WA's new workplace health and safety laws – the importance of a 'global' approach to WHS incidents

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AT A GLANCE

- In 2020, the Western Australian (WA) Parliament passed the *Work Health and Safety Act 2020 WA* (WHS Act) to replace the *Occupational Safety and Health Act 1984* (WA) (OHS Act).
- The WHS Act came into effect on 31 March 2022 following the commencement of its supporting legislation, the *Work Health and Safety Regulations 2022* (WA) (Regulations).
- The WHS Act and Regulations are broad reaching and will apply to most workplaces in Western Australia, including mines and petroleum and geothermal energy operations.
- From an insurance perspective, the major change is that WHS penalties are no longer insurable and that it is an offence to enter into a policy agreement that contains an indemnity for WHS penalties. There are fines of up to $255,000 for doing so.
- In the context of a strengthened regulatory framework, there is the potential for a rise in prosecutions.
- This makes it important to take a 'global' approach to managing WHS-related claims if a WHS incident occurs – from investigation to prosecution and the likely common law actions that will result 'down the track'.

KEY FEATURES OF THE WHS ACT

WA's harmonised work health and safety (WHS) laws are intended to improve the protection of workers by factoring in modern employment agreements and higher penalties for companies and individuals. The *Work Health and Safety Act 2020 WA* (WHS Act) reflects the sentiment of Premier Mark McGowan when he said: "Every worker has the right to come home safely from work each day."

The harmonised laws are clearer, more encompassing, and now found in one comprehensive Act and set of Regulations. Some of the key features of the WHS Act include:

- the prohibition of insurance coverage for fines
- the introduction of industrial manslaughter laws, which can attract up to 20 years' jail for individuals and a $10 million fine for a body corporate
- the introduction of the broader concept of a 'person conducting a business or undertaking' (PCBU), which has replaced the concept of an 'employer'
- broader definitions of a worker as any person who carries out work for a PCBU
- broader investigative powers for the regulator
- the introduction of enforceable undertakings as an alternative to penalties
- significantly increased maximum penalties and enforcement measures, and
- due diligence obligations for officers of PCBUs.

These key features suggest that the reform will strengthen the work health and safety regime in WA. As a result, it is likely insureds will face a greater risk of prosecution and more severe penalties.

INSURANCE IMPLICATIONS

The major insurance change with the harmonised WHS laws is that WHS penalties are no longer insurable. This brings WA law into line with other WHS legislation around the country, including in NSW and Victoria.

However, unlike some other jurisdictions, WA has not created a 'grace period'. In WA, historical policies with terms providing cover for fines and penalties with claims currently on-foot will not be eligible for fines and penalties indemnity. Section 272A(2) effectively means these terms became void on 31 March 2022, when the Act commenced. It also means any renewed policy terms should not contain an indemnity for WHS penalties as it is now an offence to do so, with corporate fines of up to $255,000.

While penalties cannot be insured, it remains possible to obtain cover for legal and defence costs incurred by an organisation or by a person at both the investigation and prosecution stages.

Insurance options for defence costs can be included within:

- a directors & officers (D&O) policy
- a statutory liability policy
- a specific WHS statutory policy, and/or
- a composite general liability policy.

Identifying which policy or policies to notify under when a claim arises is critical, as is determining whether separate representation is required for officers and the company itself.

TAKING A GLOBAL APPROACH TO MANAGING WHS-RELATED CLAIMS

If a critical incident occurs at a workplace, there are a raft of legal and insurance issues that consistently arise – all of which need to be considered from a 'global perspective'. WHS incidents are multi-faceted and often lead to a range of claims faced by an insured business, including:

- WorkSafe investigation
- coronial inquests
- deceased estate claims
- nervous shock claims by witnesses and families
- personal injury claim(s) / workers compensation
- property damage claim(s)
- contractual claims by other entities, and/or
- WorkSafe prosecution.

It is imperative that a clear strategy is put in place at the outset to ensure that a holistic approach is adopted in managing these incident-related issues to ensure the best outcome for insurers, brokers, and their insured clients.

WHS INVESTIGATION

Following a serious incident, investigations under the WHS Act are conducted by the WorkSafe Commissioner (Commissioner) with the assistance of the Department of Mines, Industry Regulation and Safety.

