

30 November 2020

Andrew Palmer QC

Via website: <https://engage.vic.gov.au/independent-review-dangerous-goods-act-1985-and-regulations>

Dear Mr Palmer

INDEPENDENT REVIEW OF THE DANGEROUS GOODS ACT 1985 AND REGULATIONS

The Construction Material Processors Association (CMPA) is dedicated to the representation and service of its Members in the Victorian Earth Resources industry. The CMPA represents a broad spectrum of businesses that extract and process hard rock, gravel, sand, clay, lime, and soil. CMPA members also operate recycling businesses.

CMPA members are typically small to medium sized family and private businesses, local government and utilities. Many are regionally based employers and service local construction, infrastructure and road maintenance needs. The extractives sector is a key pillar within the construction industry underpinning the growth and economic development of Victoria through supply of the construction materials.

In 2018/19, the sector supplied 63 million tonnes of construction materials to the market, at a value of approximately \$1.1 billion. Small to medium quarries account for approximately half of this production.

The CMPA supports the principle of responsible, balanced legislation that is in the best interests of the State of Victoria and Australia.

Thank you for the opportunity to comment on the Independent Review of the Dangerous Goods Act 1985 and regulations (DG Act). The Independent review was well written and comprehensive.

Summary

As stated previously credit should be given to Andrew Palmer QC for the Independent Review in simplifying complex legislation into plain English. His most important comment was on page 8 *“Unnecessarily complex or overly onerous regulation can lead to non-compliance, affect the competitiveness of industry, and drive legitimate operators from the market.”*

See further comments below and responses to questions.

I would be happy to discuss our submission further at your invitation.

Yours sincerely



Dr Elizabeth Gibson
General Manager
Tel: 0434 692 618
Email: elizabeth.gibson@cmpavic.asn.au

The CMPA response is as follows:

Page	Dangerous Goods Review	CMPA comments
6	<i>Chemicals, and products made from chemicals – from fertiliser, fuel and explosives to paper, plastics and paint – form an integral part of our economy and everyday life. This means that the importation, manufacture, sale, transport, storage, reprocessing and disposal of chemicals are also essential to our way of life. However, many essential chemicals are dangerous, and activities involving</i>	Chemicals are vital to life such as water and salt
8	<i>Unnecessarily complex or overly onerous regulation can lead to non-compliance, affect the competitiveness of industry, and drive legitimate operators from the market.</i>	Succinct point. This applies to other areas of legislation in Victoria.
15	<i>The dangerous goods market in Victoria has changed significantly since the DG Act was introduced in 1985. For example, in recent years, the dangerous goods sector increasingly relies on the importation of chemicals, and less on their manufacture in Australia.</i>	An example (importation of chemicals from overseas as opposed to their manufacture in Australia) of the impact of unnecessarily complex and overly onerous regulation.
16	<i>When dangerous goods reach the end of their “product life” they are either</i>	Note that there will be new obligations under the new EP Act 2017 (1 July 2021) such as the

Page	Dangerous Goods Review	CMPA comments
	<i>disposed of, reprocessed, or exported.</i>	General Environmental Duty that may lead to increased export of end of life dangerous goods.
16	<i>Depending on the chemical and its market value, the facility may instead pay to receive the waste, or collect it at no cost.</i>	Not all chemicals are dangerous goods/hazardous.
18	<i>As noted above, the storage and handling of dangerous goods above a specified threshold requires notification to WorkSafe.</i>	This is an issue for the quarry industry with recent changes to regulations now including quarries as Major Hazard Facilities due to the lowering of the threshold quantities of explosives in Schedule 14 OHS Regulations 2017.
33	<i>Chemical warehouse fires...The occurrence of such incidents therefore indicates that Victoria's dangerous goods legislation is not meeting these fundamental objectives.</i>	Is this true or is there insufficient expertise, compliance, and enforcement by WorkSafe/EPA.
34	<i>Do dangerous goods inspectors have sufficient powers?</i>	The answer is probably yes they have sufficient powers but they may be understaffed or lack focus on compliance and enforcement.
35	<p>Willing and able</p> <ul style="list-style-type: none"> • Take all reasonable steps to comply with the law and have access to expert compliance advice when they need it. • Typically large, well-resourced operations where dangerous goods are likely to form part of their core business. <p>Well intentioned</p> <ul style="list-style-type: none"> • Try to comply but, through a lack of expertise or resources, may not always meet their obligations. • May misunderstand what is required. • Typically small to medium-sized entities. • Dangerous goods may not be part of their core business. 	For 'well intentioned' small to medium sized entities, the legislative framework is far too complex to be easily understood. These small to medium sized entities are the backbone of the Victorian/Australian economy and so should not be forced out of the market because of not having access to expert compliance advice due to complex legislation. Education programmes (lessons learned); a comprehensive and easily used informative WorkSafe website; more frequent inspections etc. Additionally, a review of incidents encountered by small to medium entities should be conducted.
38	<i>However, they (principle-based duties) offer little or no guidance to duty-holders as to how to meet their obligations and are open to interpretation and ambiguity. It may, for example, require the verdict of a jury to determine whether or not the safety measures a duty-holder took reduced a particular risk "so far as was reasonably practicable".</i>	It is agreed that advice received from WorkSafe is very general with the onus being on the employer. WorkSafe have so far not defined "as far as reasonably practicable"

