NSW GOVERNMENT | Customer Service

Explosives Act 2003 – Statutory Review - Report

October 2019

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1. Executive Summary

The *Explosives Act 2003* (the Act) regulates the control and handling of explosives and explosive precursors (chemicals that can be processed to make an explosive) in New South Wales. It has been in operation since 1 September 2005.

The Act was the subject of a Statutory Review in 2009 (the 2009 Review) and was amended to reflect a number of the recommendations of the 2009 Review in 2013.

Section 38 of the Act requires that the responsible Minister conduct a review of the Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives five years from the date of commencement of the 2013 amendments.

This is a report on the outcome of that review. As part of the review, the Department of Customer Service developed a Discussion Paper in consultation with relevant Government agencies, conducted a four-week public consultation on the Discussion Paper which received six submissions, and held a forum with key stakeholders in the explosives industry.

The feedback received through the forum and the submissions made a valuable contribution to the review and has been carefully considered.

The review found that the objectives of the Act remain valid and its terms remain generally appropriate for securing those objectives. Feedback from stakeholders indicated that the Act creates a sound framework for the regulation of explosives in NSW, and that the amendments made in 2013 are working well.

However, the review has also identified a number of minor aspects of the Act which could be improved. The review recommends amendments to the Act to:

- define ‘supply’;
- increase the maximum penalties for offences in the Act and offences that have been or may be created by the Regulation to reflect increases in the consumer price index (CPI) since 2003;
- clarify regulators’ cross-jurisdictional investigative powers; and
- enable the regulator to rely on certificate evidence and samples of forfeited explosives in criminal proceedings after it has destroyed the bulk of the forfeited explosives.

Subject to these proposed amendments, the review concludes that the approach taken by the present Act should be maintained until further review is required.

2. The Statutory Review

2.1 The *Explosives Act 2003*

The Act regulates the control and handling of explosives and explosive precursors in New South Wales. Explosive precursors are chemicals and other materials that can be processed to make an explosive.

The Act establishes a licensing framework which restricts access to explosives to suitable persons, and sets out general duties in relation to explosives.

The Act is supported by the *Explosives Regulation 2013* (the Regulation) and by conditions that are attached to licenses by the regulatory authority.

The regulatory authority chiefly responsible for administering and enforcing the Act is SafeWork NSW. Only SafeWork NSW may grant licences and security clearances. Responsibility for enforcing the Act is shared between SafeWork NSW and the NSW Resources Regulator. The Resources Regulator is responsible for enforcement in mining workplaces and SafeWork NSW is responsible for enforcement elsewhere.

The Commissioner of Police also plays an important role in administering the Act by providing reports on the suitability of applicants for security clearances or licences to SafeWork NSW.

The Act was last reviewed in 2009, when a Statutory Review found that the policy objectives of the Act remained valid, and that on the whole the terms of the Act were effective and efficient in achieving its ends. The 2009 Review recommended some amendments to the Act, and the Act was amended to reflect a number of these recommendations in 2013.

2.2 Requirement for review

Section 38 of the Act requires the responsible Minister – the Minister for Better Regulation and Innovation – to conduct a review to determine whether the Act's policy objectives remain valid and its terms remain appropriate for securing those objectives.

This review is required to be undertaken as soon as possible 5 years after the date of assent to the *Explosives Amendment Act 2013* (the 2013 Amendment Act). A report on the outcome of the review must then be tabled in each House of Parliament within 12 months. The 2013 Amendment Act was assented to on 29 October 2013, and therefore this report is due to be tabled in Parliament by 29 October 2019.

2.3 Consultation

2.3.1 Public consultation

A Discussion Paper to support the Statutory Review of the Act was developed in consultation with SafeWork NSW, the NSW Resources Regulator, and the NSW Police, the government agencies responsible for the administration and enforcement of the Act. It set out the key elements of the Act, highlighted the changes introduced by the 2013 amendments, and included a number of questions to guide discussion of the Act. A copy of the Discussion Paper appears as Appendix A to this Review.

The Discussion Paper was published on 19 July 2019 for a four-week consultation period. It was available online via the SafeWork NSW website and the NSW Government's Have Your Say website. Key stakeholders were notified at the beginning of the consultation period. Submissions to the Statutory Review were accepted through an online form, by e-mail and by post until 16 August 2019.

Six submissions were received in response to the public consultation, from the NSW Minerals Council (NSWMC), the Pyrotechnics Industry Association of Australia (PIAA), the Australian Explosives Industry Safety Group (AEISG), Wollondilly Shire Council, Orica Ltd, and the NSW Police Force.

The Department has reviewed all submissions and considered the feedback in arriving at the recommendations which appear in Chapter 5 of this Review.

2.3.2 Stakeholder forum

Key stakeholders in the explosives industry, identified in consultation with SafeWork NSW and the NSW Resources Regulator, were invited to a forum as part of the Statutory Review.

The forum was attended by representatives of the NSWMC, AEISG, PIAA, and the Sporting Shooters Association of Australia (NSW) and facilitated by the Department of Customer Service with the assistance of SafeWork NSW and the NSW Resources Regulator.

The forum gave stakeholders an opportunity to express their views on the issues identified in the Discussion Paper, and to raise other issues connected with the Act and with the regulation of explosives more broadly.

A number of the attendees also provided a written submission after the forum. The feedback provided at the forum has been considered as part of the Review and taken into account in making the recommendations which appear in Chapter 5.

2.4 National harmonisation proposals

The 2009 Review noted that work was underway to develop a nationally consistent approach to the regulation of explosives. It anticipated that this work might be complete by the time of this review.

Safe Work Australia led work on the harmonisation of explosives on behalf of Commonwealth, State and Territory work health and safety (WHS) ministers. Safe Work Australia developed policy proposals for harmonisation in four key areas:

- the definition of explosives;
- authorisation processes (that is, the processes by which explosive regulators determine the classification of an explosive, whether it is fit for purpose, and whether it is safe for that purpose);
- notification processes (that is, the processes through which explosives users provide information to regulators about particular activities, events or incidents); and
- licensing.

NSW has been supportive of national harmonisation of explosive laws, subject to any reforms maintaining sufficient protections of the safety and security of people in NSW.

A number of industry stakeholders expressed disappointment at the lack of progress towards national harmonisation of explosives regulation. The review notes that there remains strong support among stakeholders for national harmonisation. Stakeholders have identified a number of ways in which harmonisation would make regulation of explosives more efficient and less burdensome, particularly where businesses and individuals are operating across jurisdictions. In particular, stakeholders are supportive of mutual recognition of interstate licences and security clearances.

At the time of this review, national harmonisation of explosives regulation is not imminent. But in making recommendations for amendment to the Act, the review has been mindful of the policy proposals developed in the work on harmonisation, and has also borne in mind that any reforms to the NSW Act should not make harmonisation more difficult or less likely.

In any event, much of the detail of explosives regulation relevant to the four key areas set out above appears in NSW's Regulation, rather than the Act. For this reason, the proposed amendments to the Act are not considered to affect the future prospects of national harmonisation of explosives regulation.

2.5 Matters relevant to the Regulation

In their submissions and at the forum, industry stakeholders raised a number of issues which, although not relevant to the Act itself, should be considered as part of the review of the Regulation due in 2020. Industry stakeholders will be consulted further on these issues, and on the Regulation generally, as part of that review.

3. Snapshot of explosive use in NSW

Explosives and explosive precursors are in use in NSW industries including demolition, mining, agriculture, policing, pyrotechnics, and transport.

SafeWork NSW licenses individuals and corporations to handle explosives in these industries. There are ten types of licences for handling explosives which SafeWork NSW is authorised to issue under the Regulation. These are:

- licence to manufacture;
- licence to import;
- licence to supply;
- licence to transport by vehicle;
- licence to transport by vessel;
- licence to store;
- blasting explosives user's licence;
- pyrotechnician's licence;
- a fireworks (single use) licence; and
- licence to use security sensitive dangerous substances.

At present in NSW there are approximately 350 licences issued to cover the activities of manufacturing, importing, supplying, transporting or storing explosives.

There are approximately 1800 blasting explosives user's licences and approximately 475 pyrotechnician's licences active in NSW.

In addition, there are approximately 6700 persons in NSW with current security clearances under the Act. Security clearances are required for individuals who wish to access explosives, explosive precursors, or concentrated ammonium nitrate.

4. Findings of the review

4.1 Objectives of the Act

The objectives of the Act can be discerned from its provisions and its statutory context, and supporting materials such as the second reading speech at its introduction. They are not limited to those set out in the Explanatory Note on the Explosives Bill 2003, which describe the Act's provisions but do not set out the underlying reasons for regulating the use of explosives in NSW.

