

EDO Submission to

Workplace Services

Department for Administrative and Information Services

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Proposal to Introduce a Dangerous Goods Act

Summary

We have come to this process a little late, but we understand that the review process is still under way. Accordingly, we wish to make the following submission.

The issues we wish to raise relate to public participation and public access to information about chemical use and storage. We have not commented on the more technical aspects of chemical regulation.

Our submission includes provisions providing for a public register of licences and notifications. As you will be aware, current provisions for community access to information are virtually non-existent. Certainly it is possible to obtain generic information about substances and their properties, toxicity etc. from Workplace Services and other sources, however our submission is that site specific information should also be available.

In addition to access to information, we believe that the legislation should also include rights of civil enforcement. Such rights are now a routine part of modern environment protection statutes:

- Environment Protection Act 1993 (s.104)

- Development Act 1993 (s.85)
- Water Resources Act 1997 (s.141)

The Environmental Defenders Office (EDO) is a community legal centre specialising in public interest environmental law. In that capacity, we are often asked by our clients how to obtain information about particular companies and their use, storage and transportation of dangerous chemicals. The best advice we can give is to "ask nicely" or use Freedom of Information Act.

The EDO has determined that the issue of "community right to know" is a campaign priority. We have previously succeeded in encouraging the EPA to improve access to information through its public register - in particular in relation to pollution monitoring data. We are now turning our attention to chemical use, storage and transport.

Protection of Health and Safety

Section 11 on the current Dangerous Goods Act provides for a general duty of care for persons who keep, handle, convey, use or dispose of dangerous substances or who transport dangerous goods. The obligation is to take such precautions and exercise such care as is reasonable in the circumstances in order to:

- *avoid endangering the health or safety of **ANY** person, or the safety of property; and*
- *prevent the risk of environmental harm.*

From a public policy perspective, it seems appropriate that those whose interests are protected by this legislation should have access to information concerning its administration.

Section 33 provides that an authorised officer may issue a notice to:

- *secure compliance with the requirements imposed under the Act, or conditions of a licence, accreditation or permit; or*
- *avert, eliminate or minimise any danger to the health or safety of a person, property or the environment that has arisen from an activity involving a dangerous substance*

Just as the public are the "eyes, ears and noses" of the EPA, there is great scope for the general public to be of assistance to Workplace Services staff in the administration of the Act. The ability of the public to report improper or dangerous dealings with chemicals is limited if access to information about the type, quantity or use of chemicals at a company level is not made accessible.

Application of Freedom of Information

It was suggested to us some years ago by an officer of your agency that any attempted use of the Freedom of Information Act to obtain details of individual licences or returns would be rejected on the grounds of commercial confidentiality.

Whilst we have not yet had occasion to test this claim, it seems to us that FOI is an inappropriate tool to access information that ought to be made publicly available as a matter of course.

The Environment Protection Act Public Register - A Comparative Model

In our submission, the public register provisions of the Environment Protection Act 1993 could be used as a model for a similar register in the Dangerous Goods Act.

The scheme of the present Dangerous Substances Act is to require licences for the possession, storage, use and transport of dangerous substances. The Environment Protection Act 1993 requires a licensing scheme for acts of environmental significance.

Section 109 of the EP Act requires the Authority to keep a public register. The register records certain mandated information such as copies of pollution licences and information provided at the discretion of the EPA. The Authority must ensure that this information is recorded as soon as practicable, but within three months after the information becomes available to the Authority.

The register is kept available for inspection by members of the public, on payment of a prescribed fee, during ordinary office hours at the principal office of the Authority. A copy of any part of the register may be obtained upon payment of a prescribed fee. In future, the Register will be searchable on-

line.

In our submission, a register under the Dangerous Goods Act should record similar information as the EPA register. This would include information regarding:

- 1. licence and notification applications and decisions;*
- 2. names and addresses of the holders and occupiers, locations at which operations will be undertaken and dangerous goods kept;*
- 3. any conditions placed upon the licence or notification;*
- 4. details of any suspension, cancellation, surrender or disqualification of a licence or notification;*
- 5. details of any incidents causing or threatening serious or material harm to the health and safety of persons, property or the environment;*
- 6. details of any orders issued under the Act;*
- 7. details of any enforcement measures issued under the Act;*
- 8. details of any civil proceedings, such as appeals, brought under the Act;*
- 9. details of what substances are to be used, handled, stored on site or transported to and from the site;*
- 10. details of the dangers associated with the use, handling, storage and transport of such substances;*
- 11. reports stating what quantities of dangerous substances were kept on the premises and issues related to management and control; and*
- 12. copies of any warnings issued in contravention of the Act.*

Policy rationale for Community Right to Know?