The main role of a WHS investigation is to:

- determine the causes of an incident
- collect, record and examine all relevant evidence, including interviewing witnesses
- assess compliance with WHS laws, and
- determine what action may be appropriate to enforce compliance with WHS laws.

If there is a notifiable incident, the Commissioner may appoint an inspector to investigate it. Under the WHS Act, an investigator has a broad range of powers, including, but not limited to, the power to:

- enter a workplace with or without the consent of the person with management or control of the workplace
- seize and inspect and examine anything (including documents) at the workplace
- seize dangerous workplace things, and
- interview any person and require them to answer the questions the inspector puts to them.

It is important to note the WHS Act does not entitle an individual to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person. However, a limited right for individuals to claim the privilege is preserved.

That is, any answer will not be admissible as evidence against that individual in civil or criminal proceedings (other than proceedings arising out of the false or misleading nature of the answer, information or document) (s172 of WHS Act). For an insured to gain this protection, it is imperative to avoid voluntary interviews and to seek expert legal advice to:

- ensure this privilege is properly maintained, and
- manage this investigative stage, as it will form the evidentiary basis of any subsequent prosecution and/or civil proceeding.

OPPORTUNITIES TO GET A BETTER OUTCOME

Throughout the investigation process, there are several opportunities to make submissions and submit evidence to:

- highlight the steps taken to eliminate or minimise risks to health and safety
- argue that there were no failures on the part of the company and PCBU to comply with the duties under the WHS Act, and/or
- submit that the available evidence does not disclose a *prima facie* case and/or it is not in the public interest to prosecute.

At this stage of the WHS process, it is important that a proactive approach is adopted by defence counsel. This investigative and submission stage of the WHS procedure affords insureds a real opportunity to 'head off' a potential prosecution. A clearly-defined submission to the regulator has, in our experience, often led to prosecutions being avoided once the evidence is clearly articulated.

It is at this juncture where submissions can be made regarding the circumstances in which the incident occurred, in the context of all relevant criteria in the compliance policy and prosecution guidelines. For the matter not to proceed, WorkSafe needs to be satisfied the matter is not an appropriate case for it to expend its finite resources on.

In situations where there was clearly a breach and a prosecution seems inevitable, the WHS Act allows the regulator to accept an enforceable undertaking in lieu of a prosecution (s216 of WHS Act).

Importantly, an enforceable undertaking does not constitute an admission of guilt. Practically, this in effect allows a business to focus on improvements in safety, developing safety initiatives, and 'doing good' for the benefit of the community. When a proposed enforceable undertaking is accepted, any legal proceedings connected to the alleged contravention are discontinued. Where legal proceedings have not been started, acceptance of the undertaking means no proceedings will be started, as long as the undertaking is not contravened.

Enforceable undertakings provide a tool to create change and an opportunity to invest in improving safety in the business, which can assist in avoiding incidents in the future. They provide the opportunity to invest in organisational reform, which can minimise exposure to WHS issues. They also promote safe practices throughout the industry and promote collaboration between businesses in addressing major WHS concerns. When such a culture is created within industries, employees will benefit significantly. Rather than businesses paying hefty fines and court fees, they are able to re-invest this capital into their own organisation and often address the issues that created a problem in the first instance.

Ultimately, an enforceable undertaking should be considered when there is a strong prosecution case, the costs of implementing the enforceable undertaking are reasonable, and if there could be an adverse effect on business as a result of a successful prosecution.

THE PROSECUTION PROCESS

Proceedings for an offence against the WHS Act are brought by WorkSafe WA or a public service officer. However, industrial manslaughter offences under s 30A may only be prosecuted by the Director of Public Prosecutions. Offences other than industrial manslaughter are to be heard and determined in the Magistrates Court.

Proceedings for offences under the WHS Act, other than industrial manslaughter, may be brought within the latest of:

- within two years after the offence first comes to the notice of the Commissioner, or
- within one year after a coronial report was made or a coronial inquiry or inquest ended.