The 2009 Review stated that the principal policy objective of the Act is the protection of workers and the public from the harm that may arise from the illegal and/or unsafe use of explosives or explosive precursors. An additional policy objective is the protection of property from the harm that may arise from illegal and/or unsafe use of explosives.

Explosives and explosive precursors are in use in a number of NSW industries. The Act aims to balance the legitimate need of these industries to handle explosives against the above policy objectives.

The Act seeks to do so by establishing a licensing regime which restricts access to explosives to suitable persons. The burden imposed by the licensing regime on individuals and businesses working with explosives is intended to be proportionate to the risks the framework aims to address. The risks of unsafe uses of explosives are significant.

This review has concluded that the above policy objectives remain valid. The community still needs to be protected from the harm that can arise from unrestricted access to explosives and explosive precursors, while explosives and explosive precursors continue to be in use across NSW industries. These objectives are not met under any other legislation.

The review notes the submission of some stakeholders that the Act should include a section setting out its objects or purpose. That is not an approach commonly taken in current NSW legislation, though it is usual for an Act to have a long, descriptive title. The Act's long title is '*An Act 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'*. Where a NSW Act does have an objects clause (for example, the *Work Health and Safety Act 2011* (WHS Act) which adopts the national model Work Health and Safety Act) it may be used to guide judicial interpretation of the provisions of the Act.

A review of proceedings involving the Act did not reveal ambiguities in the Act which would be resolved by the inclusion of an objects clause. It appears that the purpose of regulating explosives is generally well understood. In the absence of evidence that courts would benefit from an objects clause in interpreting and applying the provisions of the Act, it is not proposed to include an objects clause in the Act at present.

4.2 Scope of the Act

4.2.1 The definition of explosives and explosive precursors

The substances to which the Act applies are explosives and explosive precursors. The Act enables the Regulation to prescribe any article or substance as an explosive or explosive precursor (section 3). At present, the Regulation prescribes the following as explosives (clause 4):

- dangerous goods of Class 1 within the meaning of the Australian Code for the Transport of Dangerous Goods by Road and Rail (the ADG Code) or the Australian Code for the Transport of Explosives by Road and Rail (the Australian Explosives Code);
- goods too dangerous to be transported within the meaning of the ADG Code or the Australian Explosives Code, which can produce an explosive or pyrotechnic effect; and
- articles or substances that, when manufactured, mixed, or assembled, can produce an explosive or pyrotechnic effect.

The review notes the submission of a stakeholder that the definition of explosives should appear in the Act. The review considers that leaving the prescription of explosives to the Regulation remains appropriate, because it allows greater responsiveness to changing technologies, and to changes in national and international classifications of explosives. This will also give NSW explosives laws flexibility in responding to a nationally consistent definition of explosives, should that be achieved as part of ongoing work on harmonisation.

The Regulation prescribes security sensitive dangerous substances as explosive precursors (clause 5). At present, only security sensitive ammonium nitrate is prescribed as a security sensitive dangerous substance (Schedule 1 of the Regulation).

There was some disagreement among stakeholders as to which explosive precursors or security sensitive dangerous substances should fall within the scope of the Act. These are matters that should be considered as part of a subsequent review of the Regulation.

4.2.2 Activities involving explosives

The Act applies to activities which involve handling explosives and explosive precursors. A definition of ‘handling’ appears in section 3. It is a comprehensive term including both ‘selling’ and ‘supplying’. ‘Sell’ is also defined in section 3.

‘Supply’ is a term used in both the Act and the Regulation. At present, the Regulation defines ‘supply’ as including ‘sell’ (clause 3). Stakeholders were generally supportive of ensuring that definitions are consistent across the Act and the Regulation. For consistency, the review proposes that a definition of ‘supply’ should appear in the Act, and that this definition should replace the definition in the Regulation. The definition should continue to make clear that ‘supply’ includes ‘sell’, but should also define supply more fully. It should,

for example, make clear that a person may 'supply' an explosive by transferring ownership of the explosive, providing access to an explosive, or giving the explosive to another person.

Recommendation 1

Amend the Act to define supply. This definition should replace the definition in the Regulation. 'Supply' should continue to include 'sell', but should also include any transfer of ownership of or access to an explosive.

4.3 The licensing framework

Part 3 of the Act enables a licensing framework for the handling of explosives and explosive precursors in NSW. Within this framework, SafeWork NSW grants licences to suitable applicants to authorise the carrying out of activities which constitute handling an explosive or explosive precursor. In order to hold a licence, an individual must first hold a security clearance (section 10A), while a corporation is only eligible for a licence where there is a responsible person for that corporation who holds a current security clearance (section 10A).

Stakeholders were generally supportive of the overall licensing framework. There was some comment on the number and types of licence provided for in the framework. The Regulation provides for 10 types of licence, covering different activities involving handling explosives. The number and types of licences are matters which can be considered on the review of the Regulation.

4.3.1 Matters on which the Commissioner of Police may provide a report

In order to ensure that applicants for or holders of licences and security clearances are suitable to hold them, SafeWork NSW may request that the Commissioner of Police provide them with a report on a number of matters relevant to suitability (section 13). In practice, SafeWork NSW requests a report from the Commissioner when assessing an application for a security clearance. Some of these matters which may be covered by the Commissioner's report are:

- whether the applicant or holder has been found guilty or convicted of an offence (s 13(1)(a));
- whether the applicant or holder is the subject of a firearms prohibition order or an apprehended violence order (section 13(1)(b) and (e));
- whether the applicant or holder is a fit and proper person (section 13(1)(c));
- whether the applicant or holder has a history of violence or threats of violence (section 13(1)(d)); and

- whether the Commissioner considers that it is contrary to the public interest for the applicant or holder to hold, or continue to hold, the licence or security clearance (section 13(1)(g).

The NSW Police Force have proposed that an additional matter be added to section 13 – that is, whether the applicant or holder is the subject of a weapons prohibition order within the meaning of the *Weapons Prohibition Act 1998* (NSW). Section 33 of that Act authorises the Commissioner of Police to make an order prohibiting a person from having possession of, or from using, any prohibited weapon if, in the option of the Commissioner, the person is not fit, in the public interest, to be permitted to have possession of a prohibited weapon.

The review notes that unlike a firearms prohibition order, a weapons prohibition order made the Commissioner is not reviewable by the Civil and Administrative Tribunal under the *Administrative Decisions Review Act 1997* (NSW). It also notes that if a person is the subject of a weapons prohibition order and the Commissioner considers that this is relevant to their suitability to hold a security clearance or licence, or that for that reason it is contrary to the public interest for the person to hold a licence or security clearance, the Commissioner may already advise SafeWork NSW of these matters under section 13(1)(c) and (g).

For these reasons, the review does not recommend amending the Act to specify that the Commissioner may advise the regulatory authority of whether an applicant or holder of a licence or security clearance is the subject of a weapons prohibition order.

4.3.2 Notification of cancellation or suspension of licences or security clearances

Under section 6 of the Act, it is an offence for a person to handle an explosive or an explosive precursor without a licence. A corporation can commit the offence. A corporation's licence depends upon a responsible person for the corporation holding a current security clearance (section 10A).

The offence is also an executive liability offence for the purpose of section 33 of the Act, which provides that in some circumstances a director of a corporation or another person involved in the management of a corporation which commits the offence can be held liable for the offence. A director or a person who is involved in the management of the corporation and who is in a position to influence the relevant conduct of the corporation can be held liable where they know, or ought reasonably to know, that the offence would be or is being committed, and they fail to take all reasonable steps to prevent or stop the commission of the offence.

After granting a licence or security clearance, the regulatory authority has the power to impose conditions or vary conditions on a licence or security clearance (section 14) and to suspend or cancel a licence or security clearance in certain circumstances (sections 20 and 21).

One stakeholder submitted that the Act should ensure that employer corporations are made aware of the cancellation or suspension of an employee's security clearance or licence, as in the event that an employee's security clearance or licence is cancelled a corporation may be committing an offence by conducting its ordinary activities, and its executives may be personally liable.

They therefore propose that the Act should:

- Make it an offence for a person to fail to inform their employer of any suspension or cancellation of their security clearance or licence.
- Make it an offence for a contractor whose employee's licence or security clearance is cancelled to fail to inform a principal contractor by whom they are engaged to perform relevant work.
- Require the regulatory authority to notify a person's employer of the suspension or cancellation of their licence or security clearance.

The regulatory authority is already authorised under clause 16 of the Regulation to notify a supervising licence holder of the cancellation or suspension of a security clearance, and must do so if it is aware that the security clearance holder is listed as a nominated person on the supervising licence holder's security plan (clause 16). A security plan is a document which an applicant for a licence must submit to the regulatory authority if required to do so, and which must contain a list of responsible persons who are to have unsupervised access to the explosives or explosive precursors concerned (clause 35).

