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INTRODUCTION OF WA WHS ACT

Key changes and impacts



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WORK HEALTH & SAFETY REFORMS

The steady adoption of the 'model' Work Health and Safety (WHS) laws by States and Territories since their creation in 2011 has inched closer to completion, with Western Australia passing the Work Health and Safety Act 2020 (WA) (WHS Act) on 10 November 2020.

WA now joins ACT, NT, NSW, Queensland, SA, Tasmania and the Commonwealth in implementing the model laws.

IMPLEMENTATION

Although the WHS Act has been assented to, its operative provisions will not apply to employers and workers until the WA Government proclaims a commencement date.

At the time of writing, the WA Government has only indicated that work on transitional provisions and guidance will continue through 2021. No concrete date has been set for commencement.

It will be important to monitor Government announcements for any updates on implementation of the WHS Act.

KEY CHANGES

The WHS Act is a root and branch overhaul of WA's existing workplace health and safety regime, and brings the regime into closer alignment with other States and Territories.

Specifically, the current Occupational Safety and Health Act 1984 (OSH Act), as well as key WHS provisions of the mining and petroleum safety acts (including the Mines Safety and Inspection Act 1994 and Petroleum and Geothermal Energy Resources Act 1967) will be replaced.

The WHS Act will also adopt a number of the recommendations made in the independent review of the model WHS laws conducted by Marie Boland, which was published by Safe Work Australia in 2019.

For instance, the prohibition on insurance in respect of WHS offence fines was one of the recommendations of the review.

Some of the key changes which will come with the commencement of the WHS Act are set out on the right.

Additionally, the duty to notify the regulator of "notifiable incidents" will expand to include "dangerous incidents" in addition to serious injuries and illnesses and fatalities. A "dangerous incident" is defined in the WHS Act as an incident that exposes a worker or other person to a serious risk to their health or safety due to immediate or imminent exposure to a prescribed event (such as a leak, explosion or fall from height of an object).

Further, as outlined on the next page, the current categorisation of WHS offences will be replaced with the model law categorisation.



STATUTORY DUTY HOLDERS

- Primary duty holder is a 'person conducting a business or undertaking' (PCBU), not an employer.
- PCBUs will be responsible for ensuring, so far as is reasonably practicable, the health and safety of workers and others who might be affected by their undertakings.
- Duties previously owed to 'employees' will be owed instead to 'workers' – a more broadly defined group which includes: employees, contractors, labour hire, work experience students and volunteers.



CONSULTATION DUTIES

- PCBUs will have prescriptive duties to consult workers in respect of WHS matters.
- PCBUs will be required to consult, cooperate and coordinate activities with all persons who have a duty in relation to the same matter (e.g. suppliers, clients, contractors).



INDUSTRIAL MANSLAUGHTER

- New industrial manslaughter offence where a PCBU engages in conduct in breach of a WHS duty, is negligent in their conduct and that conduct results in the death of an individual.
- Maximum penalties of 20 years' imprisonment or a fine of \$5m for an individual, and \$10m for a body corporate.
- Australia's first IM conviction was handed down in June 2020 in Queensland, with a fine of \$3million to the PCBU and 10 month sentences for the directors (suspended for 20 months).



NO INSURANCE / INDEMNITY

- New prohibition on insurance and indemnification in respect of fines for WHS offences.
- Legal fees can still be insured/indemnified.



DUE DILIGENCE DUTIES

- Officers of a PCBU have a standalone duty to exercise due diligence to ensure the PCBU meets its safety duties.
- An officer includes any one who participates in making decisions that affect the whole or a substantial part of the PCBU's business or undertaking.
- Failure by an officer to exercise due diligence is an offence punishable by imprisonment or a monetary penalty.



PSYCHOLOGICAL HEALTH

- Health and safety duties expressly extend to physical and psychological health.
- PCBUs have a duty to protect workers from psychological risks to health, such as stress, fatigue and bullying, and investigate psychological matters

WHS OFFENCES

The WHS Act will introduce the familiar three categories of offences in the model laws to WA, replacing the current four levels of penalties in the OSH Act.

