

# Insurance Implications of the Occupational Health and Safety and Other Legislation Amendment Act 2021 (Vic)

Further to our previous [client alerts](#) in relation to changes to Work Health and Safety laws in New South Wales and Western Australia, Victoria has now followed suit by enacting the Occupational Health and Safety and Other Legislation Amendment Act 2021 (Vic) (the Act). In this paper, we summarise the changes and comment on the insurance implications.

The Act received Royal Assent on 21 September 2021. Relevantly, it describes its purpose, amongst other things, as:

“to amend various Acts to prohibit insuring or indemnifying a person for a pecuniary penalty for an offence.”

Part 3 of the Act deals with the prohibition on indemnities for pecuniary penalties. In this respect, the Act amends the Occupational Health and Safety Act 2004 (Vic), the Dangerous Goods Act 1985 (Vic) and Equipment (Public Safety) Act 1994 (Vic) (the Relevant Acts).

The Act provides that a term of a contract or other arrangement that purports to insure or indemnify a person for the person's liability to pay a pecuniary penalty under the Relevant Acts or the regulations, is void to the extent that the term provides for that insurance or indemnity.<sup>2</sup> These subsections came into effect on 21 September 2021.

The Act also makes it an indictable offence:

- for a person, without reasonable excuse, to:
  - enter into, offer to enter into or be a party to a contract or other arrangement that purports to insure or indemnify a person for the person's liability to pay a pecuniary penalty under the Relevant Acts or their regulations;
- for a person to receive a benefit under a term of a contract or other arrangement that is a term which purports to insure or indemnify the person for the person's liability for a pecuniary penalty under the Relevant Acts or the regulations;
- for a person to provide a benefit to another person under a term of a contract or other arrangement that is a term which purports to insure or indemnify that other person for that person's liability for a pecuniary penalty under the Relevant Acts or their regulations<sup>3</sup>

Importantly, these offence provisions do not come into effect until the first day after the end of the period of 12 months beginning on, and including, 21 September 2021.

## Impact on specific classes of insurance

Only policies that cover statutory fines and penalties under the Relevant Acts should be impacted by the amendments referred to above, and only to the extent they provide cover for such fines and penalties.

**Importantly, there is no prohibition in respect of indemnity for legal costs incurred in defending a prosecution under the Relevant Acts or during an investigation under the Relevant Acts.**

In addition, there is also no prohibition under the Act in respect to a policy that covers:

- fines and penalties under other Victorian legislation; or
- fines and penalties under the acts of other states, territories or the Commonwealth of Australia.<sup>4</sup>

It is important to note however, that coverage for fines and penalties and criminal acts generally is and has always been subject to the question of insurability. It is a general principle that insurance is not available where the loss is uninsurable at law (whether the policy provides such a term or not). This would include any policy that purports to indemnify a person against criminal liability if the crime is committed with guilty intent or with reckless indifference. Any insurance contract purporting to insure against such risks may be void and unenforceable, at least in part. This is for reasons of public policy on the basis that a person may not benefit from his/her own wrongdoing and, by extension, may not be indemnified against the consequences of that wrongdoing.

<sup>1</sup> Sub-section 1(b) of the Act.

<sup>2</sup> Sections, 7, 10 and 13 of the Act in respect to each of the Relevant Acts.

<sup>3</sup> Section 8, 11 and 14 of the Act in respect of each of the Relevant Acts.

## Directors and Officers (D&O) Liability Insurance

Many D&O policies cover fines and penalties imposed upon an Insured Person because of breach of statute. Generally, in order for cover to be provided, such fines and penalties must arise from an act, error or omission committed or omitted whilst acting in the Insured Person's organisational capacity.

The cover provided with respect to a work health and safety breach may also be limited by a bodily injury or fraud and dishonesty exclusion.

The Act will impact the above cover for fines and penalties to the extent that any D&O policy purports to cover pecuniary penalties imposed for breaches of the Relevant Acts respectively. **Such monetary penalties will no longer be covered under D&O policies.**

## Statutory Liability Insurance

Statutory Liability policies are essentially designed to cover fines and penalties imposed upon Insured Persons and an Insured Entity arising out of breach of statutes.