The review has considered the public interest, as well as the costs and benefits of pursuing this proposal. It considers that it would not be appropriate for the regulatory authority to be required to notify a person's employer of the suspension or cancellation of their licence or security clearance in all circumstances. This would require the regulator to maintain up-to-date records of the employment or contracts of service of every licensee and security clearance holder. This would require imposing an obligation on each licensee and security clearance holder to notify the regulator of any change in their employment. In the context of modern working arrangements, which are increasingly flexible and casual, this would be an onerous obligation on those regulated and resource-intensive for the regulator. The review therefore considers that, except where the regulator has required an applicant to lodge a security plan, it is appropriate to continue to place the obligation to ensure that their employees or contractors hold relevant licences and security clearances for the work they perform on employers, who are in a position to conduct regular checks.

The review has also considered whether it would be appropriate for the Act to make it an offence for a licence or security clearance holder to fail to inform their employer of the suspension or cancellation of their licence or security clearance. The review considers that in principle, there is merit to this proposal. However, it also considers that this would be an offence of a type more appropriately provided for in the Regulation, and that further consultation on the proposal is required. It therefore suggests that this matter should be revisited in the review of the Regulation.

4.3.3 Temporary suspension of security clearances

In consultation a stakeholder also advised that it was aware of circumstances where employers have had concerns relating to the psychological health and wellbeing of individual explosives licence holders. They propose that the Act should include a mechanism by which employers may seek a temporary suspension of a licence holder's security clearance pending the outcome of an independent medical assessment.

The risks of allowing mentally unstable persons access to explosives are clear. However, the review notes that employers who have concerns about their employees' suitability to handle explosives can take steps to relieve their employees from duties which involve handling explosives themselves. It is also open to the employer to inform the regulator of their concerns, which may give grounds for the regulator to suspend a security clearance while it conducts an investigation as to whether a person is a fit and proper person to hold a security clearance (clauses 14 and 15 of the Regulation).

At present, the Regulation provides that applicants for a blasting explosives user's licence and a licence to transport by vehicle must satisfy the regulatory authority that they have been examined by a medical practitioner and found not to have any medical or physical condition which would impair their ability to perform the activities which are the subject of the licence (clauses 38 and 94). On a review of the Regulation it may be useful for consideration to be given to circumstances in which it might be appropriate for a regulator suspend a licence until fresh evidence of a medical examination has been provided. However, the review does not consider that it would be appropriate to make provision for this in the Act.

4.3.4 Mandatory disqualifying offences

The 2009 Review recommended that the Act should be amended to provide for mandatory disqualification from holding a licence or security clearance where a person has been convicted of serious offences. The 2013 amendments did not implement this recommendation.

In consultation on this review, NSW Police advocated that the Act should make provision for the Regulation to prescribe certain offences as mandatory disqualifying offences for holding a licence or security clearance. They submit that relevant offences may include those prescribed as mandatory disqualifying offences under other licensing schemes administered by the NSW Police, including the *Security Industry Act 1997*, the *Firearms Act 1996*, the *Commercial Agents and Private Inquiry Agents Act 2004*, and the *Weapons Prohibition Act 1998*. Offences prescribed under those schemes include offences involving firearms, weapons, prohibited drugs, assault, fraud, dishonesty, stealing, robbery, industrial relations matters, riot, affray, stalking, intimidation, terrorism and organised criminal groups, and WHS offences. In addition, NSW Police submit that other mandatory disqualifying events should include a person being subject to an apprehended violence order, firearms prohibition order, or weapons prohibition order, and a person being scheduled under the *Mental Health Act 2007.*

NSW Police submit that this proposal would set clear boundaries for the guidance and information of prospective applicants, and enable the Regulation to prescribe, from time to time, offences that routinely give rise to applications being declined or licences or security clearances being cancelled under the more general grounds available under the Act and Regulation. NSW Police argue that the proposals will give applicants greater procedural fairness, streamline the application process and reduce the volume of reviews to the Civil and Administrative Tribunal.

The proposal to prescribe mandatory disqualifying offences was supported by one other stakeholder, but was not supported by the industry stakeholders who contributed to the review, who prefer that the regulatory authority retain discretion in considering whether to grant licences or security clearances. At present it is open to SafeWork NSW as the regulatory authority to consider a person's previous convictions in the context of all of the factors relevant to granting a licence or security clearance.

The review notes that the volume of applications for review of a decision to cancel or not to grant a licence or security clearance to the Civil and Administrative Tribunal is already small. A decision not to grant or to cancel a licence or security clearance can have a significant impact on a person's employment. In a previous application for review to the Civil and Administrative Tribunal, an individual with a past conviction for an offence involving threats of violence was able to satisfy the Tribunal that he was a fit and proper person to hold a security clearance under the Act.[1] The Tribunal placed weight on evidence showing significant changes in the individual's attitudes and behaviour, which tended to show that he no longer had a propensity for violence.

The review is also conscious that the licensing frameworks administered within the Department of Customer Service generally take a discretionary approach to previous convictions, with some exceptions: the *Tow Truck Industry Act 1998*, the *Tattoo Parlours Act 2012*, and the *Second-hand Dealers Act 1996*. Particular considerations may apply in some of those industries – including links to organised crime – which make mandatory disqualification appropriate. Although the risks of allowing unsuitable persons access to explosives are significant, the review is not aware of any particular circumstances in the explosives industry which make it appropriate to provide for mandatory disqualifying offences.

The review is mindful that maintaining a discretionary approach to criminal convictions imposes a greater burden on the government agencies responsible for administering the Act – in this case, SafeWork NSW and the NSW Police. It considers that this is justified since, in any event, the volume of applications for review is low, and because it is important that licences and security clearances are not automatically denied to individuals who can put forward other evidence to show that they are fit and proper persons to handle explosives, and who depend on licences and security clearances for their employment. The review notes that Safe Work Australia considered whether nationally consistent regulation of explosives licensing should provide for mandatory disqualifying offences and recommended against it. The review also notes that if the Commissioner of Police's report

[1] *McDonald v SafeWork NSW (No 2)* [2018] NSWCATAD 218.

under section 13 of the Act contains a recommendation that a person should not be granted a security clearance or licence on the basis of criminal or security intelligence or other information available to the Commissioner, it is already the case that SafeWork NSW must refuse to grant a security clearance (clause 12 of the Regulation). For these reasons, the review does not recommend amending the Act to provide for mandatory disqualifying offences.

4.4 Review of decisions

Since the 2013 amendments, anyone aggrieved by a decision under the Act or the Regulation relating to a licence or security clearance has been able to apply for an internal review of the decision. The volume of requests for internal review since then has been low and stakeholders did not express any concerns about the conduct of internal reviews.

Aggrieved persons can also apply to the Civil and Administrative Tribunal for an administrative review of the decision. Again, the volume of applications for review is low. There are provisions in place to ensure that if the decision which is the subject of an external review by the Civil and Administrative Tribunal was made on the basis of a report from the Commissioner of Police, the confidentiality of any criminal or security intelligence information or other confidential criminal information is protected (section 24A). These were introduced as part of the 2013 amendments. The NSW Police report that these provisions remain suitable, and other stakeholders raised no concerns.

The review has therefore concluded that the amendments to the review provisions made in 2013 are working well, and that the provisions for review as a whole should be maintained.

4.5 Offences and penalties

To support the licensing framework, the Act creates offences connected with the handling of explosives and explosive precursors. These offences are intended to secure compliance with the licensing framework, safe handling of explosives, and cooperation with the inspectors who enforce compliance with the Act. The Act also authorises the Regulation to create offences with a maximum penalty of $27,500 (section 36).

Stakeholders did not raise any issues with the role of offences under the Act as a whole, but raised a number of minor issues.

4.5.1 Who can be prosecuted

Both individuals and corporations can commit offences under the Act. Directors or individuals involved in the management of a corporation can be held liable for an offence committed by the corporation if they have been an accessory to it (section 33A).

The Act also allows directors and individuals involved in management in a position to influence the corporation's relevant conduct to be prosecuted for 'executive liability offences' (section 33) if they know or ought reasonably to know that the offence would be or is being committed, and fail to take reasonable steps to stop it. At present, only the offence of handling explosives or explosive precursors without a licence (section 6) is an

executive liability offence. Executives and individuals involved in management of corporations face the same maximum penalty as individuals who commit the offence.

The Discussion Paper sought stakeholders' views as to whether executive liability should be extended to any other offences in the Act. This was not supported by some industry stakeholders. Another industry stakeholder did not have concerns about extending executive liability to other offences, subject to the availability of proposed defence provisions. They suggested that the defences provided for in the *Explosives Act 1999* (Qld) were appropriate. The review has considered those provisions and notes that the Queensland provisions are similar in effect to those in section 33 of the Act, in that both involve considerations of reasonableness.

