

Dangerous Goods Safety Bill 2002

Explanation of Proposals – June 2003 EXPLANATORY MEMORANDUM

Introduction

The existing *Explosives and Dangerous Goods Act 1961* relies heavily on outdated, prescriptive regulations that place much of the responsibility for the safe handling and storage of dangerous goods on the Government, instead of industry where it belongs. A new Dangerous Goods Safety Bill has been drafted which adopts a risk management approach and incorporates a general duty of care and performance-based standards and codes of practice. This will place the responsibility for the safety of dangerous goods upon industry and is expected to achieve higher levels of public, workplace and environmental safety more efficiently.

The Bill will provide the regulation-making powers necessary to adopt the national standards for the “*Storage and Handling of Workplace Dangerous Goods*” and the “*Control of Major Hazard Facilities*” and reform outdated explosives safety requirements.

Progress of reform

The need for legislative reform was recognised several years ago when Cabinet approved a raft of amendments to the existing legislation. However, priority shifted to the development of the *Dangerous Goods Transport Act 1998* in response to new Federal Transport legislation.

By late 1999 a new Dangerous Goods Act which incorporated modern standards of risk management was clearly needed and a programme of broad public consultation began. In September 2001, the Government approved the drafting of the Dangerous Goods Safety Bill and issued a priority to introduce it into the autumn 2002 session of Parliament.

Drafting of the Bill commenced in January 2002. Following an extensive period of external consultation with key stakeholders, the final Bill was tabled in Parliament in December 2002. It passed through the Legislative Council in June 2003

Regulations will be developed in parallel with the passage of the Bill but cannot be drafted until the new Act has received the assent of Parliament. These draft regulations are expected to go out for public comment during the second half of 2003, assuming that Parliament passes the Bill early in the Spring session.

Structure of the Reforms

The transport of dangerous goods legislation came into effect in 1999 and the reforms in the Bill are therefore largely limited to changes concerning the

manufacture, processing, disposal, storage and use of dangerous goods and explosives.

The new Bill amalgamates the provisions of the outdated *Explosives and Dangerous Goods Act 1961* (EDG Act) with the *Dangerous Goods (Transport) Act 1998* (Transport Act) and create a single consolidated *Dangerous Goods Safety Act* in place of the current two Acts.

Existing Legislation

<i>Explosives and Dangerous Goods Act 1961</i>	<i>Dangerous Goods (Transport) Act 1998</i>
Explosives and Dangerous Goods(Dangerous Goods Handling and Storage) Regulations 1992	Dangerous Goods (Transport) (Road and Rail) Regulations 1999
Explosives and Dangerous Goods(Explosives) Regulations 1963	Dangerous Goods (Transport) (General) Regulations 1999
Explosives and Dangerous Goods (Search Warrant) Regulations 1979	Dangerous Goods (Transport) (Explosives by Road and Rail) Regulations 1999
	Dangerous Goods (Transport) (Dangerous Goods in Ports) Regulations 2001

Proposed New Legislation

<i>Dangerous Goods Safety Act 2002</i>	
Repeals the Explosives and Dangerous Goods Act 1961 and all associated regulations	Repeals Dangerous Goods (Transport) Act 1998
Introduced into Parliament in the Spring 2002 session but will not achieve proclamation until new associated regulations are ready for gazettal in late 2003/early 2004.	

Regulations

<p>1. Dangerous Goods Safety (Storage and Handling) Regulations 2003; [incorporating the National Standard for the Control of Major Hazard Facilities and the National Standard for the Storage and Handling of Workplace Dangerous Goods.]</p>	<p>2. Dangerous Goods Safety (Explosives) Regulations 2003 [incorporating fireworks]</p>	<p>3. Dangerous Goods (Transport) regulations above are preserved relatively unchanged</p>
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Features of the Bill

The Bill presents a significant departure from the approach of the existing *Explosives and Dangerous Goods Act 1961*. The views of stakeholders were particularly sought on the following issues;

