

CLAUSE NOTES

EXPLOSIVES BILL 2011

PART I PRELIMINARY

Clause 1 Short title

This is formal provision specifying the title of the proposed Act as the Explosives Act 2011.

The Act provides for the safe handling of explosives, for the safe management of places where explosives are handled, and for the management of incidents and emergencies involving explosives. It repeals the *Dangerous Substances (Safe Handling) Act 2005* (the DSSH Act), because most of the provisions will be covered by the proposed *Work Health and Safety Act 2011* (the new WHS Act) and its Regulations. Those provisions that relate to explosives and are not captured by the work health and safety laws are repackaged into this Bill.

Most of the clauses in Parts 1 to 7, and Schedule 1, of this Bill are based on comparable provisions, suitably modified to apply with respect to explosives, of the DSSH Act.

The Bill also makes the necessary transitional arrangements and consequential amendments to move from the dangerous substances regime to a legislative regime that is jointly covered by the work health and safety laws and explosives laws.

Clause 2 Commencement

This is a formal provision specifying the commencement date of the Act. The Act will commence on a day or days to be proclaimed.

Clause 3 Interpretation

This section defines key terms and concepts that have a particular meaning in relation to the handling of explosives. These terms are used throughout the Bill.

Most of these words and their meanings are drawn from those in the existing DSSH Act.

A significant new term that was not used in the DSSH Act is **“explosives location”**.

Schedules attached to the regulations will specify quantities of explosives that will meet the criteria for an **“explosives location”** and **“large explosives location”**.

A major hazard facility (MHF), under the regulations made under the new WHS Act is not an explosives location. MHFs under those regulations will have their own requirements.

Clause 4 Referenced to codes &c.

Clarifies that a reference to any code, standard etc may include a reference to such a document made outside Australia.

Clause 5 What constitutes the handling of explosives?

The purpose of this clause is to define activities that are regulated by this Act. Handling of explosives involves all activities conducted in relation to explosives except transportation of explosives (unless it involves movement through pipes). Transportation is regulated by the Dangerous Goods (Road and Rail Transport) Act 2010.

Clause 6 Scope of Act

This clause is intended to maintain as far as possible the status quo with respect to the coverage of explosives.

Clause 7 Act binds the Crown

“The Crown” (which includes any instrumentality, agency, statutory authority or Government Business Enterprise) must comply with the Act.

Clause 8 Inconsistencies, &c., with other Acts

This clause explains how other legislation that deal with explosives relate to this Act.

Provisions of the named Acts in subclause (1) will prevail over this Act if a provision of this Act is inconsistent with a provision of the named Acts.

If any of the named Acts in subclause (1) impose a safety obligation that is at least equivalent to the safety obligation imposed by this Act, compliance with the obligation in the named Act will be taken to be compliance with this Act.

Subclause (3) explains that this Act is in addition to but does not derogate for any other Act dealing with work health and safety. This is different to the laws mentioned in (1) because the proposed WHS Act and the proposed Mine Work Health and Safety (Supplementary Requirements) Act do not intend to cover the field so far as explosives are concerned.

PART 2 – SAFETY OBLIGATIONS

All the provisions of this part are based on the equivalent concepts under the DSSH Act, suitably modified for explosives.

Division 1 - Preliminary

Clause 9 Safety obligations

These safety obligations reflect the concept inherent in the DSSH that the legislation is intended to cover all aspects of explosives handling, whether or not the explosives are used in connection with work.

Clause 10 Achieving acceptable levels of risk

This clause explains the term “acceptable level of risk”, which is used in clause 9, by explaining what it is and how to decide whether risk is minimised as far as possible.

Clause 11 Discharge of obligations

Self-explanatory. Penalties apply to failure to discharge obligations. Penalties are applied according to the severity of harm caused.

Clause 12 Obligations may be owed in more than one capacity

Self-explanatory. For example, a person may have an obligation as both an occupier and a manufacturer.