The review notes that the Act's executive liability provision was introduced in 2012 as part of wider amendments to NSW statutes to implement nationally consistent reform of the criminal responsibility of directors and officers for corporate offences.[2] It also notes that section 33A, which provides that directors or individuals involved in the management of a corporation are liable for an offence if they have been an accessory to it, applies to all corporate offences under the Act. In the absence of strong evidence supporting the expansion of executive liability offences, the review does not consider it appropriate to depart from the approach taken in 2012.

4.5.2 Other matters relating to offences

One stakeholder submitted that the Act should include a provision to the effect that the same conduct cannot give rise to an offence under both the Act and the WHS Act. The review does not propose to make a recommendation to this effect. Although there is some overlap in the coverage of the Act and the WHS Act, and some conduct may be capable of giving rise to prosecutions for offences under both Acts, the review considers that discretion as to the appropriate offences to charge in relation to particular conduct is best left to the regulatory authority.

An additional matter raised by stakeholders is that at present it appears that the Act prohibits the sale to minors of toy fireworks such as sparklers (section 9), notwithstanding the provision in the Regulation which exempts sellers of toy fireworks from the requirement to hold a licence (clause 47). The review considers that it would be appropriate in a review of the Regulation to consider amending the Regulation to reflect the policy intention that the prohibition on sales of explosives to minors in the Act should not include toy fireworks.

A stakeholder submitted that the Act should make provision for the regulatory authority to accept enforceable undertakings in connection with contraventions or alleged contraventions of the Act, and suggested the provisions on enforceable undertakings in Part 11 of the WHS Act as a model. An enforceable undertaking is an agreement entered into by a person who is alleged to have breached an obligation under an Act, in which the person agrees to take certain specified steps to rectify the breach (including payment of an agreed amount) or to improve their compliance. Enforceable undertakings can be valuable and flexible tools as part of a graduated approach to compliance with regulation, though

[2] *Miscellaneous Acts Amendment (Directors' Liability) Act 2012.*

they may not be appropriate for the most serious offending (the WHS Act provisions on enforceable undertakings do not apply, for example, to the Category 1 offence in that Act).

The review notes that where conduct is capable of giving rise to a prosecution under the Act or the WHS Act, the regulator has discretion to bring proceedings under the WHS Act, where the regulator has power to accept an enforceable undertaking. It also notes that enforceable undertakings may not be a suitable enforcement mechanism in relation to the majority of offences prosecuted under the Act. In the absence of any evidence of prosecutions under the Act in which an enforceable undertaking might have led to a better safety outcome, the review does not recommend providing for enforceable undertakings in the Act.

4.5.3 Penalty levels

The maximum fines for offences under the Act are expressed in penalty units. The value of the penalty unit in NSW has not increased since the introduction of the Act in 2003, with the effect that maximum penalties under the Act have not changed since its introduction.

The Discussion Paper sought input from stakeholders as to whether the maximum penalties for offences under the Act should be increased. It sought input as to whether this should be done by reference to CPI increases since 2003; to reflect higher penalties available for similar offences in other NSW Acts and equivalent interstate legislation; or in order to standardise maximum penalties for very similar offences relating to inspectors in the Act and the WHS Act.

One stakeholder supported increases to penalty units both to reflect CPI and to bring penalties under the Act into line with similar offences in other NSW and interstate Acts for consistency. Industry stakeholders submitted that the current penalties are adequate and should not be increased. Two stakeholders submitted that as the penalties are expressed in penalty units, any increase should only be effected through an increase in the value of the penalty unit across NSW legislation as a whole.

One participant in the stakeholder forum said that in their view the main deterrent of non-compliance with the Act was the threat to a person's livelihood of losing their licence or security clearance.

Noting the feedback from stakeholders, the review does not propose to recommend an increase in penalties to reflect offences interstate or in the WHS Act, or to standardise penalties for offences involving inspectors. However, the review notes that while penalty levels have not increased, the costs of compliance with the Act have. That is, both the licence fees and industry costs of compliance have increased. Having regard to the time that has passed since penalties were set, the review recommends that the maximum penalties for offences in the Act be increased in line with CPI since 2003, to ensure that they maintain their real deterrent value. This would see, for example, the maximum penalty for handling explosives without a licence for an individual go from $27,500 (250 penalty units) to around $40,000 (approximately 365 penalty units) and for a corporation from $55,000 (500 penalty units) to around $80,000 (approximately 730 penalty units). The review suggests that penalties for offences in the Regulation should also be increased by

CPI. The Regulation is currently able to prescribe offences with a maximum penalty of $27,500 (250 penalty units), and the Review recommends that that figure should also be adjusted by CPI to around $40,000 (approximately 365 penalty units)The exact number of penalty units should be the subject of further detailed calculations and should conform with NSW legislative drafting conventions.

Recommendation 2
Amend the Act to increase the maximum penalty units for offences in the Act and offences may be created by the Regulation to reflect increases in the consumer price index since 2003.

4.6 Compliance and enforcement

The Act empowers SafeWork NSW and the NSW Resources Regulator to appoint inspectors to secure compliance with its provisions. The powers of inspectors are set out in the WHS Act, and section 27 applies the relevant provisions of the WHS Act to inspectors under the Act. These provisions are Part 9 (other than section 187) and section 155 of the WHS Act.

Since those provisions were applied by the Act, the WHS Act has been amended to include new section 155A. Section 155A clarifies that an inspector can exercise the information gathering power in section 155 outside of NSW. That is, that a WHS inspector can serve a notice on a person requiring them to give information, produce documents, or appear to give evidence even if the person is outside of NSW or the relevant matter occurs or is located outside of NSW, so long as the matter relates to the administration of the WHS Act.

The same considerations which gave rise to the insertion of section 155A into the WHS Act apply to this Act. Investigations under both Acts can be hampered by the lack of a clear power to require the production of documents outside NSW during an investigation. The explosives and pyrotechnics industries are national industries, in which individuals and corporations operate across Australia.

The application of section 155A to inspectors under the Act was supported by some industry stakeholders. The review notes that one industry stakeholder did not support extending the application of section 155A, on the basis that it is unnecessary given the decision in *Perilya Ltd v Nash* [2015] NSWSC 706. That case was partly concerned with whether a regulator under the Act had validly issued notices under section 155 to a company in Western Australia. Although the Supreme Court of NSW found that the regulator did have power to issue the notices, the review considers that for the avoidance of doubt it is desirable to clarify the statutory provision and take the same approach as the WHS Act. The review therefore recommends that the Act be amended to give inspectors under the Act the same extra-territorial information gathering powers as WHS inspectors have under section 155A the WHS Act.

The review notes the submission of a stakeholder that 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 the investigation and the other jurisdiction. Section 155 notices may only be issued where the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the Act, or that will assist the regulator to monitor or enforce compliance with the Act. The review does not consider that there is any reason to depart from the wording of the WHS Act in applying its provisions under this Act.

Recommendation 3
Amend the Act to give inspectors under the Act the same extra-territorial information gathering powers as WHS inspectors have under section 155A of the WHS Act.

4.6.1 Destroying forfeited explosives

The Discussion Paper sought input from stakeholders on a proposal to allow regulators to rely on certificate evidence of destroyed explosives in criminal proceedings.

When inspectors exercise their powers to seize explosives, regulators are required to store the seized explosives. Explosives cannot be returned to persons who are not licensed to handle them.

Seized explosives may subsequently be forfeited to the State if the conditions in section 179 of the WHS Act (applied by section 27 of the Act) are met, including where the regulator reasonably believes it is necessary to forfeit the explosives to prevent them from being used to commit an offence under the Act. Section 179 sets out a procedure which the regulator must follow before explosives are forfeited, including giving written notice, and allowing 28 days for an application for a review of the decision to be made. The decision to forfeit explosives is subject to external review.

Once the explosives have been forfeited and avenues for review and appeal in relation to the decision to forfeit the explosives have been exhausted, it is open to the regulator to destroy the explosives. However, the regulator may also bring or be considering bringing a prosecution for an offence under the Act in relation to the forfeited explosives. In those circumstances, the regulator would ordinarily retain and store the forfeited explosives as evidence of the offence. The need to store a large volume of explosives for lengthy periods until investigations and prosecutions are complete can be burdensome for regulators. Regulators are themselves subject to licensing requirements as to the maximum storage capacity of their facilities.

Where a regulator has forfeited explosives, but is also bringing or contemplating bringing a prosecution in relation to the explosives, it may be useful, subject to appropriate safeguards, for the regulator to be able to retain a sample of the forfeited explosives for use in evidence, and to destroy the balance.

