Australian Industry Group

Review of Dangerous Goods Laws in Victoria

Submission to the Independent Reviewer

NOVEMBER 2020

REVIEW OF DANGEROUS GOODS LAWS IN VICTORIA

SUBMISSION TO THE INDEPENDENT REVIEW

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of businesses employing more than one million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Our vision is for ***thriving industry and a prosperous community*.**

We have ongoing contact and engagement with employers across Australia on the broad range of issues related to the operation of their businesses, informing them of regulatory changes, discussing proposed regulatory change, discussing industry experiences and practices and providing advice, consulting and training services.

Ai Group is a member of Safe Work Australia and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety (WHS) Laws and the now disbanded SIG-Explosives. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

Our membership is diverse, operating across a broad spectrum of industries. We have a significant number of large organisations within our membership. However, around three quarters of our members employ fewer than 50 employees and half employ fewer than 20 employees.

SUPPORTING HARMONISATION

Ai Group, and our members generally, are strong supporters of harmonisation. Whilst it is argued that harmonisation is mostly only relevant to multistate businesses, many single-jurisdiction businesses also interact with suppliers and/or customers in other jurisdictions.

A common language of WHS helps to send a consistent message about what needs to be done to enhance risk management and reduce the level of injury and fatality within Australia.

Throughout the development of the laws there were compromises made by all participants and, ultimately, there are some things in the Model WHS Laws that are not the preferred position of our members. However, we have continued to argue, through reviews and legislative change, that the concept of harmonisation is important and should not be put at risk due to jurisdictional pressures.

Ai Group continues to hold the position that harmonisation of WHS laws is important to Australian businesses and workers. We are pleased to see that Western Australia has now passed its WHS Act, although implementation is delayed until the Regulations are finalised. Members continue to express frustration that Victoria is relying on an incomplete Supplementary Impact Assessment (SIA) undertaken in 2012 to justify retention of its Occupational Health and Safety (OHS) laws, even where there are provisions of the Model WHS Act which undoubtedly improve organisational focus on risk management, i.e. the officer duty to exercise due diligence to ensure compliance within their business or undertaking.

This Victorian review of the Dangerous Goods legislation provides an opportunity for Victoria to take an important step towards harmonising the management of substances with the approach under the Model WHS laws. This would involve disbanding the current Dangerous Goods legislation and incorporating the requirements of hazardous substances and dangerous goods into the OHS laws.

Whilst Ai Group would prefer the full adoption of the Model WHS laws, this change would certainly address a major anomaly between Victoria and the rest of the country on an issue that has to take into account significant movement of product between jurisdictions.

CONTEXT OF THIS REVIEW

The review of the Dangerous Goods legislation is long overdue, and we hope that it will lead to changes that will result in a more streamlined approach to the management of substances (dangerous goods and hazardous substances) within Victoria.

However, we note that the review was prompted by the 2018 and 2019 fires involving illegal stockpiles of dangerous goods, as outlined in the Premier's media statement of 19 April 2020:

> *The Andrews Labor Government will undertake a comprehensive review of the Victoria's dangerous goods laws to help stamp out unsafe chemical stockpiling and keep Victorians safe.*
>
> *The review is the latest step in the Government's ongoing response to chemical stockpiling after two large chemical fires in West Footscray in August 2018 and Campbellfield in April 2019.*

It is important that the review recommendations recognise that the majority of businesses that utilise dangerous goods are not in the category of *illegal operators*. The recommendations should not create unnecessary administrative or operational burdens on all businesses justified by the illegal operations that have occurred.

THE CONSULTATION PAPER

The Consultation Paper has provided a clear and concise summary of the key issues that are being considered and provided good insight into the interaction of the various pieces of legislation and the role of multiple regulators.

Box 4 of the Consultation Paper highlights 5 key duty-holder archetypes:

- Willing and able
- Well intentioned
- Reluctant
- Uninformed
- Deliberately invasive

Those that are "willing and able" do not need much assistance to meet their obligations to manage the risks of dangerous goods but can be aided by streamlined legislation. Those that are well-intentioned will also benefit from clearer legislation and well-written guidance. Those that are uninformed would benefit from information and promotion about their obligations, supported by clearer legislation and well-written guidance.

