wotton kearney

Legal Insights

Shaping the future of insurance law

NSW outlaws insurance for WHS penalties

4 DECEMBER 2019

AT A GLANCE

- A proposed NSW Bill sets out three new offences regarding insurance for WHS penalties and will make NSW the first state to outlaw insurance for WHS penalties.
- The new offences make it both unlawful for a person to receive the benefit of the insurance policy and for an insurer to offer insurance for monetary liability under the WHS Act.
- The Bill does not prohibit the insurer offering, or a person taking, a benefit of an insurance policy for defence or investigation costs for WHS matters.

BACKGROUND

The NSW Government will be the first state government to outlaw insurance for WHS penalties when the *Work Health and Safety Amendment (Review) Bill 2019*, which is currently before the NSW Parliament, becomes operative. The legislation is expected to come into effect early next year.

THE THREE NEW OFFENCES

The proposed Bill sets out three new offences regarding insurance for WHS penalties. In doing so, it addresses recommendations made late last year by Safe Work Australia in its final report on the first national review of the model Work Health and Safety laws. The review had been undertaken at the request of government ministers with responsibility for WHS matters, who agreed that the content and operation of the model WHS laws would be reviewed every five years.

The Bill makes it unlawful for any person, without a reasonable excuse, to enter into a contract of insurance or other arrangement where that person (or another person) is covered for liability for a monetary penalty under the WHS Act. It is worth noting, however, that there is no guidance in the Explanatory Memorandum about what constitutes a "reasonable excuse."

The second offence makes it unlawful for a person to provide insurance or grant an indemnity for liability for a WHS monetary penalty.

Finally, it will be an offence for persons to take the benefit of a contract of insurance or other arrangement or grant of indemnity for WHS monetary liability.

Other significant changes in NSW will include:

- a move way from maximum fines to penalty units (currently $100 per unit), which are usually increased on an annual basis; and
- a change in the definition of "recklessness" in Category 1 to gross negligence – this change may

see an increase in the number of prosecutions for Category 1 offences.

COVERAGE THAT IS STILL ALLOWED

Insurers should note that the Bill does not prohibit the insurer offering, or a person taking, a benefit of an insurance policy for defence or investigation costs for WHS matters. This is an important distinction, as these costs can be significant.

The Bill, to some extent, preserves existing insurance cover for WHS penalties provided that the incident has occurred before the commencement of the amendments. In those cases, that insured is entitled to receive and insurers are entitled to give the benefit of a policy so far as it relates to any penalty. However, after the commencement date of the amendments, it will be unlawful for an insurer to indemnify a person for a WHS fine even for policies that have been taken out or renewed before that date.

It is important to note that these amendments are limited to New South Wales and we are not aware of any other state or territory governments that have indicated that they will pass similar legislation. This means that insurers will, for the time being, continue to be able to provide indemnities in all states and territories other than New South Wales.

THE IMPACT ON INSURERS AND NATIONAL HARMONISATION

In response to this change, insurers should review their policies immediately to avoid committing an offence under the new law. They also need to be vigilant about checking the date of the incident before determining whether indemnity will be granted. We also recommend insurers keep up-to-date with jurisdictional developments in this space as it is possible other states will follow NSW's lead.

Nationally, there has been little consistency amongst the states in the way they have responded to the National Review. The recent legislative changes in WHS legislation in New South Wales, Queensland and Victoria show a tendency for state governments to "cherry pick" from Safe Work Australia's recommendations. The lack of national unity in approach is further highlighted by Victoria's move to legislate for industrial manslaughter, and New South Wales Government's expressed disavowal of taking a similar action.

When the "model" WHS Scheme was introduced in 2011, it was hoped that state and territory legislation would mirror each other throughout Australia to achieve the aim of consistency amongst each of the jurisdictions. Unfortunately, as time progresses it looks more and more likely that we will end up with great variances in WHS laws across Australia. That variability makes the issue of appropriate insurance more complex for insurers and insureds alike.

NEED TO KNOW MORE?

For more information please contact us.

Chris Mossman
Partner, Sydney
T: +61 2 8273 9806
E: chris.mossman@wottonkearney.com.au

Lisa Schumacher
Senior Associate, Sydney
T: +61 2 8273 9894
E: lisa.schumacher@wottonkearney.com.au