STATUTORY REVIEW OF EXPLOSIVES ACT 2003

The Australasian Explosives Industry Safety Group (AEISG) welcomes the opportunity to input to the current review and thanks SafeWork NSW for the stakeholder meeting held on Friday 9 August 2019.

AEISG has for a long time now been pursuing consistency in the legislation covering the explosives industry in Australia which is implemented and administered by each of the state and territory jurisdictions. The existing inconsistent and disjointed jurisdictional explosives legislations are an unnecessary administrative burden on both the industry and the regulators, and more importantly, are an impediment to improving safety and security from explosives.
For the past 7 years, AEISG and all jurisdictions have worked with Safe Work Australia to develop a suite (4) of proposals to assist in reducing the level of inconsistencies. The proposals have been agreed by Workplace Health and Safety Ministers, and other relevant Ministers, for implementation. It is now up to all jurisdictions to pursue these agreed outcomes via their respective legislations.
While the work of the SIG-Explosives project overseen by Safe work Australia is briefly mentioned in the Discussion Paper, there appears little attention to the outcomes in proposing any changes within the current review. AEISG believes it is an opportune time to at least incorporate the agreed proposals into the framework of the enabling legislation (Act) such that implementation can proceed, or not be prevented by the inability of the Act to allow implementation.
The following comments from AEISG will follow the issues as posed in the Discussion Paper.

General

- The existing Explosives Act 2003 is enabling legislation passed by Parliament 'to provide for the regulation and control of the handling of explosives and explosive precursors; to provide for the regulation of certain other dangerous goods; and for related purposes.'
  It outlines the strategies to be applied in achieving its purpose including security checks and an array of licences required to conduct activities included in the overall definition of 'handling'.
  While Section 38 enables regulations to be made under this Act, such regulations are not to be inconsistent with the Act (Section 38(1)). It is not considered appropriate that regulations made by governments should override, exempt or extend provisions agreed by Parliament.
  AEISG believes there are provisions included in the Explosives Regulations which should be relocated to the Act e.g. Authorisation of Explosives, Sales of certain explosives to minors which is prohibited by Section 9 of the Act.
  Should the Authorisation of explosives be relocated to the Act, AEISG considers the provisions should allow for recognition of Authorisations made by other jurisdictions – one of the agreed proposals.

- Administration and Enforcement
  It is stated on page 4 of the Discussion Paper that 'Only SafeWork NSW may grant licences and security clearances. Compliance and enforcement of the Act is shared between SafeWork NSW and the NSW Resources Regulator.
  While AEISG agrees with this position, it would seem, in practice, that some licensing practices are carried out by the NSW Resources Regulator e.g. licence assessments, recommendations. AEISG believes all licensing activities including assessments and recommendations should be conducted by SafeWork NSW officers. AEISG has no problem with the sharing of compliance and enforcement activities with other agencies.

  There has long been a disparity between the way that Division 5.1 – 'Explosives Precursors' have been legislated across the various Australian states and territories. This has resulted in

AEISG Inc.
P: (07)5669 9718
M: 0417 021 032
E: bob.sheridan@aeisg.org.au
Suite 14 Level 1 Sands Court
1 Sands Street Tweed Heads
NSW 2485

confusion and overlap between the legislative requirements, and the subsequent increased administration related to the different requirements of the various legislative authorities.
In NSW the following legislative agencies are relevant to explosives and explosives precursors:

- Explosives (SafeWork NSW and NSW Planning and Environment for mine sites);
- Dangerous goods transport (NSW EPA); and
- Work, Health and Safety, including Major Hazard Facility (MHF) obligations (SafeWork NSW).

Specific

1. **Is the object of the Explosives Act 2003, outlined above, still valid? Why or why not?**

   On page 5 of the Discussion Paper it is outlined the object of the NSW laws is 'to protect workers, the public, and property from harm arising from the illegal and/or unsafe use of explosives'.
   AEISG is not aware of the origins of this developed object of the legislation. It is not referred to in the Act. For clarity, AEISG believes the purpose of the legislation could be included in that legislation so that provisions and associated compliance activities could be better focussed.
   AEISG believes the object of explosives legislation is community safety from explosives. It should not be limited to 'illegal' or 'unsafe use', but to all explosives' activities. Further, the legislation should recognise and facilitate the legitimate use of explosives.