- a) ***A general duty of care to prevent harm from dangerous goods***, contravention of which carries significant penalties. Whilst the legislation will provide guidance through a combination of regulations, non-prescriptive standards adopted into regulations, and non-mandatory codes of practice, the onus will remain on anyone engaged in activities relating to dangerous goods to prevent harm arising from those goods. This type of general duty already exists in the *Dangerous Goods (Transport) Act 1998* and is now extended to all areas of dangerous goods management.
- b) ***A requirement to prepare risk assessment reports***. Whilst all persons associated with dangerous goods are expected to minimise risks in accordance with the general duty of care, the regulations will prescribe criteria whereby certain dangerous goods sites must complete a formal hazard identification/risk assessment/risk mitigation report.
- c) ***The adoption of performance-based standards into the regulations***. The National Standards for the Storage and Handling of Workplace Dangerous Goods and the Control of Major Hazard Facilities are two performance-based standards that will be adopted by the regulations. The departure from highly prescriptive regulations will offer flexibility whilst facilitating safety.
- d) ***The approval by the Minister of Codes of Practice***. Whilst not having the same legislative force as regulations, the approved codes of practice will provide practical guidance to persons storing, handling or transporting dangerous goods. Compliance with the codes will also provide a defence against prosecution arising from a dangerous goods incident.
- e) ***The requirement for ministerial approval for certain exemptions***. The Chief Dangerous Goods Officer will still be capable of issuing exemptions for circumstances where it is clearly impractical to comply with the regulations and granting of the exemption would not result in an increase in risk. Any other circumstances will require that the exemption be granted by the Minister and be verified by Parliament. It is anticipated that performance based legislation will not present such a need for exemptions. Similarly it is felt that a regulation which prompts permanent exemptions should itself be amended. The Department is particularly keen to hear the views of stakeholders regarding this issue.
- f) ***Powers of a Dangerous Goods Officer to enter for inspection and enforcement***. In keeping with existing dangerous goods legislation, a DGO will be able to enter any premises other than a dwelling for enforcement purposes, purely on the suspicion that there are dangerous goods at those premises.

- g) **The requirement to carry out an independent safety audit.** If the Chief Dangerous Goods Officer suspects that dangerous goods may be presenting an unacceptable level of risk at a site or that the safety management procedures are not suitable, he may require that an approved, independent auditor carry out a safety management audit at a licensed site.
- h) **A directive to remedy dangerous situations.** A Dangerous Goods Officer will be able to direct the manager of a dangerous goods site to carry out remediation measures to avert danger from those goods. The time in which to carry out those measures depends on the degree of risk involved, with a minimum of seven days unless the Chief Officer directs a lesser time. A DGO will also have the ability to request immediate remediation if there is clear indication of imminent danger.
- i) **Infringement notices.** Where a contravention of the regulations is such as not to justify full prosecution proceedings, the new Bill envisages the issuing of infringement notices which carry a penalty much lower than that prescribed. This is a feature of the current *Dangerous Goods (Transport) Act 1998* and can work well for certain obvious regulatory infringements.
- j) **Liability of company officers.** If a body corporate commits an offence against the Act or regulations, a director, manager, or other officer may also be charged and if so charged must demonstrate that the offence was committed without the officer's consent and that he/she took all reasonable steps to avoid it.
- k) **Level of Penalties.** The proposed maximum penalties for offences against the Act and regulations are in keeping with the *Dangerous Goods (Transport) Act* and similar workplace safety and environmental law, viz:
- Offence against duty of care-
 - resulting in death or serious injury - \$100,000 individual /\$500,000 corporate
 - other consequences - \$50,000 / \$250,000
 - Failure to hold appropriate licences - \$50,000/\$250,000

Offences against the regulations will attract a maximum penalty of \$10,000 for an individual and \$50,000 for a corporation, in general keeping with the current Explosives and Dangerous Goods Act 1961.

Summary of the Bill

Part 1 – Preliminary

- Title – “Explosives” has been deleted from the title, as they are considered to be simply another class of dangerous goods. (s1)
- Commencement - The *Dangerous Goods Safety Act 2002* will not become law until the associated regulations are approved and published in the Government Gazette. If the Bill gains assent before the end of 2002, then it is anticipated that the entire package could be ready by June 2003.
- Application – The Act will not apply to some dangerous goods that are subject to other Acts such as gas and petroleum pipelines and fuel supplies in vehicles. (s6)

Part 2 – General duties as to dangerous goods

The regulations to accompany the Act may prescribe, in detail, specific duties or obligations, or may make reference to standards or codes of practice which assist in complying with those duties. Quite apart from these, there are general duties applicable to all persons with the control or management of dangerous goods:

- A duty of care to prevent “unreasonable” harm to people (including themselves), property or the environment, from dangerous goods. (s8)
- A duty upon managers of hazardous sites to carry out formal risk assessment and prepare a safety management document. (s10)
- A duty to hold the appropriate licence as required by the regulations for the possession, storage, transport and use of dangerous goods and a duty to report significant incidents involving dangerous goods. The penalties for non-compliance with these general duties are significantly higher than those for a regulation, and are even higher if an offender was aware that, in not complying with the duty, the safety of a person, property or the environment was endangered. (ss9, 11-16)

It is intended that a risk management approach to dangerous goods safety, in conjunction with mandatory National standards and non-mandatory codes of practice for guidance, will achieve higher levels of public, workplace and environmental safety more efficiently whilst freeing up the chemical industry from the constraints of prescriptive regulations as much as practicable.

