



NSW MINERALS COUNCIL
PO Box H367
Australia Square, NSW 1215

T 02 9274 1400
nswmining.com.au
ABN: 42 002 500 316

Explosives Regulation 2021
Policy & Strategy, Better Regulation Division
NSW Department of Customer Service
4 Parramatta Square
12 Darcy Street
PARRAMATTA NSW 2150

By email: explosives@customerservice.nsw.gov.au.

20 August 2021

Feedback on *Explosives Regulation 2021*

NSW Minerals Council (NSWMC) appreciates the opportunity to provide feedback on the *Explosives Regulation 2021* (NSW) (Regulation). NSWMC represents the state's mining industry and has prepared this submission in consultation with our members but also with input from the Australasian Explosives Industry Safety Group (AEISG) who represent a range of explosives manufacturers.

Safety is the foremost priority of the mining industry. This is reflected in our strong safety performance that is underpinned by robust management practices and systems with regard to the transport, storage and use of explosives.

The uninterrupted and efficient supply of explosives is a critical input to ensure that the mining industry can continue to make its significant contribution to the NSW economy and communities.

The review of the *Explosives Regulation 2001* presents an opportunity to ensure that the supply and use of explosives is not unduly inhibited while facilitating their safe and proper use.

It is unfortunate that the Regulatory Impact Statement (RIS) has only assessed a limited range of reforms and has not taken the opportunity to harmonise with the work of the *Safe Work Australia Strategic Issues Group - Explosives* (SIG) and other explosives legislation in Australia.

Harmonisation would deliver improved safety outcomes, reductions in red tape and greater transparency and accountability in explosives management.



NSW MINERALS COUNCIL
PO Box H367
Australia Square, NSW 1215

T 02 9274 1400
nswmining.com.au
ABN: 42 002 500 316

Further, the RIS has failed to properly consider all of the flow on effects from the proposals that are considered. The impact of these failures is that potentially poorer safety outcomes could result which is inconsistent with the aims of the legislation.

The submission has been structured to address the relevant questions from the Regulator Impact Statement followed by other issues of concern. NSWMC trusts that this feedback will be considered in the review and would welcome the opportunity to meet to discuss this submission.

Yours sincerely

James Barben
DIRECTOR POLICY

1. How will the proposed classification of desensitized explosives as explosive precursors affect you or your business?

The proposal to classify desensitised explosives as explosives precursors has not been well considered or assessed in the RIS.

NSWMC has concerns regarding the classification of ammonium nitrate as an explosive precursor and foresees significant impacts across the sector should this go ahead.

This proposal could have significant impacts on sectors that are currently not subject to the explosives regulatory framework and particularly for those who operate across different jurisdictions

Significant consideration and thorough analysis of the proposal needs to be undertaken to ensure there are no unintended consequences or inconsistencies in the way the Regulation operates. For example inconsistencies may arise in the following clauses:

- Section 67(b) applies AS4326 (on the storage and handling of oxidizing agents) on all explosives precursors
- Section 81(1) requires all explosives precursors to be packaged and marked in accordance with the Australian Explosives Code (which covers Class 1 explosives)
- Section 97(1) also requires compliance with the Australian Explosives Code for persons driving a vehicle containing an explosive precursor.

The proposed change could impact a wide range of industries who have not been made aware of the proposed reforms to the Regulation including the paint, cosmetics and pharmaceutical sectors. These industries should be specifically consulted.

This proposal will also create further disharmony with other Australian jurisdictions and would be best considered and addressed in a nationally coordinated way.

NSWMC encourages that consideration of this proposal occur at a national level through a body such as the Australian Forum of Explosives Regulators prior to changes being made at a State or Territory level.

2. Should employees be required to tell their employer/principal contractor about changes to the status of their licence or security clearance? Is the proposed penalty commensurate with the offence?

NSWMC supports the proposal to require employees to notify their employer/principal contractor about changes to the status of their licence or security clearance as a valuable safety improvement to the explosives licencing framework.

The proposed penalty for failure to comply of 50 penalty units (\$5,500) is appropriate.

The Regulation could be enhanced by:

- Making mandatory the discretionary notification by the regulatory authority of the cancellation or suspension of a security clearance to a “supervising licence holder” (in clause 15(1) of the Regulation).

3. Do you support removing the requirement for NSW Police officers to hold security clearances?

NSWMC has no comment.

