Independent Review of the Dangerous Goods Act 1985 and associated regulations

WorkSafe submission to the Consultation Paper

WorkSafe Victoria's (WorkSafe) vision is to ensure that Victorian workers return home safely every day and its mission is to actively work with the community to deliver outstanding workplace safety and return to work, together with insurance protection.

In its work to prevent injury, disease and death in Victorian workplaces, WorkSafe conducts a range of outreach activities including raising public awareness, providing advice and information, fostering cooperative and consultative relationships, initiating and encouraging research and publishing information and findings. WorkSafe also enforces Victoria's occupational health and safety and accident compensation laws through inspecting workplaces, granting licences and prosecuting to enforce the law and deter non-compliance.

The primary legislation through which dangerous goods are regulated by WorkSafe is the *Dangerous Goods Act 1985* and associated regulations. Where dangerous goods are present at a workplace, the *Occupational Health and Safety Act 2004* (the OHS Act) and the *Occupational Health and Safety Regulations 2017* (OHS Regulations) also apply.

WorkSafe welcomes the opportunity to provide comment on the Independent Review of the Dangerous Goods Act and supporting regulations. The following submission focuses on particular operational aspects of the Victorian dangerous goods framework and WorkSafe's experience in applying the existing legislation for more than 30 years.

Where responses to consultation questions are inter-linked according to a theme, these have been identified in the headings.

Enhancing risk-based/prevention-focused requirements (Q.4, Q.5, Q.6, Q.9)

WorkSafe considers that a number of reforms could help to improve risk-based, prevention-focused outcomes in the dangerous goods sector, particularly for sites storing and handling dangerous goods.

Safety management systems

Safety management systems (SMS) are a common legislated requirement in high hazard industries. High hazard industries carry inherently high risks to people and the environment, due to the specialised plant, processes, activities, equipment and materials involved. Examples of high hazard industries include the aviation industry, nuclear facilities, offshore oil and gas operations, Major Hazard Facilities (MHF) and mining.

SMS provide a systematic way to continuously identify and monitor hazards and control risks while maintaining assurance that these risk controls are effective. It is used for high hazard industries in recognition that safety is an integral element to effective operations/production and must underpin

all activities and processes where the potential consequences are severe, including death, serious injury, plant failure and community impacts.

WorkSafe regulates high hazard industries of earth resources, construction, dangerous goods and MHF. Each of these, with the exception of facilities subject solely to the *Dangerous Goods (Storage & Handling) Regulations 2012*, require a SMS to be in place to address the highest risk activities/hazards. The SMS requirements are scaled to the industry/high-risk activities based on the potential for onsite and offsite consequences.

Broadly, SMS define how an organisation is set up to manage risk by:

- identifying workplace risks and implementation of suitable controls
- implementing a process to identify and correct under-performing controls
- ensuring the approach to safety is supported by broader systems of work, such as training, procedures, auditing, maintenance and management of change
- implementing a continual improvement process.

The SMS requirements for construction, mining and MHF are summarised as follows.

	Construction	**Mining**	**Major Hazard Facilities**
Requirement specified in	Part 5.1 *Occupational Health and Safety Regulations 2017*	Part 5.3 *Occupational Health and Safety Regulations 2017*	Part 5.2 *Occupational Health and Safety Regulations 2017*
Form of SMS required	Safe Work Methods Statement	SMS	Safety Case (which contains the SMS)
Effort required in development	Low	Medium*	High*
Mandatory elements	Document: • High-risk construction work activities • Hazards and risks of that work • Measures that control those risks • How risk control measures are implemented • Must be set out in a way that is accessible and clear to those that need to use it	• Must provide a comprehensive and integrated management system for all risk control measures implemented to control mining hazards • Provides the safety policy and safety assessment for the mine • Documents the systems, procedures and other risk control measures to address the mining hazards • Includes performance standards of the SMS	• Requires assessment and documentation of all hazards that may give rise to a major incident at the facility and adequate risk controls to limit the consequences of major incidents • Must demonstrate the SMS in place provides a comprehensive and integrated management system of risk control measures in relation to major incident hazards and major incidents

Required for	"High-risk construction work" (defined term)	Prescribed mines (defined term). A prescribed mine is an underground mine or other individual mine or class of mines determined by WorkSafe	MHF which have hazards that may give rise to a "major incident" (defined term)
Permissioning requirement	No - though licences are required for a range of "high-risk work". A copy of the Safe Work Method Statement must be kept for the duration of the high-risk construction work	No – however the operator of a prescribed mine must keep the SMS and make it available for inspection on request	Yes – WorkSafe grants MHF licences on the basis of an adequate Safety Case. The SMS is a key component underpinning the Safety Case