An approach along these lines has been adopted in relation to the seizure of drugs under the *Drug Misuse and Trafficking Act 1985* (NSW). Part 3A of that Act makes provision for the destruction of some prohibited substances after samples have been taken and retained. It addresses the evidentiary issues this may create for subsequent prosecutions by:

- the use of evidentiary certificates as prima facie evidence of the identity of the substance analysed, its quantity, and mass;
- requiring a certificate be issued, photographs taken, and the mass of the substance recorded before the substance is destroyed;
- giving 28 days' notice to the defendant of the proposed destruction; and
- requiring that three times the amount needed for two samples for analysis be retained.

Proposals to adopt a similar approach to the *Drug Misuse and Trafficking Act 1985* in relation to forfeited explosives were supported by one stakeholder, and supported in principle by the NSW Police Force, subject to safeguards to ensure that the testing is valid, that evidence of the tests is admissible in court, that the tests are sufficient to represent the entire sample, and that destruction is not premature. An industry stakeholder also supported the regulator being able to destroy some explosives, subject to appropriate protections of the rights of the accused, including notice of any proposed destruction and the retention of samples.

The proposal was not supported by the remaining industry stakeholders.

The review notes that is more usual to retain all of the evidence relating to a prosecution until the prosecution is complete. However, a departure from the usual practice is justified by the inherently dangerous nature of explosives and explosive precursors which may be seized by inspectors under the Act. The long-term storage of forfeited explosives imposes a burden on the regulator which is excessive, having regard to the availability of reasonable measures to ensure that prosecutions are not compromised by their destruction.

The review is encouraged by the fact that the regulatory framework which adopts this approach already appears to be working well in NSW. It considers that, subject to appropriate safeguards, it is appropriate for the regulator to be able to destroy the bulk of forfeited explosives and to retain samples and/or use certificate evidence in subsequent proceedings. It may be useful to use certificate evidence as to the explosives' type, volume, mass, composition, condition, or other characteristics. The review notes that these provisions should only apply to forfeited explosives, which have already passed into the possession of the State, and that appropriate safeguards to ensure the integrity of evidence and the rights of the defendant or potential defendant should be part of any amendment.

Recommendation 4
Amend the Act to allow a regulatory authority who is in possession of forfeited explosives to destroy the bulk of the explosives while preserving the admissibility of samples of the forfeited explosives and certificate evidence in any subsequent proceedings for offences, subject to appropriate safeguards to ensure the integrity of the evidence and protection of the rights of a defendant

4.7 Other matters

The review also invited submissions as to the Act's administrative provisions and any other matters of concern to stakeholders. In response, a stakeholder raised some issues with regard to the Act's overall structure.

First, they submitted that some matters should be addressed in the Act rather than the Regulation – for example, the definition of 'explosive'. The review has addressed this above, and considers that it is important the Regulation retain the flexibility to prescribe substances as explosives and explosive precursors. In general, the division of provisions between the Act and the Regulation is intended to ensure that regulation of explosives as a whole is responsive to technological change, which one industry stakeholder notes is a feature of this industry.

Secondly, the stakeholder submitted that rather than the Act referring to and applying relevant provisions of other Acts (for example, the WHS Act), the text of the applied provisions should appear within the Act itself.

The review notes that this is not the usual practice in NSW legislation, and that the Act applies or makes reference to provisions of the WHS Act, the *Interpretation Act 1987*, the *Licensing and Registration (Uniform Procedures) Act 2002*, the *Administrative Decision Review Act 1997*, the *Civil and Administrative Tribunal Act 2013*, the *Corporations Act 2001* (Cth), the *Fines Act 1996*, the *Ombudsman Act 1974*, and the *Electronic Transactions Act 2000*. The approach of referring to legislation rather than incorporating relevant provisions within the Act itself is intended to ensure consistency and uniformity of licensing procedures, reviews, and penalties across NSW Acts. This consistent approach has benefits for stakeholders and regulators across NSW.

The review is not satisfied that there is a reason to depart from the usual approach in the case of this Act. In respect of the WHS Act provisions, the review notes that the present position has the advantage that amendments to WHS inspectors' powers in Part 9 apply automatically to the powers of inspectors under the Act, which is administratively more efficient than requiring separate amendment to the Act. For these reasons, the review does not recommend setting out the text of any applied provisions in the Act itself.

5. Recommendations

1. Amend the Act to define supply. This definition should replace the definition in the Regulation. ‘Supply’ should continue to include ‘sell’, but should also include any transfer of ownership of or access to an explosive.

2. Amend the Act to increase the maximum penalty units for offences in the Act and offences that may be created by the Regulation to reflect increases in the consumer price index since 2003.

3. Amend the Act to give inspectors under the Act the same extra-territorial information gathering powers as WHS inspectors have under section 155A of the WHS Act.

4. Amend the Act to allow a regulatory authority who is in possession of forfeited explosives to destroy the bulk of the explosives while preserving the admissibility of samples of the forfeited explosives and certificate evidence in any subsequent proceedings for offences, subject to appropriate safeguards to ensure the integrity of the evidence and protection of the rights of a defendant.

6. Appendix A – Discussion Paper

Department of Customer Service

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Statutory Review of the *Explosives Act 2003*

Discussion Paper

July 2019

Introduction

Purpose of this Discussion Paper

The *Explosives Act 2003* ('the Act') regulates the control and handling of explosives and explosive precursors in New South Wales. Explosive precursors are chemicals and other materials that can be processed to make an explosive.

The purpose of the Act is to protect people and property from the harm that may arise as a result of the illegal or unsafe use of explosives and explosive precursors. The Act does this by establishing a licensing framework which restricts access to explosives and explosive precursors to people who can safely handle them. This framework is supported by the *Explosives Regulation 2013* ('the Regulation').

Section 38 of the Act requires that the Act be reviewed to determine whether its policy objectives remain valid and its terms remain appropriate for securing those objectives. The review is now underway.

This Discussion Paper gives you an opportunity to participate in the review and tell us how well the Act is working. Your feedback will help us to ensure that the legislation continues to reflect the needs of the community.

The Regulation is not currently under review. It is anticipated that the Regulation will be reviewed in 2020. At this stage, any feedback should relate to the Act rather than the Regulation.

In preparing this paper and identifying a range of matters for consideration, the NSW Government has considered comments received from government agencies involved in the administration and enforcement of the Act, including SafeWork NSW, the Resources Regulator, and the NSW Police.

The issues and options identified in this Discussion Paper are not exhaustive. They are intended to stimulate discussion, and do not indicate government policy. We welcome further comments on any other matters that are relevant to improving the regulatory framework established by the Act.

Next steps

Once the consultation period has closed, we will consider all comments and submissions. A report will be submitted to the Minister for Better Regulation and Innovation. This report will be tabled in each House of Parliament by 29 October 2019.

Have your say

We invite you to read this paper and provide comments.

To assist you in making a submission, an optional submission form is provided on [link to Have Your Say page]. This form is not compulsory and submissions can be in any written format.

You may wish to comment on only one or two matters of interest or on all the issues raised in this Discussion Paper.

You can make submissions:

- online at the NSW Government's Have Your Say website: www.haveyoursay.nsw.gov.au
- online at the SafeWork NSW website: www.safework.nsw.gov.au
- by email to: Explosives@finance.nsw.gov.au or
- by post to the following address:

  Statutory Review of Explosives Act 2003
  Regulatory Policy
  Better Regulation Division, Department of Customer Service
  McKell Building
  2-24 Rawson Place
  SYDNEY NSW 2000

The deadline for submissions is **5 pm 16 August 2019.**

Important note: release of submissions

All submissions will be publicly available. If you do not want your personal details or any part of your submission published, please indicate this in your submission together with reasons.

Automatically generated confidentiality statements in emails are not enough. You should also be aware that, even if you state that you do not wish certain information published, in some circumstances the NSW Government may be legally obliged to release that information (for example, under the *Government Information (Public Access) Act 2009*).

Executive Summary

Outline of the *Explosives Act 2003*

Industries in NSW which regularly deal with explosives and explosive precursors include demolition, mining, agriculture, policing, pyrotechnics and transport. Regulation of explosives in NSW seeks to balance the legitimate need of these industries to handle explosives against the need to protect workers in these industries, the public, and property from unsafe uses of explosives.

The Act does this by authorising the regulatory authority responsible for the administration of the Act to issue licences for the handling of explosives and precursors. The licensing framework ensures that only suitable persons can access explosives.

The burden imposed by the licensing framework on individuals and businesses working with explosives is intended to be proportionate to the risks the framework aims to prevent. The risks of unsafe uses of explosives are significant.

The Act:

- authorises the regulations to prescribe an article or substance as an explosive or explosive precursor;
- creates offences relating to explosives;
- enables a licensing regime, including providing for security clearances for applicants for licences;
- provides for the Commissioner of Police to report on the suitability of applicants for a security clearance and licence;
- allows the regulatory authority to suspend or cancel a licence or security clearance and provides a right of review to aggrieved persons;
- provides for the administration and enforcement of the Act; and
- provides for procedural matters, including proceedings for offences, disclosure of information, penalty notices, and a regulation-making power.

