Next.

Business, the Environment and Safety today

KING&WOOD MALLESONS
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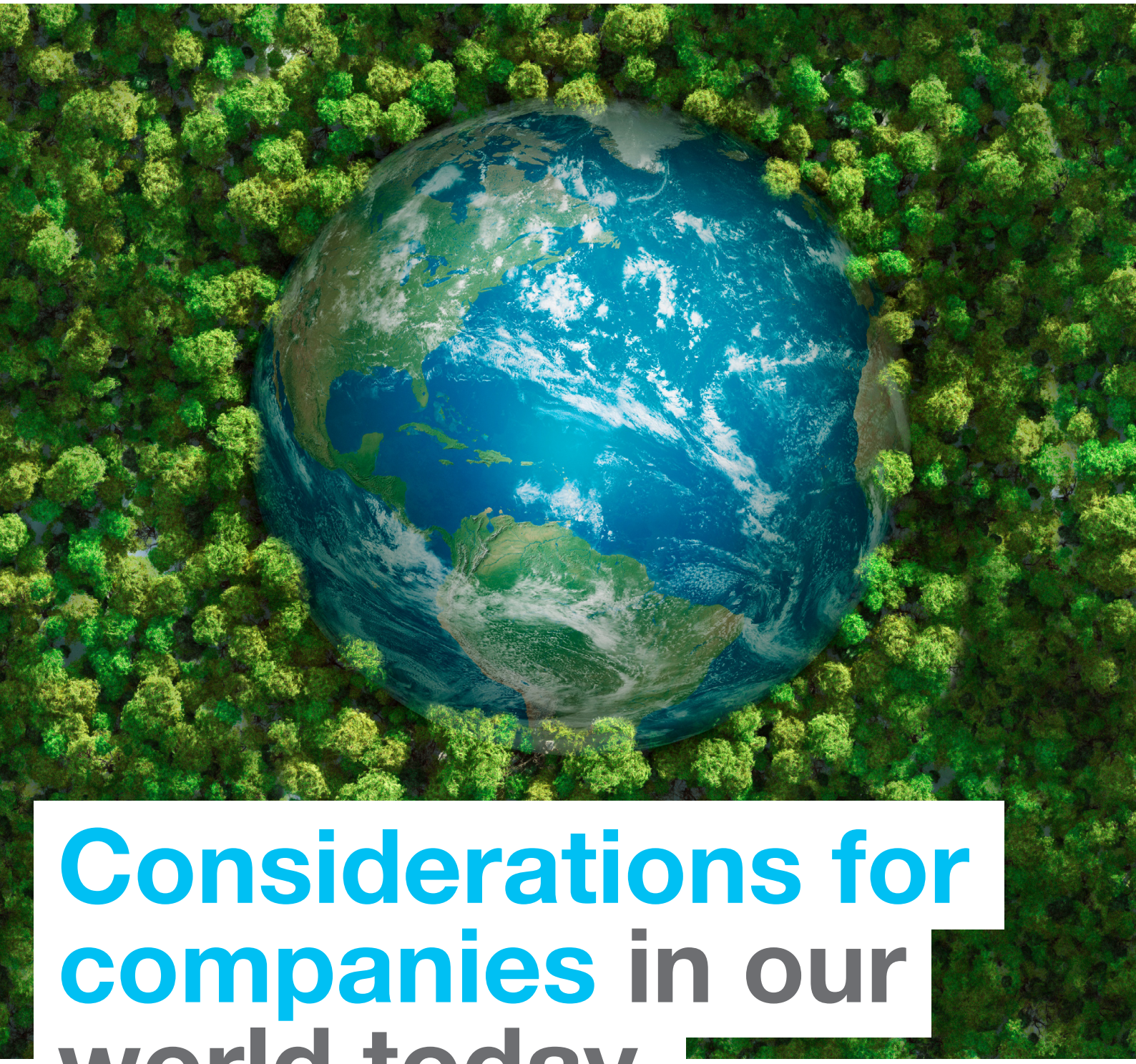


Considerations for companies in our world today.

- How boards can lead on climate risk
- Effective incident responses

Contributors

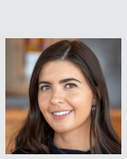
Mark Beaufoy is a specialist environmental lawyer with more than 20 years' experience. Mark acts for business and various levels of government advising on environmental regulatory compliance (in particular in relation to contamination, waste, pollution and hazardous substances) and responding to regulatory action. Mark acts for clients across the Industrial & Consumer, Energy & Resources, Agriculture, Infrastructure and Real Estate sectors. Mark has represented many clients in response to regulatory investigations and legal proceedings (including remedial notices, enforceable undertakings and prosecutions) by both State EPAs and Federal environmental regulators.

Mark has been closely involved in industry groups advising on the reforms to Victoria's environment protection laws. He is known for his experience and expertise in contaminated land law and brownfield redevelopment and has published and presented widely in this area. He is actively involved in the Australasian Land and Groundwater Association (ALGA) and provides legal training to members of the Australian Contaminated Land Consultants Association (ACLCA (Vic)) on environmental report writing and professional liability. Mark regularly presents at industry conferences including Clean Up and EcoForum and was recently awarded the recognition of the 2019 Lawyer of the Year in Contaminated Land and Groundwater by ALGA. Mark is also a sessional lecturer in environmental and planning law at Monash University.

Nicholas Beech is a special counsel in the Employment team, with specialist skills in regulatory compliance and health and safety law.