CURRENT REGIME

The OSH Act increases the quantum of penalties based on both the consequences of the duty breach and the relevant state of mind of the duty holder:

Level	Description
1	Offences for which no penalty is specified, which are generally low level offences against the OSH Act
2	Offence against the general health and safety duty
3	Offence against a relevant duty provision where it has caused death or serious injury.
4	Offence against a relevant duty provision where it is contravened in circumstances of gross negligence.

The OSH Act also increases penalties after the first offence. For example a body corporate may be fined a maximum of \$1.5m for their first level 2 offence but will be fined \$1.8m for any subsequent offences.

NEW CATEGORIES

Under the WHS Act, a duty holder may be convicted of the following offences:

- Category 1 offences occur where a failure to comply with a health and safety duty causes death or serious harm;
- Category 2 offences occur where the failure exposes an individual to a risk of death or injury or harm to health; and
- Category 3 offences apply for a general failure to comply with the duty.

It is possible to be convicted under multiple categories.

The WHS Act approach closely follows the model laws approach but is different in one key aspect. Under the model laws none of the categories are tied to the consequences of the breach (e.g. causation of injury). Instead category 1 offences require proof of recklessness in exposing an individual to a risk of death or serious injury.

The WHS Act category 1 offence is noticeably broader and is intended to cover serious breaches which do not rise to the level of industrial manslaughter, for instance where proof of the mental state of the duty holder is not possible or for non-PCBU/officer individuals.

Increased penalties for subsequent offences have also been removed. The penalties are set out below.

PENALTIES FOR WHS OFFENCES

The new penalties under the WHS Act as follows:

Category	Individual PCBU or Officer	Other Individuals	Body Corporate
1	5 years imprisonment or \$680,000 fine	5 years imprisonment or \$340,000 fine	\$3,500,000 fine
2	\$350,000 fine	\$170,000 fine	\$1,800,000 fine
3	\$120,000 fine	\$55,000 fine	\$570,000 fine

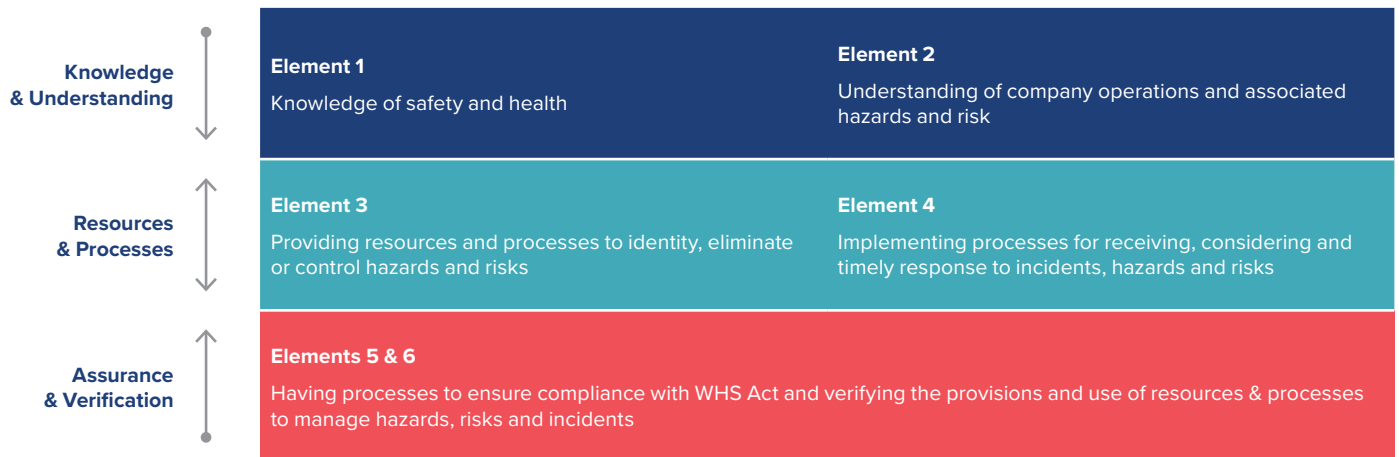


DUE DILIGENCE OBLIGATIONS

Management should acquaint themselves with the WHS Act as it contains a new stand-alone duty for officers to exercise due diligence in ensuring the PCBU complies with its duties and obligations under the Act.

PRACTICAL STEPS

As an officer, you should be satisfied that you are meeting the elements set out below.