Part 3 – Regulations and codes of practice

- The regulations for this Act are made by the Governor in Executive Council and may be made for all or any of the matters listed in schedule 1 to the Bill. Non-compliance with regulations carries a maximum penalty of \$10,000 for an individual and \$50,000 for a corporation. (s18)
- The regulations may adopt subsidiary legislation from another State or a code or standard which is not already part of WA law, and if so adopted, the Chief Dangerous Goods Officer must publish the fact in the Government Gazette and make a copy available for public inspection. The code so adopted is that which is in force “*from time to time*”, so updated codes and standards are automatically adopted into the legislation, avoiding the need for frequent amendment of regulations. (s19)

- The Minister for State Development may “*approve*” any code of practice, or revision of such, for the purpose of providing practical guidance to person engaged in activities relating to dangerous goods. Whilst such a code must also be approved by Parliament, it does not have the direct legislative effect of a regulation. It merely assists a person to comply with a duty of care to prevent harm to people, property or the environment from dangerous goods. A person may depart from a code of practice, provided that the departure presents no greater hazard than the code of practice, and the regulations and general duty of care are complied with. (s20)

Part 4 – Exemptions

The Minister, by order published in the Government Gazette, may exempt a person or collective group from complying with a specified provision of a regulation for a specified period. Once published, the exemption has effect, but is subject to confirmation by a parliamentary committee as if the exemption were a regulation. (s21)

The Chief Dangerous Goods Officer may grant exemptions from the regulations provided that he is convinced that

- it is not reasonably practicable to comply with the existing regulation; and
- the exemption would not result in an increased risk to people. (s22)

The exemption may be granted subject to conditions and may be varied or revoked at any time. (s23)

Part 5 – Administration

- The title of Chief Inspector of Explosives and Dangerous Goods will be replaced under the new Act by the “*Chief Dangerous Goods Officer*”, to be designated by the Minister for State Development. This officer may appoint, and delegate any power or duty to, a “*dangerous goods officer*” (DGO), whose title replaces the existing position of “inspector”. (ss25-27)
- A DGO must carry and produce his or her identification card whenever exercising a function of a DGO under the Act. (s28)
- A DGO, a police officer acting as a DGO, and the Crown are exempted from civil liability for anything carried out in good faith by a DGO in the performance of a function under the Act. (s31-32)

Part 6 – Investigation and enforcement

Part 6 relates to the investigation and enforcement powers of Dangerous Goods Officers and comprises 6 divisions:

Pt.6 Div 1-Preliminary (s33)

Pt.6 Div 2-Investigative powers

- A DGO has the authority to request personal details to assist in an investigation and it is a serious offence not to provide that information when requested. He or she may enter any premises for enforcement purposes if it is suspected that dangerous goods are present, but in the case of a dwelling, the consent of the occupier, or a search warrant, is first required, unless a dangerous situation exists. Similarly, a DGO may stop a vehicle for inspection, provided that it is not a mobile home. (ss34-36)

- In the carriage of his enforcement duties, a DGO may take samples for analysis or seize a thing, substance or record. A person must answer all questions asked by a DGO but if the answer incriminates that person, then the answer or any associated information cannot be used as evidence in any subsequent criminal proceeding. (ss37-39)

- A DGO may restrict access to the site of a dangerous goods incident in order to avert danger or to investigate the incident. The Bill proposes penalties for unauthorised disturbance of the site of an incident. (s40)

Pt.6 Div 3-Entry warrants

- The Bill imposes stringent requirements for the issue of a warrant to enter premises such as dwellings where consent of the occupier is normally required. The DGO must convince a JP of the justification for the warrant, which must be exercised within 7 days of application, preferably between 6am and 9pm. Whilst executing a warrant, a DGO may seize an item which is not the subject of the warrant if he considers that there may be a contravention of the Act. (ss41-45)

Pt.6 Div 4-Audits of dangerous goods sites

- The Chief DGO may direct a person responsible for a dangerous goods site to employ an approved, independent auditor, to carry out a safety audit or to report on a dangerous goods incident. The Chief DGO maintains a list of approved auditors. (s46)

Pt.6 Div 5-Remedying dangerous and other situations

- A DGO may issue a remediation notice where there is, or is likely to be, a contravention of the Act not considered dangerous and the recipient has a specified time not less than 7 days to rectify the situation or face a penalty. The remediation notice must explain, among other things, the consequences of not complying with the directive and the avenues of appeal against the directive that are available. If the Chief Officer does not revoke the notice under review, and it is subsequently not complied with, then the DGO can take the remediation measures necessary and recover the costs from the operator. (s47,49)