Considered a safe pair of hands for the full scope of health and safety issues, Nicholas has a particular focus on risk management, incident management, inquiries, incident related litigation and significant experience in relation to health and safety incidents, fatalities, investigations, regulatory actions, prosecutions and coronial inquiries.

He has extensive knowledge of and has presented widely on the modernisation of health and safety laws.



Lauren Taylor is a solicitor in the Mergers & Acquisitions team specialising in corporate governance and head office advisory.

Lauren's experience includes advising the Boards of large corporations and ASX listed entities on compliance with directors' duties under the Corporations Act 2001 and general law, as well as compliance with the ASX Listing Rules and Corporate Governance Principles and Recommendations.

Lauren has advised Boards on major events and controversies that affect corporates of all sizes, including the Hayne Royal Commission, COVID-19 and the ever-evolving landscape of climate-related risk.

Michael Ashforth is a solicitor in the Environment, Planning and Native Title team. Michael advises public and private sector clients on a range of environmental, planning, regulatory and governance matters across all Australian jurisdictions.

His experience includes planning litigation, pollution and environmental licensing, due diligence, contaminated land, local government, heritage and environmental regulatory compliance.

Michael is assisting a number of clients prepare for the transition to the new Victorian environment protection regime, across a number of sectors including mining, energy, forestry freight, manufacturing and retail.

Adrian Perkins is a partner in the Mergers & Acquisitions team with particular speciality in cross border mergers and acquisitions, international trade, commodities trading and offtake arrangements, joint ventures and private equity in various sectors including the industrials, resources, health and technology sectors. Adrian heads King & Wood Mallesons' market leading Industrials & Consumer sector team, and in that capacity leads strategic pursuits and initiatives including international trade and investment projects, client crisis and major incident response, domestic supply chain enhancement projects and business transition to automation, robotics and data driven supply chains.

Andrew Gray is a partner in our Employee Relations & Safety team specialising in all aspects of employment and safety law. Andrew has worked closely with a number of clients to help them adapt to the workforce challenges arising from increased automisation and the future of work.

Andrew is recognised for his expertise in handling sensitive high-profile executive employment issues and is the "go-to" lawyer for many clients looking to implement senior executive change without legal or reputational risk.

Justin McDonnell is a senior partner with 30+ years' experience in commercial litigation. He is sought out by clients for his particular expertise in anti-bribery & corruption. Justin has a long track record advising clients in this space, particularly at Board level. A frequent contributor to thought leadership on ABC issues, Justin contributed the Australian chapter to the Global Legal Insights publication on global Bribery & Corruption. As part of his practice, Justin has liaised with the Queensland Fraud Squad and the Australian Federal Police. He has drafted submissions to Commonwealth Government reviews into ABC and lectured both in Australia and overseas in the area – equipping him with important insights into the machinery of regulatory bodies.

Angela Weber is a senior associate who is recognised as a trusted advisor to a diverse range of clients in the infrastructure, financial services, mining, government and utilities sectors. Her practice spans the full range of WHS and industrial relations work. In recent years, Angela has acted in prosecutions in both NSW and Victoria, and in various regulatory investigations.

Angela's practice incorporates both advisory and litigious work in New South Wales, Victoria, Australian Capital Territory, Western Australia and Queensland.

Shane Ogden is an experienced litigator with broad experience advising on class actions and matters involving banking, energy, mining, LNG, telecommunications, regulatory and privacy. He has successfully defended insider trading allegations against a CEO of an ASX200 company and misconduct allegations against a Vice-Chancellor. Shane has advised on environmental law and employee entitlements in dispute settings.

Will Heath focuses on M&A, joint ventures, capital raisings and corporate advisory work. In his corporate advisory work, Will regularly advises leading ASX-listed and multinational clients across a wide range of sectors on directors' duties, shareholder activism and other governance matters. He is a Senior Fellow at the Melbourne Law School where he teaches an LLM course in corporate law and he also leads a KWM internship course at the Monash Law School on corporate governance. He has published widely on directors' duties and governance issues.

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From the Editor

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Foreword

The world is changing, rapidly. NEXT is about bringing the next to now.

The current environment presents an unparalleled opportunity for business to lead – to prove that the same agility shown in responding and adapting to the pandemic can be applied to tackling society's greatest environmental, safety and technological challenges.

Born out of KWM's Major Incidents team, NEXT looks ahead to spot trends within sectors, the law and the market in order to empower businesses to act with confidence, not only in a crisis but also in strategic planning.

In our first edition of NEXT we consider and predict the issues that our companies face in the world today… and tomorrow. NEXT puts the hazards associated with operating in today's world, into a legal and commercial context. NEXT tracks the moves of investors, consumers, regulators and courts to address current and emerging risks. We explain how identifying and responding to hazards and risks builds brands, reputations and investor confidence – as well as business compliance and continuity.

Enjoy

Adrian Perkins
Sector Lead – Industrials & Consumer,
King & Wood Mallesons

A watchful eye to be kept

Business is currently being called upon to help Australia through an unprecedented upheaval.

The community is looking to companies big and small to provide vital continuity – maintaining supplies, preserving lives, preserving finances and preserving futures.

We think continuity is a powerful theme. It is what this publication, NEXT - Considerations for companies in our world today - is all about. It is why we've decided to push ahead with releasing it in the current climate.

NEXT isn't about COVID-19 directly, but it is about companies' public role in responding to major challenges, keeping business going and keeping the people who depend on them safe and healthy.

