

# NSW Work Health and Safety Amendments

The impact on insurance coverage for penalties and fines





The human impact of an industrial death is traumatic and far-reaching. For the families and friends of those individuals killed at their place of work, the loss has a profound and lasting impact on their lives.

## What's changing?

Australia has recently seen a continuous debate surrounding Workplace Health and Safety Legislation, following a national review into Australia's model Work Health and Safety Laws. The review considered the appropriateness of insurance policies covering fines and penalties from offences committed under workplace laws. Subsequently, a recommendation has been proposed to prohibit insurance for WHS related penalties, by making it an offence to:

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model Work Health & Safety Legislation;
- provide insurance or a grant of indemnity for liability for a monetary penalty under the model Work Health & Safety Legislation; and
- take the benefit of such insurance or such an indemnity<sup>1</sup>.

Based upon the above recommendations, legislation is currently pending in NSW, to make it an offence to enter into a contract of insurance to cover liability or monetary penalties, or provide insurances or other indemnity arrangements, with respect to penalties pursuant to the Work Health & Safety Act 2011 (NSW) (NSW WHS Act). The proposed legislation will also make it an offence to take the benefit of such arrangements.

## Summary of the proposed changes

This paper outlines the proposed amendments to the NSW WHS Act, key drivers behind the proposed changes and their implications going forward.

### **Work Health and Safety (Amendment) Review Bill 2019 NSW (the Bill)**

The above Bill is presently before the NSW Parliament and is likely to be passed in the first half of 2020<sup>2</sup>. The proposed amendments make it an offence to:

- A. Without reasonable excuse<sup>3</sup> enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the NSW WHS Act;
- B. Provide insurance or a grant of indemnity for liability for a monetary penalty under the NSW WHS Act; or
- C. Take the benefit of:
  - A contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the NSW WHS Act; or
  - A grant of indemnity for liability for a monetary penalty under the NSW WHS Act;<sup>4</sup>

The maximum penalties applicable to the above are:

- For (A) \$25,000 for an individual and \$125,000 for a body corporate; and
- For (B) and (C) for an individual \$50,000 and \$250,000 for a body corporate<sup>5</sup>.

The amendments also make it an offence for an officer of a body corporate to:

- A. Aid, abet, counsel or procure the commission of an above offence by the body corporate;
- B. Induce, whether by threats or promises or otherwise, the commission of an above offence by the body corporate;

<sup>2</sup> The NSW Parliament resumes sitting in late February 2020.  
<sup>3</sup> Neither the proposed legislation nor its explanatory memorandum give guidance as to what is considered a 'reasonable excuse'.  
<sup>4</sup> Proposed section 272A of the Work Health and Safety Act 2011 NSW  
<sup>5</sup> All the penalties referred to above only apply for financial year 2019-20. It is expected that these monetary funds will be written as penalty units to ensure they reflect inflation rates.

<sup>1</sup> Review of the model Work Health and Safety laws: Final Report - December 2018 (page 5, page 16, page 137)

- C. Conspire with others to effect the commission of an above offence by the body corporate; or
- D. In any other way, whether by act or omission, knowingly be concerned in, or a party to, the commission of an above offence by the body corporate.<sup>6</sup>

A penalty of up to \$125,000 will apply to officers found in breach of these prohibitions.

There will also be an increase in the monetary penalties payable under the NSW WHS Act. For example, the maximum penalty for ‘a person conducting a business or undertaking (PCBU) convicted of a Category 1 offence will increase from \$3,000,000 to \$3,463,000’.<sup>7</sup>

The PCBU has the primary duty of care to ensure the health and safety of workers while they’re at work in the business or undertaking. This means a PCBU is responsible for ensuring work carried out does not carry risk to the health and safety of others.

**Notably, there is no prohibition in respect of indemnity for legal costs incurred in defending a WHS prosecution or during an investigation.**

The proposed amendments include a transitional provision, providing that a person does not commit an offence against the proposed section 272A for providing insurance or a grant of indemnity, or for taking the benefit of such insurance or arrangement, if the insurance or indemnity was in force before the commencement of the proposed section 272A and any payment made under the insurance or indemnity is not in relation to a penalty for an incident that occurred after the commencement of the proposed section 272A<sup>8</sup>.