- If the Chief Officer believes that, in order to avert serious risk of harm, the remediation measures should be carried out immediately or otherwise in less than 7 days, then he or she may approve the issue or amendment of a remediation notice requiring that the measures be so carried out in the shorter period. (s48)

- If, on the other hand, the DGO believes that a dangerous situation exists and immediate measures are justified, he or she may take those measures, irrespective of the existence or otherwise of a remediation notice. The cost of such action will be recoverable from parties associated with the dangerous goods unless they can show that they were not responsible for the dangerous situation and they took all precautions to prevent it. (ss50-51)

Pt.6 Div 6-General

- Any person who has been given a direction or notice under the enforcement provisions of the Act can ask the Chief Officer to review it. (s54)

- Non-compliance with a direction given by a DGO under Part 6 can attract a maximum penalty of \$10,000 for an individual and \$50,000 for a corporation. (s55)

Part 7 – Legal proceedings

- As an alternative to a remediation notice, prohibition order or legal proceedings, when dealing with a minor non-compliance a DGO may issue an infringement notice and modified penalty within 21 days of an alleged offence. The offender then has 28 days to pay the penalty or elect to take the matter further. (s56)
- A complaint alleging an offence against the Act can only be made by the Chief DGO or under his authority within 12 months of the alleged offence. (ss57)
- The draft Bill includes a number of matters relating to evidence for proceedings including presumptions as to contents of containers. (ss58-59)
- The conduct of a body corporate is deemed to be the conduct of a director, agent or employee of a body corporate, unless the body corporate can show that it took precautions to avoid those actions. Similarly, if a corporation commits an offence against the Act, then a director, secretary or other officer of the corporation also commits an offence if he or she was aware or consented to the offence, or neglected to avoid it. (ss60-61)
- A person will not be convicted for an offence against the Act if he can show that he acted in accordance with an approved code of conduct that specified a means of complying with the relevant provision of the Act. (s62)
- If a direction from a DGO requires that an action be taken by a certain time, then it is considered a separate and further offence if that action is not taken by that time, with a maximum penalty of \$500 per day for individuals and \$2500 per day for corporations, for each day that the actions remain incomplete. (s63)
- The Courts may;
 - confiscate dangerous goods involved in a contravention,
 - prohibit an offender from further involvement with dangerous goods, and
 - order a person convicted of an offence to pay any reasonable costs incurred in relation to the investigation. (ss64-66)
- A person who is not satisfied with a certain review decision of the Chief Officer, may appeal that decision to a Local Court. (s67) NB. This will be amended in due course to a review by the State Administrative Tribunal.

Part 8 – Miscellaneous

- No-one can be held liable for any action done in good faith while attempting to deal with an emergency or accident involving dangerous goods. (s68)
- The Minister must review the operation and effectiveness of the Dangerous Goods Safety Act after it has operated for five years. This review must also be laid before parliament. (s69)

Schedule 1 – Regulations

Schedule 1 lists the subjects for which the Governor may make regulations, including;

1. General – Classification, quality and composition, control of imports, storage, handling or transport, segregation, safety, duties of person involved etc.

2. Persons involved – Training and qualifications of DGO's and of persons involved with dangerous goods, approval of courses, accreditation, etc
3. Possession – Prohibiting or controlling the possession, quantities, age and mental capacities, etc
4. Places – Classification of sites, controlling use, registration, construction standards, hazard identification and risk minimisation, security and safety, operating procedures, emergency plans, reporting of accidents and incidents, public information, duties of occupiers, insurance and indemnities, etc
5. Pipelines – standards and operating procedures, accident reporting, duties of constructors and users, insurance, etc.
6. Packaging – Design, manufacture and construction, standards, labelling and placarding, packing, etc
7. Transport – Prohibiting the transport of certain goods, containers and vehicle specifications, labelling and placarding, loading, licensing of vehicles and drivers, recording, procedures, security and safety, routing, reporting of incidents, duties, insurance, etc
8. Licensing – Applications, tests, approvals, periods, conditions, suspension, review, etc
9. Fees and charges – For licenses etc, tests, inspections, use of assets, etc
10. Miscellaneous – Signage, records, reporting, approval of laboratories, forms, transitional and savings provisions.

Schedule 2 – Repeals and consequential amendments

As shown in the diagram above, both the Dangerous Goods Transport Act 1998 and the Explosives and Dangerous Goods Act 1961 will be repealed along with all of the associated regulations. The transport regulations will however be largely unchanged from their current form.

A number of other Acts will require minor amendments to incorporate the title of the new Act whilst two Acts will need to amend their definitions of “explosives”.