The reluctant may be influenced by the risk of penalties but are most likely needing direct intervention to achieve compliance.

Those that are deliberately evasive will not be influenced by changes to the law and are unlikely to be influenced by increased penalties. General enforcement activities that involve visiting known businesses are also likely to be ineffective in removing these operations from the industry. In these circumstances, clever intelligence and coordinated approaches from all relevant bodies is needed, supported by community intelligence.

RESPONSE TO THE QUESTIONS RAISED IN THE CONSULTATION PAPER

Ai Group's response to the Consultation Paper is predominantly focused on how the Dangerous Goods regime applies to workplaces that utilise chemicals and other substances as part of their general operations.

We understand that Chemistry Australia is also making a submission to this review, and with their speciality in this area will have greater insight into the implications of proposed changes for organisations whose business is the production and distribution of dangerous goods. Many of their members are also members of Ai Group; where we are silent on an issue, we support the views expressed by Chemistry Australia.

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 current approach to the regulation of substances within workplaces involves two separate pieces of legislation - the Dangerous Goods package and the Occupational Health and Safety package. A large percentage of substances are both dangerous goods and hazardous substances, resulting in an employer having to consider two sets of legislation in order to comply.

Businesses that are predominantly engaged in work with dangerous goods understand that there are multiple sets of legislation that apply to their operations.

Many employers that use dangerous goods, even in large quantities, may not be aware that they need to comply with Dangerous Goods legislation in addition to the requirements of the OHS Hazardous Substances regulations. The OHS legislation is a more familiar reference for employers.

Many obligations across the two sets of legislation are similar, but different. For example:

- an employer must keep a Hazardous Substances Register under the regulation 162 of the OHS regulations and may also be required to maintain a manifest of Dangerous Goods under section 45 of the related Storage and Handling regulations.
- Notification to the regulator of dangerous goods is established by regulation 66 of the Dangerous Goods (Storage and Handling) Regulations, whilst requirements to notify of hazardous substances is established by regulation 360 of the OHS Regulations which relate to major hazard facilities.

We note also the reference in the Consultation Paper to the fact that the regulation of the management of waste materials that are dangerous goods is the responsibility of the Environment Protection Authority and thereby is covered by an additional set of laws.

WorkSafe Victoria has provided guidance material to assist businesses to understand the full range of duties under the laws they administer – Dangerous Goods and Occupational Health and Safety. The *Step by step guide for managing chemicals in workplaces* outlines the combined requirements and illustrates to some extent how a business can combine the requirements of the two legislative frameworks, e.g. by providing a proforma Chemicals Register which covers the requirements of both a hazardous substance register and a dangerous goods manifest. However, in relation to waste, the reference is only to seek advice from the Environment Protection Agency.

The Dangerous Goods regime could better achieve its outcomes by being integrated into the Occupational Health and Safety laws.

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

If the dangerous goods obligations are integrated into the OHS framework, they will automatically become more performance based, incorporating obligations such as “eliminating or minimising risk so far as is reasonably practicable”.

It is difficult to make a general assessment of the level of detail that is needed within the legislative framework.

Large operators specialising in Dangerous Goods have highly skilled specialists managing the risks in their businesses and do not need detailed information about how to reduce risks.

General workplaces that utilise dangerous goods in their processes have less expertise and often need quite detailed guidance on the management of dangerous goods, in particular how to store product to achieve appropriate separation and segregation.

It is Ai Group's view that the general Regulations should closely align with the Model WHS laws. Additional guidance directed at the non-technical users of dangerous goods should be provided to address the full range of risks associated with the use of substances, with simple information on how to correctly store dangerous goods provided in a format such as a segregation table.

If this approach was taken, the current Compliance Code for Hazardous Substances should be amended to incorporate the requirements of the dangerous goods related obligations. The Code could be supplemented with simple guidance for businesses that utilise only small quantities of dangerous goods.

It is Ai Group's view that there is no requirement for, or value in, any additional *permissioning* arrangements. Employers are already required to notify of manifest quantities of dangerous goods, which enables WorkSafe to undertake the necessary field work to verify compliance. Increased permissioning arrangements would merely add extra red tape without reducing the risks of individual workplaces or the industry as a whole.