Page	Dangerous Goods Review	CMPA comments
38	<i>For that reason, principle-based duties often have to be supplemented or supported by more detailed and prescriptive regulation and guidance. They are also often supported through process duties.</i>	WorkSafe do not provide guidance.
39	<i>Both process duties and documentation duties can represent a regulatory burden and – as a general proposition – should only be required if that burden is likely to result in clear improvements in risk management.</i>	Agreed
43	<i>A general principle-based duty regulating dangerous goods would also pick up some duty-holders and activities not covered by the general duties in the OHS Act; and might help to focus duty holders’ attention on the risks associated with dangerous goods and the safety measures needed to control those risks.</i>	Additional documentation is not going to prevent dangerous chemical waste warehouses. Enforcement is important.
44	<i>The safe management of dangerous goods often requires a higher level of resources and technical knowledge than many duty-holders possess.</i>	Education, enforcement and less complex legislation would assist in resolving this issue.
44	<i>Prescriptive duties relieve the duty-holder of the need to identify risks and to identify the safety measures that would control those risks; performance-based duties relieve the duty-holder of the need to identify the risk, but leave it to them how to control it; and process duties require the duty-holder to engage in a process that is likely to support the identification of both risks and the safety measures needed to control them.</i>	This is not the case with engineered stone kitchen benchtops containing respirable crystalline silica dust.
45	<i>Although codes can be more easily expressed in plain English than can legislation, the process of tracking regulations through to a code, and then from the code to any further material referred to (such as an Australian Standard), can be complicated.</i>	Also becomes complicated when the Australian Standard becomes updated.
46	<i>The Review is considering whether the DG Act’s focus on risk can be enhanced through an increased use of permissioning – or licensing –</i>	Evidence of need must be established first.

Page	Dangerous Goods Review	CMPA comments
	<p><i>frameworks. Permissioning frameworks require a person to obtain a licence, permit or registration, before they can engage in an activity.</i></p>	
48	<p><i>A licensing scheme could have the following benefits:</i></p> <ul style="list-style-type: none"> <i>• Providing an opportunity to ensure full compliance with the regulations prior to a licence being granted.</i> <i>• Ensuring that certain conditions are met before a licence is granted, for example, that high risk facilities storing and handling dangerous goods are fit for purpose and are located in areas that are sufficiently separated from sensitive land uses.</i> <i>• Requiring that an operator is a “fit and proper person”: if they present a relevant concern to the community, they do not get a licence.</i> <i>• Imposing additional duties on high risk sites, in the same way that prescribed mines have additional duties under the OHS Regulations compared to other mines (for example, requiring the establishment and implementation of a safety management system and the conduct of a safety assessment).</i> <i>• Allowing WorkSafe to require occupiers to carry out specific hazard and risk studies as a pre-condition of the licence.</i> <i>• The threat of licence revocation or suspension might encourage licence-holders to increase their ongoing compliance level.</i> 	<p>This proposal for a licensing scheme would impose a significant regulatory burden for the already highly regulated extractive industry and is unlikely to deter illegal operators.</p>
52	<p><i>The significant increase in illegal activity in the waste market for dangerous chemicals in Victoria now represents one of the greatest sources of risk to persons and property.</i></p>	<p>If the target (illegal activity) is as high-lighted then that should be the focus without penalising those that are complying.</p>
52	<ul style="list-style-type: none"> <i>• WorkSafe’s compliance and enforcement action has at times been adversely affected by resourcing limitations, and by a lack of inter-agency coordination and information sharing.</i> 	<p>The CMPA supports this statement.</p>

