

# STATUTORY REVIEW OF THE EXPLOSIVES ACT 2003 (NSW)

16 August 2019

**NSW MINERALS COUNCIL**

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# 1 Executive Summary

NSW Minerals Council (NSWMC) welcomes the opportunity to provide feedback on the statutory review of the *Explosives Act 2003* (NSW) (Act).

NSWMC represents the State's \$27.3 billion mining industry. NSWMC provides a single, united voice on behalf of our 100 member companies: 36 full members (producers and explorers), 19 associate members (junior explorers), and 39 associate members (service providers) and works closely with government, industry groups, stakeholders and the community to foster a dynamic, efficient and sustainable minerals industry in NSW.

Work health and safety (WHS), including a robust licensing regime which ensures safe access to, and handling of, explosives is the number one priority of the minerals industry in NSW.

The review of the Act is welcomed, however, NSWMC strongly supports the development and implementation of nationally consistent explosives legislation, to reduce regulatory burden.

NSWMC acknowledges that the Act is being reviewed separately to the *Explosives Regulation 2013* (NSW) (Regulations). Many of the practical issues which industry face in relation to the use of explosives arise from the requirements in the Regulations. NSWMC is of the strong view that a consultation process is required on the Regulations and would appreciate the opportunity to provide comment during the review of the Regulations.

The NSWMC invites the Government to give consideration to the recommendations set out in this submission which will assist in ensuring a more effective operation of the Act. Key recommendations include:

- The Act include an objects clause
- Automatic mutual recognition of security clearances and licences granted in other jurisdictions
- The Act include a mechanism to notify the employer of a licensee of any suspension/cancellation of a security clearance/licence of their employees.
- Consideration be given to making it an offence if:
  - an individual failed to inform their employer of any suspension/cancellation of a security clearance or licence; or
  - any contractor failed to pass this information to any principal the contractor is engaged by, where the relevant employee is employed by a contractor to a principal.
- A provision which prohibits double jeopardy by indicating that proceedings cannot be commenced under the Act and the WHS Act in relation to the same conduct

The NSWMC looks forward to continuing to engage on the review of the Act and future review of the Regulations.

## 2 Recommendations

1. Any changes to the Regulations be the subject of industry consultation.
2. Nationally consistent regulation of explosives be pursued as a matter of priority.
3. The Act contain an objects clause to assist in the understanding and interpretation of the Act.
4. The Act include an objects clause based on the objects contained in the Explanatory Notes to the Bill (with an update to refer to the current health and safety legislation).
5. The Act include a provision which prohibits double jeopardy by indicating that proceedings cannot be commenced under the Act and the WHS Act in relation to the same conduct.
6. The Act provide for the automatic mutual recognition of security clearances and licences granted in other jurisdictions.
7. The Act include a mechanism to notify the employer of a licensee of any suspension/cancellation of a security clearance/licence of their employees.
8. Consideration be given to making it an offence if:
  - an individual failed to inform their employer of any suspension/cancellation of a security clearance or licence; or
  - any contractor failed to pass this information to any principal the contractor is engaged by, where the relevant employee is employed by a contractor to a principal.
9. There be no introduction of offences resulting in mandatory disqualification.
10. The Act provide a mechanism for temporary suspension of a licence pending the outcome of an independent medical assessment.
11. There be no change to the executive liability offences in the Act.
12. The Act remain unamended in respect to enforcement powers under section 27 of the Act.
13. In order to exercise any extraterritorial powers, the regulator should be required to have a reasonable basis on which to believe there is a clear and close nexus between the issues the subject of an investigation and the other jurisdiction.
14. There be no change to the penalties in the Act.
15. The Act include the ability for an accused to enter into an undertaking similar to a WHS undertaking under Part 11 of the WHS Act.
16. The regulator have the right to destroy some seized explosives and appropriate protections be included in the Act so that the rights of an accused are protected.
17. The definition of “supply” which appears in the Regulations should be moved to the Act.
18. Where possible, there should be consistency between definitions used in the Act and the WHS Act to assist understanding of the Act as part of a broader health and safety framework.