**Consequently, an offence will be committed under the proposed section 272A in relation to a liability for a monetary penalty for an incident that occurred after the commencement of section 272A, notwithstanding that the relevant policy of insurance was entered into before the commencement of section 272A.**

## How we got here

### i. Work Health and Safety Harmonisation

In 2011, the Commonwealth Parliament passed the Work Health and Safety Act 2011(Cth) (“WHS Act (Cth)”). One purpose of the WHS Act (Cth) was to provide for the harmonisation of Work Health and Safety legislation across Australia. Since 2011 the majority of States and Territories have adopted versions of the WHS Act (Cth).<sup>9</sup>

Neither the WHS Act (Cth), nor any equivalent State or Territory legislation expressly dealt with the issue of insurance cover for fines and penalties imposed for breaches of the legislation. As a result, coverage for such fines and penalties was essentially subject to the common law rules in relation to the insurability of such fines and penalties.

Since 2013, judicial, legal and academic commentators have questioned whether fines and penalties for breaches of Work Health and Safety legislation should be insurable in Australia. This led to a number of reviews which in whole or part examined this question. In particular: the 2018 Review of the Model Work Health and Safety Laws undertaken by Ms Marie Boland on behalf of Safe Work Australia; and Senate Education and Employment Committee inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia.

### ii. 2018 Review of the Model Work Health and Safety Laws undertaken by Ms Marie Boland on behalf of Safe Work Australia (the Boland Review)

In 2018 Ministers responsible for WHS asked Safe Work Australia to complete an in-depth review on the model WHS laws (both the Act and the Regulation). This review identified 34 recommendations to improve the model WHS law, however, Ms. Boland recognised that the model WHS laws were largely operating as intended.

The 34 recommendations listed in the review included a focus on penalty levels, sentencing guidelines and prohibiting access to insurance for Directors and Officers (who have personal liability to comply with WHS laws).

Ms. Boland considered a number of previous reviews completed on the WHS laws, specifically the Senate’s inquiry into industrial deaths. The Senate’s inquiry also questioned the value of financial penalties given the availability of insurance for Directors and Officers.

On 18 February 2018 a Discussion Paper which called for written submissions was published.

<sup>9</sup> Work Health and Safety Act 2011 (ACT), Work Health and Safety Act 2011 (NSW), Work Health and Safety (National Uniform Legislation) Act 2011 (NT), Work Health and Safety Act 2011 (Qld), Work 7 Health and Safety Act 2012 (SA), and Work Health and Safety Act 2012 (Tas). Victoria and West Australia did not adopt the uniform legislation, retaining the Occupational Health and Safety Act 2004 7 (Vic) and Occupational Safety and Health Act 1984 (WA) respectively.

**The Discussion Paper posed a number of questions including:**

*“Question 37: Have you any comments on the availability of insurance products which cover the cost of WHS penalties?”*

In relation to the above, a number of submissions commented on this question, expressing concern as to availability of insurance products which cover WHS penalties and that the model WHS Act should expressly prohibit insurance contracts which indemnify, or purport to indemnify, against penalties imposed for WHS breaches.

The Final Report of the Boland Review recommended, amongst other things that:

*“The model WHS Act make it an offence to:*

- *Enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act;*
- *Provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act; and*
- *Take the benefit of such insurance or such an indemnity.”*

One of the reasons given for this recommendation was that insurance policies which cover the fines of those found guilty of breaching the model WHS Act have the potential to reduce compliance with the laws and undermine community confidence.

### iii. Senate Education and Employment Committee inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia

This Inquiry commenced in March 2018 and submissions closed on 6 June 2018. The Committee reported on 17 October 2018.