* Requirements proportionate to risks

The addition of a requirement to implement a SMS for dangerous goods facilities would support a risk-based, prevention-focused approach to safety management at relevant facilities. A SMS for dangerous goods facilities would:

- Link existing general requirements to identify hazards (regulation 26) and control risks (regulation 27) with more prescriptive requirements of Part 4 (regarding training, induction, supervision etc) via a documented, integrated SMS
- Require a systematic approach to assessing safety hazards and risks of the facility (including onsite and offsite risks in the event that consequences of an incident are experienced beyond the facility's boundary)
- Provide the reference/benchmark against which controls can be audited and reviewed over time
- Enable workers at the site to be informed of/contribute to the SMS through ongoing management and review
- Provide WorkSafe inspectors with site specific documented information on the hazards at the site, to help inform inspections and enquiries
- Establish the processes and expectations that underpin a safety culture. That is, a facility's approach to safety (as defined in the SMS) becomes embedded practice in workers; how work is conducted; and the means by which safety concerns can be raised/escalated.

The threshold at which a dangerous goods facility would require a SMS would need to consider the inherent risk of a facility, and would not be appropriate for all sites storing and/or handling dangerous goods. Relevant considerations for defining a threshold for a SMS requirement include:

- Approximately 80 sites under the Dangerous Goods Strategic Inspections (DGSI) program (implemented in July 2020, with information available here) exceed the 10% MHF threshold, above which the site can be determined a MHF. While the risk factors at these individual sites have not justified a MHF determination, the sites are still large dangerous goods facilities with

inherently higher risks than much smaller facilities subject to the same current dangerous goods regulations.

- Approximately 150 further notified sites have also been brought into the DGSI program based on a variety of risk factors (including dangerous goods volumes, location and compliance history) that have justified a more detailed regulatory oversight approach.
- SMS and the regulatory requirements that underpin them are typically scaled according to the risk of the regulated activities and the potential magnitude of consequences in the event of a serious incident.
- The United Kingdom, New Zealand and some Australian jurisdictions use a two-tiered regulatory system which define requirements for highest risk dangerous goods sites (MHF) and a lower threshold at which a SMS and/or licence is still required.
- There have been no large-scale incidents at a WorkSafe-regulated MHF in Victoria since the introduction of the SMS system requirement (in the form of a Safety Case) in 2000.

As can be seen in the approach to construction and prescribed mines, a SMS does not have to be tied to a permission, such as a licence to operate, to provide a regulatory benefit. However, other regulatory changes considered by the Review may give additional purpose for introducing a permission-based scheme such as a licence requirement for high-risk dangerous goods sites.

Suitably qualified person

There is currently no requirement for persons in management control of dangerous goods facilities to have a minimum level of training or qualification in dangerous goods, or otherwise engage a suitably qualified person to provide advice concerning the safety of dangerous goods at a facility. This compares to requirements under section 22(2)(b) of the *Occupational Health and Safety Act 2004*, which states that "an employer must, so far as is reasonably practicable (…) employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer concerning the health and safety of employees of the employer".

Given the inherent risks of dangerous goods, the introduction of a requirement to employ or engage persons suitably qualified in relation to the safe management of dangerous goods would contribute to prevention-focused outcomes. To ensure this requirement is commensurate with risks, it could be a component of a new requirement to implement a SMS (as described above), which would only be required of sites meeting a particular risk threshold.

Consideration could also be given to introducing an offence if a duty holder did not have access to a suitably qualified person at all times. A suitably qualified person should have good working knowledge of dangerous goods legislation, codes, standards, risks and controls as relevant to the facility. This requirement could potentially capture a larger cohort of dangerous goods sites than those requiring a SMS. The intention of this requirement would be to develop a site's capacity to identify and resolve issues with respect to dangerous goods sites by creating an enduring link/relationship with a suitably qualified person. In the absence of this requirement, duty holders may lack a trusted advisor with whom dangerous goods safety concerns can be escalated, which creates a risk that safety issues beyond the capacity of the duty holder may not be addressed in a timely or appropriate manner.

