

Work Health and Safety (Amendment) Review Act 2020 (NSW) & Work Health and Safety Act 2019 (WA)

Impact on specific classes of insurance



SITE SAFETY



No admittance
for unauthorised
personnel



This is a
hard hat area



Protective
footwear
must be worn



High visibility
jackets
must be worn

New South Wales update

On 10 June 2020, amendments to the **Work Health & Safety Act 2011 (NSW)** (“the NSW Act”) under the **Work Health and Safety Amendment (Review) Act 2020 (NSW)** (“the NSW Amending Act”) commenced, with one of the key updates making it an offence to:

- enter into a contract of insurance or other arrangement;
- provide insurance or a grant of indemnity; or
- take the benefit of such contract of insurance, other arrangement or grant of indemnity

covering a monetary penalty under the NSW Act.

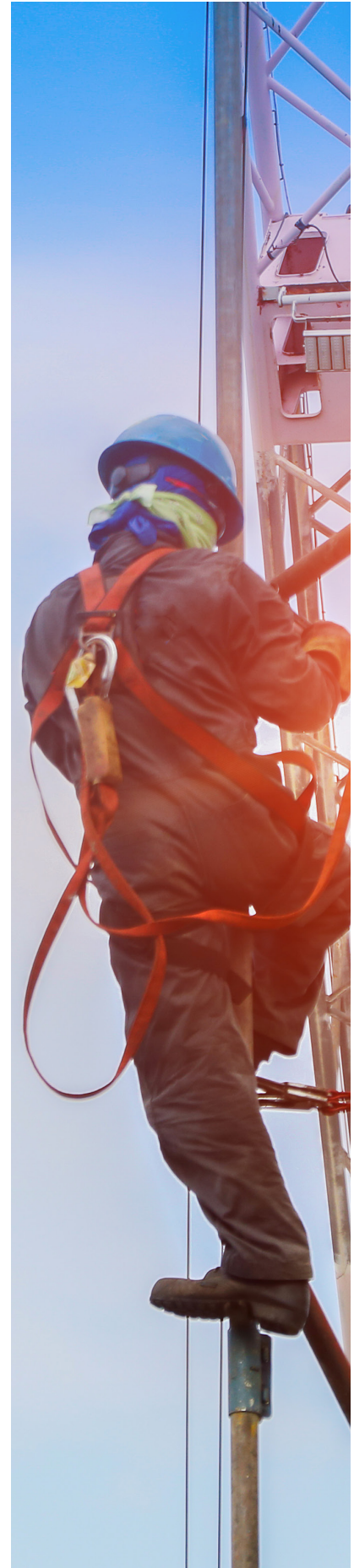
Notably, there is no prohibition in respect of indemnity for legal costs incurred in defending a WHS prosecution or during an investigation.

Western Australia update

Western Australia has now followed NSW’s lead by passing the **Work Health and Safety Act 2019 (WA)** (“the WA Act”), which received Royal Assent on 10 November 2020. The WA Act replaced previous WHS legislation and, amongst other things:

- provides that an insurance policy is of no effect to the extent that it would indemnify a person for the person’s liability to pay a fine for an offence against the WA Act;
- makes it an offence for a person to:
 - enter into, or offer to enter into, an insurance policy that purports to indemnify a person for the person’s liability to pay a fine for an offence against the WA Act; or
 - indemnify, or offer to indemnify, another person for the other person’s liability to pay a fine for an offence against the WA Act; or
 - be indemnified, or agree to be indemnified, by another person for a liability to pay a fine for an offence against the WA Act; or
 - pay to another person, or receive from another person, an indemnity for a fine for an offence against the WA Act.¹

The WA Act will likely come into effect in 2021. Notably, the WA Act will make an insurance policy void to the extent that it would indemnify a person for the person’s liability to pay a fine for an offence against the WA Act.



¹ Section 272A of the WA Act.

Impact on specific classes of insurance

Further to our [earlier update](#), this paper further outlines the potential implications on specific classes of insurance which are likely to be impacted by the NSW Amending Act and the WA Act.

Only policies that cover statutory fines and penalties for work health and safety breaches in NSW and WA should be impacted by this legislation. They should only be impacted to the extent they provide cover for such fines and penalties. As noted above, there is no prohibition in respect of indemnity for legal costs incurred in defending a WHS prosecution or during an investigation. In addition, to the extent that a policy covers:

- fines and penalties under other NSW or WA legislation; or
- fines and penalties under the acts of other states, territories or the Commonwealth of Australia, including those for work health and safety breaches,

the NSW Amending Act and WA Act should not impact such cover.

It is important to note, however, that coverage for fines and penalties and criminal acts generally is and has always been subject to the question of insurability. It is a general principle that insurance is not available where the loss is uninsurable at law (whether the policy provides such a term or not). This would include any policy that purports to indemnify a person against criminal liability if the crime is committed with guilty intent or with reckless indifference. Any insurance contract purporting to insure against such risks may be void and unenforceable, at least in part. This is for reasons of public policy on the basis that a person may not benefit from his/her own wrong and, by extension, may not be indemnified against the consequences of that wrong.

Directors' and Officers' (D&O) Liability Insurance

Many D&O policies cover fines and penalties imposed upon an Insured Person because of breach of statute. Generally, in order for cover to be provided, such fines and penalties must arise from an act, error or omission committed or omitted whilst acting in the Insured Person's organisational capacity.

The cover provided with respect to a WHS breach may be limited by a bodily injury or fraud and dishonesty exclusion.

The NSW Amending Act and WA Act will impact the above cover for fines and penalties to the extent that any D&O policy purports to cover monetary penalties imposed for a breach of the NSW and WA Acts respectively. Such monetary penalties will no longer be covered under D&O policies.

