically large, well-resourced operations where dangerous goods are likely to form part of their core business.*

Well intentioned

- *Try to comply but, through a lack of expertise or resources, may not always meet their obligations.*
- *May misunderstand what is required.*
- *Typically, small to medium-sized entities.*
- *Dangerous goods may not be part of their core business.*

Reluctant

- *Prepared to test the boundaries of the law in order to minimise compliance obligations.*
- *May be willing to “cut corners” or challenge their obligations.*

Uninformed

- *Not aware of the requirements of the law, or possibly even that they are subject to dangerous goods regulation.*
- *Likely to be small, poorly resourced operations.*

Deliberately evasive

- *Deliberately break the law, and actively seek to avoid detection.*
- *Aware that legislative duties exist but put profit before compliance.*
- *May be associated with other criminal activities.*

In relation to the Terms of Reference and questions raised in consideration of the Dangerous Goods Act and associated regulations are fit for their intended purposes, CCF makes the following commentary:

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

The existing regulatory framework is generally effective but does not appear to prevent major incidents, such as the recent chemical warehouse fires or the subsequently discovered illegal storages of dangerous chemicals.

The extent to which this occurs has not been well documented and is made more difficult when considering what is a dangerous or hazardous.

The major fire at the Stawell tyre dump illustrates the difficulty of identifying the point at which a commonplace material becomes dangerous or hazardous. In that case, the tyres became dangerous because of the volume of the storage and the lack of segregation, fire prevention, and management.

Similarly, on a construction site, hydrocarbons, chemicals and wastes may become dangerous or hazardous due to the amounts held, the means of storage or use, exposure to the workforce or adjacent public areas during the works, or proximity to sensitive receptors.

Minor failures are likely to result in breaches of the requirements of WorkSafe and the EPA.

The current regulatory requirements under the Dangerous Goods Act are prescriptive and complex, and do not acknowledge the changing and transitory nature of construction sites and their support activities.

Each site has unique characteristics that are not readily compatible with the “one size fits all” nature of the current Dangerous Goods Act but are more suited to the approach of the OHS Act and the soon to be implemented EPA Amendment Bill (2018), which require the duty holder to assess risk, plan and implement appropriate management processes.

Dangerous goods and hazardous materials may be encountered during demolition (eg asbestos or residual hydrocarbons). Site geography may include sensitive receptors or risks to isolation and containment processes.

Dangerous Goods and Hazardous substances such as hydrocarbons, solvents, coatings and explosives may be used to construct or be embedded in the construction. Both the OHS Act and the EPA Act overlap the Dangerous Goods Act. Prescriptive regulations mean that compliance overrides what may be the best answer. Non-compliance becomes likely as the duty holder implements appropriate practices.

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

In its current format the Dangerous Goods Act, does not effectively manage the safety of persons and property. The Act does not adequately recognise the unique challenges relating to construction which include short term site presence, different stages of construction and the many variable inputs to a construction project.

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

Effective management of Dangerous goods under the current legislation is difficult. Management requirements change through each phase of the project. These requirements may overlap and potentially conflict with the construction process.

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

A means of assessing risk at each stage of a project and the development of appropriate management strategies is required.

Terms of Reference B: How the Dangerous Goods Act and associated regulations could be enhanced to be more risk-based and prevention focused.

Principle based duties.

These set a general objective, such as “provide safe working environment” and “reduce the risk as far as practicable the risk of dangerous goods chemically or physically interacting with other substances”. These objectives are flexible and allow the duty holder to determine the best methodology, but do not provide any guidance on how the objectives are to be met.

Prescriptive duties

These require specific measures to be adopted and rely on a body of Legislation and Regulation describing every situation and risk. Construction processes and materials are constantly evolving, which means constant change in Regulations. Innovation and improvement is stifled.

Performance-based duties

Performance based duties set a standard which must be achieved; for instance, the minimum separation distances between fireworks and a member of the public. Improvement and innovation is encouraged but there is no encouragement to improve beyond the required standard.

Process duties

Process duties require duty holders to follow particular processes to manage and control risk. These can include:

- identify hazards,
- carry out risk assessments, and
- review risk control measures are all process duties.

It is assumed that following a mandated process will likely result in meeting obligations under a general duty.

Documentation duties

Records are kept which allow the regulator to confirm compliance. This is a paperwork requirement that doesn't in itself provide any improvement in risk management.

The Dangerous Goods Act does not include a broad general principle-based duty for dangerous goods, such as found in the OHS Act and the yet to be implemented Environment Protection Act (EPA Amendment Bill 2018).

Currently, the Dangerous Goods Act does not apply to:

- Every person engaged in activities involving Dangerous Goods, or
- Every risk, other than those specifically listed.

It also applies the principle of “taking all reasonable precautions” rather than “minimisation of risk so far as reasonably practicable”.

A broad, general principle-based duty underpinning the Dangerous Goods Act would mirror the approach of the OHS Act and the Environment Protection Act, so reducing conflict and confusion across these overlapping Acts.

