

Explosives (Security Clearances and Other Matters) Amendment Regulation 2020

Explanatory notes for SL 2020 No. 170

made under the

Explosives Act 1999

General Outline

Short title

Explosives (Security Clearances and Other Matters) Amendment Regulation 2020

Authorising law

Section 135 of the *Explosives Act 1999* (Explosives Act)

Policy objectives and the reasons for them

The Explosives Act provides a framework for regulating the handling of, and access to, explosives to protect public health and safety, property and the environment. The Explosives Act establishes an authorisation framework, which requires a licence or permit (collectively referred to as an ‘authority’) for most explosives related activities in Queensland (e.g. import, export, manufacturing, sale, storage, transport, use, fireworks, etc.).

On 1 February 2020, a new security clearance regime came into effect under the Explosives Act to ensure only those persons who are assessed as suitable to have access to certain types of explosives do so. Under the regime, applicants for, or holders of, an authority associated with security sensitive explosives (referred to as a ‘security sensitive authority’) are required to hold a security clearance.

A security clearance can only be held by an individual, so the following applies in relation to security sensitive authority applicants and holders:

- for an individual—the individual must hold a security clearance
- for a listed corporation—a responsible person must be appointed, and that person must hold a security clearance
- for a corporation, other than a listed corporation—each executive officer must hold a security clearance
- for a partnership—each partner must hold a security clearance.

Security clearances must also be held by all employees of security sensitive authority holders who have, or will have, unsupervised access to explosives in the course of their employment. Employers have an obligation to ensure this requirement is complied with. Failure of a security sensitive authority holder to ensure the relevant persons associated with their authority (as outlined above) hold a current security clearance is grounds for suspension or cancellation of the authority. It is also an offence for a security sensitive authority holder to permit an employee who does not hold a security clearance to have unsupervised access to an explosive.

A security clearance is valid for up to five years. Existing security sensitive authority holders may be 'taken to hold' a security clearance under transitional arrangements for up to five years. The chief inspector of explosives (the chief inspector) issues successful security clearance applicants with a security clearance card as confirmation of the person's security clearance status. A security clearance card is a printed plastic card similar to that used for explosives occupational licences. A card is not issued for a security clearance under transitional arrangements.

The *Explosives Regulation 2017* (the Explosives Regulation) prescribes a fee to recover the cost of providing a copy of a licence to a holder. The fee as prescribed currently does not extend to cover copies of security clearances, even though a security clearance card is essentially the same type of plastic card as for a licence, with the same associated printing and administration costs. This is an omission from when the security clearance regime was introduced. Resources Safety and Health Queensland (RSHQ), which administers the Explosives Act and the Explosives Regulation, is a statutory body, which operates under a self-funding model. It is important that RSHQ's operating costs be appropriately recovered from those that benefit from a particular service.

The chief inspector is kept informed by Queensland Police regarding any changes to the criminal history or domestic violence status of a security clearance applicant or holder. Security clearance holders are also required to notify the chief inspector of a change in circumstance which effects, or may effect, the security clearance (e.g. if the holder is named as the respondent in a domestic violence order or police protection notice) and must return their card within 14 days if their clearance is suspended or cancelled.

However, a security clearance holder is currently not required to notify other persons (e.g. their employer) if their security clearance has been suspended, cancelled or surrendered. Further, while the legislation ensures the chief inspector is kept informed regarding a change in a security clearance holder's circumstances or change in clearance status; there are two matters that prevent the chief inspector informing applicable security sensitive authority holders. Firstly, the chief inspector does not keep security clearance holder employment records, so it is not known which security sensitive authority holder a security clearance holder is associated with. Secondly, the chief inspector is limited in the release of such information unless it meets disclosure requirements under the Explosives Act (e.g. such as being in the interests of public safety).

Given security sensitive authority holders have obligations to ensure certain persons associated with their authority hold a security clearance, it is essential that security sensitive authority holders are able to be informed regarding changes in the security clearance status of relevant persons associated with their authority. It is also essential that a mechanism to enable verification of the status of a person's security clearance be established that is independent of the card system, as cards are not issued for security clearances under transitional arrangements and because there can be a delay between the suspension or cancellation taking effect and the return of a card.