Practically speaking then, exercising due diligence will require officers to proactively consider what steps they ought to take to discharge the duty. What a particular officer may need to do may be different to others depending on the nature of their role on the Board and/or in the executive management team.

TRANSITIONING TO THE NEW REGIME

Although a commencement date has not yet been set, it will be imperative for employers to begin preparation for their own transitional arrangements in response to the changes introduced in the WHS Act.

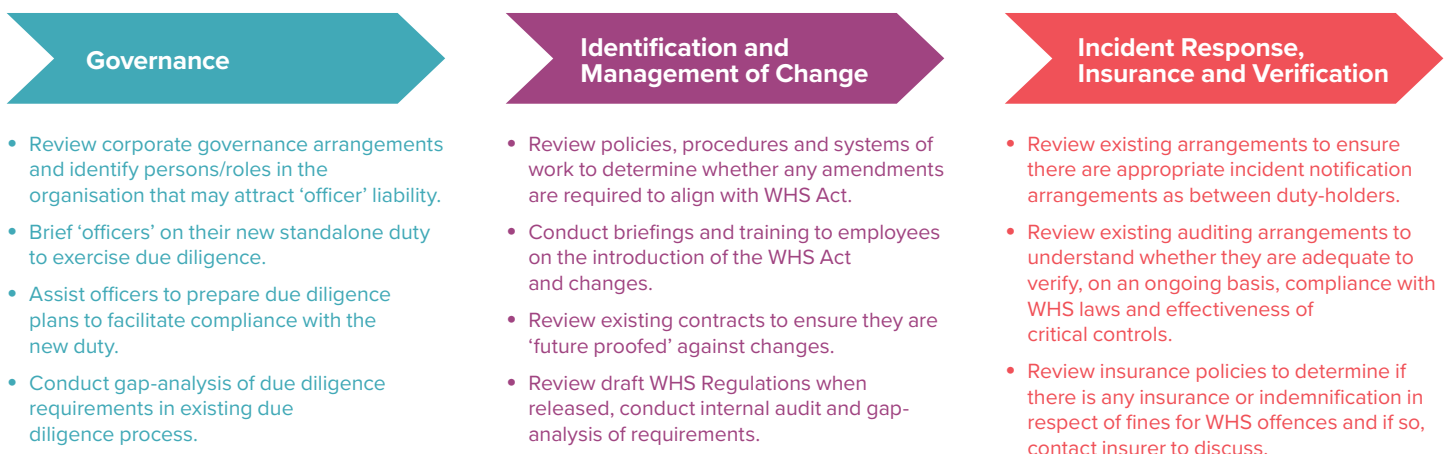
PREPARATION

As outlined on the previous pages, the WHS Act will significantly alter the workplace health and safety framework within which WA businesses currently operate.

The table below sets out some suggested actions that companies may wish to consider in order to prepare for the introduction of the WHS Act and the associated regulations.

These actions are not intended to be exhaustive, but may assist companies to prepare for the future changes in the law and assess the current level of compliance with occupational health and safety obligations.

It will be important for directors and other officers to understand their new safety obligations and prepare to meet their due diligence obligations prior to the commencement of the WHS Act, particularly given the implication of failure to comply with the due diligence provisions and the new industrial manslaughter offence.





INSURANCE IMPLICATIONS

As with the June 2020 update to the New South Wales WHS Act, the update to the Western Australian WHS Act also prohibits insurance for a penalty under the Act.

There was some suggestion that these updates meant statutory liability policies were no longer valuable; however such 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 be obvious that there is a lot more to statutory liability than a monetary penalty.

As outlined by Herbert Smith Freehills above, WHS is a serious issue, and in particular, the changes to the WA Act mean broader

duties for businesses and their directors & officers. 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.

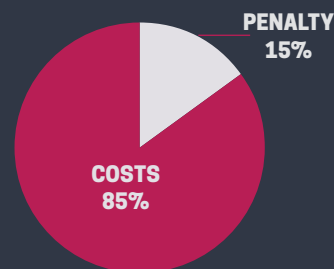
HOW MUCH OF A CLAIM IS A PENALTY

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 and WA.

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.



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 WA, like 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 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 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 the new prohibitions in the 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 WHS Acts.

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 for WHS in 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 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.



KEY CONTACTS

For more information on the changes to the WHS Act or practical tips on how to prepare for these changes, please contact our team.



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