The Act is supported by the Regulation and by General Explosives Conditions which are attached to explosives licences. The General Explosives Conditions 2013 (‘the Conditions’) appear on SafeWork NSW’s website. There are also Operational Conditions specific to pyrotechnician licences and fireworks single-use licences.

In 2009 a Statutory Review of the Act (‘the 2009 Review’) found that the policy objectives of the Act remained valid, and that on the whole the terms of the Act were effective and efficient in achieving its ends. The 2009 Review recommended a number of minor amendments to the Act. The Act was amended to reflect a number of these recommendations in 2013. Those amendments:

- clarified the role of the security clearance provided by the Commissioner of Police as a prerequisite to obtaining a licence;
- ensured that any criminal or security intelligence or other confidential criminal information given by the Commissioner of Police to the regulatory authority would not be disclosed on applications for review;
- enabled internal reviews of licensing decisions;
- strengthened the regulatory authority’s information-gathering powers; and
- inserted transitional provisions reflecting the amendments.

Administration and enforcement

The regulatory authority chiefly responsible for administering and enforcing the Act is SafeWork NSW. 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. The Resources Regulator undertakes compliance and enforcement in mining workplaces where they are responsible for:

- examination and inspection of explosives and explosive precursors;
- notification of loss of explosives or explosive precursors;
- notification of serious incidents;
- investigations of breaches of the Act, the Regulation and licences under the Act; and
- the appointment of inspectors for mining workplaces.

In all other places those functions are performed by SafeWork NSW and its inspectors.

The Commissioner of Police also plays an important role in administering the Act by providing reports on the suitability of applicants for security clearances or licences to SafeWork NSW.

Scope of the Discussion Paper

The Discussion paper sets out the main elements of the Act:

- background;
- scope of the Act;
- the licensing framework;
- rights of review;
- offences and penalties;
- compliance and enforcement; and
- other matters.

The Discussion Paper highlights any reforms introduced by the 2013 amendments, to give you an opportunity to comment on how those changes are working. It also covers issues that have been raised by the government agencies involved in administering the Act, and issues which were raised as part of the 2009 Review.

To assist you in making a submission, there are a number of questions on these issues throughout the paper. In your submission you are not limited to answering these questions. You can raise any other issue or make any other comment you wish to make on the operation of the Act.

Background

For much of the twentieth century, access to explosives in NSW was regulated by the *Explosives Act 1905*. In 1975, the *Dangerous Goods Act 1975* consolidated the *Explosives Act 1905* and the *Inflammable Liquid Act 1915* in a single piece of legislation which aimed to control the risks associated with the importation, manufacture, supply, possession and use of explosives and dangerous goods. It established a licensing regime which restricted access to explosives to suitable persons, and general duties for the safe handling of explosives.

In 2001 a national standard for the storage and handling of dangerous goods was developed, which did not cover explosives or explosive precursors. As a result, separate legislation to control the handling of explosives was developed and passed by the NSW Parliament in 2003. The *Explosives Act 2003* consolidated and modernised the main provisions relating to explosives in the *Dangerous Goods Act 1975*.

In 2009, a Statutory Review of the *Explosives Act 2003* found that its policy objectives remained valid and that subject to minor amendments, its terms were effective and efficient in achieving its policy objectives.

The amendments recommended by the Statutory Review, along with other minor amendments, were passed by the NSW Parliament in 2013.

The 2009 Statutory Review noted that work was underway to develop a nationally consistent approach to the regulation of explosives. That work, led by Safe Work Australia on behalf of Commonwealth, State and Territory work health and safety ministers has not yet resulted in national harmonisation of explosives regulation. Although NSW remains committed to harmonising regulation of explosives, it continues to administer and enforce its own explosives laws. These already incorporate elements of national codes including the Australian Code for the Transport of Dangerous Goods by Road and Rail (the ADG Code) and the Australian Explosives Code.

The current statutory review will ensure that pending the development of nationally harmonised explosive regulations, NSW laws operate effectively and fulfil their object: to protect workers, the public, and property from harm arising from the illegal and/or unsafe use of explosives.

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

Scope of the *Explosives Act 2003*

The Act applies to explosives and explosive precursors. The Regulation can prescribe any article or substance as an explosive or explosive precursor for the Act (section 3). At present, the Regulation prescribes the following articles or substances as explosives (clause 4):

- dangerous goods of Class 1 within the meaning of the ADG Code or the Australian Explosives Code;

- goods too dangerous to be transported within the meaning of the ADG Code or the Australian Explosives Code, which can produce an explosive or pyrotechnic effect; and
- articles or substances that, when manufactured, mixed, or assembled, can produce an explosive or pyrotechnic effect.

Security sensitive dangerous substances are explosive precursors for the purpose of the Act (clause 5). At present, only security sensitive ammonium nitrate is a security sensitive dangerous substance (Schedule 1 of the Regulation).

The Act covers activities which involve handling explosives and explosive precursors. 'Handling' is a comprehensive term including the following activities (section 3):

- conveying (carrying, loading, unloading, transferring, transmitting, pumping, or discharging);
- manufacturing (including the blending together of any substances to make the explosive, the breaking up of the explosive and the re-making, altering or repairing of the explosive);
- processing;
- possessing;
- using or preparing for use;
- treating, dispensing, storing or packing;
- importing into the State from another country;
- rendering harmless, abandoning, destroying and disposing.
- selling (including selling by tender; barter or exchange; consigning or delivering for sale; advertising for sale; offering for sale; having in possession for sale; agreeing to sell; causing a sale to take place or any of the above to done; and selling or doing any of the above as or by an agent or broker);
- supplying.

At present, the Regulation defines 'supply' as including 'sell' (clause 3). 'Supply' is a term used in the Act and the Regulation. For the avoidance of doubt, and consistency across the Act and Regulation, it may be more appropriate for a definition of supply to appear in section 3 of the Act, alongside the definitions of 'handling', 'convey', 'manufacture' and 'sell'.

The Act does not apply to the transport of dangerous goods and associated activities or matters, to the extent to which they are regulated by the *Dangerous Goods (Road and Rail Transport) Act 2008* and its regulations.

2. Is the scope of the Act appropriate? Are there substances or activities which should be within the scope of the Act which are currently outside it?
3. Should the definition of 'supply' be moved from the Regulation to the Act?

The licensing framework

Part 3 of the Act enables a licensing framework for the handling of explosives and explosive precursors. To support this framework, the Act also creates offences connected with handling explosives and explosive precursors outside the licensing framework, which are discussed later in the Discussion Paper.

SafeWork NSW grants licences to suitable applicants to authorise the carrying out of activities which constitute handling an explosive or explosive precursor (section 11). The Regulation provides for 10 categories of licence, intended to cover all activities which involve handling explosives. This ensures that licence-holders for particular activities have relevant expertise and that handling of explosives is carried out safely. The Regulation also provides for licence-holders and security clearance-holders to supervise others in handling explosives.

The Act, supported by the Regulation, creates exemptions from the licensing requirements for some public officers, including police, inspectors, and emergency services.

Security clearances

To be eligible for a licence, a natural person must first have a security clearance which is in force. A corporation must have at least one responsible person who has a current security clearance to be eligible for a licence (section 10A).

Under the Regulation, security clearance holders must be at least 18, and a fit and proper person to be granted a security clearance.

In determining whether a person is a fit and proper person to be granted or to hold a security clearance or a licence, SafeWork NSW may request the Commissioner of Police give a report on relevant matters (section 13). These include:

- whether the person has been found guilty or convicted of an offence, and information about the conviction;
- whether the person is the subject of a firearms prohibition order under the Firearms Act 1996;
- whether the person is a fit and proper person to hold a licence or security clearance;
- whether the person has a history of violence or threats of violence, including stalking or intimidation with intent to cause fear of physical or mental harm;
- whether there is an apprehended violence order in force with respect to the person;
- available information on the participation of the person in any criminal activity;
- whether the Commissioner considers that it is contrary to the public interest for the person to hold a licence or security clearance;
- other matters specified by SafeWork NSW.

There are provisions in place to protect the confidentiality of any information provided by the Commissioner of Police.

4. Does the licensing framework enabled by the Act meet its objectives?
5. Are there other matters which the report provided by the Commissioner of Police should include?

Mandatory disqualifying offences

During the 2009 Review, some stakeholders supported introducing mandatory disqualification from holding a licence or security clearance where a person has been convicted of certain offences. It was proposed that a person who has been convicted of offences involving one or more of the following would be ineligible to hold a licence:

- violence or threats of violence;
- firearms or other weapons;
- explosives; and
- domestic violence or restraining orders.

