

STATUTORY LIABILITY IS AS RELEVANT AS EVER



CHANGES TO NSW WHS ACT

On the 10th of June 2020 the New South Wales Parliament succeeded in having its Work Health and Safety Amendment (Review) Bill 2020 (the Bill) achieve royal assent; turning the provisions of the Bill into law.

The most noteworthy changes, and ones that have sparked a lot of conversations and queries, are the new sections 272A and 272B (of the Work Health and Safety Act 2011 NSW) (the Act) that respectively prohibit insurance or indemnity agreements for any penalty under the Act, and create an offence for anyone that breaches that prohibition.

Whilst this is the first time in Australia that such a prohibition has been made for work health and safety (WHS) laws, specific prohibition against insurance in other acts of parliament is not new. It is for this reason all statutory liability policies will have some sort of exclusion that mentions uninsurable liabilities, penalties uninsurable at law or contain qualifying phrases like "where insurable at law" or similar. At the time of writing, the Western Australian Parliament has similar provisions in its own Bill that is currently with the Standing Committee on Legislation for consideration.

IMPACTS OF THE UPDATED ACT

There is some suggestion that this update means statutory liability policies are no longer valuable; however such a suggestion takes a very narrow view of statutory liability. If one looks at a robust statutory liability policy, and understands how the regulatory enforcement environment operates, it will become obvious that there is a lot more to statutory liability than a monetary penalty.

It is a timely reminder to a person conducting a business or undertaking (PCBU) that WHS is a serious issue, and the law places a primary duty of care on the business, as well as its directors and officers. The time to worry about WHS isn't when there is an accident or the resulting regulatory action, it is right now. Purchasing a statutory liability policy should be the final piece of a large risk management puzzle that includes proper management systems, documented policies and procedures, recorded training and enforcement to ensure the safety of workers and other people that come into contact with the business.

It is also important to remember that statutory liability extends past WHS; businesses are exposed to a seemingly endless number of Acts and regulations that they must comply with.

HOW MUCH OF A CLAIM IS A PENALTY

SUA has conducted a review of its statutory liability portfolio, and since its inception in 1998, on average only 15% of all claims paid were for penalties; the remaining being either legal costs, enforceable undertaking costs, or prosecution costs - none of which are affected by the revised WHS Act in NSW.

Furthermore, the trend in claims is seeing the legal costs component of claims increasing as regulators engage in more rigorous investigations before prosecuting, if at all. Appropriate risk management policies and procedures are crucial, not only to prevent an accident, but to mitigate any resulting regulatory action. Many claims either don't proceed to prosecution following an investigation, are purely investigative in nature (e.g. a Royal Commission or Senate Inquiry), or result in an enforceable undertaking instead of a penalty. If this trend continues, it is reasonable to expect a further reduction in the percentage of claims that represent penalties.

SNAPSHOT OF INFORMATION

- Review of over 1500 claims.
- Of large claims (over \$200k) analysed, roughly half were for WHS.
- Of the large claims, fewer than 30% received a penalty.
- On average, a penalty is only 15% of the total claim costs across all claims.

PENALTY VS COSTS



Costs include: legal costs for incident response, investigations/inquiries; production of documents; reputation protection; enforceable undertaking costs; legal costs for prosecution defence; and prosecution costs

*Prosecution costs are costs awarded against an Insured by a court, following a successful prosecution by a regulatory authority.

WHS IN THE SPOTLIGHT

Focusing on WHS matters, it is important that a statutory liability policy is broad and allows for cover to be triggered by a notifiable incident (as defined in s35 of the Act - death, serious injury or a dangerous incident) as this is the time when proper legal representation should be appointed to ensure the insured's interests are protected. The ability for a WHS specialist lawyer to be appointed immediately - often to attend the site of the notifiable incident within hours - is imperative to secure the best outcome for the insured.

As this revised WHS Act in NSW now puts the financial burden of a penalty squarely on the shoulders of the insured, it is even more important that things are done correctly from the beginning. The right policy and the appointment of the right lawyer could mean a lower penalty, or even no prosecution in the first place. Statutory liability is as relevant as ever.

SUA's statutory liability policy responds from the earliest possible time; following a notifiable incident or mandatory reporting obligation (under any Act of Parliament, not just WHS), or from the time of any investigation, examination or inquiry by a regulatory authority. Furthermore, SUA has an established panel of specialist solicitors that can be appointed to assist an insured during that initial investigation, and beyond.



MAKE SURE YOU HAVE PROPER PROTECTION

The only effect this revision has on insurance is the prohibition on insuring a WHS penalty in NSW (at the time of writing). Otherwise, for statutory liability, its business as usual – provided you have the right policy in place.

Things to look for in a statutory liability policy are:

INCIDENT RESPONSE

If a policy doesn't provide cover for legal costs for an investigation, especially one commenced after verbal notice from a regulator attending the site of a notifiable incident; or provide cover for legal costs where there is no allegation of wrongdoing, then such a limited cover is further hampered by the prohibition in the revised WHS Act.

BROADFORM COVER

Businesses are exposed to numerous regulations from a great number of Acts depending on the industry; for some, WHS is a very small exposure. Having a broadform policy that responds to any Act of parliament is important. Other general exposures that can be faced include:

- Environmental Protection Acts;
- Spam Act;
- Privacy Act;
- Planning and Building Acts;
- Heavy Vehicle National Law (Chain of Responsibility);
- Corporations Act;
- Fair Work Act.

Other specific legislation can also apply to various occupations. A proper risk analysis of the regulatory environment that a business operates in should be conducted to ensure effective compliance, which then makes the purchase of a statutory liability policy easier.

ENFORCEMENT OPTIONS

Where there is an option for an enforceable undertaking (EU) rather than a penalty, it is usually preferable to take an EU. If a policy doesn't include a provision for enforceable undertakings, it may not be pursued as an option; meaning the only outcome is an uninsurable penalty.

KEY COVER NEEDED FOR:

- Incident response – cover triggered by a notifiable incident/mandatory reporting obligation;
- Investigations commenced verbally, not only by written notice;
- Enforceable undertakings;
- Prosecution costs;
- Reputation expenses;
- Production of documents;
- Not limited to WHS only.

SUA was the first in Australia to write statutory liability in 1998, and EPL in 1997; and have always lead the market in these products. SUA is able to provide modular or combined options, ensuring that every client from sole traders through to listed entities and not-for-profits can secure coverage; with a solution for just about every industry.

General Advice Warning

The information contained in this publication is general in nature and does not take into account your personal situation. You should consider whether the information is appropriate to your needs, and where appropriate, seek professional advice from an insurance broker or risk adviser.

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