4. Are there any reasons why existing exemptions from requirements to hold a licence should not be extended to include the proposed exemptions from requirements to hold a security clearance?

NSWMC has no comment.

5. Are there any other instances where an exemption from requirements to hold a security clearance is appropriate?

NSWMC has no comment.

6. Are there any other amendments to the research and development process that need to be implemented? If so, what are they?

NSWMC has no comment.

7. Are there any reasons why police officers should not be exempt from a licence to store explosives for general duties in evidence handling in police stations? If so, what are they?

NSWMC has no comment.



8. Are the proposed restrictions of 12kg of propellant powder at a single residential address for firearms licence holders appropriate?

NSWMC has no comment.

9. Are any other explosives or items suitable for inclusion or exclusion from Table 1.1 within Clause 47 of the proposed Regulation? If so, what?

NSWMC has no comment.

9. Do you support transferring publishing requirements from the NSW Government Gazette to the SafeWork NSW Website?

NSWMC supports efforts to improve the transparency and availability of requirements including making them available on the SafeWork NSW website.

10. Are there any concerns with the expansion of restricting the transport of loads of HD 1.1, 1.2 and 1.5 explosives to all NSW road tunnels in alignment with 300-2 of the NSW Road Rules 2014?

NSWMC is not supportive of the proposal of restricting the transport of loads of HD 1.1, 1.2 and 1.5 explosives to all NSW road tunnels. This would have a significant impact on industry and detailed analysis and consideration is required before this is progressed.

Safety remains the paramount concern and it is envisaged that there may be circumstances in which travel through a short tunnel would be safer than alternative routes that transport the explosives through areas of high population density.

Any blanket requirement such as this proposal goes against the foundations of risk and outcomes based regulations. A risk assessment needs to be conducted on each of the tunnels to which this limitation is proposed to apply to understand the consequences in each specific circumstance.

In particular it is noted that clause 93(2)(b)(i) of the proposed Regulation restricts transportation of HD 1.1, 1.2 and 1.5 explosives in the central business district of Sydney, North Sydney, Penrith, Newcastle or Wollongong. This may conflict with the alternative being the use of a tunnel.

Other issues

National consistency

National consistency should be sought to be achieved in relation to the regulation of explosives in order to reduce regulatory burden.

The *Explosives Regulation 2021* provides an ideal opportunity to consider implementing previously developed proposals to assist in reducing inconsistencies in explosives legislation in Australia. In particular the work conducted and proposals put forward between 2012 to 2018 by the SIG with collaboration of industry organisations, state and territory jurisdiction and Safework Australia. For example, the mutual recognition of the classification of authorised explosives from other jurisdictions or under a corresponding law.

The current review of the Explosives Regulation does not demonstrate that a thorough analysis of other jurisdictions' explosives regulations has been conducted or that the existing or proposed NSW provisions have contemplated alignment with other jurisdictions.

Harmonisation would deliver improved safety outcomes, reductions in red tape and greater transparency and accountability in explosives management.

Interstate equivalents of security clearances

Currently, those operating in different jurisdictions are required to obtain security clearances in each jurisdiction. This creates inefficiencies and duplication.

Clause 19 of the Regulation sets out the requirements for persons that may be a responsible person for a corporation.

The Regulation could be enhanced by allowing persons that are authorised to handle explosives under a corresponding law to be a responsible person for the corporation.

Temporary suspension of security clearance

The Regulation could be enhanced by broadening the circumstances in which a security clearance may be suspended. Clause 13(1) of the Regulation only permits suspension of a

security clearance “for the purpose of carrying out an investigation to determine whether the security clearance should be cancelled”.

There may be circumstances where a temporary suspension may be required, for example where an employer wishes to seek medical evidence of a person’s continued suitability to hold a security clearance, which currently do not fall within the existing grounds of suspension.

Consultation requirements

Clause 7 of the Regulation provides that where more than one party has a duty under the Regulation, the duty is to be discharged in a coordinated manner. The Regulation could be enhanced by including an express obligation for parties with shared responsibilities to consult, cooperate and coordinate activities. Section 46 of the *Work Health and Safety Act 2011* (NSW) (WHS Act) could provide a frame of reference for this requirement.

For example, where licence holders with different types of licence under clause 21 (e.g. a supplier and a blasting explosives user) share duties, it may be an enhancement to have express obligations for these persons to consult, cooperate and coordinate to eliminate or minimise risks to health and safety.