The 2009 Review recommended that the Act should include mandatory disqualification, but only for more serious offences. This recommendation was not adopted in the 2013 amendments.

At present, the Police Commissioner reports on any previous convictions to SafeWork NSW, and any convictions are relevant both to the Commissioner's view as to whether the person is a fit and proper person to hold a licence or security clearance, and to SafeWork's determination of whether to grant a licence or security clearance. A person's previous convictions are considered in the context of all the factors relevant to granting a licence or security clearance. SafeWork has discretion to consider whether, taking into account any past convictions, a person is currently an appropriate person to hold a licence.

It is possible for an individual with a past conviction for an offence involving threats of violence to show that they are a fit and proper person to hold a security clearance under the Act.[1] This may be the case where they can show significant changes to their attitudes and behaviour and that they no longer have a propensity for violence. A licence to handle explosives can be a requirement for a person's employment.

At any time, if SafeWork NSW believes that a licence or security clearance holder cannot be trusted to handle explosives because of a history of violence or threats of violence, SafeWork NSW can use special provisions in the Act to cancel or suspend the licence or security clearance (section 22).

Mandatory disqualifying offences are a feature of some occupational licensing legislation administered by the NSW Police, including the *Security Industry Act 1997*, the *Firearms Act 1996*, the *Commercial Agents and Private Inquiry Agents Act 2004*, and the *Weapons Prohibition Act 1998*. A number of these Acts provide for mandatory disqualification where the convictions have taken place within a specified time period before the application: often, five to ten years. This is intended to allow time for people to reform.

Generally the licensing frameworks administered by the Department of Customer Service take a discretionary approach to previous convictions, with the exception of the *Tow Truck Industry Act 1998*; the *Tattoo Parlours Act 2012*, and the *Pawnbrokers and Second-hand Dealers Act 1996*. This imposes a greater administrative burden on the regulator, but is intended to ensure that licences and security clearances are not automatically refused where people who can now show that they are fit and proper persons to handle explosives require them for their employment.

[1] McDonald v SafeWork NSW (No 2) [2018] NSWCATAD 218.

6. Do you support mandatory disqualifying offences for holding a licence or security clearance? Why?
7. If you support mandatory disqualifying offences, what should those offences be? Should they be limited to offences involving violence or include work health safety offences?
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?

Review of decisions

Since the 2013 amendments, anyone aggrieved by a decision under the Act or the Regulation relating to a licence or security clearance has been able to apply for an internal review of the decision.

The procedure for an internal review is set out in s 53 of the *Administrative Decisions Review Act 1997*. An internal review is conducted by an individual within SafeWork who was not substantially involved in making the original decision. They can consider any material submitted by the applicant and can affirm the decision, vary it, and set it aside and make a different decision.

Aggrieved persons can also apply to the Civil and Administrative Tribunal for an administrative review of the decision. The Tribunal has the power to set aside the decision and substitute its own decision. The provisions of the *Administrative Decisions Review Act 1997*, which govern administrative reviews of decisions made by many NSW regulators, apply to these reviews.

There are provisions in place to ensure that if the decision under review was made on the basis of a report from the Commissioner of Police, the confidentiality of any criminal or security intelligence information or other confidential criminal information is protected (section 24A). These were introduced as part of the 2013 amendments.

9. Are the internal and administrative review provisions of the Act working to ensure oversight of licensing decisions?
10. Do the 2013 amendments strike the right balance between protecting the confidentiality of police information and providing an effective right of review?

Offences and penalties

To support the licensing framework, the Act creates offences connected with the handling of explosives and explosive precursors. These offences are intended to secure compliance with the licensing framework, safe handling of explosives, and cooperation with the inspectors who monitor compliance with the Act. The Act also authorises the Regulation to create additional offences with a maximum penalty of $27,500 (section 36).

Who can be prosecuted?

Both individuals and corporations can commit offences under the Act.

Directors or individuals involved in the management of a corporation can be held liable for an offence committed by the corporation if they have been an accessory to it (section 33A).

The Act also allows directors and individuals involved in management in a position to influence the corporation's relevant conduct to be prosecuted for 'executive liability offences' (section 33) if they know or ought reasonably to know that the offence would be or is being committed, and fail to take reasonable steps to stop it. At present, only the offence of handling explosives or explosive precursors without a licence (section 6) is an executive liability offence. Executives and individuals involved in management of corporations face the same maximum penalty as individuals who commit the offence.

The offences

The Act creates the following offences:

- handling an explosive or explosive precursor without a licence (section 6);
- handling an explosive or explosive precursor without a security clearance (section 6A);
- conveying explosives without taking all precautions necessary to prevent access to the explosive by persons not lawfully entitled to have access to the explosive (section 7);
- negligently handling explosives in such a manner or in such circumstances as to:
  - endanger or be likely to endanger the life of any person;
  - cause injury or be likely to cause injury to any person;
  - damage or be likely to cause damage to any property belonging to any other person (unless the owner of the property consented to the damage) (section 8);
- selling or supplying explosives to a minor (section 9);
- offences relating to licences and security clearances (section 18), including:
  - pretending to hold a licence or security clearance;
  - providing information a person knows to be false or misleading in a material particular for the purpose of obtaining a licence or security clearance;
  - forging or altering a licence or security clearance with intent to deceive;
  - possessing another person's licence or security clearance without reasonable excuse;
  - lending a licence or security clearance or allowing it to be used by another person;
- contravening conditions of a licence or security clearance (section 15);
- disclosing information obtained in connection with the administration of the Act for other purposes (section 35);
- failing to deliver a security clearance or licence which has been suspended or cancelled to the regulatory authority as soon as is practicable after the licence or security clearance is suspended or cancelled (section 23); and
- obstructing or intimidating inspectors (section 28).

The Act also applies offences relating to inspectors under Part 9, Division 6 of the *Work Health and Safety Act 2011* (NSW) ('the WHS Act'), including offences of obstructing, intimidating, or impersonating an inspector. Some of these offences are similar to those under section 28 of the Act, above.

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

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

Penalty levels

The Act sets maximum penalties for the offences it creates, for both individuals and corporations. In the case of individuals, for some offences the Act allows for a sentence of imprisonment. Otherwise the Act allows for fines. The maximum amount that an individual or a corporation can be fined for an offence under the Act is expressed in penalty units, which are standard across NSW legislation. The current value of the penalty unit $110. For example, an offence carrying a maximum penalty of 250 penalty units carries a maximum penalty of $27,500.

In setting the penalty levels under the Act, there are a number of relevant factors.

First, the penalties under the Act should be commensurate with those for similar offences, such as those under the *Work Health and Safety Act 2011* (NSW). Other jurisdictions' penalties for similar offences can also offer a useful reference point.

The tables below compare the penalties for the main offences in the Act with the penalties for similar offences in other NSW and interstate legislation. In a number of cases the penalties for similar offences, both within other NSW legislation and interstate, are significantly higher than the penalties for offences under the Act. The penalties under the Act have not been increased since it was enacted in 2003. The penalty unit itself was last increased in 1997. Consideration may be given to increasing penalty levels in the Act to reflect changes in CPI since 2003.

Table 1: Penalties for offences equivalent to handling explosives without a licence or security clearance

Licensing framework	**Offence**	**Maximum penalty (individual)**	**Maximum penalty (corporation)**
Explosives Act 2003 (NSW)	Handling without a licence (s 6)	$27,500	$55,000
Explosives Act 2003 (NSW)	Handling without a security clearance (section 6A)	$27,500	N/A (a corporation cannot hold a security clearance)
Work Health and Safety Act 2011 (NSW)	Carrying out work at a workplace without being authorised (section 43),	$20,000	$100,000

Licensing framework	Offence	Maximum penalty (individual)	Maximum penalty (corporation)
	including high risk work (clause 82 of the *Work Health and Safety Regulation 2017*)		
Explosives Act 1999 (Qld)*	Possessing explosives without a licence (section 34) Manufacturing explosives without authorisation (section 38)	$52,220 or 6 months imprisonment	$52,220
Explosives Act 1999 (Qld)	Selling explosives without authorisation (section 41) Storing explosives without a licence (section 44)	$26,110 or 3 months imprisonment	$26,110
Dangerous Goods Act 1985 (Vic)/*Dangerous Goods (Explosives Regulations 2011* (Vic)	Unlawful possession of explosives (clause 20, section 45)	$13,055	$64,476
Dangerous Goods Safety Act 2004 (WA)	Unlicensed possession of dangerous goods (s 12)	$50,000 or imprisonment for 2 years or both	$250,000

Table 2: Offences equivalent to negligently handling explosives

Licensing framework	Offence	Maximum penalty (individual)	Maximum penalty (corporation)
Explosives Act 2003	Negligent handling of explosives in such a manner or in such circumstances as to endanger or be likely to endanger the life of any person (s 8)	$27,500 or 12 months imprisonment or both	$55,000
Work Health and Safety Act 2011	Failure to comply with a health and safety duty exposing an individual to a	$150,000 or $300,000 (person conducting a	$1,500,000

* This Act has been amended by the *Land, Explosives and Other Legislation Amendment Act 2019* but the amendments have not yet commenced. They are expected to commence within the next 12 months. The penalties in the tables are the penalties in the Act as amended.

