



Shaping the future of insurance law

Insurance for WHS fines – will they soon be prohibited?

10 JANUARY 2019

AT A GLANCE

- Safe Work Australia is currently undertaking a review of the model Work Health & Safety Laws in Australia.
- The review considers the availability of insurance products that provide cover for fines for breaches of WHS laws.
- The outcome of the review may recommend that the model WHS laws be amended to prohibit insurance for WHS fines.

The 2018 Review of the Model WHS Laws

Safe Work Australia is currently finalising its review of the model Work Health and Safety (WHS) laws, which have been implemented in all jurisdictions in Australia (including the Commonwealth), except Victoria and Western Australia.

The purpose of the review is to examine and report on the operation and content of the model WHS laws to confirm that they are operating as intended. The review started in February 2018, and Safe Work Australia is due to provide a written report for the WHS Ministers to consider in early 2019.

One of the areas being investigated as part of the review is whether the compliance and enforcement provisions, such as penalties and enforcement undertakings, effectively deter non-compliance with the legislation. It has been questioned in the courts and the media whether fines for WHS prosecutions are sufficient to deter future non-compliance when directors and companies are being indemnified by their insurer for the payment of those fines. The availability of insurance against fines imposed under WHS legislation has also prompted public policy debate.

In the courts, this issue of insurance was initially considered in His Honour Industrial Magistrate Lieschke's decision in *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22. In this decision, in considering the penalties to be handed down against the company and its director, His Honour criticised the director's actions in taking out insurance covering criminal penalties for WHS offences because it:

"...undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message his actions send to employers and Responsible Officers is that with insurance cover for criminal penalties for OHS offences there is little need to fear the consequences of very serious offending, even if an offence has fatal consequences."

As a result, His Honour declined to order a reduction in penalty to the company and its director. While this was a decision made regarding the now-repealed *Occupational Health, Safety and Welfare Act 1986* (SA) (OHSW Act), His Honour also commented that:

- the Court had no ability to challenge the fact that an insurance company had granted insurance to the company and its director
- the OHSW Act did not prohibit such insurance, and
- while section 272 of the model WHS laws provide that any term of a contract that seeks to modify the operation of the Act is void, it does not explicitly prohibit such insurance.

Certainly, from a public policy perspective, there is speculation about whether insurance policies covering the failure to comply with a regulation or law is contrary to public policy and so should be considered illegal and void. However, until this issue is considered by the Courts, insurers remain free to provide insurance.

In Australia, Judges, academics and policy-makers remain extremely interested in this issue, particularly in the context of the sentencing principles judges need to apply when determining the most appropriate penalty for WHS prosecutions. In fact, it has been successfully argued before the Court that the Sentencing Judge could not decide the prosecutor's arguments concerning an offending company director's accountability and acceptance of responsibility at the future sentence hearing without considering the degree of insurance cover.

As a result, there has been a growing trend that sees prosecutors subpoenaing the insurance policies held by companies and their directors, assessing coverage under the policy, and upon the discovery of insurance, seeking "alternative" orders in addition to, or as opposed to, a fine. These have included orders that the offender undertake a WHS training course, an adverse publicity order forcing the offender to publicise the offence and penalty, and an order forcing the offender to undertake a specified project for the general improvement of WHS within a specified time period.

It seems likely the review will address the issue of insurance that covers penalties. In New Zealand, insurance for WHS monetary penalties is unlawful and similar reviews undertaken in Queensland and South Australia both considered essentially copying New Zealand's prohibition, although that did not eventuate.

Any recommendations that actually result in safer workplaces will be welcomed widely. However, it remains to be seen whether banning cover for WHS prosecutions will achieve that goal.

Need to know more?

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