Given the potential for harm posed by the improper use of explosives, a complementary verification mechanism for explosives authorities is also warranted. For example, an employer would be able to verify if an employee (or potential employee) holds a current security clearance and the appropriate explosives licence for undertaking a particular role.

The policy objectives of the *Explosives (Security Clearances and Other Matters) Amendment Regulation 2020* (Amendment Regulation) are to:

1. require security clearance holders notify prescribed person(s) (e.g. their employer) as soon as practicable if the holder's clearance is suspended, cancelled or surrendered to ensure security sensitive authority holders are informed if the security clearance status of a person associated with their authority changes;
2. provide for a register of authorities and security clearances, and enable the disclosure and publication of register information, including online, to ensure essential details about an authority or security clearance (e.g. status) can be verified;
3. broaden the application of the existing 'copy of licence' fee to also apply for copy of 'security clearance' so the cost of providing a copy of a security clearance card to a holder is recoverable; and
4. repeal explosives security and transportation restriction provisions associated with the 2018 Commonwealth Games, as these are no longer required.

Achievement of policy objectives

The policy objectives will be achieved by:

- requiring security clearance holders to take all reasonable steps to notify the following persons as soon as practicable after becoming aware their security clearance has been suspended, cancelled or surrendered, unless the security clearance holder has a reasonable excuse:
 - for a holder who is an employee of a security sensitive authority holder—notify the employer
 - for a holder who is a responsible person for a listed corporation holding a security sensitive authority—notify each executive officer of the corporation

- for a holder who is an executive officer of a non-listed corporation holding a security sensitive authority—notify each other executive officer of the corporation
- for a holder who is a partner in partnership holding a security sensitive authority—notify each other partner
- requiring the chief inspector to keep a register of each authority and security clearance issued by the chief inspector, specifying the information to be kept in the register about each authority and security clearance, and clarifying that information kept in the register, other than restricted information (i.e. an individual's contact details and the circumstances surrounding the suspension, cancellation or surrender of an authority or security clearance) may be disclosed or published by the chief inspector, including online;
- broadening the application of the existing 'copy of licence' fee to apply in relation to 'copy of licence or security clearance' to ensure the cost of providing a copy of a security clearance card is recoverable from the beneficiary; and
- repealing redundant provisions associated with the 2018 Commonwealth Games.

The security clearance holder notification requirement provides appropriate flexibility by requiring the holder to take all reasonable steps to give notice to the person(s) prescribed, unless the holder has a reasonable excuse. Where all reasonable steps to notify have been taken by the holder, but the notification was either not achieved, or only partly achieved (e.g. not all prescribed persons were notified), the holder could still have fulfilled the notification requirement. Further, this proposal ensures only essential information is notified, by requiring the security clearance holder give notice only of the suspension, cancellation or surrender of their security clearance and not the reasons for, or circumstances surrounding, the suspension, cancellation or surrender of the clearance. Similarly, the register proposal explicitly prohibits the disclosure or publication of contact details of an individual and the circumstances surrounding the suspension, cancellation or surrender of an authority or security clearance.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the policy objectives of the authorising law, as it will help to regulate the handling of, and access to, explosives to protect public health and safety, property and the environment.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is not inconsistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

The policy objectives cannot be met except by regulatory amendment.

Benefits and costs of implementation

The proposal relating to broadening security clearance holder notification requirements is expected to benefit the explosives industry as security sensitive authority holders, who have obligations relating to employees and other persons associated with their authority, will have a legislative mechanism for being appropriately informed if the status of a security clearance holder associated with their authority changes. As a result, authority holders will be able to take necessary action to ensure they remain compliant with legislative requirements (e.g. if an employee's security clearance is suspended, the authority holder can ensure the employee only has supervised access to explosives while the suspension is in effect). The proposal is not expected to have any significant cost impact on industry or government.

The register proposal is expected to provide significant benefits for industry, particularly security sensitive authority holders, who will be able to verify whether a person associated with their authority holds a valid security clearance (including via an online portal once this function is enabled). Industry in general will also benefit from the register proposal, particularly as it will enable the chief inspector to disclose, to any person, certain authority and security clearance information by request (e.g. via phone or email). These changes will provide industry with the tools needed so they can comply with legislative requirements for ensuring safety and security of explosives.