WorkSafe has a published position on how it applies the law in relation to employing or engaging suitably qualified persons to provide health and safety advice under section 22(2)(b) of the *Occupational Health and Safety Act 2004*. This provides useful context for how a comparable provision could be established for dangerous goods: https://content.api.worksafe.vic.gov.au/sites/default/files/2018-06/ISBN-Employing-or-engaging-suitably-qualified-persons-to-provide-health-and-safety-advice-2008-10.pdf.

Risk based duties

The introduction of a general duty to minimise risks of harm from dangerous goods (so far as reasonably practicable) would improve consistency with the *Occupational Health and Safety Act 2004,* as well as providing consistency across dangerous goods regulations. For example, the *Dangerous Goods (Storage & Handling) Regulations 2012* currently impose a general duty for occupiers to control risks associated with the storage and handling of dangerous goods (regulation 27). A comparable requirement does not exist under the *Dangerous Goods (Explosives) Regulations 2011*.

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

Currently, duties regarding dangerous goods-related incidents are found in Part V of the *Occupational Health and Safety Act 2004,* Part V of the *Dangerous Goods Act 1985* and Division 9 of the *Dangerous Goods (Storage & Handling) Regulations 2012.* The requirements to report incidents vary across these instruments in terms of the trigger requirements for reporting (depending on the nature of the dangerous goods, quantity and whether a person is at risk) and which agency information must be reported to. This may create confusion for duty holders and does not sufficiently capture all incidents of serious safety concern.

"Dangerous occurrences" for which a person was fortuitously not seriously injured, killed or exposed to immediate risk still indicates that a hazard has not been adequately controlled or a control has failed. For dangerous goods, dangerous occurrences include spills, leakages, fires, explosions and incidents that have the potential to cause serious harm (being injury, death, property or environmental damage) and can also have offsite implications such as impacts to neighbouring properties and local communities.

Reporting of dangerous occurrences involving dangerous goods that had the potential to cause serious harm onsite or offsite would assist WorkSafe in the targeting of compliance education and intervention strategies, either at the site in question or more broadly across an industry sector. Existing provisions across the three instruments described above should be consolidated to ensure duties related to incidents are clear and apply broadly (for example, regardless of whether a duty holder holds a licence). Dangerous occurrences involving dangerous goods should therefore be required to be reported to WorkSafe within an appropriate timeframe (such as 48 hours).

Other high hazard industries and jurisdictions have mandatory reporting of dangerous occurrences - also referred to as high potential incidents - to the regulator. In addition to Queensland mining and quarrying regulations (referred to in the Consultation Paper), the requirement to report these types of high potential incidents also exist in New South Wales, Western Australia and the United Kingdom.

Industry monitoring and identification of unknown dangerous goods sites (Q.12, Q.15)

Surveillance

WorkSafe inspectors have powers incidental to entry under section 13B(1)(h) of the *Dangerous Goods Act 1985* to "do any other thing that is reasonably necessary for the purpose of the inspector performing his or her functions or exercising his or her powers under this Act". However, there is no specific power to conduct surveillance at a site to monitor for movement of suspected dangerous goods, either pre or post site entry.

Undertaking surveillance before a WorkSafe inspector has exercised entry powers at a site could potentially improve WorkSafe's ability to uncover illegal operations involving the transfer and storage of dangerous goods, including where multiple sites may be utilised as part of an illegal operation. Thresholds for suspicion of illegal activity would need to be met to justify surveillance action, which may include tip-offs, information from other agencies or other surveillance activity.

Inter-agency considerations

Intelligence sharing amongst agencies (Q.16, Q.17, Q.19)

Sharing of dangerous goods-related intelligence amongst agencies is currently complicated by a multitude of legislative requirements which often require a case-by-case assessment of whether information/intelligence can be shared. The ability for WorkSafe to share relevant dangerous goods information depends upon how the information was obtained (i.e. pursuant to which Act), the agency with which it wishes to exchange information; the purpose of information sharing; and whether privacy legislation applies. This makes decisions to share information operationally complex (in terms of which agencies can be provided information and why) and inefficient where legal opinion must be frequently sought on whether legal thresholds to share information have been met.

A broad power to share dangerous goods information collected by WorkSafe with any Australian government agency with an interest in dangerous goods matters (including non-safety related regulators) - if community or environmental safety is the driving purpose of the information exchange - would improve efficiency, enable more coordination and ensure prioritisation of safety at all stages of a site's regulatory life cycle (planning, preparedness, response and recovery).