A general duty could require any person engaging in any activity involving dangerous goods to minimise as far as practicable the risks of harm to people or property arising from that activity.

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

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

A general principle-based duty allows a Contractor to develop site specific controls that are practicable, rather than prescribed measures that are impractical for what is effectively a temporary and changing site.

The Dangerous Goods Act needs to compliment and align with existing regulations currently in place including the OHS Act (2007), Environment Protection Act (1970) and Environmental Amendment Bill (2018).

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

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

Codes and Guidance documents are essential tools for any Contractor applying the general duty to manage site-based risk. Compliance Codes issued by WorkSafe and the proposed Guidance Documents being developed for issuance by the EPA under new legislation, are effective and a good example of this practice.

The Industry Consultation process and Reference Groups currently being used in the development of EPA Guidance Documentation is highly effective and recommended for adoption in the review of the Dangerous Goods Act to ensure that “the body of knowledge” is current and practical.

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

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

In principle, “permissioning” of high-risk sites, and the reporting of incidents are appropriate. However, if the principle of the proposed general duty is that the duty holder manages the risk, there must be consultation on the right definition of “high risk” and the need to report incidents, which are effectively managed on site.

Terms 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

The events which have triggered this review clearly demonstrate that the Dangerous Goods Act is not effectively deterring non-compliance and illegal activity. However, there is little evidence of non-compliance by the majority of legitimate operators, ranging from manufacturers, storage facilities, users and waste management operators.

During our recent consultation with the EPA, it was noted that even though the EPA suspected non-compliance activity, the EPA could not enter and inspect premises without due cause. The recent series of fires provided due cause and right of entry to other premises on the basis of a well-founded knowledge of the potential risk of fire and thus due cause.

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?

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

Non-compliance can occur due to complex legislation and also where operations are not open to scrutiny.

It is recommended, improved transparency and increased powers of inspection are needed. The process of inspection must be collaborative so that an inspection visit is seen as “here to help” rather than one of “looking for a reason to prosecute.”

A possible process for formalisation would be as follows:

- First visit is to advise, inform and educate;
- Second visit is to investigate remedial actions and if non-taken, warn and issue show cause notice;
- Third visit is issue with issue unresolved, issue penalty;

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

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

The OHS, Dangerous Goods and Environment Protection Acts overlap and the boundaries to their individual purposes is blurred.

A non-compliance related to dangerous goods is likely to also be a WorkSafe issue and a potential environmental incident.

If activities on a construction site are to be subject to inspection under any of these Acts, it is reasonable that the information gained in the inspection is shared between the agencies.

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

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

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

Effective enforcement of the intersecting Acts relies on information which is typically gained by inspection. The current situation where a site can be subject to inspection by 3 different agencies can be disruptive, a duplication of effort and a waste of valuable resources.

Sharing of inspection reports between the agencies is appropriate but there will need to be caution regarding the powers of each inspector. Typically, a WorkSafe Inspector may not have the training and background to provide advice on the finer points of environment or dangerous goods.

Enforcement should also defer to the expertise of the relevant agency. This must be balanced in accordance with individuals and body corporates legal & privilege rights under the relevant Acts.

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

Non-compliances can occur without scrutiny due to there being no right of entry to an inspector.

We acknowledge that inspectors must have a right of without the need for due cause. However as repeated entry without due cause has the possibility of being construed as harassment, there will need to be controls on frequency of entry.

Sharing of information between relevant agencies will ensure consistency of approach and may assist in minimising the frequency of inspections being undertaken.

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

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

All waste must be managed by a duly accredited and or licensed waste management operator, in accordance with approvals issued by the EPA in accordance with the new EPA Amendment Bill (2018).

<u>Terms of Reference E:</u> Ways to streamline and modernise the Dangerous Goods Act and regulations.

We have seen the new Environment Protection Act and its Amendment Bill (2018) modelled on the OHS Act. It would be reasonable to expect that in drafting a new Dangerous Goods Act, that it would follow the same model to ensure consistency between these overlapping Acts, all of which apply to building and construction sites.

Summary

The CCF is committed to doing its utmost to support its members to ensure that the work they undertake is safe, with workers afforded the highest level of protection, while mitigating risk and damage to the environment.

To achieve this aim, the CCF offers its members a broad range of services to assist them to perform their important work safely. Our services include:

- industry specific training through our registered training organisation;
- verification of competency training;
- access to a discounted contractor management system;
- providing members with access to specialist HSE and legal advice to assist them to maintain effective and robust safety management systems;
- publication of a regular industry bulletin raising safety and compliance issues; and
- providing our members with access to template safe work method statements, risk assessments and traffic management plans amongst many others.

CCF Victoria fully supports workplace and environmental safety and welcomes the opportunity to work collaboratively with the State Government in delivering improved safety and environmental outcomes under proposed amendments to the Act, as a collaborative process.

Our members take great pride in delivering the critical infrastructure we use in everyday life from roads, rail, bridges, underground sewerage, water and power connections and we make this submission for your due consideration in the drafting of any proposed amendment to the legislation.

*Civil Contractors Federation Victoria
30 November 2020*