

Client Alert

Insurance ban for OHS offences in Victoria now law

October 2021

Victoria's Occupational Health and Safety and Other Legislation Amendment Bill 2021 is now in force. The Bill has immediate effect and there is no grace period.

Victorian employers should be aware that if they have a current policy of insurance that indemnifies the company or its directors and officers for fines or penalties under the OHS Act, those provisions are now void. The Bill also prevents directors and officers being indemnified by a company for breaches of workplace safety laws.

Even if your insurers have previously confirmed cover, fines or penalties for breaches of the OHS Act imposed after the Bill came into force on 21 September 2021 are no longer insurable.

The Bill introduces criminal offences for being a party to, or entering into, a contract of insurance that seeks to insure or indemnify OHS fines. These come into force 12 months from the date of Royal Assent (21 September 2021).

The new offences carry significant penalties - up to \$54,522 for individuals and \$272,610 for businesses.

The prohibition on insuring fines and penalties applies equally to the Occupational Health and Safety Act 2004, the Dangerous Goods Act 1985, and the Equipment (Public Safety) Act 1994.

What are your options and what's next?

The new offences are not intended to void terms in insurance contracts or other arrangements which cover legal expenses for the cost of a business or a director or officer defending themselves against a workplace safety prosecution, or for the cost of court-ordered damages. Only Victorian OHS fines and penalties are now uninsurable.

Many insurance policies that would respond to workplace safety prosecutions will already include language to say that fines/penalties are covered only "to the extent permitted by law". So, in most cases, no changes to the policy wording will be necessary because the contract specifies that the insurance can only respond if the law allows.

Employers and directors should:

- liaise with their broker and conduct a detailed review of their contracts of insurance and indemnities to identify any terms that may be void under the new legislation; and
- where any terms constitute an offence under the OHS Bill, ensure these are removed within 12 months of the Bill's commencement date. Failure to do so could expose the company (and directors) to significant penalties.

The purpose of these new offences is to ensure monetary penalties retain their deterrent value to ensure businesses and individuals comply with their duties under health and safety laws. It is vital that all businesses and directors review their safety management systems and processes, and ensure they are addressing all operational risks.

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Avoiding penalties is the best course of action

Workplace safety breaches can attract significant penalties, including the recently introduced industrial manslaughter offence, which carries a maximum penalty of up to 20 years' imprisonment. To avoid sanctions, now is the time to act. Having a robust OHS management system in place that is implemented and followed by everyone in the organisation is the best way to avoid exposure.

Employers should:

- complete a review of their OHS processes to ensure they comply with the law and implement any recommended changes; and
- gain an understanding of the level of organisational maturity and culture in order to provide insight into change management activity necessary to embed OHS processes within the organisation. One of the factors in determining industrial manslaughter involves an assessment of whether there has been a failure by the employer or an individual to create a "culture of compliance".

Contact your local FINEX broker or Workplace Risk advisor for further information and assistance.



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