An additional or alternative means of improving interagency coordination would be to allow for joint-agency investigations. This could take a range of forms, with an example being joint investigations undertaken between Victoria Police and the Australian Criminal Intelligence Commission.

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

In addition to the information sharing issues outlined above, a challenge for WorkSafe is where dangerous goods facilities in Victoria have opted into the Comcare self-insurance scheme and are therefore regulated by Comcare for health and safety purposes (including dangerous goods).

WorkSafe has found that, in the event of an incident involving dangerous goods at a Comcare site in Victoria, emergency services and members of the public at times direct their enquiries to WorkSafe despite it having no jurisdiction.

The existence of two regulators may result in inconsistent levels of regulatory oversight of dangerous goods facilities in Victoria; and resultant community concern or expectation that WorkSafe is regulating facilities beyond its jurisdiction. There is a risk that confusion regarding the responsible agency for reporting complaints or incident notification may potentially lead to a delay in response, which could place workers and others at risk.

WorkSafe's response to the issue of waste dangerous goods is covered under Questions 28-29.

Dangerous goods waste disposal (Q.28, Q.29)

Currently, section 31(1)(b) of the *Dangerous Goods Act 1985* requires that an occupier of premises where dangerous goods are stored "must not abandon, discard or otherwise neglect to dispose safely of any dangerous goods in the ownership, control or possession of that person". Failure to comply with section 31(1)(b) is an offence. While WorkSafe has regulatory responsibility to ensure that dangerous goods are 'safely disposed', the facility which takes dangerous goods for disposal must also meet the regulatory requirements of the Environment Protection Authority (EPA) with regards to the appropriate management of waste. A challenge for regulators is that the intent to abandon dangerous goods may be disguised as dangerous goods storage. Both regulators would therefore benefit from a shared understanding of the presence of dangerous goods at a site which are also waste.

The intersection of dangerous goods and waste legislation is complex as there is no definition of "dangerous goods waste" under existing legislation. Waste is not defined under occupational health and safety legislation, dangerous goods legislation or the ADG code (with the exception of asbestos and other materials including clinical waste, which is Class 6.2 and not regulated under the *Dangerous Goods Act 1985*). Equally, the *Environment Protection Act 1970* has the following definition of waste which does not consider dangerous goods:

waste includes—

(a)any matter whether solid, liquid, gaseous or radio-active which is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment;

(ab)any greenhouse gas substance emitted or discharged into the environment;

(b)any discarded, rejected, unwanted, surplus or abandoned matter;

(c)any otherwise discarded, rejected, abandoned, unwanted or surplus matter intended for—

(i)recycling, reprocessing, recovery or purification by a separate operation from that which produced the matter; or

(ii) sale; and

(d)any matter prescribed to be waste.

Chemical testing can be used to confirm whether the waste is dangerous goods, and is the responsibility of the duty holder.

Consideration should be given to ensuring clarity that both sets of Acts/regulations equally apply where the material is both dangerous goods (as regulated by WorkSafe) and waste (as regulated by the EPA).

Assessing compliance against other regulators' advice or requirements (Q.47)

The role of agencies in setting/enforcing fire protection requirements at sites storing dangerous goods is currently spread across a number of regulatory instruments. While WorkSafe has responsibility for assessing compliance with dangerous goods fire-related controls, it does not have a role in defining appropriate fire controls, which is performed by fire agencies in their advice and Essential Safety Measures as required by the *Building Regulations 2018.*

Victoria is the only jurisdiction that mandates the authority of the emergency services in regards to fire protection and emergency response plans. In WorkSafe's experience, this has created challenges in terms of timeliness and inconsistent detail of advice, as well as complexity in WorkSafe's enforcement of emergency services' recommendations.

WorkSafe notes that work health and safety legislation utilised in other Australian jurisdictions provides for a competent person to assess fire risks and controls, rather than fire agencies. This approach utilises specialists including fire engineers to design fit for purpose fire protection for a facility and does not draw down on the resourcing of emergency services personnel to provide this advice.

To improve the efficiency with which effective fire protection measures/emergency response plans are established at dangerous goods sites in Victoria, a number of options could be considered, such as:

- increasing the resourcing of emergency services (Fire Rescue Victoria and the Country Fire Authority) to support the activity of fire protection assessments/emergency response plans
- allowing for Suitably Qualified Persons to provide support to the emergency services in preparing fire protection/emergency plans advice
- providing the emergency services with powers to enforce their recommendations.