Clause 13 Obligations are owed even if others also have them

The intent of this clause is to make it clear that each person must discharge his or her obligation. Another person having the same obligation does not diminish a safety obligation of one person.

Clause 14 How to discharge obligations if there are regulations or approved codes of practice.

If a regulation prescribes how to achieve an acceptable level of risk, the person must comply with the regulation.

If a regulation prohibits exposure to a risk then a person must comply by complying with the prohibition.

If an approved code of practice states a way of achieving an acceptable level of risk, a person must discharge their obligation by:

- adopting and following that stated way; or
- adopting or following another way that achieves a level of risk equal to or lower than the acceptable level.

Clause 15 How to discharge obligations if there are no regulations or approved codes of practice

This clause relates to the previous clause and explains how to discharge the safety obligation if regulations or codes of practice do not specify how to minimise risk or provide guidance for a specific hazard.

Division 2 – Obligations of occupiers and others

Clause 16 Obligations of occupiers regarding risk reduction

The clause and sub-clauses detail the safety obligations of an occupier to minimise risk associated with handling explosives at an explosives location.

Clause 17 Obligations of occupiers regarding emergency plans and procedures

An occupier of a large explosives location has an obligation to prepare an emergency plan and procedures in consultation with relevant employees and emergency services. Consultation with relevant employees in the preparation of emergency plans and procedures has a three-fold intent: first, it is consistent with the requirement for employees to discharge their safety obligations; second, it ensures that there is a greater preparedness for an emergency on the part of all employees through their involvement; and third, it enables the relevant knowledge and

expertise relating to emergency requirements and operations to be considered. These plans must be documented and reviewed.

The phrase “significantly alter” in subclause (b) is intended to mean that the risk(s) identified may either significantly reduce or significantly increase. It is not intended to apply to trivial or minor changes in risk.

Clause 18 Obligation of employees

Employees have specific responsibilities including requirements to comply with procedures and instructions and to report to a supervisor matter that may lead to an explosives emergency.

Clause 19 Obligations of manufacturers, importers and suppliers of explosives

The intent of this clause is that persons at the beginning of the chain of supply, that is manufacturers, importers and suppliers, must ensure that the explosives are in a condition that is safe for handling. These persons must provide information about the explosives either with or before the explosives are provided.

Clause 20 Obligations of designers, manufacturers, importers, suppliers and installers of handling systems

This clause makes it an obligation for the listed persons to ensure the handling systems are safe and provide the necessary information to users to maintain them in safe condition. Installers of handling systems have an obligation to ensure that they are installed so that they can be used safely.

Clause 21 Obligation of suppliers and installers regarding known hazards, &c.

If a person installs or supplies a handling system for use at an explosives location and becomes aware of a hazard or defect associated with the system that may create an unacceptable level of risk, the person has an obligation to inform the user of the hazard or defect and how it may be corrected. (The occupier

must, according to his safety obligations, then correct the handling system.)

Division 3 Defences

Clause 22 Defences for Division 1 or 2

The intent of this clause is to emphasise that it is a defence in any proceedings against a person if the person is able to establish that they followed regulations, an approved code of practice or another way to achieve a level of risk that was equal to or lower than the acceptable level of risk.

PART 3 CODES OF PRACTICE

The provisions of this part are based on the equivalent provisions relating to codes of practice under the DSSH Act.

Clause 23 Minister may approve codes of practice

In accordance with the status quo, this clause is to enable the adoption of codes of practice, standards, guidelines or rules that provide practical, detailed guidance relating to how to minimise risk. The clause also provides details of the approval process to be followed.

Clause 24 Use of codes of practice in proceedings

In proceedings relating to a contravention of a safety obligation, a code of practice is admissible as evidence.

PART 4 – EXPLOSIVES LOCATIONS

The provisions of this part are based on the equivalent provisions relating dangerous substances locations under the DSSH Act, narrowed to explosives locations for the purpose of this Act.