2. **Is the scope of the Act appropriate? Are these substances or activities which should be within the scope of this Act which are currently outside it?**

   At present, the Act refers to the regulations for the definition of 'explosive'. AEISG believes the definition of 'explosive' is an issue for the enabling legislation, i.e. the Act, and not left to the changeable regulations.
   AEISG believes the definition of 'explosive' should be included in the Act and should be that agreed by relevant Ministers as one of the 4 proposals resulting from the work of SIG-Explosives.
   AEISG is comfortable with the scope of the legislation covering things other than 'explosives' as is already the case.
   The agreed definition for 'explosive' would overcome several deficiencies in the current definition in Clause 4 of the regulations and as outlined in the Discussion Paper.

3. **Should the definition of 'supply' be moved from the Regulation to the Act?**

   AEISG would be comfortable with this proposal.

4. **Does the licensing framework enabled by the Act meet its objectives?**

   While not agreeing with the current range of explosives licences under the regulations and referred to on page 14 of the Discussion Paper, AEISG is comfortable with the framework established in the Act. Comments on the types of licences can be held until the proposed review of the regulations in 2020.
   However, AEISG believes it is an opportune time to incorporate the agreed proposal of automatic recognition of licences issued under other jurisdictions' explosives laws.
   In correspondence to AEISG dated 18 December 2018, the Minister for Innovation and Better Regulation (NSW) stated:
   'Automatic mutual recognition of licences is a proven way of outlining red tape and, in principle, I support automatic mutual recognition of explosives practitioners.'

AEISG Inc.
P: (07)5669 9718
M: 0417 021 032
E: bob.sheridan@aeisg.org.au
Suite 14 Level 1 Sands Court
1 Sands Street Tweed Heads
NSW 2485

The current review of the Act should incorporate the ability to automatically recognise other jurisdictions' explosives licences. Relevant provisions to accommodate these measures have been issued by Safe Work Australia for implementation by jurisdictions.

5. **Are there other matters which the report provided by the Commissioner of Police should include?**

   To facilitate national consistency and remove current impediments to industry, security assessment criteria should be established nationally such that individual security licences/cards can be automatically accepted nationally. It makes no sense to require individuals to hold numerous security cards from various jurisdictions – when any one security card already authorises access to explosives.
   AEISG also believes any report from the Commissioner of Police is advice to the explosives licensing authority – the decision to licence or not rests with the explosives regulator, not the police.

6. **Do you support mandatory disqualifying offences for holding a licence or security clearance? Why?**

   As indicated above, AEISG believes the decision to licence or not rests with the regulatory authority. Explosives licences vary in type and relevant offences conducted by an individual may only be significant for certain licence types.
   Security assessment criteria should be nationally consistent and applied by the regulator, without mandatory disqualifying offences. The assessment of offences should also take into account relevant spent convictions requirements.

7. **If you support mandatory disqualifying offences what should those offences be? Should they be limited to offences involving violence or include work health and safety offences?**

   N/A

8. **Should mandatory disqualification only apply where the convictions have occurred within a certain period before application of the licence? What should that period be?**

   Refer 6 above.

9. **Are the internal and administrative review provisions of the Act working to ensure oversight of licensing decisions?**

   AEISG is unaware of any examples of deficiencies in this area. Hence, no further comment.

10. **Do the 2013 amendments strike the right balance between protecting the confidentiality of police information and providing an effect right of review?**

    AEISG offers no comment.

11. **Do these offences appropriately support the Act's objective of ensuring that explosives and explosives precursors are handled safety?**

    This objective is different to that offered in Question 1 of the Discussion Paper.

AEISG Inc.
P: (07)5669 9718
M: 0417 021 032
E: bob.sheridan@aeisg.org.au
Suite 14 Level 1 Sands Court
1 Sands Street Tweed Heads
NSW 2485

AEISG believes the offences outlined should be sufficient to achieve community safety.
For clarity, AEISG believes the powers of Inspectors should be included in the Explosives Act. This Act applies universally to workplaces and other areas within the community. If offences of obstructing or intimidating inspectors (section 28) are included, the relevant powers of those inspectors should be explicit within the Act.

12. Should executive liability apply to offences other than handling explosives or explosives precursors without a licence?

AEISG has no significant concerns with extending the liability of executives where offences may be committed by corporations. However, AEISG also believes there should be appropriate defence provisions included for executives – examples of such provisions can be found in the Queensland Explosives Act 1999.

13. Taking into account the costs of compliance, are the maximum penalty levels for offences under the act sufficient to ensure compliance with its provisions?

AEISG believes the current penalty levels seem sufficient. Alternative measures are also available in relation to offences e.g. suspension or cancellation of licences which can prove more efficient and effective in many cases.

14. Should penalty levels be adjusted to take account of increases in CPI since they were last changed in 2003?

Penalties within the Act are generally included as Penalty Units. The number of Penalty Units should not be adjusted to address the failure of managing the values of each Penalty Unit. The question seems one for the government and its Penalty Unit system.