In our experience, agencies that do not have a culture of accountability to the public are often reluctant to open up their regulatory processes to outside scrutiny. Part of this reluctance is that regulatory functions are often regarded as inherently a technocratic process that the general public will not understand and cannot contribute to. It is also probably true that greater scrutiny is threatening for the regulators involved, who envisage legal challenges and "ministerials" flowing from every decision they make.

On the other hand, lack of public confidence in regulatory agencies largely stems from a lack of transparency.

The experience of agencies such as the EPA shows that

increasing access to information does not open the "floodgates" of litigation. Neither is the servicing of access arrangements particularly onerous.

Under United States Law, it is mandatory for a company to report the locations and quantities of more than 600 designated toxic chemicals stored on-site as well as the transport, use and disposal of those chemicals. Data is stored on-line in a publicly accessible national computerised Toxics Release Inventory. The enactment of the Emergency Planning and Community-Right-to-Know Act 1986 (USA) provided an opportunity for the public to be informed about chemical hazards in their area. This Act followed from widespread community concern over the world's worst industrial accident in Bhopal, India. In 1984 a Union Carbide accident saw the release of a deadly cloud of methyl isocyanate that killed approximately 6500 people.

The provision of information to the community gives citizens the chance to evaluate their local facilities and potential health risks to their community and determine how toxic chemicals are used.

The South Australian EPA has accepted the community's right to access pollution data forwarded by companies to the EPA as a condition of their pollution licenses. At a Commonwealth level, the development of the National Environment Protection Measure for the National Pollutant Inventory also recognises the importance of "community right to know".

Civil enforcement

Introducing requirements for "community right to know" regarding dangerous substances should be considered alongside civil enforcement rights. These rights enable third parties (often affected neighbours) to bring proceedings to restrain breaches or anticipated breaches of an Act.

The Environment Protection Act 1993, the Water Resources Act 1997 and the Development Act 1993 all provide for public participation in the enforcement of the Acts. We submit that these provisions provide a model for civil enforcement procedures that should be incorporated in the Dangerous Goods Act.

The Environment Protection Act and Water Resources Act

give broad (but not open) standing to bring a civil action in the Environment, Resources and Development Court. Applications to the court for an order must be made by a person whose interests are affected by the subject matter of the application, or a person who has the leave of the court. The Development Act differs in that it allows "any person" to bring an action.

In our submission, a provision similar to that contained in s.104 of the Environment Protection Act would be appropriate in the new Dangerous Goods Act. This provision is a potentially powerful tool when used in conjunction with the enforcement powers already exercised by departmental "authorised officers".

We should also point out that these provisions are rarely resorted to in practice. The EPA provisions are used on average once per year. What is important here is the right to bring appropriate actions. Whether that right needs to be used depends in part on the effectiveness of the regulatory agency. If the agency does its job properly, the provisions are rarely used.

We would recommend that the appropriate court to bring a civil enforcement action regarding dangerous substances is the ERD Court.

We would also submit that types of orders that can be applied for under the Dangerous Goods Act be similar to those under the Environment Protection Act, namely applications for an order to:

- restrain the person or company from engaging in conduct that is a contravention of the Act;*
- require the person or company to take any action that is required by the Act;*
- require the person or company to rectify any environmental damage caused by them or to mitigate any further environmental harm;*
- pay compensation to a person who suffered injury, loss or damage or any reasonable costs and expenses incurred by the person in taking action to avoid injury, loss or damage; and*
- pay exemplary damages for contravention of the Act.*

Conclusion

We appreciate that the formal public consultation period over the Discussion Paper may have expired, nevertheless, we ask that you give consideration to the issues raised in this submission. In our experience, concepts such as the ones raised here are better dealt with through the agency policy formulation stage than on the floor of Parliament.

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