## 3 Regulations

NSWMC understands the current review is limited to the Act. If any amendments are proposed to the Regulations, NSWMC recommends there be consultation with industry on the nature of those changes and would appreciate the opportunity to provide comment. This is particularly important in the context of the statutory scheme dealing with explosives because many of the detailed obligations which have an impact on the mining industry are contained in the Regulations.

### Recommendation

1. Any changes to the Regulations be the subject of industry consultation.

## 4 National consistency

NSWMC welcomes the review of the Act. However, it is important that efforts to achieve nationally consistent laws on explosives continue.

The benefits of a nationally consistent approach were recognised in the Decision RIS on Explosives Regulation in Australia dated July 2016.<sup>1</sup> Specifically, it was identified that national consistency across the four areas of:

- definition of explosives
- licence framework
- notification process and
- authorisation process

would result in estimated cost savings of \$13.83m per annum for business.

Inconsistencies across jurisdictions in the definition of explosives, licencing requirements and notifications continue to cause a regulatory burden which would be eased with nationally consistent legislation.

### Recommendation

2. Nationally consistent regulation of explosives be pursued as a matter of priority.

## 5 Objects of the Act

### 5.1 The Act would benefit from an objects clause

An objects clause is a provision, often located at the beginning of a piece of legislation, that outlines the underlying purposes of the legislation and can be used to resolve uncertainty and ambiguity.

The Federal Office of Parliamentary Council describes an objects clause as a technique that can be used to aid comprehension and to “give readers a general understanding of the purpose of legislation,

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<sup>1</sup> <https://ris.pmc.gov.au/2017/03/06/explosives-regulation-australia>

or to set out general aims or principles that help readers to interpret the detailed provisions of legislation.”<sup>2</sup>

Objects clauses may assist the courts and others in the interpretation of legislation. Section 33 of the *Interpretation Act 1987* (NSW) provides that:

*“In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.”*

#### Recommendation

3. The Act contain an objects clause to assist in the understanding and interpretation of the Act.

## 5.2 The objects clause should reflect the original objects of the Bill

The Discussion Paper states the object of the Act is “to protect workers, the public, and property from harm arising from the illegal and/or unsafe use of explosives”.

The Act does not currently contain an objects clause. It is therefore necessary to have regard to extrinsic materials to identify the objects of the Act.

The Explanatory Notes for the Explosives Bill 2003 (which led to the Act), provided the objects of the Bill were:

*“(a) to provide for the regulation and control of the handling of explosives and explosive precursors by requiring a licence to handle explosives and explosive precursors and also by enabling regulations to be made under the proposed Act containing provisions governing the handling of explosives and explosive precursors, and*

*(b) to provide for the regulation and control of other dangerous goods in circumstances that will not be covered by the Occupational Health and Safety Act 2000 by enabling regulations to be made under the proposed Act with respect to those matters.”*

These objects are narrower than the object outlined in the Discussion Paper. It is NSWMC’s view that the objects identified in the Bill properly and correctly identify the objects of the Act.

The objects of the Bill could be updated by amending the reference to the OHS Act to the *Work Health and Safety Act 2011* (NSW). These objects would then provide an appropriate objects clause for the Act. This would assist in providing clarity to the Act without the need to refer to extrinsic materials.

#### Recommendation

4. The Act include an objects clause based on the objects contained in the Explanatory Notes to the Bill (with an update to refer to the current health and safety legislation).

