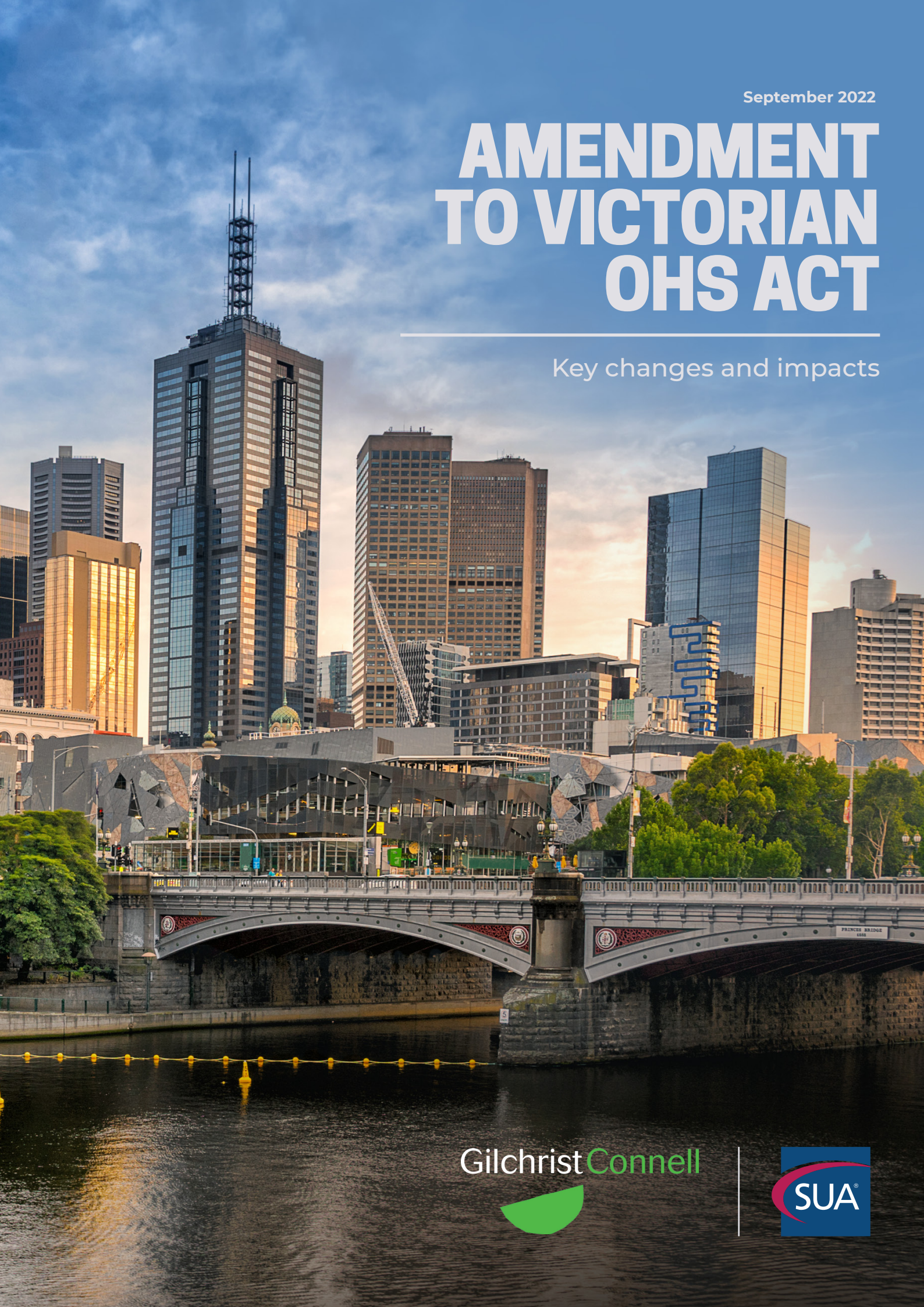

September 2022

AMENDMENT TO VICTORIAN OHS ACT

Key changes and impacts

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OCCUPATION HEALTH & SAFETY REFORMS

On the 21st of September 2021, Victoria followed in New South Wales' and Western Australia's footsteps and passed critical amendments to the Occupation Health and Safety Act 2004 (the Act). Among other things, the amendment has the effect of preventing penalties under the Act from being indemnified by an insurance policy.

WHAT ARE THE CHANGES?

We'll keep the 'boring' legal bits short – but they are important.

Any terms in contracts of insurance which purport to indemnify a person (whether a corporation or individual) for a penalty under the Act are void. This means the term is unenforceable at law – it's as if it does not exist even if it's written in a policy. The change has already taken effect, as of 22 September 2021. There is no 'grandfathering' clause – no grace period. Even if an incident occurred or prosecution commenced before 22 September 2021, as long as the indemnifying clause was called on after that date, as the clause is void, it is unenforceable at law. The penalty is simply uninsurable.