Page	Dangerous Goods Review	CMPA comments
53	<i>Some stakeholders have also suggested that relying on desktop audits as an alternative to site inspections is an unreliable method of monitoring compliance.</i>	This is a valid point
54	<i>...a sudden or sharp drop in the cost of disposing of chemical waste may indicate the presence of illegal operators, who are avoiding compliance costs. That price undercutting may lead legitimate operators to exit the market – another indicator of illegal activity.</i> <i>The Review has been informed that both of these had been occurring in Victoria in the years leading up to the 2018 and 2019 fires, but that the facts were either unknown to regulators, or their significance was overlooked and uninvestigated.</i>	The statements are very concerning that WorkSafe did not act on information received.
62	<i>There are no requirements under the DG framework for waste producers to undertake any due diligence or to select an accredited provider. They can choose their waste provider entirely on price, and there are no legal incentives or requirements for them to take steps to ensure that the waste provider disposes of their waste safely.</i>	The Environment Protection Act 2017 has a General Environmental Duty that will come into force on 1 July 2021
67	<i>• The broader shift in the Australian economy from manufacturing to importing manufactured goods, including chemicals.</i>	A consequence (importation of chemicals from overseas as opposed to their manufacture in Australia) of the impact of unnecessarily complex and overly onerous regulation.
67	<i>• The lack of adequate waste infrastructure in Victoria, including infrastructure and businesses able to safely destroy, recycle or reprocess chemical waste.</i>	A question should be asked here as to why there is lack of adequate waste infrastructure in Victoria? Expensive, bureaucratic, red tape. Lack of enforcement for illegal operators.

Question Number	Dangerous Goods Review Question	CMPA response
1	<i>To what extent does Victoria’s dangerous goods legislation promote the safety of persons and property?</i>	An analysis of the number of significant incidents over the past 30 years would give an indication of its effectiveness.
2	<i>To what extent does it promote the effective management of dangerous goods?</i>	Obviously where waste dangerous goods are involved, the Environment Protection Act appears to not be working but this may be

Question Number	Dangerous Goods Review Question	CMPA response
		due to lack of inspections and enforcement; lack of inspectors/lack of experience.
3	<i>How could it be improved so that it better promotes these objectives?</i>	Greater clarity around the different legislation governing dangerous goods with increased enforcement and inspections.
4	<i>How could the DG Act and associated regulations be enhanced to be more risk-based and prevention focused?</i>	Firstly, is the DG Act working? Review into the number of incidents and whether there is adequate enforcement. From experience changing an Act to be more risk-based may result in small to medium entities departing the market. A focus on prevention may lead to activities not being undertaken at all and again small to medium entities leaving the market.
5	<i>Should dangerous goods legislation include a broad, general principle-based duty to minimise risks of harm to persons and property?</i>	This is similar to the EP Act 2017 it may be useful subject to an informative and up-to-date WorkSafe website.
6	<i>Broadly speaking, do the Storage and Handling, Explosives, HCDG and Transport Regulations impose the right combination of the different kinds of duties?</i>	Confusing question.
7	<i>What role should codes and guidance material play in supporting the DG Act and associated regulations?</i>	They should provide clarity.
8	<i>Do you have any suggestions about how the codes and guidance material issued by WorkSafe could be improved?</i>	The codes and guidance material should be updated on a regular basis to allow, e.g. innovation.
9	<i>Should a permissioning framework be introduced for higher-risk sites and/or activities involving dangerous goods?</i>	No. It would add additional regulatory burden to those sites that are already complying and would not deter illegal operators.
10	<i>What kinds of incidents involving dangerous goods should duty-holders be required to report to WorkSafe?</i>	There are already well established reporting protocols for the extractive industry that are discussed (lessons learned) at the Earth Resources Safety Tripartite Safety Forum (WorkSafe)
11	<i>How could the dangerous goods legislation be made more effective in deterring non-compliance and illegal activity in relation to the management of dangerous goods?</i>	By ensuring consistent effective enforcement against non-compliant operators.
12	<i>What methods could WorkSafe use to identify unknown dangerous goods sites, and do those methods require additional legal powers?</i>	WorkSafe already has the powers it needs. Coordination with the EPA over waste transport. New EPA legislation/General Environmental Duty. Conducting onsite audits and not just of the documentation