WorkSafe powers to intervene at non-compliant sites (Q.23, Q.24)

Section 17K of the *Dangerous Goods Act 1985* provides WorkSafe with the power to take control of a site in very limited circumstances. As a pre-condition, an inspector must believe on reasonable grounds that there is danger to person or property arising from dangerous goods that are damaged or spilled (section 17K(1)). Once that pre-condition is met, and provided that the inspector:

- believes on reasonable grounds that there is an immediate danger to any person or property (section 17K(4)); or
- has issued a direction to the owner, or the person who was or is in possession of control and the inspector believes on reasonable grounds the person has failed to comply with the direction or will use unsafe means to do so (section 17K(5)),

then the inspector may take any action necessary to destroy, render harmless, dispose of or remove the dangerous goods and containers, and destroy or render harmless anything contaminated by spilled dangerous goods.

While it is important to set a high threshold for WorkSafe to take control of a dangerous goods site, there may be situations in which the inherent risk of dangerous goods are inadequately controlled but do not meet the criteria under section 17K, and no duty holder is available who has the capacity or willingness to address the risks in a timely manner. If this situation poses a serious risk to community safety (such as risk of explosion or unauthorised access of the materials), WorkSafe should have powers to: safeguard the premises; seize the dangerous goods; transport the dangerous goods to a safe location; take samples (already an inspector power); destroy the dangerous goods; and recover costs for any action undertaken.

Existing powers under section 17K do not extend to empower WorkSafe to take any necessary action at neighbouring properties in the event that WorkSafe exercises control over dangerous goods at a site. WorkSafe's powers to render dangerous goods harmless should therefore be broadened to enable it to take necessary action at neighbouring properties where it contributes to the desired safety outcome.

It should also be noted that section 17K does not use the same description of a duty holder to whom WorkSafe can issue a direction as is used in other parts of the *Dangerous Goods Act 1985*. This should be amended to ensure consistency throughout the Act and take the broad definition to capture all possibilities of person, occupier, apparent occupier, owner, person in possession or control or who last had possession or control of dangerous goods, or person who has management control.

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

There are two broad categories of costs that should be recoverable by WorkSafe. The first category is costs, charges and expenses relating to offences against the *Dangerous Goods Act 1985* or regulations. Costs of seizure, including handling, storing and destroying dangerous goods are currently recoverable under section 50 against a convicted person, however expanding this to allow recovery of the costs of taking action and investigating offences, similarly to *Dangerous Goods (Road and Rail Transport) Act 2008 (NSW)* and *Dangerous Substances Act 1979 (SA)*, would further assist in deterring non-compliance and illegal activity in the management of dangerous goods. These costs should be recoverable from any person found guilty of offences against the *Dangerous Goods Act 1985* or regulations.

The other category is costs arising more generally from an incident or danger involving dangerous goods. Currently, WorkSafe may recover costs of remediation action relating to spilled or damaged dangerous goods under section 17K(6) of the *Dangerous Goods Act 1985*. These powers should be extended to allow WorkSafe to recover the costs of disposing, destroying or rendering harmless dangerous goods which pose a risk to the health and safety of a person or property, including community safety more generally, regardless of whether the dangerous goods are spilled or damaged. The need to undertake remediation works to address risks posed by dangerous goods is not limited to spilled or damaged dangerous goods as outlined by WorkSafe's response to Question 23 above.

Costs associated with remediating spilled or damaged dangerous goods are currently recoverable against an owner, or person in control or in charge of a place where the spilled or damaged dangerous goods were present. Similarly to section 51 of the *Dangerous Goods Safety Act 2004 (WA)*, allowing WorkSafe to recover costs from the following categories of persons would further promote the safety and compliance objectives of the *Dangerous Goods Act 1985*, by imposing financial responsibility on those who had the capacity to control or prevent the relevant risk:

- the owner of the premises at which the dangerous goods were held
- the owner of the dangerous goods
- any person who was in control or possession of the dangerous goods
- any person who caused or contributed to the dangerous incident or situation.

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?

Financial assurances are a common feature of environmental protection legislation, including in section 67B of the *Environmental Protection Act 1970 (Vic)*, as well as similar legislation in NSW, Queensland and South Australia. A financial assurance in the form of a bond is also payable under the *Mineral Resources (Sustainable Development) Act 1990* and is not refundable until remediation works are completed at, for example, quarries.