**As a result, the Act means that pecuniary penalties imposed for breaches of the Relevant Acts will no longer be covered under Statutory Liability policies.**

Another important consideration is that many Statutory Liability policies provide that the insurer does not have to pay defence costs unless in the insurer's view the insured has reasonable prospects of defending the proceeding brought to impose a penalty. In the past, this meant that rather than defending the matter, the insurer paid the penalty to the extent it was insurable.

However, now with the growing number of statutes that prohibit the insurability of statutory fines and penalties, insurers may refuse to pay the defence costs on the basis that the insured has no reasonable prospects of defending, and end up not paying the fine and penalty because it is an offence to do so. As a result, it will be important to review Statutory Liability policies, with a view to seek cover without a reasonable prospect of defending provision.

Note, however, that to date New South Wales and Western Australia have enacted similar restrictions. Please see the Client Alerts referred to above.

## Management Liability Insurance

Most Management Liability policies include D&O and/or statutory liability cover. These will cover fines and penalties of Insured Persons (pursuant to either the directors and officers

or statutory liability cover) and Insured Entities (pursuant to the statutory liability cover).

The Act will impact these covers in the same way as explored above under D&O and Statutory Liability.

## Profession Indemnity (PI) Insurance

Most PI policy wordings exclude fines and penalties. Those that do provide some cover often refer to compensatory civil penalties. Such PI policies should not be impacted by the Act, as the pecuniary penalties imposed by the Relevant Acts generally are not compensatory in nature.

## Employment Practices Liability (EPL) Insurance

A number of EPL policies provide cover for fines and penalties arising from an employment related wrongful act. To the extent that a pecuniary penalty under the Relevant Acts arises from an employment related wrongful act, the Act will likely prohibit cover for such a pecuniary penalty.

## Cyber Insurance

Most Cyber policies will cover fines and penalties resulting from events such as unauthorised system access, electronic attack and privacy breach. Most Cyber policies include a bodily injury exclusion, often with a write-back in relation to mental injury or emotional distress.

To the extent that a pecuniary penalty under the Relevant Acts arises from an event giving rise to cover under a Cyber policy, the Act will likely prohibit cover for such a pecuniary penalty.

## Crime Insurance

Crime policies primarily cover the Insured for loss of money, securities or other property. Such cover is usually subject to such loss occurring as a result of the dishonesty or fraud of, or theft by:

- An employee; or
- A third party, either:
  - On the Insured's premises;
  - Whilst the money securities or property is in transit;
  - Through forgery or fraudulent alteration;
  - Through computer fraud or fraudulent funds transfer;
  - Through erroneous funds transfer; or
  - Telephone toll fraud.

As a result, most Crime policies typically do not cover fines and penalties. Those that do provide such cover usually also

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<sup>4</sup>To date New South Wales and Western Australia have enacted similar restrictions, see the Client Alerts referred to above.

require that a fine or penalty results from direct financial loss of the Insured. It is unlikely that a pecuniary penalty under the Relevant Acts will be this type of fine or penalty.

## Where to from here

Like the amendments enacted in NSW and WA,<sup>5</sup> the changes under the Act will have significant impact upon the coverage provided by a number of insurance classes. It is also likely that other States and Territories will follow suit enacting similar prohibitions on the coverage for fines and penalties.

It is arguable that pecuniary penalties under the Relevant Acts are now uninsurable, in which case it is also arguable that no amendment is needed to existing policies as no policy can cover uninsurable losses. Notably, most policies expressly exclude matters uninsurable at law or losses that the insurer is prohibited by law or regulation from indemnifying.

Previously we have suggested that for the abundance of caution, it may be prudent to amend policies expressly to exclude cover for statutory fines and penalties where such cover is impermissible in NSW, WA and now Victoria. However, given the expanding nature of the prohibition on coverage for statutory fines and penalties, it will become increasingly difficult to take into account all statutes that may impose such a prohibition on cover. As a result, a catch-all exclusion on coverage for losses the insured is legally prohibited from paying, may be preferable, if the relevant policy does not already include such an exclusion.

For further information, please contact your Marsh broker or visit our website at [marsh.com/au](https://marsh.com/au).

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<sup>5</sup> See the Client Alerts referred to above.

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