Division 1 Identification of explosives locations

Clause 25 Meaning of “explosives location” and “large explosives location”

Schedules attached to the regulations will specify quantities of explosives that will meet the criteria for “explosives location” and “large explosives location”

A major hazard facility (MHF), under the regulations made under the new WHS Act is not an explosives location. MHFs under those regulations will have their own requirements.

Division 2 - Other obligations of occupiers of explosives locations

Clause 26 Obligations of occupiers regarding emergency plans and procedures

This clause makes it an obligation of an occupier of large explosives location to develop emergency plans and procedures.

Clause 27 Obligation of occupiers regarding safety management systems

This clause relates to the requirement at clause 16(e) that, as part of the process of risk reduction, an occupier must develop a safety management system

Clause 28 Obligations of occupiers to report, &c., explosives emergencies

Self explanatory

Clause 29 Obligations of occupiers to record dangerous situations

“Dangerous situation” is defined in clause 3. Keeping a record of dangerous situations, including how they were controlled, and consulting with employees and other persons about how to avoid similar dangerous situations in the future, are important to continuing corporate knowledge.

PART 5 – ADMINISTRATION AND ENFORCEMENT

The provisions of this part are based on the equivalent provisions under the DSSH Act.

Division 1 – Secretary

Clause 30 Powers of secretary

Self explanatory

Division 2 – Authorised officers

Clause 31 Appointment of authorised officers

Self explanatory

Clause 32 Powers of authorised officers

Self-explanatory

Clause 33 Identification of authorised officers

The intent of this clause is to ensure that persons cannot impersonate an authorised officer for this Act, by making it a requirement that identity cards be issued to persons appointed as authorised officers and carried and shown when exercising their duties under this Act.

Clause 34 Delegation

Self-explanatory

Clause 35 General powers of inspection, &c., of authorised officers

The intent of this clause is to give authorised officers general powers to enforce the Act.

Clause 36 Authorised officers may require names and addresses

Self-explanatory. A penalty applies to failure to comply with a request to give name and address or evidence that the name and address is correct.

Clause 37 Powers of authorised officers regarding suspected offences

Self-explanatory

Clause 38 Authorised officers to restore premises, &c., to original condition after inspections

The intent of this clause is to clarify that if an authorised person requires to make any change to premises, a vehicle or equipment, in order to conduct an inspection, the authorised officer is required to take reasonable action to restore them to the condition they were in immediately before the inspection. No action lies against the authorised officer, the director or the Crown in respect of the failure by an authorised officer to do so.

Clause 39 Offence to obstruct, &c., authorised officers

Self-explanatory

Clause 40 Offence to fail to comply with authorised officer's directions

It is intended that "reasonable excuse" in this clause would refer to a possible situation where complying with the authorised officer's directions might compromise safety; however as a general rule, directions would be given with the objective of improving safety.

Clause 41 Self-incrimination no excuse

The intent of this clause is that a person must answer any question asked under clause 35 in order that an authorised officer may determine issues of safety. While the answer to the question may not be used in evidence; other evidence of an alleged breach would be used in evidence.

Division 3- Directions by authorised officers

Clause 42 Authorised officers may give directions

This clause allows authorised officers to give directions under and in accordance with this Division. Subsequent clauses deal with the kinds of directions that an authorised officer may give

Clause 43 Procedure for giving directions

The intent of this clause is to clarify how directions may be given.

Clause 44 Directions to carry out risk assessments

If an authorised officer reasonably suspects that a risk from explosives location is not minimised as far as reasonably practicable, an authorised officer may direct that a risk assessment must be carried out. Subsequent clauses list other types of directions that may be given by an authorised officer.

Clause 45 Directions to reduce risks

Clause 46 Directions to review safety management systems

Clause 47 Directions to review emergency plans and procedures

Clause 48 Directions to stop and secure handling systems

The above clauses are self explanatory.