Licensing framework	Offence	Maximum penalty (individual)	Maximum penalty (corporation)
	risk of death or serious injury or illness (section 32)	business or undertaking or officer)	
Explosives Act 1999 (Qld)	Breach of general duty of care to avoid endangering a person's safety, health or property while doing an act involving explosives (section 32)	Sliding scale based on harm caused by the contravention, ranging from $391,650 to $65,275 or 3 years to 6 months imprisonment.	Sliding scale based on harm caused by the contravention, ranging from $391,650 to $65,275.
Dangerous Goods Act 1985 (Vic)	Breach of duty to take precautions in using, handling and transferring dangerous goods to prevent damage to property or dangerous to the public (section 31)	If offence results in death or serious injury: $80,595 or 2 years imprisonment. Otherwise, $80,595.	$402,975
Dangerous Goods Safety Act 2004 (WA	Breach of duty to minimise risk to people, property and the environment from dangerous goods (section 8)	$100,000 or imprisonment for 4 years or both	$500,000

It is also important that there be similar penalties for similar offences within the Act and the applied WHS Act. At present, the penalties for the offences of obstructing or intimidating an inspector under the Act and the WHS Act differ. It may be appropriate to bring the penalties in the Act into line with the penalties under the WHS Act. The different penalties are set out in Table 3 below.

Table 3: Penalties for offences in the Act similar to those in the WHS Act

Licensing framework	Offence	Maximum penalty (individual)	Maximum penalty (corporation)
Explosives Act 2003 (NSW)	Obstruct, hinder or impede an inspector in the exercise of their functions (section 28(a))	$24,750	$82,500
Work Health and Safety Act 2011 (NSW)	Hinder or obstruct or induce or attempt to induce any other person to hinder or obstruct (section 188)	$10,000	$50,000

Licensing framework	Offence	Maximum penalty (individual)	Maximum penalty (corporation)
Explosives Act 2003 (NSW)	Intimidate, threaten, or attempt to intimidate an inspector in the exercise of their functions (section 28(b)	$24,750	$82,500
Work Health and Safety Act 2011 (NSW)	Assault, threaten or intimidate, attempt to assault, threaten or intimidate an inspector o person assisting an inspector (section 190)	$50,000	$250,000

Another relevant factor in setting penalties is that non-compliance with the licensing framework relative to the costs of compliance with the licensing framework be sufficiently high to deter non-compliance.

The Regulation authorises SafeWork NSW to fix a fee to cover its expenses in connection with the regulation of licences (cl 41). SafeWork NSW fixes fees for each of the categories of explosive licence created by the Regulation. The fees for the grant or renewal of a licence or security clearance are set out in the table below:

Table 4: Fees for licences or security clearances

Licence/security clearance	Duration	Fee
Security clearance	5 years	$169.50
Manufacture explosives	5 years	$2815.50
Notification of import of explosives	Single occasion	$112.50
Supply explosives/security sensitive dangerous substances	5 years	$675.00
Transport explosives by vehicle	5 years	$2,083.00
Transport explosives by vessel	5 years	$2,083.00
Store explosives/security sensitive dangerous substances	5 years	$281.00
Blasting user	5 years	$281.00
Pyrotechnician	5 years	$281.00
Fireworks single use	Single occasion	$56.00
Use security sensitive dangerous substances	5 years	$112.50

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?
14. Should the penalty levels be adjusted to take account of increases in CPI since they were last changed in 2003?
15. Should 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?
16. Should the maximum penalties for the offences relating to inspectors which can be prosecuted under both the Act and the WHS Act be the same?

Compliance and enforcement

The Act empowers SafeWork NSW and the Resources Regulator to appoint inspectors to secure compliance with its provisions. The inspectors have the same powers as inspectors under section 155 and Part 9 (except section 187) of the WHS Act. These powers include:

- information gathering powers (section 155), including the power, upon service of a notice, to require a person to give information in writing, to produce documents, and to appear to give evidence in person;
- the power to require compliance with the Act through issuing notices (section 160(d));
- the power to investigate contraventions of the Act and assist in the prosecution of offences (section 160(e));
- the power to enter at any time premises in which the handling of explosives, explosive precursors, or dangerous goods is occurring (section 163);
- powers upon entry to inspect, examine and make inquiries (section 165);
- powers to seize evidence and to copy and retain documents (sections 174 and 175);
- powers to seize dangerous workplaces and things (section 176).

Since the Act was last amended, the powers of inspectors under the WHS Act have been amended to clarify that an inspector can exercise the information gathering power in section 155 outside of NSW (section 155A). That is, an inspector in the WHS Act can serve a notice on a person requiring them to give information, produce documents, or appear to give evidence even if the person is outside of NSW or the relevant matter occurs or is located outside NSW, so long as the matter relates to the administration of the WHS Act. This provision has not been automatically applied by the Act, but inspectors under the Act face many of the same evidence-gathering challenges as WHS inspectors.

17. Do inspectors under the Explosives Act have sufficient powers to ensure compliance with the Act?
18. Should inspectors under the Act have the same extra-territorial information gathering powers as inspectors under the WHS Act (section 155A)?

Destroying forfeited explosives

When inspectors exercise their powers to seize explosives under the applied sections 175 and 176 of the WHS Act, above, SafeWork NSW and the Resources Regulator are obliged to store the seized explosives. Explosives cannot be returned to persons who are not licensed to handle them.

Seized explosives may be forfeited to the State if the conditions in section 179 of the WHS Act are met, including where the regulator reasonably believes it is necessary to forfeit the explosives to prevent them being used to commit an offence against the Act. Section 179 sets out a procedure which the regulator must follow before explosives are forfeited, including giving written notice, and allowing 28 days for an application for review of the decision to be made.

Seized explosives need to be kept as evidence of an offence under the Act. However, the obligation to store a large volume of explosives for lengthy periods while investigations and then Court proceedings take place can be problematic for regulators. Regulators are themselves subject to licensing requirements as to the maximum storage capacity of their facilities.

Instead, it may be useful for a regulator to be able to retain a sample of explosives which have been forfeited under section 179 for use in evidence in any subsequent proceedings, while destroying the balance. This would be a departure from the usual practice of retaining all of the evidence relating to a prosecution until it is complete. The departure may be justified by the inherently dangerous nature of the explosives and explosive precursors seized by inspectors under the Act.

If this approach were to be taken, consideration would need to be given to how destroying a part of the evidence of the commission of an offence under the Act may affect any subsequent proceedings for the offence.

This approach has been adopted in relation to the seizure of drugs under the *Drug Misuse and Trafficking Act 1985* (NSW). Part 3A of that Act makes provision for the destruction of some prohibited substances after samples have been taken and retained. It addresses the evidentiary issues this creates in part by:

- the use of evidentiary certificates as prima facie evidence of the identity of the substance analysed, its quantity and mass (section 43);
- requiring a certificate be issued, photographs be taken, and the mass of the substance recorded before the substance is destroyed (section 39I);
- giving 28 days' notice to the defendant of the proposed destruction (section 39I); and
- requiring that three times the amount needed for two samples for analysis be retained (section 39D and clause 13 of the *Drug Misuse and Trafficking Regulation 2011*).

Consideration may be given to implementing a similar framework under the Act, which in theory could enable the regulator to destroy the bulk of forfeited explosives without prejudicing subsequent criminal prosecutions.

Regulators also incurs costs in storing and disposing of explosives. The 2009 Review considered whether the then-regulatory authority, WorkCover NSW, should be reimbursed for the costs incurred in the destruction of illegal explosives. The Act now applies the provisions of the WHS Act, and under section 179, the regulatory authority can take action to recover its reasonable costs in storing or disposing of forfeited goods.

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

Other matters

The Act makes provision for a number of other matters, including:

- summary prosecution of offences;
- giving the Regulation the power to prescribe penalty notice offences;
- a general regulation-making power;
- savings and transitional provisions;
- this review of the Act.

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

Any other comments

The issues and options identified in this Discussion Paper are not exhaustive. They are included to stimulate discussion and do not indicate government policy.

You are not confined to the questions listed in this paper and may raise any other issue or make any other comment you wish to make on the operation of the Act. Further comments on any other general matters relevant to improving the current regulatory framework for the explosives are welcome.