The register proposal is not expected to have any significant cost impact on industry or government as it is an enabling provision, which provides for the disclosure and publication of register information. The register proposal also supports the future online publication of certain register information; however, implementation of an 'online register' is dependent on database functionality. In the short-term, online access to limited security clearance database information (e.g. status) is proposed via an online portal, for which no additional implementation costs are expected because the security clearance database supports limited online functionality and the proposed portal was included in the original database build budget. It is also proposed to provide future online access to limited information about explosives authorities.

The proposal relating to broadening the application of the existing 'copy of licence' fee to also apply for copy of 'security clearance' is expected to benefit both industry (general) and government. The change ensures the administrative costs to government associated with providing a replacement card is recoverable from the security clearance holder requesting the card.

Consistency with fundamental legislative principles

The Amendment Regulation is generally consistent with fundamental legislative principles. However, the Amendment Regulation potentially infringes the fundamental

legislative principle under section 4(2)(a) of the *Legislative Standards Act 1992* relating to the rights and liberties of individuals pertaining to the new security clearance holder notification requirements and register proposal.

Section 5 of the Amendment Regulation introduces new section 18BA (Persons to be notified if security clearance suspended, cancelled or surrendered), which includes three new offences, each with a maximum penalty of 200 penalty units. The three offences prescribe the bodies/individuals a person must notify if the person's security clearance is suspended, cancelled or surrendered.

The penalty unit amount is consistent with the existing and comparable offence in section 18B(2)(c) of the Explosives Regulation, which provides that the security clearance holder must notify the chief inspector in any of the following notifiable events occur:

1. the holder is charged with a relevant offence;
2. the holder is named as a respondent in a domestic violence order;
3. release conditions are imposed on the holder under the *Domestic and Family Violence Protection Act 2012*.

The penalty unit amount is also consistent with the section 135(5) of the Explosives Act, which provides that the Explosives Regulation may create offences and impose penalties of not more than 200 penalty units for an offence.

Section 8 of the Amendment Regulation introduces new section 47A (Register to be kept by chief inspector), which allows certain register information to be disclosed or published. Information that could potentially be disclosed, or published, by the chief inspector may be personal information under the *Information Privacy Act 2009* (e.g. a person's name, their authority or security clearance number, and the status of the authority or clearance). However, the Amendment Regulation specifically prevents the chief inspector from disclosing or publishing other personal information such as an individual's contact details and the circumstances surrounding the suspension, cancellation or surrender of an authority or security clearance. In practice, the disclosure or publication of information would be further limited to that which the chief inspector considers appropriate to allow industry (including employers) to check key authority or security clearance details (e.g. whether it is 'issued' or not, expiry date, etc.). Further, such information would be readily available to any person shown the holder's authority or security clearance.

Given the potential risk to public safety that could result from the misuse of explosives; the potential fundamental legislative principles infringement by the Amendment Regulation is considered justifiable; particularly, given that significant public-interest benefits associated with ensuring the appropriate bodies/individuals are notified if a person's security clearance is suspended, cancelled or surrendered, and the establishment of the register.

The proposed register is also consistent with other Queensland licencing regimes (e.g. driver's licence, electrical licence, building trades licences), which also feature an online mechanism for verifying licence status.

Consultation

In accordance with the *Queensland Government Guide to Better Regulation* (the guidelines), the Queensland Productivity Commission (QPC) was consulted regarding whether further regulatory impact analysis was required regarding the security clearance proposals. The QPC advised that the proposals are unlikely to result in significant adverse impacts and that no further analysis is required under the guidelines.

In accordance with the guidelines, the QPC was not consulted in relation to the regulatory proposal to repeal redundant 2018 Commonwealth Games provisions. RSHQ applied a self-assessable exclusion from undertaking further regulatory impact analysis (category (g) – Regulatory proposals that are of a machinery nature).

The Australian Explosives Industry Safety Group (AEISG) was consulted in relation to security clearance related amendments in mid and late 2019, February 2020 and provided with a consultation draft of the Amendment Regulation in April 2020. AEISG supported the intent of the regulatory amendments as they will improve security provisions and facilitate checking by authority holders. AEISG requested further information on two matters, which RSHQ provided. The notification requirement was also subsequently changed to provide greater notification flexibility for security clearance holders.