Clause 49 Directions to suspend operations for unacceptable levels of risk

The intent of this clause is to allow an authorised officer, who identifies that a risk from operations being conducted at an explosives location is not minimised and may lead to a dangerous situation if not minimised by taking immediate action to halt operations, may direct the operations at the facility to be suspended.

Clause 50 Directions to isolate sites

Self-explanatory. This clause applies after an emergency has occurred at an explosives location.

Clause 51 Directions to address specific manufacturing, import or supply risks

This clause allows the authorised officer to specify the corrective or preventative action, which may include the initiation of a general or limited recall of the explosive.

Clause 52 Directions for independent studies or audits

The intent of this clause is to provide that, where there may be some doubt, conflicting opinions, or lack of relevant knowledge about acceptable levels of risk relating to the operations, safety of a handling system, building or other structure, &c., of an explosives location; an authorised officer may direct the occupier to have an independent audit or study carried out that would provide the basis for further decision-making.

Clause 53 Directions to importers or exporters to have explosives analysed, &c.

Self-explanatory

Clause 54 Offence not to comply with direction

Self-explanatory

Clause 55 Orders to secure compliance with directions

This provision allows an authorised officer to apply to the Supreme Court for an order requiring compliance.

Clause 56 Obligation of occupiers to make directions available for inspection by employees

Since one person's obligation does not cancel another person's obligation, the intent of this clause is to ensure that occupiers make employees and others aware of the directions through

making the directions available for inspection, so that employees and others are able to carry out their safety obligations in relation to the directions. If the directions apply to different sites or different parts of the facility or location, it follows that the occupier must make them available for inspection to all relevant employees at the different sites or different parts of the facility or location. The clause does not intend to specify or prescribe how this may be done, the occupier could choose how to meet this obligation.

Division 4 – Preventative measures and other matters

Clause 57 Taking urgent direct action to prevent dangerous situations causing serious harm

The intent of this clause is to allow an authorised officer to take immediate action to prevent, remove or minimise a dangerous situation.

Clause 58 Recovery of costs of government action

This clause relates to the previous clause and is standard to legislation dealing with government action taken to prevent, remove or minimise a dangerous situation.

PART 6 – OFFENCE PROCEEDINGS AND RELATED MATTERS

The provisions of this part are based on the equivalent provisions under the DSSH Act.

Clause 59 Time limit for prosecuting offences

Not later than 12 months from date of offence

Clause 60 Authorised officers may prosecute offences

An authorised officer may prosecute an offence against this Act, but since the Crown is not obliged in every instance to prosecute, the authorised officer is not required to prosecute in every instance.

Clause 61 Analysts

This clause relates to the use of appropriately qualified persons to perform analyses to determine whether substances or articles are explosives or to determine the identity of the explosive, for use in offence proceedings.

Clause 62 Evidentiary matters

The intent of this clause is to allow the production of certificates or reports or published documents in proceedings as evidence of the matters in the certificates rather than having to verify or prove at law each matter separately, something that would unnecessarily delay and complicate the process of giving evidence. Likewise it is not necessary to prove appointments of the Secretary or authorised officer, or analyst or the authority of such officers. These provisions are intended to streamline court proceedings and prevent legal or highly technical arguments on certain issues that are straightforward.

Clause 63 Responsibility for acts or omissions of representatives

The intent of this clause is to encapsulate the levels of responsibility that occur where one person acts as a representative of another – for example in employment relationships.

This is consistent with earlier clauses that make it an obligation on everyone to explosives safely, and provide that obligations may be owed in more than one capacity.

“state of mind” and “representative” are defined in sub-clause (4).

Clause 64 Offences by bodies corporate

The intent of this clause is to show that individual responsibility remains within a body corporate and that both the body corporate and the individual can be convicted of an offence, unless the person is able to establish that the act or omission took place without the person’s knowledge or consent, or the person used all due diligence to prevent the act or omission of the body corporate.