Financial assurances under dangerous goods legislation would require a duty holder to raise and set aside financial assurance at a specified level, for example a letter of credit from a bank, certificate of title, personal guarantee, bond or insurance. The financial assurance could presumably be drawn upon by WorkSafe in the event of an incident or other matter occurring at the site, and would provide WorkSafe with a reliable source of funds for cost recovery in the event of WorkSafe needing to take action to address unacceptable risks arising from the presence of dangerous goods. Financial assurances may also support deterrence and prevention objectives by creating a strong financial incentive on relevant entities to control their dangerous goods activities. Where used, financial assurances are often a condition of permission-based mechanisms, such as the issuing of a licence.

WorkSafe considers that there are a number of limitations and challenges to a financial assurance requirement for dangerous goods which may undermine any intended cost recovery benefit. These include:

- financial assurances are typically used as a form of security to manage prospective risks of environmental harm. This makes it a more suitable instrument for environmental/extractive industry regulators (which focus on the interface between an entity's activities and impacts to the environment), rather than safety regulators (which focus on the risk of activities on people and property).
- financial assurances would not be obtained from illegal operations where actors have deliberately evaded detection by regulators.
- the value of a financial assurance would need to balance the reasonable capacity for a duty holder to pay compared with potential costs of a clean-up operation (which may be in the order of millions of dollars depending on the size of the incident/matter to be recovered).

- financial assurances are likely to increase costs of operation, which could impact the viability of legitimate businesses and redirect funds that could otherwise be used to ensure adequate safety precautions are taken (which is an object of dangerous goods legislation).
- insurance may provide an alternative to financial assurances, however WorkSafe notes insurance may not be a dependable source of funds in addressing incidents such as fire, as it requires premiums to be kept up to date, and policies will have specific exclusions of liability resulting in conduct of operators potentially voiding policies without WorkSafe having opportunity to respond or intervene. Policies may also not provide appropriate coverage for incidents and the circumstances that contribute to them.

It is also worth noting that financial assurances are not currently required of MHF, the largest and highest risk dangerous goods sites in Victoria (noting there have been no large-scale incidents at a WorkSafe-regulated MHF in Victoria since the introduction of that regime).

An alternative approach that would improve WorkSafe's prospects of cost recovery (above the status quo) while minimising upfront impacts to duty holders is if WorkSafe could issue a charge against property where it has a right to recover costs of action taken to address risks from dangerous goods. Similar charging provisions are contained in section 62(3) of the *Environment Protection Act 1970 (Vic)* and in section 103(3)(b) of the *Environment Protection Act 1993 (SA)*. A charge could be issued against any property owned by:

- the owner of the premises at which the dangerous goods were held; and/or
- the individuals associated with the relevant breaches of the *Dangerous Goods Act 1985* (which may include individuals who owned or were in control or possession of the dangerous goods, or otherwise caused or contributed to the relevant incident or situation).

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?

A criminal sanction is the ultimate sanction for breaches of Australian law, and is the benchmark against which all other sanctions are measured. Criminal sanctions not only punish the offender, but carry with them significant social stigma (heightened when it is accompanied by a term of imprisonment) which is used to increase both general and specific deterrence.

Certain unlawful conduct, by its nature and degree of malfeasance, should result in regulators prosecuting those responsible via criminal sanction. One such circumstance is when the unlawful conduct involves or has the potential to cause significant harm to the public or the environment. With this in mind, it remains appropriate that the most serious breaches of the *Dangerous Goods Act 1985* carry criminal sanctions.

However, WorkSafe recognises that in more modern regulatory schemes (including the scheme that will shortly come into effect under the *Environment Protection Act 2017*), civil penalties are widely used by regulators as a more effective means to prosecute certain unlawful conduct. This is primarily because proceedings for civil penalties can carry the same monetary penalties as criminal sanctions but have the benefit of being determined by the civil standard of proof 'on the balance of

probabilities' (or in certain circumstances, according to the Briginshaw standard of 'reasonable satisfaction').

In WorkSafe's view, the introduction of flexibility for WorkSafe to determine whether to commence civil or criminal proceedings in response to alleged offences will create a more effective regulatory regime that deters breaches, while also bringing the scheme in line with more modern regulatory practices.