Much like the Financial Services Royal Commission triggered a fundamental shift in community expectations of banks, this past summer's bushfires, highlighted the current and future impacts of climate change, the current pandemic will continue to drive increased health, safety and environmental awareness among consumers, and regulation by Governments.

What will this mean for businesses and the people who run them, and those at the frontline proactively preparing and responding to incidents impacting the environment, health and safety and threating business continuity?

One thing is for certain – Crisis-management and continuity planning are essential.

In the medium-term, when economic activity begins to lift and the rush is on re-hire and onboard workers, Industrial Manslaughter laws enacted or expected in several states will mean many employers need to revisit their workplace health and safety schemes. Nicholas Beech explains.

Andrew Gray and Angela Weber outline why New South Wales and Western Australia are moving to ban workplace accident insurance.

Victoria is undertaking a once-in-a-generation overhaul of its Environmental Protection legislation. Michael Ashforth and I lay out the new system of proactive duties and discuss what organisations (now environmental 'duty holders') need to do to comply.

All these changes impact the roles, responsibilities and expectations on company directors. Will Heath and Lauren Taylor provide some practical advice on key considerations.

Recognising that none of this matters if businesses can't continue, Justin McDonnell and Shane Ogden have a guide for arguably the most immediate task confronting businesses fighting for continuity – understanding your contractual obligations and options.

We hope you find this publication useful.

Mark Beaufoy
Partner, Melbourne
Projects and Real Estate

Climate Change:
The (un) forgotten Crisis

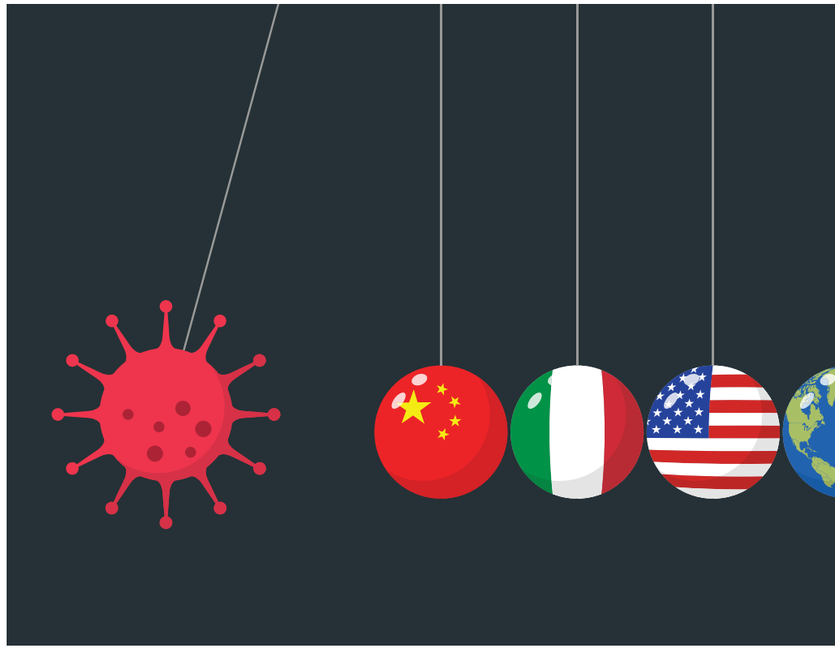
60%
of Directors & Senior Executives ranked ESG principles as the primary reason for Climate Change concerns (KWM Directions Survey 2019)

COVID-19
will undoubtedly have lasting, yet uncertain, impacts. What remains certain is that the risk of environment and other human-related incidents will prevail.

Spotlight

Coronavirus, Cancellations and Contracts

Justin McDonnell / Shane Ogden



Closing for public benefit may not get businesses out of contractual obligations. Negotiating to keep them alive may be to our long-term benefit. >>

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Health Ministers have exceptional powers to take action against COVID-19 and to give such directions considered necessary to deal with public health risks. The existing orders have had a significant impact on Australian organisations and the Australian economy.

Australian employers generally have an obligation to ensure the health and safety of its workers and others in the workplace as far as reasonably practicable and they have responded to COVID-19 in a number of ways. There have been travel restrictions, office closures with working from home arrangements, and offers to pay casual employees sick leave which they might typically not have received. Large events were also cancelled – both the hosting of and the attendance by employees at such events – even before the Health Ministers started to issue formal bans. Large client meetings, symposiums, event sponsorships, and the like.

For more information visit **kwm.expert/NEXT**

However, Australian organisations need to be mindful that the measures they took did not lead them to breach contracts and that they may have suffered from a breach of contract caused by another organisation's COVID-19 response. A general sense of fairness may mean most breaches will be settled by agreement, but will that always be the case? And how much protection against a breach of contract will a public health order, or similar government action, offer?

At the moment, there are more questions than answers. However, common law countries like Australia, the United Kingdom, the United States, and many others recognise the unfairness of requiring parties to uphold contracts where they have been 'frustrated'. A contract is frustrated when the nature of performance of the contract has radically changed since it was agreed, and it has become impossible to perform. A commercial party could easily imagine scenarios that might meet this definition. For example, an organisation hosting a paid annual event for over 500 people might have a large number of cancellations from corporate ticket holders with some seeking refunds. The cancellation of the Melbourne Grand Prix may be a high profile example. Alternatively, perhaps a company can no longer meet its goods delivery obligations because it has become unsafe for its delivery people to make those deliveries.