Clause 65 Recovery of investigation costs from convicted persons

The intent of this provision is that persons convicted of an offence under this Act may be ordered to pay costs that were incurred in investigating the offence.

Clause 66 Prohibiting convicted persons from involvement in handling of explosives

This clause enable a court that convicts a person for an offence under this Act to prohibit that person for a specified period from having any involvement in the handling of explosives.

Clause 67 Forfeiture

In addition to other penalties, the court may order that explosives be forfeited to the Crown. Forfeited explosives may be destroyed, sold or otherwise disposed of, and costs thereby incurred are recoverable from the convicted person as a debt to the Crown.

Clause 68 Infringement notices

This clause provides that infringement notices may be issued as a means of dealing quickly with a prescribed offence.

PART 7 - MISCELLANEOUS

The provisions of this part are based on the equivalent provisions under the DSSH Act.

Clause 69 Applications for review of decisions

This provision enables an aggrieved person to seek a review of a particular decisions by the Magistrates Court (Administrative Appeals Division).

Clause 70 False or misleading statements

This clause makes it an offence to make a false or misleading statement.

Clause 71 Delegation of Minister's power to Secretary

The Minister has power to approve codes of practice or other instruments. The Minister is given power by this clause to delegate this power to the Secretary should he or she wish to do so.

Clause 72 Protection from liability

The intent of this clause is to indemnify the Secretary or authorised officer from civil liability for an act or omission done in good faith in the course of performing duties under this Act.

Clause 73 Assistance in emergencies or accidents

The intent of this clause is to provide indemnity from civil liability to volunteers, for example fire brigade volunteers, who provide assistance in and explosives situation in which an emergency or accident occurs.

It does not apply to a person whose act or omission was wholly or partly the cause of the occurrence.

It applies also to a government authority even though the authority requires payment for a service in connection with the occurrence. It does not apply to an authorised officer. Clause 72 provides immunity from civil liability to authorised officers.

Clause 74 Status of Gazette Notices

Unless otherwise provided for in this Act, a *Gazette Notice* is not to be treated as a statutory rule, or any other instrument of a legislative character. It is not therefore subject to the requirements of the *Subordinate Legislation Act 1992*.

Clause 75 Service of documents

This is a machinery provision providing for the service of documents.

Clause 76 Regulations

This clause is the regulation making power in the Act that enables the Governor to make regulations for a variety of practical purposes as listed in sub-clause (2).

Clause 77 Minister to notify adoption of codes, &c. by regulation

This clause relates to 76(6). The intent is to publicly give notice of the application, adoption etc., of the code etc., so that relevant persons may be aware of the adoption of the code or other instrument. Public notice is given in the *Gazette*

Subclause (2)(b) If such a code etc is amended, the Minister must likewise give notice in the *Gazette* advising of the amendment or replacement, with details of where the amended document may be obtained or inspected.

Clause 78 Administration of Act

Until administration is assigned under the *Administrative Arrangements Act 1990*, it will rest with the Minister for

Workplace Relations and the department responsible to the Minister will be the Department of Justice.

Clause 79 Savings and transitional provisions

See Schedule 2

Clause 80 Consequential amendment of regulations do not prevent their subsequent amendment

Self explanatory

Clause 81 Consequential Amendments

See Schedule 3

Clause 82 Legislation repealed

See Schedule 4

Clause 83 Legislation rescinded

See Schedule 5

Clause 84 Legislation revoked

See Schedule 6

SCHEDULE I – PROVISIONS WITH RESPECT TO WARRANTS

This schedule sets out the provisions that apply in connection with warrants provided for in this Act.

The provisions of this part are based on the equivalent provisions under the DSSH Act. The provisions are standard and are consistent with warrant provisions in other Acts such as the *Security-sensitive Dangerous Substances Act 2005*.

An authorised officer who requires a warrant must comply with the provisions in the Schedule in making application.

