

NEW NSW WORKPLACE SAFETY LAWS PROHIBIT INSURANCE AND OTHER INDEMNITY AGAINST WHS FINES

Overview of changes

On 4 June 2020, the NSW Minister for Better Regulation and Innovation, Kevin Anderson announced proposed amendments to the [Work Health and Safety Amendment \(Review\) Bill 2020](#) (the **Bill**) that are aimed to make it easier to prosecute certain offences which can lead to prison time and increase fines for breaches of the [Work Health and Safety Act 2011](#) (the **WHS Act**).

Of major relevance to the insurance industry, is that the Bill will make any form of insurance to cover penalties for work health and safety offences under the WHS Act illegal and make it an offence for a person:

- without reasonable excuse, 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 WHS Act [Maximum penalty - individual - 250 penalty units (\$25,000) and body corporate - 1,250 penalty units (\$125,000)]; or
- to provide insurance or grant indemnity for liability for a monetary penalty under the WHS Act; or
- to 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 WHS Act, or
 - a grant of indemnity for liability for a monetary penalty under the WHS Act [Maximum penalty for the last two offences is - individual—500 penalty units (\$50,000) and body corporate-2,500 penalty units (\$250,000)]

(s272A)

Where a body corporate that breaches the above, an officer of that company can also breach if they aid, abet, counsel or procure the commission of the offence, or induce, whether by threats or promises or otherwise, the commission of the offence, or conspire with others to effect the commission of the offence, or is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the offence
Maximum penalty—1,250 penalty units (\$125,000).

(s272B).

The value of a penalty unit will be set at \$100 for 2019-20, and will increase every year.

As at 4 June 2020, the Bill has been passed by both houses and is awaiting assent. The provisions have effect from the date of assent.

As at 9 June 2020, the Bill is still awaiting assent.

For a contract of insurance or other arrangement, or a grant of indemnity for liability, mentioned in section 272A that is in force immediately before the commencement on assent, there will only be a breach to the extent any payment made under the arrangement is not in relation to a liability for a monetary penalty under the WHS Act for an incident that occurred after the commencement of s272A.

Why were the changes made?

Following the Senate inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, the Education and Employment References Committee released a report, entitled [*They never came home- the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*](#). In the report, the Committee was concerned about the availability of insurance for directors against penalties, the Committee:

- found it utterly reprehensible that insurance policies were available to insure corporations and individual directors against financial penalties handed down for breaches of WHS legislation;
- was of the view that having such policies available significantly undermined the deterrence value of the penalties and companies that took out this kind of insurance showed an inexcusable disregard for the consequences of their actions, and the committee found this behaviour appalling;
- noted that given that the prospect of personal liability for WHS breaches is one of the core drivers for the improvement of corporate safety, there was an urgent need for reform to resolve this issue and was 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 be made unenforceable and illegal.

The Committee recommended Safe Work Australia to 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.

During the [second reading speech](#) of the Bill, the Minister for Better Regulation and Innovation, Kevin Anderson, made the following comment regarding the new offences relating to insurance or indemnity arrangements:

If a company commits the new offence, its officers may also be liable. Both the 2018 review and the Senate report strongly condemned the availability of this insurance, and found that it had the potential to seriously undermine the deterrent power of the Act. If those who breach work health and safety duties are able to escape the consequences of their actions, their incentive to take those duties seriously is substantially lessened. The new offences will put an end to the practice of insuring for liability for work health and safety offences, and contribute to creating a strong health and safety culture in New South Wales workplaces.

Practical impact of the changes

The prohibition is broadly drafted and would appear to at least catch insurance, corporate indemnities and discretionary arrangements.

Insurers will need to amend any new policies to be issued post commencement to remove any such prohibited cover.

Existing pre assent policies do not need to be amended but it appears that an insurer is prohibited by law from paying under an existing policy for a post assent incident.

Premium adjustments may need to be considered along with communications to insureds.

Insurance brokers will need to ensure they do not arrange such insurance or other arrangements for their clients on an ongoing basis from assent or arrange for any payments in breach of the Act under existing arrangements. Communication to clients may need to be considered

Employers will need to ensure they do not have such insurance or other arrangements and avoid breaches in relation to existing arrangements for post assent incidents.

Similar legislation in other states

Other than NSW, Western Australia appears to be the only state in Australia that has similar proposals.

The [Work Health and Safety Bill 2019 \(WA\)](#) was first introduced on 27 November 2019. On 20 February 2020, the Bill was presented to the Legislative Assembly for a third reading and to the Legislative Council for a second reading.

As at 9 June 2020, there had been no updates on the progress of the Bill.

Section 272A in the WA Bill is similar to section 272A in the WHS Act. There is no equivalent provision to s272B of the NSW WHS Bill regarding officers.

There is also no transitional provision in the WA Bill. It does however provide that an insurance policy is of no effect to the extent that, apart from s272A, it would indemnify a person for the person's liability to pay a fine for an offence against the Act.

Clause 272A in the Bill provides that an insurance policy to be of no effect to the extent that it purports to indemnify a person against their liability to pay a fine under the Bill. Elements of an insurance policy that do not relate to insurance or indemnification against fines will continue to apply.

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