15. Should the maximum penalty levels in the Act be increased to reflect the higher penalties available for similar offences in other NSW and interstate Acts? Why or Why not?

AEISG sees no need to increase relevant penalties and the information included in the Discussion Paper provides no reasoning for any increase.
In most cases, the penalties outlined in the Work Health and Safety Act 2011 (NSW) will already be applicable as this legislation also applies to explosives industry activities/sites. Most offences may be pursued under either legislation.

16. Should the maximum penalties for the offences relating to offences which can be prosecuted under both the Act and the WHS act be the same?

The offences outlined in the Discussion Paper relevant to this issue are not the same and hence the reasoning for similar penalties is not made. As indicated previously, the relevant powers of inspectors should be included within this Act so that offences against inspectors are explicit.

Research available in the public arena has shown little evidence that penalties, or increasing penalties, significantly improves compliance levels.

The comparison of WHS legislative penalties to Explosives legislation penalties is concerning due to the difference between the scope of both sets of legislation. The scope of WHS is very large, encompassing numerous businesses (100,000 plus), with significant variations in the:

a) size of operations;

b) type of work conducted;
c) hazards of the work;
d) type of equipment used; and
e) training and competency requirements.

In contrast, the scope of Explosives legislation is significantly narrower with detailed obligations and training requirements, specific hazards and industry specific, custom-built and operated equipment. The Explosives legislation is a small subset of WHS with extensive controls. Penalties appropriate to WHS obligations should not be translated as providing appropriate penalties to be applied for the explosives industry.

17. Do inspectors under the Explosives Act have sufficient powers to ensure compliance with the Act?

AEISG is unaware of any problems in this area. Relevant powers should be in this Act.

18. Should inspectors under the Act have the same extra – territorial information gathering powers as inspectors under the WHS Act (section 155A)?

AEISG would offer no objection to such powers.

19. Where a regulator is considering or intending to bring a prosecution in relation to forfeited explosives, should the regulator be able to destroy some of the explosives as they can under the Drug Misuse and Trafficking Act 1985?

It is unclear what powers of forfeiture exist under this Act. While relevant provisions exist in the WHS Act, what is the situation in places not covered by the WHS Act but where explosives may be found?
AEISG would like to see any specific forfeiture provisions included explicitly in this Act.

AEISG does not believe any explosives should be destroyed until such time as a prosecution is decided. Even then, forfeiture and/or destruction should only be considered relevant to the offence and the associated penalty for that offence. In exaggerated terms, it would not be appropriate to destroy property (explosives and/or equipment) valued at millions of dollars for an offence which might generate a penalty of only 50 penalty units.

It is a poor argument to suggest the regulator incurs costs in storing or disposing of explosives. That is the role of the regulator and the regulator should be appropriately resourced to administer the relevant legislation. In any case, the regulator has access for recovering any costs incurred.

20. If so, what safeguards should be in place? Do you have any concerns about such an approach?

Refer comments in 19 above.
SafeWork NSW should have at its disposal appropriate resourcing to address explosives recovered and/or forfeited under this Act.
Most jurisdictions have explosives storage facilities for their own use in such circumstances.

21. Do you have any comments on these provisions of the Act?

The Act should include provisions to recognise alternative safety measures that can be used to achieve an equivalent, or better, level of safety when compared to the legislative requirements. For example, technology changes, equipment changes or product composition

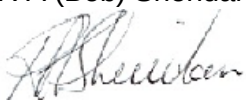
changes can all significantly improve safety and can provide an equivalent level of safety to the legislation, without the need to adopt some legislated prescriptive measures. Without a provision to allow recognition of these alternative safety measures, industry is constrained to what are often prescriptive requirements that have been tailored to a worst-case situation and may not provide any significant improvement in safety.

AEISG has offered comments where relevant. It would also like to stress again that this opportunity of reviewing this Act should be used to progress the 4 proposals agreed by WHS Ministers to achieve national consistency:

- Definition of 'explosive'
- Automatic recognition of Authorisations of explosives
- Automatic recognition of occupational and activity based licences issued by other jurisdictions
- Nationally consistent Notifications processes.

Implementation of these agreed proposals is now a jurisdictional responsibility, supported by the relevant NSW Minister.

R A (Bob) Sheridan



CEO
AEISG

AEISG Inc.
P: (07)5669 9718
M: 0417 021 032
E: bob.sheridan@aeisg.org.au
Suite 14 Level 1 Sands Court
1 Sands Street Tweed Heads
NSW 2485