SCHEDULE 2 – SAVINGS AND TRANSITIONAL PROVISIONS

Clause 1 Interpretation

In this Schedule the term commencement day is used to refer to the commencement of this Act, and former Act refers to the Dangerous Substances (Safe Handling) Act.

Clause 2 Authorised officer appointments

This clause preserves the appointment of authorised officers (and their identity cards) within the Department to avoid a need to remake the appointments. The appointments of persons outside the Department including police will have to be remade. The Department and the Police Service will undertake discussions to identify the most appropriate officers given the narrowed scope of this Act compared to the former Act.

Clause 3 Directions of authorised officers

Directions of authorised officers under the former Act but not complied with or cancelled are preserved.

Clause 4 Analysts

Analysts of explosives will have their authorisations preserved.

Clause 5 Review of Decisions

Applications for reviews of decisions made under the former Act may be lodged or continued as if the former Act had not been repealed.

Clause 6 Notification of adoption of codes, &c., by regulation

This provision will allow these documents to be transferred through to the new Act without having to repeat compliance with the notification requirements.

Clause 7 Savings and transition regulations

This provision allows regulations to deal with further matters of a savings or transitional nature, including continuations of licences, permits and so on.

Clause 8 Application of Acts *Interpretation Act 1931*

This clause clarifies that the provisions of this Act in no way affect the application of section 16 of the Acts Interpretation Act which deals with effects of repeals, expiries and so on.

SCHEDULE 3 – CONSEQUENTIAL AMENDMENTS

As mentioned at the beginning of these clause notes, the regime covered by the former Act will be covered in part by this Act and in part by regulations under the new WHS Act. In some instances, references to the former Act have been replaced solely to a reference under this Act, either because a reference to the new WHS Act will be made through the *Work Health and Safety (Transitional and Consequential Provisions) Act 2011*, or the context in which the reference is relevant to explosives only.

Building Regulations 2004

A reference to the former Act is replaced with a reference to this Act and the new WHS Act.

Dangerous Goods (Road and Rail Transport) Act 2010

A reference to the former Act is replaced with a reference to this Act and section numbers are updated.

Environmental Management and Pollution Control (Controlled Waste Tracking) Regulations 2010

Regulation 4(6) refers to a definition of “agvet chemical” in the former Act. This clause provides an alternative definition.

Environmental Management and Pollution Control (Waste Management) Regulations 2010

This clause also provides a definition of “agvet chemical”. It also replaces the name of the former Act with this Act and the new WHS Act, plus it updated a reference to a related Act with the current title of the relevant Act, being the *Dangerous Goods (Road and Rail Transport) Act 2011*.

Fire Service Act 1979

The above Act refers to “dangerous substance” as defined in the former Act. Because the term has not been used in either of the replacement Acts, a definition has been drafted for inclusion in the Fire Service Act, based on the definition in the former Act.

Gas Act 2000

Gas Pipelines Act 2000

Neither of these Acts require a replacement reference to the former Act.

Right to Information Act 2005

The above Act refers to “dangerous substance” as defined in the former Act. Because the term has not been used in either of the replacement Acts, a definition has been drafted for inclusion in the right to Information Act, based on part of the definition in the former Act. Because of the context in which the term is used, a more detailed definition is not required.

Security-sensitive Dangerous Substances Act 2005

References to the former Act have been replaced with references to this Act and the new WHS Act.

SCHEDULE 4 – LEGISLATION REPEALED

The former Act is repealed.

SCHEDULE 5 – LEGISLATION RESCINDED

This clause rescinds the Dangerous Substances Safe Handling Regulations 2009, which will be replaced by regulations under this Act for explosives and the new WHS Act for hazardous chemicals and major hazard facilities.

It also rescinds a number of Amendment Regulations to the former Regulations, which no longer have any currency.

SCHEDULE 6 – LEGISLATION REVOKED

This clause revokes a proclamation under the former Act.