In practice, however, the threshold for establishing frustration is a high one. Circumstances that prevent performance, but which were reasonably foreseeable at the time the contract was entered into, will not frustrate a contract.

> Delays and increased costs, say, to deliver or receive goods may also not frustrate a contract as performance may not be impossible, merely more difficult. Is a contract frustrated simply because there is an increased risk of exposure to COVID-19 when there are reasonable preventative measures that could be taken instead?

A major concern in seeking to rely on the doctrine of frustration is that the only available remedy is the automatic termination of the contract at the time of the frustrating event. However, this is not always useful. A party may not wish for an automatic termination of a long term contract.

Why terminate a contract measured in years when the steps to limit the spread of COVID-19 may be measured in months?

There is also a risk of misuse of the doctrine. If a party incorrectly believes that there is a frustrating event – and the court later disagrees – the mistaken party may have repudiated an otherwise effective contract and become liable for damages.

For some organisations, there may have recourse to a more sophisticated contractual mechanism for dealing with otherwise frustrating events in their existing contracts. Such a mechanism is known as a force majeure clause (translated as "superior force"). Such clauses are a contractual attempt to overcome the deficiencies of the doctrine of frustration. They reflect an agreement, made ahead of time, about how the parties are to respond to specified but uncertain events that might otherwise frustrate a contract. Common events covered by a force majeure clause include earthquakes, nuclear radiation, civil unrest, nationalisation, strikes, and government action but, effectively, any event can be covered including a viral outbreak.

A key reason parties often prefer a force majeure clause over reliance on the doctrine of frustration is that they give the parties an ability to manage the fallout so to speak. However, viral outbreaks are not necessarily a traditional element in standard force majeure clauses so Australian organisations may need to review their existing contracts. Other commonly defined events may indirectly offer protection in the case of COVID-19, such as embargoes or government action, but whether these are effective will depend on the circumstances and the contract.

A major difficulty parties may face, or need to consider when including viral outbreaks in future contracts, is what exactly constitutes the force majeure event when it comes to a viral outbreak? Is it the emergence of the virus even though, initially, its emergence may have no economic impact? Is it the declaration by the World Health Organisation of a "pandemic"? Perhaps it is a declaration by the Australian Government but then what kind of declaration and does that declaration have any likely impact on the subject matter of the contract?

Even in the case of a public health order, does the content of the order matter?

Why should a public health order banning large events trigger a force majeure event under a delivery contract for coal or steel? Is the declaration of a state of emergency enough on its own or must there be some more specific direction? Also keep in mind that the States and Territories issue their own public health orders or directions so, for contracts with national implications, can a force majeure event be issued for obligations in one State but not others? These questions and more may come to be tested over the next few months or years.

A common issue that also arises when seeking to apply existing force majeure clauses is when should a party give formal notice that a force majeure event is occurring? Most force majeure clauses require formal notice before they are triggered, and it is not uncommon for parties to neglect to give notice because they are cooperating at the time of the event. However, by not giving notice at the right time, a key benefit of a force majeure clause – to improve certainty around when a force majeure event is taking place – is lost. After the event passes or when the costs of cooperation become too high, a failure to have issued a formal notice can lead to difficulties. A court properly interpreting the contract may find that the force majeure clause was never triggered and the doctrine of frustration is all that is available. For some, this will be an unsatisfactory outcome.

At least, these are some of the issues Australian organisations may wish to factor into their pandemic plans. Certainly, some costs will be borne by organisations as the price for protecting the health and safety of their workers and as the cost of complying with public health orders. However, the longer the impact of COVID-19 exists and as the quarantine related costs increase, it is not unreasonable to anticipate disputes arising between currently cooperative parties.