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<sup>2</sup> Australian Government, Office of Parliamentary Council, OPC’s drafting services: a guide for clients, sixth edition, July 2016, <https://www.opc.gov.au/sites/default/files/s13ag320.v49.pdf>

## 6 No double jeopardy

As the Act is intended (in accordance with the objects of the Bill) to provide for the regulation and control of matters not addressed by the general health and safety legislation, it is important that a protection is included in the Act so that any person is not exposed to double jeopardy. Without the inclusion of such a term there is a risk that a person may be exposed to risk of prosecution under the Act and the WHS Act arising from the same conduct.

### Recommendation

5. The Act include a provision which prohibits double jeopardy by indicating that proceedings cannot be commenced under the Act and the WHS Act in relation to the same conduct.

## 7 Automatic recognition of security clearances and licences

The Act does not provide for the automatic mutual recognition of security clearances and licences between jurisdictions. This increases the compliance burden for licensees and inhibits the free flow of labour between jurisdictions.

There is an opportunity to reduce compliance costs to businesses operating in NSW by the Act providing for automatic mutual recognition of licences that have been granted in another jurisdiction.

### Recommendation

6. The Act provide for the automatic mutual recognition of security clearances and licences granted in other jurisdictions.

## 8 Identification of disqualified security clearances and licences

Section 6 of the Act makes it an offence for a person to handle an explosive or explosive precursor unless the person is authorised to do so by a licence. The offence may be committed by a corporation and the offence is an executive liability offence.

The effect of the offence is that an employer can be prosecuted in circumstances where an individual employee who is required to be licensed does not hold a licence.

If an individual's security clearance or licence is suspended or cancelled, there is no way for employers to be made aware of this and this places employer at risk of committing an offence.

It is important that a mechanism is built into the Act so that employers are made aware of any suspension or cancellation of an employee's security clearance or licence.

For such a regime to operate, it is anticipated that the Act would contain:

- A requirement for the holders of a security clearance or licence to notify the regulator and their employer and to notify the regulator of any changes to these details.
- An obligation on the regulator to notify the relevant employer of any suspension/cancellation.

Consideration could also be given to making it an offence if an individual failed to inform their employer of any suspension/cancellation of a security clearance or licence. It should also be an offence if any contractor failed to pass this information to any principal the contractor is engaged by, where the relevant employee is employed by a contractor to a principal.

#### **Recommendation**

7. The Act include a mechanism to notify the employer of a licensee of any suspension/cancellation of a security clearance/licence of their employees.
8. Consideration be given to making it an offence if:
  - an individual failed to inform their employer of any suspension/cancellation of a security clearance or licence; or
  - any contractor failed to pass this information to any principal the contractor is engaged by, where the relevant employee is employed by a contractor to a principal.

## **9 Mandatory disqualification**

The Discussion Paper seeks views on whether there should be any mandatory disqualifying offences for holding a licence or security clearance. ‘

It would be inappropriate for the Act to include any mandatory disqualification offences because this would run the risk of a person automatically being unable to work.

As a matter of natural justice it is appropriate to provide a framework that allows for a consideration of the individual’s circumstances prior to disqualification.

The existing framework in section 22 of the Act to require a person to “show cause” as to why they should not hold a licence is an appropriate mechanism to deal with specific issues where there is a belief the person cannot be trusted to handle explosives.

#### **Recommendation**

9. There be no introduction of offences resulting in mandatory disqualification.

## **10 Temporary disqualification**

Holding a licence under the Act provides the licensee with a high degree of responsibility. NSWMC is aware of circumstances where employers have had concerns relating to the health and wellbeing of a licensees - in particular, impacts on psychological wellbeing.

The Act would be improved by a mechanism that provided employers with a mechanism to seek a temporary suspension of a licensee’s licence pending the outcome of an independent medical assessment.

#### **Recommendation**

10. The Act provide a mechanism for temporary suspension of a licence pending the outcome of an independent medical assessment.



## 11 Executive liability offences

The Act provides that section 6(1) constitutes an executive liability offence where a director or manager of a corporation is taken to have contravened section 6(1) if the corporation has committed such a contravention.