Natural persons to hold corporation security clearance

Clause 19(2)(c) of the Regulation provides that a responsible person for the corporation must be a natural person who is concerned in the management of the corporation. The Regulation could be enhanced by amending this requirement so that the responsible person is employed or engaged by the relevant corporation and can make or participate in decisions of explosive handling and storage (without needing to be concerned in the management of the corporation).

Review provisions for refusing a licence

The Regulation could be enhanced by including an avenue for internal review of decisions to refuse to grant a licence. These should apply as a preliminary avenue prior to the review provisions under section 24 of the *Explosives Act 2003* (NSW).

The review mechanisms in Part 12, Division 2 of the WHS Act could provide a frame of reference for such a review mechanism.

Definition of using the explosives

Clause 28(1)(a) provides that a blasting explosives user's licence authorises the licence holder to:

using, at the premises or location specified in the licence, if any, the explosives or explosive precursors in the quantities specified in the licence,

It would be helpful if a definition was provided of what is envisaged to be included in "using" the explosives or explosive precursors.

Handling of explosives by inspectors and other authorised officers

Clause 44(1) of the Regulation provides:

An inspector or authorised officer is not required to hold a security clearance or licence to handle an explosive or explosive precursor during the person's duties as an inspector or authorised officer

There is no rationale for exempting an inspector or authorised officer from these requirements. The public would expect a form of clearance or check to be in place. This differs from the exemptions provided for those in the police as the police undergo other rigorous clearance processes.

Transport of explosives by private road

Clause 52(a) makes reference to a person not being required to be authorised, by a licence to transport by vehicle, to transport an explosive or explosive precursor by motor vehicle if the motor vehicle is travelling on a private road within an explosives site.

"Explosive site" is defined in the Dictionary to mean land on or in which explosives are stored. This does not take into consideration that there may be places where explosives are transported to for immediate use but not actually stored on site. The definition or this clause should be amended to take into account such situations.

This will assist in ameliorating the anomaly where there is an exemption for sites that store explosives, while there isn't an exemption for sites that transport explosives for immediate use (less risky).

Duty to comply with certain standards or codes

Clause 67 provides that a person who carries out an activity in relation to explosive precursors must ensure that the activity is carried out in compliance with the Australian Dangerous Goods (ADG) Code and the Australian Standard AS 4326 *The storage and handling of oxidizing agents*.

In practice there has been a variation in the standards that have been referenced by different regulators, at times going beyond the ADG Code and AS 4326. For clarity and consistency, it should be highlighted to regulators that the ADG Code and AS 4326 are the applicable standards to apply.

Compliance with Australian Explosives Code

Clause 69(2) of the Regulation provides that a person/persons involved in the transport of explosives must be trained in the relevant requirements of the Australian Explosives Code. The Regulation could be enhanced by allowing this obligation to be met by providing relevant information, instruction, training or supervision.

This provides clarity on how the obligation in clause 69(2) may be met and provides flexibility on the method of training suited to the particular circumstances of each case.

Most current security plan and safety management plan

Clauses 72 and 74 of the Regulation require a licence holder to comply with the licence holder's security plan and safety management plan. For clarity and to avoid confusion it would be helpful to make reference to the "most current" security plan and safety management plan.

Compliance with safety management plan

Clause 74 of the Regulation requires compliance with a safety management plan. The Regulation could be enhanced by qualifying this obligation so that the safety management plan must be followed so far as is reasonably practicable. The term "reasonably practicable" should be defined. Section 18 of the WHS Act could provide a frame of reference for the definition.

Written advice for emergency plans

Clause 93(2)(f) of the proposed Regulation provides that *"if the regulatory authority or the Commissioner of Fire and Rescue NSW gives the licence holder a written recommendation*



about the content or effectiveness of the emergency plan—the licence holder revises the plan in accordance with the recommendation”.

The current clause 90(2)(d)(ii) of the current Regulation provides that in the course of developing or reviewing an emergency plan the licence holder “has regard to any written advice received from the regulatory authority or the Commissioner of Fire and Rescue NSW”.

A requirement to have regard to any feedback is sufficient as this will allow the licence holder to consider all of the relevant factors to ensure the safest possible outcome. An external party may not have all relevant information at hand to develop the best solution.

Alternatively, it is recommended that clause 93(2)(f) is qualified by the advice needing to be followed so far as is reasonably practicable. This will help to avoid situations where there may be unintentional dangerous outcomes from the written recommendations that are not appropriate.