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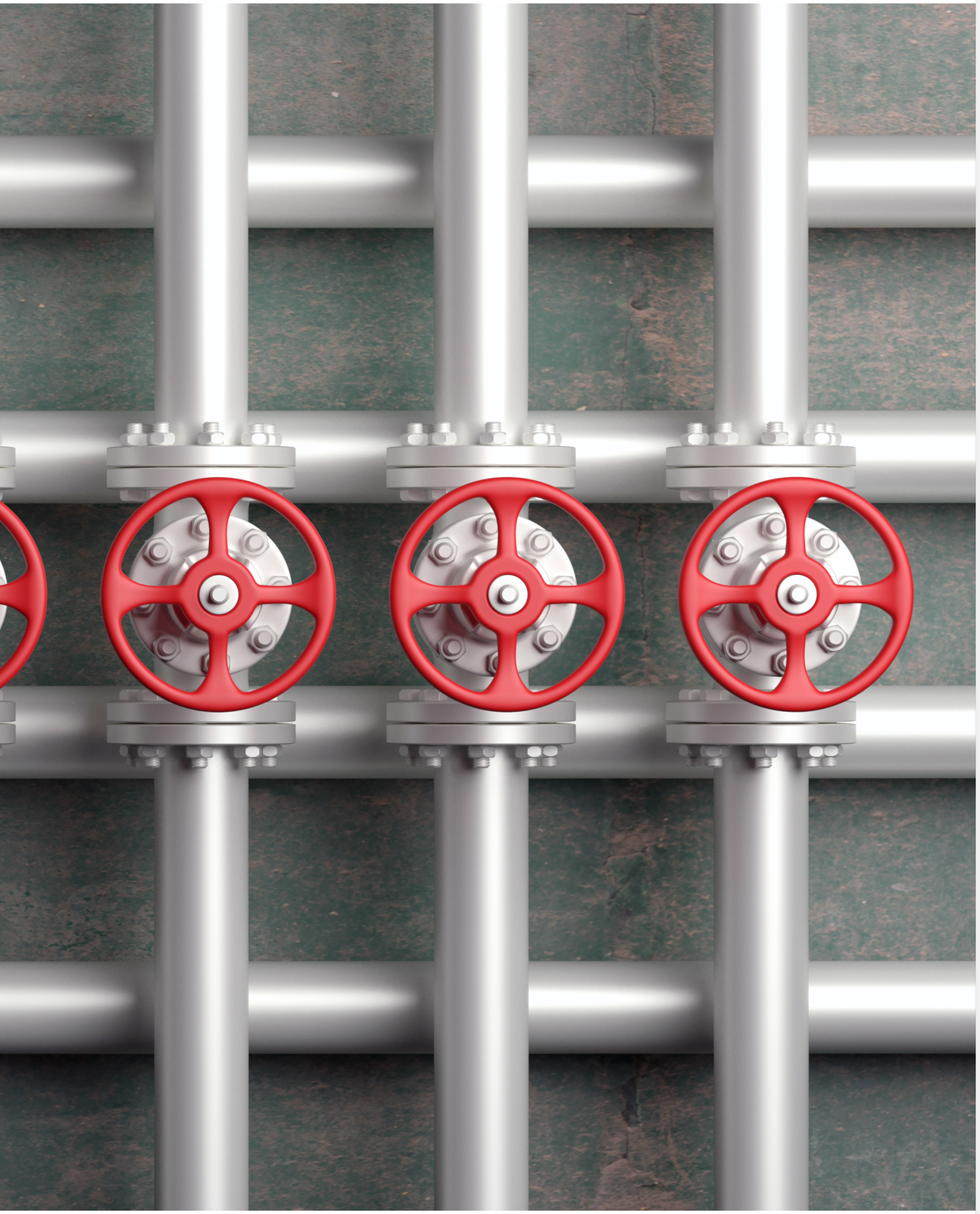

WHS LAW

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Prohibition on work health and safety insurance

Insuring against fines for breaches of work health and safety law is now unlawful in New South Wales. Other jurisdictions are expected to follow suit, meaning companies should review any such policies they hold, and sharpen their focus on WHS risk management to avoid exposure to fines.

Insurance has always played an essential role in business. By insulating a company and its officers against loss, insurance helps businesses manage the risks necessary for economic success. Below, we explain how evolving workplace safety and community expectations have led New South Wales to ban work health and safety (**WHS**) insurance.

Just like other risk classes, many companies have sought to manage work health and safety compliance risks with insurance policies. Whilst there has always been some doubt about the enforceability of these contracts of insurance, they are now unlawful in NSW. Other jurisdictions are anticipated to follow suit. Western Australia has introduced similar amendments, and the bill has been referred to the Standing Committee on Legislation.

Amendments to the *Work Health and Safety Act 2011* (NSW) introduced into the NSW parliament last year makes it an offence for a person to enter into, provide, or benefit from insurance or indemnity arrangements for liability for a monetary penalty (i.e. a fine) for a WHS offence.

An issue ripe for reform

The enforceability of WHS insurance policies have long been questioned. Courts have long held that it is not possible to insure against criminal conduct. Under these principles, WHS policies (which insure against criminal liability arising from statutory duties) are arguably invalid and therefore unenforceable.

Why?

One of the primary purposes of statutory penalties is deterrence. The theory is that an individual or company personally penalised for their actions should be less likely to re-offend, and the penalty also serves to indicate to others the consequences that flow from such conduct, thereby dissuading them from committing similar breaches. By allowing insurers to step in and bear the burden of any monetary penalty imposed, it is arguable that deterrence is eroded. Indemnification for WHS fines removes the incentive for the offender (and others) to change their ways.

For the intention behind WHS law to be realised, criminal penalties need to be levied on the person on whom they have been imposed. This reform seeks to foster a more robust work health and safety culture by holding those responsible for breaches of WHS duties – whether individuals or corporations - to personal account. While WHS law typically prohibits the contracting out of obligations, it is unclear whether obtaining indemnity for monetary penalties would be a contravention of that provision.

Consideration of WHS insurance by the Courts

Despite the principle set out above - that insurance policies designed to avoid the payment of criminal penalties are void against public policy - insurers have continued to offer them. A 2018 review of the model WHS laws commissioned by Safe Work Australia (Boland Review) observed that Courts have been willing to uphold insurance contracts in relation to penalties for strict liability offences or offences that do not involve wilful or dishonest conduct.

To date, the issue has not been conclusively determined by the Courts and there are legal and commercial realities which explain this. When sentencing for breaches of WHS duties, a Court does not generally have jurisdiction to intervene in the contractual relationship between the accused company or individual and their insurer (a third party not involved in the litigation). For the issue to be directly examined, a Court would need to be asked to determine the enforceability of the contract of insurance. But that would require an insurer to decline indemnity on the grounds of illegality. Insurers generally would not be motivated to do this, as they want to continue to sell this type of insurance. Also, to decline indemnity on this basis may expose an insurer to claims for misleading and deceptive conduct[1].

Notwithstanding there have been no cases directly challenging the enforceability of WHS insurance, the issue has drawn judicial comment in the context of sentencing. In a 2013 decision of the South Australian Industrial Relations Commission, the Court declined to discount its sentence on account of the company's early guilty plea and remorse. The Court considered the WHS insurance to be completely at odds with the company asserting it had genuinely accepted the legal consequences of its conduct.

