



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 be 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)
<i>Explosives Act 2003</i> (NSW)	Handling without a licence (s 6)	\$27,500	\$55,000
<i>Explosives Act 2003</i> (NSW)	Handling without a security clearance (section 6A)	\$27,500	N/A (a corporation cannot hold a security clearance)
<i>Work Health and Safety Act 2011</i> (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 <i>Work Health and Safety Regulation 2017</i>)		
<i>Explosives Act 1999 (Qld)*</i>	Possessing explosives without a licence (section 34) Manufacturing explosives without authorisation (section 38)	\$52,220 or 6 months imprisonment	\$52,220
<i>Explosives Act 1999 (Qld)</i>	Selling explosives without authorisation (section 41) Storing explosives without a licence (section 44)	\$26,110 or 3 months imprisonment	\$26,110
<i>Dangerous Goods Act 1985 (Vic)/Dangerous Goods (Explosives Regulations 2011 (Vic)</i>	Unlawful possession of explosives (clause 20, section 45)	\$13,055	\$64,476
<i>Dangerous Goods Safety Act 2004 (WA)</i>	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)
<i>Explosives Act 2003</i>	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
<i>Work Health and Safety Act 2011</i>	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)	
<i>Explosives Act 1999 (Qld)</i>	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.
<i>Dangerous Goods Act 1985 (Vic)</i>	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
<i>Dangerous Goods Safety Act 2004 (WA)</i>	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)
<i>Explosives Act 2003 (NSW)</i>	Obstruct, hinder or impede an inspector in the exercise of their functions (section 28(a))	\$24,750	\$82,500
<i>Work Health and Safety Act 2011 (NSW)</i>	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)
<i>Explosives Act 2003</i> (NSW)	Intimidate, threaten, or attempt to intimidate an inspector in the exercise of their functions (section 28(b))	\$24,750	\$82,500
<i>Work Health and Safety Act 2011</i> (NSW)	Assault, threaten or intimidate, attempt to assault, threaten or intimidate an inspector or 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.