Statutory Liability Insurance

Statutory Liability policies are essentially designed to cover fines and penalties imposed upon Insured Persons and an Insured Entity arising out of breach of statutes.

As a result, the NSW Amending Act and WA Act will impact the cover provided by Statutory Liability policies such that monetary penalties imposed pursuant to the NSW and WA Acts will no longer be covered under Statutory Liability policies.

Management Liability Insurance

Most Management Liability policies include directors and officers and/or statutory liability cover. These will cover fines and penalties of Insured Persons (pursuant to either the directors and officers or statutory liability cover) and Insured Entities (pursuant to the statutory liability cover).

The NSW Amending Act and WA Act will impact upon these covers in the same way as set out above under D&O and Statutory Liability.

Profession Indemnity (PI) Insurance

Many PI policy wordings exclude fines and penalties. Those that do provide some cover often refer to compensatory civil penalties. Such PI policies should not be impacted by the NSW or WA Acts, as they generally do not provide cover for the types of penalties imposed pursuant to the NSW or WA Acts.

Some PI policies do provide cover for civil fines and penalties. There are a number of civil fines imposed pursuant to the NSW Act. However, many of the civil penalties imposed are unlikely to be imposed upon a company or director, officer or employee. (Many are imposed upon a WHS entry permit holder.) Civil penalties that may be imposed upon a company or director, officer or employee include:

- Refusing or delaying, without reasonable excuse, a WHS entry permit holder from entering a workplace;
- Intentionally or unreasonably hindering or obstructing a WHS entry permit holder from entering a workplace or in exercising any rights at a workplace;
- Taking action with the intention of giving the impression, or being reckless as to whether the impression is given, that the doing of a thing is authorised by Part 7 of the Act (which sets out the requirements for WHS entry permit holders), if it is not so authorised;

- Unauthorised use or disclosure of documents; and
- Contravention of an order made by an authorising authority made to deal with a dispute.

Cover for such civil penalties may be limited by any deliberate or intentional act exclusion found in the relevant PI policy. To the extent that they are not, then the NSW Act will likely prevent cover for such penalties.

The WA Act refers to fines for an offence against the WA Act. This may not encompass any civil penalties under the WA Act.

Employment Practices Liability (EPL) Insurance

A number of EPL policies provide cover for fines and penalties arising from an employment related wrongful act. To the extent that a monetary penalty under the NSW Act or a fine for an offence under the WA Act arises from an employment related wrongful act, the NSW and WA Acts respectively will likely prohibit cover for such a fine or penalty.

Cyber Insurance

Most Cyber policies will cover fines and penalties resulting from events such as unauthorised system access, electronic attack and privacy breach.

Most Cyber policies include a bodily injury exclusion, often with a write-back in relation to mental injury or emotional distress.

To the extent that a monetary penalty under the NSW Act or a fine for an offence under the WA Act arises from an event giving rise to cover under a Cyber policy, the NSW and WA Acts respectively will likely prohibit cover for such a fine or penalty.

Crime Insurance

Crime policies principally cover the Insured for loss of money, securities or other property. Such cover is usually subject to such loss occurring as a result of the dishonesty or fraud of, or theft by:

- An employee; or
- A third party, either:
 - On the Insured's premises;
 - Whilst the money securities or property is in transit;
 - Through forgery or fraudulent alteration;
 - Through computer fraud or fraudulent funds transfer;
 - Through erroneous funds transfer; or
 - Telephone toll fraud.

As a result, most Crime policies typically do not cover fines and penalties; in fact, many expressly exclude such cover. Those that do provide such cover usually also require such a fine or penalty to result from direct financial loss of the Insured. It is unlikely that a monetary penalty under the NSW Act or a fine for an offence under the WA Act will be such a fine or penalty.

Where to from here

As described in this paper, the changes under the NSW Amending Act and WA Act have and will have a significant impact upon the coverage provided by a number of classes of insurance. It is arguable that a monetary penalty under the NSW Act is now uninsurable, and will be uninsurable under the WA Act once it comes into force, 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 claims for which the insurer is prohibited by law or regulation from indemnifying.

Notwithstanding the above, it may be prudent to amend policies expressly to exclude cover for NSW and WA Act fines and penalties where such cover is impermissible under the NSW and WA Acts, for the absolute avoidance of doubt so that the coverage limits set out in the policy's express terms are more clear, and in light of the fines that may attach for a purported breach of the respective Acts.



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.

For more information about the implications of these amendments on the insurance classes discussed in this paper, please contact:

DAVID CAPPER
T: +61 2 8864 8844
M: +61 420981256
david.capper@marsh.com

Alternatively, if you'd like to set up an appointment with our experienced Workplace Risks Consultants to audit your WHS systems, please contact:

KRISTY NICHOLSON
T: +61 2 8864 8214
M: +61 420 308 490
kristy.nicholson@mercermarshbenefits.com

Please note: This paper (the 'Marsh Analysis') is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Statements concerning legal matters are based solely on our experience as insurance brokers and risk consultants and are not to be relied upon as legal advice for which you should consult your own professional advisors. Any projections are subject to inherent uncertainty, and the Marsh Analysis could be materially affected if any underlying assumptions, conditions, information, or factors are inaccurate or incomplete or should change. The information contained herein is based on sources we believe reliable, but we make no representation or warranty as to its accuracy. Except as may be set forth in an agreement between you and Marsh, Marsh shall have no obligation to update the Marsh Analysis and shall have no liability to you or any other party with regard to the Marsh Analysis. Marsh makes no representation or warranty concerning the application of policy wordings, and makes no assurances regarding the availability, cost, or terms of insurance coverage.