However, Courts in other jurisdictions have not necessarily adopted this approach. In a recent NSW decision, the Court was told by the prosecution that both the company and its sole director (both charged with breaches of WHS duties) were indemnified against any fine imposed. The prosecution argued that the existence of the insurance policy contradicted any submission that the defendants were remorseful and accepting of the consequences of the offending. In sentencing, the Court agreed that the insurance policy was relevant to the defendants' capacity to pay their fines. But the Court did not accept the submission as it related to remorse, finding instead that the existence of the insurance policies was a neutral factor. Further, the Court considered that the insurance policy did not affect the public denouncement of the offending, and the recognition of harm to the victims, which was signified by the conviction[2].

Boland Review recommends blanket prohibition

The prevalence of WHS insurance policies has left policymakers and industry stakeholders concerned about the deterrent power of WHS laws becoming diluted. The Safe Work Australia review of the model WHS laws (conducted by Marie Boland and published in February 2019) said that stakeholders who were consulted overwhelmingly supported a legislative response to this issue.

The Boland Review duly recommended that insurance for WHS fines be prohibited by making it an offence to enter into a contract of insurance or other arrangement under which a person is covered for liability for a monetary penalty under the model WHS laws. It also recommended that insurers be prevented from offering insurance or granting indemnity for liability. According to the Boland Review, these amendments would facilitate compliance with the model laws by ensuring that the deterrent effect of monetary penalties is not blunted by insurance coverage

The NSW parliament has been the first to act to give legislative effect to this recommendation. A Bill which has been passed by the NSW Legislative Council creates three new offences:

1. without reasonable excuse, entering into an insurance contract or other arrangement which covers a person for liability for a monetary penalty under the WHS Act;

2. providing insurance or granting indemnity for liability for a monetary penalty under the WHS Act; and

3. benefiting from an insurance contract, other arrangement or grant of indemnity, for liability for a monetary penalty under the WHS Act.

The amendments also make officers of a body corporate liable for offences committed by the body corporate. The parameters of the phrase 'without reasonable excuse' are unclear – this is not defined in either the Bill or the explanatory note.

The laws will not apply to contracts of insurance entered into before their commencement. Further, it is important to note that the laws will not prevent a person being indemnified for the legal costs of defending a WHS prosecution or investigation.

What next?

NSW companies and their officers need to ensure that policies offering indemnity for WHS fines are not renewed and that no new policies are entered into. It is also necessary for a watchful eye to be kept on the status of this reform in other states and territories.

As a risk class that can no longer be covered by insurance (at least in NSW), now more than ever it is critical for businesses to take a proactive risk management approach to WHS duties. Given also that this reform is occurring at a time when penalties for WHS breaches are on the increase, companies and officers should take the opportunity to review their duties to ensure that WHS risk is prioritised and well-managed.

See Issue 1 Footnotes page 26.

COMPLIANCE

RISING HEAT IN THE BOARDROOM

Directors' duties in the face of climate risks

Being an Australian company director isn't easy in 2020. The role requires dealing with more prescriptive compliance burdens, increasingly aggressive regulators and demanding stakeholders. **Business-as-usual directorship is tough.** Added to this, Australian companies are under increasing pressure to recognise, manage and disclose climate risks as major natural disasters are seeing public and shareholder expectations grow fast.

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Boards now more than ever need to consider strategies to manage climate-related risks – this is no small feat. Part of the complexity of climate-related risks is that they will invariably raise significant legal issues which have yet to be tested by the courts, and Boards cannot be guided by market practice in dealing with them. While the response to a climate-related risk is likely to be nuanced and require specialist advice, there are some common themes we encounter in advising Australian company Boards on risk management. Here are our seven key considerations that will help you navigate climate-related risk.

1

Directors' duties set a high bar

Directors should always comply with their statutory and general law duties. In responding to a climate-related corporate risk (or any corporate risk, emerging or otherwise), the baseline duties of every company director are to act with reasonable care and diligence (section 180 of the Corporations Act) and in good faith in the best interests of the company and for proper purposes (section 181 of the Corporations Act). While it is always essential for company directors to act with integrity and honesty, doing so will not necessarily discharge these statutory duties.[1]

Under Australian law, regulators and courts will judge directors' acts and omissions by the objective standard of the reasonable company director and with the benefit of hindsight.

And, as we have noted elsewhere, ASIC has a strong track record in prosecuting directors for breaches of statutory duties.[2] In particular, the recent 'stepping stones' cases (including, most recently, the Vocation decision) illustrate that directors may be pursued for an alleged breach of their statutory duty of reasonable care where their acts or omissions have exposed the company to a breach of law.[3] Although it is unlikely ASIC will pursue directors using the stepping stone approach for a breach of environmental laws alone (this falls outside of ASIC's regulatory purview), ASIC could 'piggy back' its own actions against directors following successful prosecutions by environmental regulators of a breach of environmental laws.

It is also possible for directors to be personally liable for breaching their duty of care and diligence as a result of a failure to adequately consider reasonably foreseeable climate risk,[4] even if the company is not in breach of the Corporations Act or other legislation.

2

Get your ASX disclosure right

In responding to climate risks, listed company directors will need to manage continuous disclosure obligations and keep the market informed of material developments. It's not enough to make timely disclosures. Disclosures also need to be accurate and not misleading.