It is appropriate for the executive liability offence to remain unchanged. It is appropriate for directors and others to have a framework in place to verify that persons handling explosives are licenced. However, due to the fact that other licensing obligations are owed by the individual licensee it would be inappropriate to deem a director or a manager liable for an offence committed by another individual.

The broader health and safety context in which the Act operates includes the WHS Act. The WHS Act imposes an obligation on officers to exercise due diligence to ensure that a person conducting a business or undertaking complies with its duties. This framework means there are adequate obligations owed by officers which overlap the Act and which ensure the health and safety of persons working with explosives. It would create unnecessary duplication to include further obligations in the Act in respect of officers.

### Recommendation

11. There be no change to the executive liability offences in the Act.

## 12 Extraterritoriality

The Discussion Paper seeks views on whether the Act should be amended in a similar way to the amendment made by section 155A of the WHS Act.

Extending inspector's powers extraterritorially to reflect section 155A of the WHS Act is unnecessary given the finding in *Perilya Ltd v Nash* [2015] NSWSC 706. This is notwithstanding that the WHS Act was amended (which was arguably an unnecessary amendment). NSWMC therefore recommends the Act remain unamended in respect to enforcement powers under section 27 of the Act.

If further extraterritoriality is considered, the regulator should be required to have a reasonable basis on which to believe there is a clear and close nexus between the issues the subject of an investigation and the other jurisdiction.

### Recommendation

12. The Act remain unamended in respect to enforcement powers under section 27 of the Act.
13. In order to exercise any extraterritorial powers, the regulator should be required to have a reasonable basis on which to believe there is a clear and close nexus between the issues the subject of an investigation and the other jurisdiction.

## 13 Penalty levels

The imposition of penalties should be considered in the context of other enforcement mechanisms in accordance with prosecution and enforcement policies. As examples, the National Compliance and Enforcement Policy published by Safe Work Australia and SafeWork NSW Prosecution Guidelines.

These enforcement policies make it clear that prosecution is only one option among the enforcement tools the regulator has. In the broader context of the range of enforcement options that ought be used prior to prosecution and the imposition of a monetary penalty, the existing penalty levels remain appropriate. Further, consideration should be given to a wider range of enforcement options under the Act similar to WHS undertakings under Part 11 of the WHS Act.

### Recommendation

14. There be no change to the penalties in the Act.
15. The Act include the ability for an accused to enter into an undertaking similar to a WHS undertaking under Part 11 of the WHS Act.

## 14 Destruction of seized explosives

NSWMC does not oppose the regulator being able to destroy some seized explosives where the regulator is considering beginning a prosecution. However, NSWMC considers it is important that safeguards are put in place.

An accused should be provided notice of the proposed destruction and provided an opportunity for the accused to arrange samples/access to the seized explosives to facilitate the accused's defence, prior to destruction.

Further, it should be expressly recognised that if the accused is acquitted and explosives have been destroyed, the accused have a right to seek compensation from the state for the value of the destroyed explosives. Section 184 of the WHS Act provides a framework that it may be useful to consider in establishing a provision to allow for compensation to be sought.

NSWMC recommends the regulator have the right to destroy some seized explosives and appropriate protections be included in the Act so that the rights of an accused are protected.

### Recommendation

16. The regulator have the right to destroy some seized explosives and appropriate protections be included in the Act so that the rights of an accused are protected.

## 15 Definition of “supply”

The term “supply” is used in the Act, but is only defined in the Regulations.

As a matter of convenience, the definition of “supply” which appears in the Regulations should be moved to the Act. Further, where possible there should be consistency between definitions used in the Act and the WHS Act to assist understanding of the Act as part of a broader health and safety framework.

### **Recommendation**

17. The definition of "supply" which appears in the Regulations should be moved to the Act.
18. Where possible, there should be consistency between definitions used in the Act and the WHS Act to assist understanding of the Act as part of a broader health and safety framework.