

Agency Bulletin

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Work Health and Safety Act 2020 (WA)

Changes to workplace safety legislation include provisions which have implications for agencies' insurance coverage.

The *Work Health and Safety Act 2020 (WA)* (WHS Act) received royal assent on 10 November 2020 and came into effect upon finalisation of the Regulations on 31 March 2022. The WHS Act effectively replaces the *Occupational Safety and Health Act 1984 (WA)* as the governing legislation for this State's workplace safety regime.

Under Section 272A of the WHS Act it is an offence to enter into an insurance policy or other arrangement covering or indemnifying a person for monetary fines imposed by the WHS Act. The key elements of the section are that it is an offence to:

- enter into an insurance policy that indemnifies a person for liability to pay a fine for an offence under the WHS Act;
- indemnify another person for that person's liability to pay a fine for an offence under the WHS Act;
- be indemnified by another person for liability to pay a fine for an offence under the WHS Act or
- pay to another person, or receive from another person, an indemnity for a fine for an offence under the WHS Act.

Penalty for this subsection:

- (a) for an individual a fine of \$51,000;
- (b) for a body corporate, a fine of \$255,000.

These provisions indicate the government's clear intention to ensure that obligations under the WHS Act are taken seriously, by making any insurance policy insuring against penalties imposed by the WHS Act unlawful for both the insurer and insured.

The core cover provided by the RiskCover Fund (RiskCover) has always excluded cover for fines and penalties, so significant changes are not anticipated.

Cover for Legal Expenses

The WHS Act does not prohibit insurers providing cover for legal defence costs arising under the WHS Act.

Key Points

- **Insuring or indemnifying individuals against fines or penalties imposed by this Act is unlawful.**
- **\$1 million legal expenses cover introduced.**
- **Cover to be amended to reflect the new legislation.**
- **Directors and Officers Liability insurance policies will not provide cover for fines and penalties under the WHS Act.**



**Insurance Commission
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RiskCover Legal Expenses Cover

Where a WHS incident results in a claim being made, provided RiskCover's definition of a "Claim" is met, legal costs incurred in the defence of such a claim are covered, subject to the terms, conditions and limitations of cover.

In addition, where circumstances do not meet the definition of a "Claim", RiskCover will now provide cover for legal expenses incurred in participating in investigations and defending prosecutions brought under the WHS Act. The main features of this cover are:

- The limit of indemnity will be \$1,000,000 any one claim and in the aggregate for any one period of insurance.
- Indemnification for investigations/prosecutions that are of a criminal nature will be reserved until it is established by final adjudication by a judicial or arbitral tribunal that the breach did not arise from a criminal act.
- Cover for individuals will be subject to the 1990 Guidelines (Guidelines relevant to Ministers and Officers involved in Legal Proceedings) and the current Government Insurance Division practice to assess each case on its merits.
- Where an agency has Directors and Officers Liability (D&O) insurance, individuals will have to first claim against their agency's D&O insurance policy before a claim against the agency's RiskCover cover will be considered.
- Cover will not apply, for the organisation or the individual, where it is established by formal admission or final adjudication by a judicial or arbitral tribunal that the breach of the WHS Act arose from the dishonest, fraudulent, criminal or malicious conduct of the agency/individuals.
- Cover to apply to WHS incidents that have occurred on or after 31 March 2022, the date the legislation took effect.

Directors and Officers Liability Insurance (Not insured by RiskCover)

Some Agencies have D&O insurance with a private insurer. The current D&O insurance policy with the private insurer has provision to cover a Director or Officer for fines and penalties in certain circumstances. However, as described above, the WHS Act does not allow an insurance policy to cover fines and penalties imposed by that Act. Therefore, as the D&O policy excludes matters uninsurable under the law to which the policy is construed, fines and penalties imposed by the WHS Act will not be covered.

It is worth noting that in section 30A, the WHS Act provides for the offence of industrial manslaughter, which carries a maximum penalty of 20 years imprisonment and a \$5 million fine for individuals or a \$10 million fine for a body corporate. As outlined above, no cover can be provided for these fines.

Directors and Officers Liability Insurance Legal Expenses Cover

Agencies' D&O insurance also covers, up to the limit of the policy, inquiry/investigation and prosecution legal costs associated with alleged WHS Act breaches, subject to the terms, conditions and limitations of policy.

Please contact your client relationship advisor if you have any queries regarding this matter.



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