One of the biggest traps for Boards is to sign-off on disclosures that have not been subject to an appropriately robust review process, which is only made more difficult by the still developing requirements of climate-related risk disclosure. In recent years ASIC and APRA have repeatedly emphasised the need for companies to address climate change risk as part of their governance and risk management frameworks and to make public disclosures where appropriate.[5] The ASX Corporate Governance Council has also weighed in, now requiring listed entities to disclose whether they have any material exposure to environmental or social risks, and if so, how they manage those risks.[6]

We also know from the results in a long line of cases from James Hardie[7] to Vocation[8] that ASIC will not hesitate in pursuing (with a very high rate of success) directors who authorise misleading company announcements. Additionally, the recent Vocation case confirms the principle (rightly or wrongly) that the business judgment rule will not apply to directors' decisions in relation to ASX releases and other compliance matters. Practically, this means ignorance or carelessness in climate-related risk disclosure will almost invariably lead to liability.

3

Don't miss the shifting sands

The law is dynamic and Boards must not be complacent or adopt a 'wait and see' approach to dealing with climate-related risk. Boards need to consider the regulatory guidance including ASIC regulatory guides and international developments such as the Financial Stability Board Task Force on Climate-Related Financial Disclosures and actively monitor updates in this area, particularly in reporting and other disclosure obligations.[9] Boards also need to keep their shareholders at front of mind. The 2019 AGM season saw the ASX200 have an increase from 2018 in (albeit unsuccessful) ESG-related shareholder resolutions. Being on the front foot of climate risks may allow companies to avoid shareholder activism of this kind.

It is also important to follow litigation trends – in Australia, we've already seen climate change litigation for approvals for developments in fossil fuel-related projects.[10] There have also been actions to hold companies that have been either directly or indirectly affected by climate change to assess and effectively disclose those risks.[11] In the not too distant future, we may see investors and regulators pursue directors and officers who have not proactively dealt with climate change or are responsible or significant emissions. In these evolving circumstances, being ignorant of the state of the law in relation to climate risks can be its own disaster.

4

So, where's your plan?

As with any material corporate risk, companies should consider formulating a risk management plan that will allow the Board to deal with climate risks head-on. In this context, the Board's role is to oversee the implementation of an appropriate plan and periodically test it against a range of potential risks that may affect the company's business and operations in both the short and long term. Climate risks go beyond the physical risks of flooding or fires that can have a financial and operational impact on companies that are vulnerable to these risks. Reputational risks as a result of engaging in or supporting carbon intensive activities, the premature devaluation of carbon heavy assets, and the financial and resource strain as a result of responding to litigation, regulatory scrutiny and compliance must also be front of mind.

5

You need a legal adviser who you can trust

By their very nature, major corporate risk incidents raise significant legal issues. Directors need to adopt a proactive approach to considering climate risk in their corporate strategies and will need legal advice on resulting issues from an adviser they trust. This has two aspects. First, internal legal counsel should be empowered to assist the Board's response to a climate-related crisis. Crisis and risk management should not be limited to operational executives. Second, Boards will typically need external advice and support on a broad range of legal issues that may arise from a climate risk including continuous disclosure, directors' duties, environmental protection laws and in relation to non-Australian operations or foreign stakeholders, among others.

6

Lessons learned

Boards and their risk committees should also ensure sufficient time is dedicated to learning from climate-related incidents in corporate Australia and abroad. To this end, Boards of listed entities should be aware that if a climate-related risk affects their business, the ASX Principles require them to review any material incident involving a breakdown of the entity's risk controls and the "lessons learned".[12] Boards should engage with management to determine what could be done better and should be fed back into risk management planning. It may be necessary to engage external consultants to determine how these risks feed into the company's crisis and strategic planning.

7

Look for the opportunities

It's not all bad news. Taking a more holistic view, Boards are in the driver's seat for assisting in the transition to a lower carbon economy. To that end, the current focus on climate risk also provides an opportunity for corporates to seek out and hire specialists that will assist the company to successfully navigate the increasingly ESG focussed landscape. Moreover, companies that have well thought out, well progressed approaches to climate change (and sustainability more generally) – be it net zero pledges (with transparency and clear metrics on how targets are to be achieved), production or investment in low carbon products or provision of services that contribute to a lower carbon economy – will be a more attractive investment for ESG minded investors.

* *See Issue 1 Footnotes page 26.*

OPERATIONS

ON BOARD

INDUSTRIAL MANSLAUGHTER

Author

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KEY TAKEAWAYS

ALIGNMENT ON PENALTIES HIDES MAJOR DIFFERENCES BETWEEN LAWS STATES AND TERRITORIES ARE PASSING.

INDUSTRIAL MANSLAUGHTER OFFENCES ARE ***OUTCOME-BASED*** *OFFENCES, TRIGGERED BY AN EVENT – A WORKPLACE DEATH. THIS IS DIFFERENT TO EXISTING* ***RISK-BASED*** *OFFENCES – WHERE LIABILITY COMES FROM CONDUCT EXPOSING SOMEONE TO RISK.*

HOW RISKS ARE IDENTIFIED AND CONTROLLED WILL REMAIN KEY ISSUES IN RESPONDING TO THE NEW LAWS.

NATIONAL EMPLOYERS WILL NEED TO UPDATE POLICIES, LEGAL COMPLIANCE SYSTEMS AND DOCUMENTS.