During a prosecution, if a PCBU or its officers are found to have contravened the WHS Act, the following enforcement measures may be brought:

- fines
- imprisonment
- adverse publicity orders
- restoration orders
- WHS project orders
- court ordered undertakings, and
- training orders.

A prosecution of alleged breaches of WHS requirements must identify what measures an employer/operator could have taken to protect against the particular risk that gave rise to the incident but did not implement. Knowing this critical element at the outset of the prosecution will place an insured and its company officers in a better position to establish a defence and maintain the business took all reasonably practicable steps (s19 of WHS Act) to ensure the health and safety of its workers.

It is essential from a defence perspective to demand proper particularisation early regarding the nature of the offence and how the work procedures, risk assessments or safety standard fell short of the expected standard, including the specific measures an employer should have taken and did not.

Armed with this proper particularisation, clients can then attempt to satisfy the court that it was not reasonably practicable to take the identified measure in question, as opposed to having to establish that there were no reasonably practicable measures of any kind that could have addressed the risk (as has previously been necessary with the way that complaints were framed – this is a much harder case to meet).

When defending alleged contraventions of WHS legislation, employers should ensure that any complaint against them meets the relevant thresholds so that the most effective defence can be advanced.

THE BENEFITS OF A CLEAR GLOBAL STRATEGY

When a critical incident happens in the workplace, the first steps taken are vital. Decisions made in the immediate aftermath of an incident can shape the course of an investigation and influence the insured's exposure to liability from prosecution to common law. Inconsistent approaches taken at the outset can often lead to missed opportunities 'down the track'.

With this in mind, it is essential that brokers/insureds and their insurers get on the 'front foot' to ensure that there is a clearly defined global strategy from the outset that includes the following key steps:

- accessing a key contact to guide insureds/brokers through the initial aftermath of an incident – including potential PR response so that inadvertent admissions are not made to media and/or other parties
- having an experienced legal practitioner available to attend the site to meet with key staff members and the regulator
- interviewing key witnesses and engaging experts under legal professional privilege – this should be done as early as possible
- inspecting the site and, if possible, taking photographs and video footage of the original condition (via lawyers and appointed investigators)
- advising staff during interviews with the regulator, making sure an accurate record is maintained
- managing the regulator's urgent and extensive requests for documents and information
- ensuring there is a central point of contact for the insured, insurer and broker to facilitate timely and consistent avenues of communication, and
- being able to manage the media response and PR issues as they arise – a strategy should be agreed at the outset.

Without these actions, incidents can quickly become overwhelming. W+K can assist in ensuring that a holistic, 'one stop shop' is available for insureds, insurers and brokers when these matters arise.

We can help alleviate some of the burden and ensure that a clear, coherent global strategy is in place from incident to investigation/prosecution, and to potentially 'head off' and defend future common law actions that result.

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Need to know more?

For more information, please contact us.

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Workplace Incident Response Managers WA

A critical incident has occurred on site… what should I do?

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Provide first aid and arrange emergency care if necessary

Call the Wotton + Kearney 24/7 critical advice service

W+K will immediately provide you with up to an hour of free of charge advice over the phone

Notify the market regulator

- For Onshore Incidents – Notify WorkSafe & the Department of Mines, Industry Regulation and Safety
- For Offshore – Notify National Offshore Petroleum Safety & Environmental Management Authority Notify National (NOPSEMA)

What is a critical incident?

A 'notifiable incident' under the work health and safety legislation relates to:

- death of a person
- serious injury (eg. head or eye injury, amputation, electric shock, loss of bodily function, serious lacerations, serious burns, spinal injury, degloving or scalping injury)
- a dangerous incident that exposes any person to an immediate risk, even if no one is injured (eg. collapse of a building, implosion, explosion or fire, spillage or leakage of dangerous goods, collapse or failure of registered plant equipment)

Who are we?

Wotton + Kearney is your critical Workplace Incident Response Manager. We work with insureds to coordinate and assist with the range of services and resources available under the policy to investigate and respond to accidents on site. Our market-leading team has handled hundreds of accidents, including some of the largest and most complex incidents in Australia.

For more information on our team and services, visit: www.wottonkearney.com.au

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Emergency contacts

We are available at all times to respond to any issues or questions you may have. Don't hesitate to contact us.

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