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

WorkSafe would support the introduction of an infringements scheme for minor offences under dangerous goods regulations (as defined in the Consultation Paper). It is difficult to identify all of the offences that should be subject to an infringements scheme (noting that the Review may result in their significant amendment), however examples of offences that would benefit from an infringement scheme include:

Dangerous Goods (Storage and Handling) Regulations 2012

- A range of duties of manufacturers and suppliers under Part 3, including:
    - failure of a manufacturer or first supplier of dangerous goods to ensure that the package marking for the dangerous goods complies with the *Dangerous Goods (Transport by Road or Rail) Regulations 2018* (regulation 15)
    - failure of a manufacture or first supplier of dangerous goods to ensure that the Safety Data Sheet contains the matters identified in regulation 19(2).
- A range of duties of occupiers under Part 4, including:
    - failure of an occupier of prescribed premises to ensure that the manifest of dangerous goods is kept on the premises in a place where it is readily accessible to the emergency services authority (regulation 45)
    - failure of an occupier of premises where dangerous goods are stored and handled to ensure that placarding is affixed in accordance with regulation 48(1).
    - failure of an occupier of premises where dangerous goods are stored and handled in quantities that exceed the relevant quantities specified in Schedule 2 to notify WorkSafe of the presence of those dangerous goods (regulation 66).

Dangerous Goods (Transport by Road or Rail) Regulations 2018

Consideration should be given to introducing infringement notices consistent (to the extent appropriate) with 'Schedule 1 Penalties' of the Model Subordinate Instrument on the Transport of Dangerous Goods by Road or Rail (as at 18 May 2018).

The Model Subordinate Instrument establishes the benchmark for nationally consistent infringement notices and penalty units adopted by Australian jurisdictions (except Victoria) that administer the model dangerous goods transport regulations/ADG Code.

Observations of the dangerous goods industry (Q.34, Q.35, Q.36, Q.37, Q.38)

WorkSafe has observed a range of changes in the dangerous goods sector over the past three decades.

- Dangerous goods operators are increasingly involved in logistics, food manufacturing, blending and specialised products. There has been a discernible trend away from local large scale manufacturing of dangerous goods in Victoria
- There has been an accompanying decline in the dangerous goods expertise in the Australian industry as more dangerous goods products are imported rather than locally manufactured
- Multi-national companies have outsourced aspects of production to smaller local companies that may not be supported by the same level of knowledge, policies and procedures as would be expected for a large global business
- There was a boom in the manufacture of hand sanitiser (Class 3 flammable dangerous goods) in 2020 in response to COVID-19. Barriers to enter the hand sanitiser market are low for existing manufacturing businesses with storage and blending tanks (such as wineries and distilleries), and thresholds to notify WorkSafe of dangerous goods may not have been met. Some new operators did not have had a good understanding of the flammable risks of the product before commencing these operations
- There are relatively low barriers to entry for logistics companies handling dangerous goods. With no permission or licensing requirements, these facilities are only required to notify WorkSafe that they exist if they meet the thresholds for dangerous goods under Schedule 2 of the *Dangerous Goods (Storage and Handling) Regulations 2012*
- Chemical waste disposal in Victoria is expensive, and few facilities are able to accept chemical waste. The high demand on facilities means they may delay collection or set minimum quantities or other requirements, which may contribute to upstream facilities building up waste volumes to recycle, thereby increasing risks on site. The high cost of legal disposal and bottlenecks in dangerous goods waste processing also create incentives for illegal operations to offer a reduced price to take and illegally dispose of waste
- The EPA and WorkSafe have found recent evidence of waste battery stockpiling at some e-waste recyclers at which compliance interventions have been undertaken. Stockpiling may indicate poor market conditions for battery recycling. Battery stockpiling may increase risk of fires or otherwise inappropriate disposal (such as to landfill).

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

Automatic adoption of published changes to the ADG Code in Victoria would support cross-border regulatory consistency in the transport of dangerous goods. WorkSafe notes that a 12-month transition period would support duty holders in complying with new requirements, while not preventing earlier uptake if suitable for the business.

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

Ammonium nitrate (Class 5.1) is not currently included in the *Dangerous Goods (Explosives) Regulations 2012*. However, given the mass explosion hazard, it would be beneficial to incorporate the security requirements under the High Consequence Dangerous Goods regulations within the Explosives regulations.

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

WorkSafe notes that dangerous goods matters are regulated across Australian jurisdictions through different legislation and by different agencies. Given the significant cross border movement and

trade for dangerous goods, it is important to consider that any changes to Victoria's dangerous goods regulatory framework may have implications for the degree of regulatory consistency across borders.