Further, from 22 September 2022, it will be a criminal offence to enter into, offer to enter into, or be a party to a contract of insurance which purports to provide an indemnity for a penalty under the Act, unless a person has a reasonable excuse. This applies to insurers and insured – that is, both parties will be committing the criminal offence.

It will also be a criminal offence to provide or receive any benefit under a clause which provides an indemnity for a penalty under the Act. This criminal offence means an insurer will commit a criminal offence if it pays an insured any money or provides any benefit in respect of a penalty. An insured will also commit the criminal offence if it receives any such money or benefit.

The inclusion of a reasonable excuse exception is likely to give some flexibility in cases where there may be an acceptable reason for the conduct constituting the offence. At present there is no guidance about the scope of this defence. Depending on the circumstances, it may be arguable that a 'reasonable excuse' could include having entered into the contract or arrangement before the legislation commenced.

A person (including natural persons and corporations) committing these offences will be exposed to significant penalties and criminal conviction. The penalties are:

- a maximum penalty of 300 Victorian penalty units for a natural person, which currently equates to $54,522 as of 1 July 2021, and;
- a maximum penalty of 1500 Victorian penalty units for a body corporate, which currently equates to $272,610 as of 1 July 2021.

Officers of corporations which contravene the new laws are exposed to personal liability if the contravention is attributable to a failure by the officer to take reasonable care.

Similar provisions to the above apply to contracts that insure or indemnify the payment of monetary penalties under the Dangerous Goods Act 1985 (Vic) and the Equipment (Public Safety) Act 1994 (Vic).

Importantly, other terms of insurance contracts are still permitted, including terms providing cover for defence costs (see below) or enforceable undertakings. If accepted by the regulator, enforceable undertakings avoid a conviction and any fine. Enforceable undertakings can also result in better outcomes for workers, businesses and the community at large.

WHY THE CHANGES?

The Victorian government implemented the amended law to ensure there is an appropriate punishment for offenders. It has voiced concerns about the reduced deterrent value of penalties if they are being covered by insurance. The reasoning behind the amendment is in keeping with what the New South Wales and Western Australian governments put forward for their respective legislative reviews.

INSURANCE IMPLICATIONS

As noted above, there is no effect on any indemnity provisions that relate to legal costs or enforceable undertakings; which means that the utility of policies such as statutory liability or directors' and officers' liability still remains.

As SUA has reported when addressing the New South Wales and Western Australian law updates, the majority of claims paid in this space by SUA since 1998 have been for legal costs – with penalties only accounting for around 15% of all claims costs. See below for further details.

What this means for insureds is that if found guilty of an offence under Victorian safety legislation, they will need to pay the penalty themselves. This could be hundreds of thousands, or even millions of dollars. It is vitally important that all employers take proactive steps to ensure the safety of workers, and others that come into contact with their business operations.

When imposing a penalty, a court has regard to the seriousness of the offending, measured by the gravity of the safety risk to which workers were exposed. In doing so, courts take into account a number of considerations, including the standard of safety systems and procedures in place at the time of the incident and whether machinery and other equipment was safe. A thorough review of risks, and the creation and implementation of safe systems of work are crucial to ensure compliance with the Act, but most importantly to ensure as far as reasonably practical, that no harm comes to any person.

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

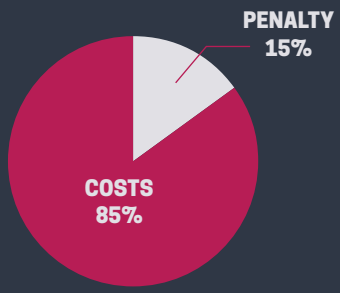
HOW MUCH OF A CLAIM IS A PENALTY

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 OHS Act in Victoria.

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 OHS.
- 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.



*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.

OHS IN THE SPOTLIGHT

Focusing on OHS 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 s37 of the Act – death or serious injury etc) as this is the time when proper legal representation should be appointed to ensure the insured's interests are protected. The ability for an OHS 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.

This revised Act in Victoria, like in NSW and WA, now puts the financial burden of a penalty squarely on the shoulders of the insured. Consequently, 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 still a valuable policy. 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 OHS), 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 the new prohibitions in the Victorian, WA and NSW Acts have on insurance is for the indemnification of a monetary penalty. Otherwise, for statutory liability, it's 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 OHS Acts.

BROADFORM COVER

Businesses are exposed to numerous regulations from a great number of Acts depending on the industry; for some, OHS 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 for OHS in Victoria, WA and NSW.

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 OHS 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.

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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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