Further, there is no value in increasing the amount of information provided to WorkSafe by legitimate operators.

Increasing the costs of legitimate, complying businesses would only achieve an even bigger cost gap between compliant and illegal activities.

Ai Group does not see any value in changing the incident notification requirements which currently align closely with those in the Model WHS laws. Any increased obligations would not address the primary concern which relates to illegal activity.

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

Non-compliance and illegal activity undermines the viability of legitimate and compliant operators by providing opportunities to provide services at a cost much lower than that required for complying businesses to operate profitably.

Legislation itself will not deter non-compliant and illegal activity. The penalty regime may have some impact, but without appropriate enforcement, penalties are not effective.

The current restriction on inspector powers of entry that require a reasonable belief that there are damaged or spilled dangerous goods on a premises, does not enable inspectors to intervene appropriately if there is a suspicion that an illegal stockpile of dangerous goods is stored in a place. Ai Group supports amendments to powers that relate to accessing properties where there is a reasonable suspicion that illegal activity is taking place associated with dangerous goods.

It is debatable whether this power should be extended to residential properties. To do so would take the power well beyond what is permissible under OHS laws. It may be that the ability to seek a search warrant for such purposes could be included in the legislation, but it would need a strong basis for inclusion.

It would not be appropriate for an inspector to be able to issue a prohibition notice for DGs without an "immediate risk" as that would diverge from the accepted approach under OHS laws and we should be making them more aligned, not more different.

There should be powers for authorising and regulatory bodies to share knowledge about operations of places that may pose a risk from the storage and handling of dangerous goods and associated waste. However, in relation to significant legislative breaches, it is not sufficient to just share the information. There needs to be a coordinated approach to jointly analyse that information to identify if the various pieces of intelligence brought to the table create a significant knowledge base that should be acted upon by regulators, individually or jointly.

In relation to cost recovery, it is appropriate that illegal or non-compliant operators should bear the cost of any clean-up. If this does not occur, the costs will be borne by taxpayers or, if the clean-up is managed by WorkSafe premium payers.

However, there do need to be safeguards in place to allow for appeals against any recovery action, without the need to take an action to court. It may be that cost recovery could also be built into any penalties associated with prosecution actions.

It is not appropriate to seek financial assurances from legitimate entities engaging in dangerous goods activities. It could be a huge cost/cashflow impost if there was a requirement to hold some form of bank guarantee. Further, it would not apply to the illegal operators, which would provide another opportunity to create a bigger cost differential between compliant businesses and rogue operators.

The EPA administers the dangerous goods waste stream. Other legislation should not impose obligations on businesses to utilise accredited waste facilities or require any form of due diligence process for the disposal of waste. Additional costs associated with the disposal of dangerous goods waste could further drive stockpiling to avoid costs.

Ai Group does not support an infringement scheme. This review is focused predominantly on major breaches of the legislation that have the potential to cause significant damage and harm. The introduction of an infringement notice scheme for relatively minor breaches will not enhance the safety of dangerous goods facilities.

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?

Ai Group does not have any specific insight related to emerging issues within the industry.

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

Amendments to the Dangerous Goods legislation should be incorporated into the OHS Act and aligned as much as possible with the Model WHS laws. In line with this, it would be appropriate to recognise interstate dangerous goods licences.

The issue of the classification and regulation of ammonium nitrate has been strongly debated during the review of explosives legislation at the national level, through Safe Work Australia's *Strategic Issues Group – Explosives.*

Ammonium nitrate (AN) is not an explosive and does not fit the classification of an explosive. Including AN would not be a sound science approach and would skew the lines of classification applicability of explosives. It should be noted that any type of dangerous good can have a severe consequential impact under the right circumstances.

In Victoria AN is regulated under the High Consequence Dangerous Goods (HCDG) laws, which imposes stringent controls. Under these laws you must have an appropriate licence or permit if you import, export, manufacture, store, sell, supply, use, handle, transfer, transport or dispose of HCDG. This applies to many industries, particularly the mining, agricultural, transport, retail and manufacturing industries. Licence and permit applicants must also undergo a security and police check. Licenses and permits are valid for five years, with renewal options. We recommend that they remain under the HCDG legislation.

Term of Reference F: Other relevant matters

Ai Group has no further issues to raise.