The Terms of Reference did not include any express request for commentary on the availability of insurance cover in relation to WHS breaches; however a number of submitters used the Terms of Reference in relation to ‘any related matters’ to comment on this issue.<sup>10</sup>

The Committee Report made the following comments in relation to insurance cover for WHS breaches:

*“The Committee finds it utterly reprehensible that insurance policies are available to insure corporations and individual directors against financial penalties handed down for breaches of WHS legislation.*

*As numerous submitters identified, to have such policies available significantly undermines the deterrence value of the penalties. Companies that take out this directors and officers insurance show an inexcusable disregard for the consequences of their actions, and the Committee finds this behaviour appalling.*

<sup>10</sup> See for example the comments of Industrial Magistrate Lieschke in *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22.

<sup>6</sup> Proposed section 272B of the Work Health and Safety Act 2011 (NSW)

<sup>7</sup> Proposed clause 27 of Schedule 4 to the Work Health and Safety Act 2011 (NSW).

<sup>8</sup> Proposed clause 27 of Schedule 4 to the Work Health and Safety Act 2011 (NSW).

Given that the prospect of personal liability for WHS breaches is one of the core drivers for the improvement of corporate safety, the Committee is of the view there is an urgent need for reform to resolve this issue. It is of the strong opinion that the model WHS legislation must be amended to make clear that contracts which purport to offer insurance against criminal penalties are unenforceable and illegal.”

The Committee recommended that Safe Work Australia work with Commonwealth, State and Territory governments to:

- Amend the model WHS laws to make it unlawful to insure against a fine, investigation costs or defence costs where they apply to an alleged breach of WHS legislation; and
- Pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process’.

## What are the implications if these amendments become law?

When passed, the amendments will impact any policy that purports to provide cover for monetary penalties imposed for a breach of the NSW WHS Act.<sup>11</sup>

As the proposed amendments essentially make it illegal for an insurer to provide insurance or a grant of indemnity for liability for a monetary penalty under the NSW WHS Act, it is arguable that such a monetary penalty is therefore uninsurable, in which case it is also arguable that no amendment is needed to existing policies to expressly deal with the proposed changes as no policy can cover uninsurable losses. Notably, most policies already exclude matters uninsurable at law or matters for which the insurer is prohibited from paying by law or regulation.

<sup>11</sup> For example, Statutory Liability policies, Directors and Officers policies and some Professional Indemnity policies.

Notwithstanding the above it may be prudent to amend policies to expressly exclude cover for WHS Act fines and penalties for the absolute avoidance of doubt in light of the fines that attach for any purported breach of the amendments. Given that the transitional provision only applies to policies of insurance in force prior to the commencement of the proposed section 272A, in relation to a penalty for an incident that occurred before the commencement of the proposed section 272A, it may be necessary to make such an amendment mid-term.

Importantly, as the proposed amendments only refer to monetary penalties, it should not impact cover for defence costs or inquiry costs in relation to a WHS prosecution or inquiry<sup>12</sup>. This is significant since:

- without sufficient resources, an individual may not be able to properly defend allegations made against him or her;
- inquiries (such as Royal Commissions) or investigations by regulators can often result in adverse findings and give rise to civil or criminal proceedings against individuals.

For Directors and Officers, D&O policies have played a fundamental role in a variety of workplace health and safety matters. The proposed amendments could have a significant impact on individuals, particularly those with a prominent role in an organisation such as directorship. In line with these changes, they would be personally liable for any penalties imposed due to the failure of exercising their obligations and responsibilities to avoid such matters.

<sup>12</sup> Note the Senate Education and Employment Committee inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia recommended that 11 the model WHS laws make it unlawful to insure against defence costs and investigation costs as well as fines, where they apply to an alleged breach of WHS legislation.

## HOW CAN MARSH HELP?

Marsh’s team of workplace risk consultants can provide advisory services to help organisations understand their WHS obligations and requirements, as well as develop risk management strategies to ensure abidance with relevant legislation. Marsh has established and maintains a national team of Exemplar Global accredited auditors, providing organisations with experienced professionals to review and evaluate the effective of WHS management systems and procedures. These solutions will help to ensure compliance with applicable laws, whilst supporting company directors to make the necessary decisions to run their business without the concern of breaching WHS policies.

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