Question Number	Dangerous Goods Review Question	CMPA response
13	<i>Are the triggers for notification appropriate?</i>	There has been no qualitative evidence supplied that justifies changing the trigger for notification.
14	<i>What types of information should be notified?</i>	When there is a significant increase in risk low/medium risk increases to high/very high risk
15	<i>What methods could WorkSafe use to monitor the dangerous goods market, and do those methods require additional legal powers?</i>	More information sharing with the EPA/Municipal Councils; forensic review of the dangerous goods waste industry to develop key point indicators for monitoring and action. Additional legal powers are not required.
16	<i>To what extent is the detection of unknown or illegal dangerous goods activity hampered by restrictions on information sharing by government agencies?</i>	It appears to be extensive.
17	<i>What kind of information sharing should be permitted?</i>	Information sharing should be permitted that is relevant to ensuring compliance and enforcement
18	<i>What are the obstacles to the effective management of dangerous goods where the functions and powers of multiple agencies intersect and overlap?</i>	Lack of information sharing/coordination /staffing and experience. WorkSafe have sufficient powers.
19	<i>How could interagency coordination in relation to dangerous goods be improved?</i>	By having a designated lead agency.
20	<i>Should powers be delegated between agencies to improve coordination?</i>	No, there needs to be a designated lead agency
21	<i>Under what circumstances should a dangerous goods inspector be permitted to enter a place where dangerous goods might be stored?</i>	Where there is reasonable cause to suspect that there has been a serious breach of the Dangerous Goods Act and there is an immediate or potential risk of harm to human health or the environment.
22	<i>Should there be a power for inspectors to enter residential premises? What should the threshold for such a power be?</i>	No
23	<i>Does WorkSafe need broader powers to intervene at non-compliant sites?</i>	No
24	<i>If so, what powers does it need, and what should be the threshold to the exercise of those powers?</i>	Needs to be carefully considered. It could be argued that WorkSafe already has sufficient powers.
25	<i>Should WorkSafe have the power to redirect body corporate obligations to their officers and controlling entities?</i>	Yes, where a serious breach of the Dangerous Goods Act has occurred.

Question Number	Dangerous Goods Review Question	CMPA response
26	<i>What costs should WorkSafe be able to recover, and from whom?</i>	Cost of clean up from those that produced the dangerous goods and those that accepted the dangerous goods
27	<i>Should WorkSafe be empowered to require entities engaging in dangerous goods activities to provide financial assurances, and if so, how should this be done?</i>	Have to be careful to ensure that it is not too costly leading to the illegal dumping of the dangerous goods.
28	<i>Should dangerous goods operators only be permitted to dispose of their waste to accredited waste providers?</i>	Yes
29	<i>Alternatively, should dangerous goods operators have a duty to undertake due diligence in relation to the disposal of their waste?</i>	As per Environment Protection Act 2017 that comes into force 1 July 2021.
30	<i>Should officer liability for dangerous goods offences be based on a due diligence test or duty?</i>	Yes, as per EP Act 2017
31	<i>Should a civil penalty regime be introduced into the dangerous goods legislation, so that WorkSafe has the option of bringing a civil penalty proceeding in relation to a dangerous goods contravention, as an alternative to a criminal prosecution?</i>	Seems logical
32	<i>Should an infringements scheme be introduced for dangerous goods offences and if so, which ones?</i>	Yes
33	<i>Should maximum penalties be increased for (some or all) dangerous goods offences?</i>	Evidence of current maximum penalties applied needs to be presented first before this question can be answered.
34	<i>How has the dangerous goods industry changed from when the DG Act was first introduced?</i>	Manufacturing of chemicals went overseas
35	<i>Are there any other emerging issues and challenges that Victoria's dangerous goods legislation should be responding to?</i>	Foster an environment in which chemical manufacturing is viable within Victoria.
36	<i>What does the future of the dangerous goods industry look like?</i>	Bleak
37	<i>What are the main challenges in the disposal of chemical waste in Victoria?</i>	Developing a competitive network of responsible waste treatment facilities
38	<i>Are there new technologies being introduced into the dangerous goods industry that will change the way the industry operates? Will this create new risks?</i>	No comment
39	<i>How does Victoria's dangerous goods legislation need to adapt and change</i>	No comment

Question Number	Dangerous Goods Review Question	CMPA response
	<i>in order to meet these issues and challenges?</i>	
40	<i>Should a new DG Act adopt (as far as possible) the structure, order, language and conceptual framework of the OHS Act?</i>	See below (41)
41	<i>Should dangerous goods legislation be incorporated within the OHS Act?</i>	Yes, but care needs to be taken to ensure that there is the possibility of compliance.
42	<i>Should DG Act and Transport Regulations apply to the transport of prescribed industrial waste?</i>	Yes
43	<i>Should amendments to the ADG Code come into force automatically?</i>	Yes
44	<i>Should the detailed regulations and offence provisions in the Transport Regulations be replaced by a single offence of failing to comply with the ADG Code?</i>	Yes
45	<i>How can the way in which dangerous chemicals are classified and captured be streamlined?</i>	Should be evidenced based to prevent issues such as quarry sites becoming Major Hazard Facilities due to a change in the Regulations
46	<i>Should ESM compliance be a condition of operating a dangerous goods site or facility?</i>	No comment
47	<i>Should occupiers be required to implement the advice given by emergency services authorities, rather than simply "have regard to" it?</i>	No comment
48	<i>Should Victoria recognise interstate dangerous goods licences?</i>	Yes and vice versa
49	<i>Should ammonium nitrate be regulated by the Explosives Regulations?</i>	Care must be taken to ensure that agricultural use is not limited.
50	<i>Are there any other relevant matters that the Review should consider?</i>	No comment