The disharmony of industrial manslaughter laws

If Western Australia's proposed industrial manslaughter offences become law, the maximum prison and monetary penalties would be in line with the punishment in jurisdictions with similar laws. But behind the press-friendly headline, the uniformity ends.

It is a curious state of affairs for a relatively new offence.

The emergence of differing regimes among the states and territories unquestionably means increased complexity and expense navigating occupational health and safety systems for any organisation operating nationally. But safety - not simplicity – is the standard by which these laws will be judged. So where to start for an employer who is committed to safety improvement and navigating these changes?

The state(s) of play

Industrial manslaughter currently exists in the ACT, Queensland, Victoria and the Northern Territory.

The ACT made industrial manslaughter an offence back in 2003. In Queensland in 2016, two construction site deaths, followed by four high-profile fatalities at the Dreamworld theme park brought national attention to the issue. The state introduced a workplace manslaughter offence the following year. Victoria's and the NT's legislation passed in November 2019.

Proposed laws are before Western Australia's parliament to introduce two offences – a 'crime' offence and a 'simple' offence.

There has been unsuccessful attempts to introduce industrial manslaughter laws in South Australia and Tasmania don't look like they will. The Coalition Government has previously stated it doesn't believe federal industrial manslaughter laws are required.

The present Liberal New South Wales government will not be introducing industrial manslaughter laws and instead proposes to provide clarity, by way of insertion of a curious 'drafting note' into its present Work Health and Safety laws, that when a person dies at a workplace, it may constitute manslaughter under the State's Crimes Act.

Many of the jurisdictions that have introduced or are proposing to introduce industrial manslaughter laws say they are following the recommendation of the 2018 federal review (conducted at state WHS ministers' request) that examined progress in harmonising workplace safety laws. The review recommended the model WHS Act be amended to include a uniform industrial manslaughter offence that addressed community concerns and the limitations of the criminal law and which enhanced and maintained harmonisation of WHS laws[1].

All worthy aims. But what has unfolded is a fragmented implementation of laws that lacks uniformity and spirit of harmony. The introduction of the laws has been described as a distraction from the harmonised model WHS laws and 'a fissure which puts at risk the collaborative approach' of a harmonised system. Goals other than consistency have led the charge to provide criminally enhanced consequences for the worst examples of corporate or individual behaviour that causes the death of workers.

The law says...

In most jurisdictions, the offence of industrial manslaughter is committed when 'negligent' conduct causes the death of a worker.

In Victoria, it has been made clear that the focus on whether a corporate employer has committed the offence is on its conduct. In practical terms, this means that such an employer may avoid being found guilty solely because of the conduct of a 'rogue' employee, agent or officer who acted contrary to steps taken or things provided or directed by the employer.

RESULTS IN BRIEF

In NSW, companies and their officers will need to ensure that policies offering indemnity for WHS fines are not renewed and that no new policies are entered into. It will also be necessary for a watchful eye to be kept on the status of this reform in other states and territories.

Officers of employers can also be charged. Who is liable within an organisation differs between the laws, although there is commonality - each jurisdiction looks at an individual's decision-making capacity within the organisation to determine if they're senior enough to warrant prosecution - meaning each case will depend on the facts and circumstances.

Western Australia and the Northern Territory omit partners in a partnership. Victoria and Queensland explicitly include them. The ACT doesn't explicitly say but would likely capture partnership owners as decision-makers.

Two-tiered laws in the West

There are three big differences between Western Australia's proposed legislation and that already in force elsewhere.

The first is the plan to create not one but two offences – a more serious crime offence where someone acts with knowing disregard for life, and less serious simple offence where death occurs as a result of a breach of WHS duty. The concept of two-tiered manslaughter does not exist elsewhere in our legal system.

Secondly, the test applied to the crime offence is unique and will be difficult to prove – the prosecutor will have to show the employer knew that their actions were likely to cause death. The setting of this incredibly high burden is deliberate and may only see a prosecution every 5 years[2].

Because of this and the peculiarities of the Western Australian legal system, the simple offence will be prosecuted in the Magistrates' Court and not require proof of any knowledge elements. It has been described as an alternative offence - so that in the case when a crime offence is not proven the accused may still be convicted of the 'lesser' industrial manslaughter charge (and face a multi-million dollar monetary penalty).

Lastly, unlike in other jurisdictions, for an officer of the employer to be held separately responsible for an offence in Western Australia, additional elements of the offences must be proven, including that the employer's conduct was 'attributable to any neglect on the part of the officer' or it was engaged in with the officer's 'consent or connivance'. This 'derivative' application of responsibility to an officer mirrors the existing unique approach under Western Australia's occupational, health and safety laws.

The outcome is now the trigger, but preparation still the key

At their foundation, the industrial manslaughter offences are outcome-based offences – i.e. the offence is triggered by a specific event – a workplace death. This is new as most of the existing WHS offences are risk-based in relation to conduct that exposes a person to a risk of death. These existing offences can be proven in the absence of a death, serious injury or even an incident. The key elements behind the risk based offences are well known and much has been written, by legislators, regulators and the courts that provides guidance on what concepts such as 'reasonably practicable' and 'due diligence' mean. This helps organisations know exactly what they have to do to comply with their duties and most of their safety management systems will be built around these concepts.

The way risks have been identified and controlled will remain key issues in responding to the new laws.

It's negligence, but criminal

Although concepts such as 'negligence' have long histories and established meaning in civil jurisdictions, there is less consistency in the criminal regime, particularly as it applies in the WHS space.

The legislators have offered some guidance on what conduct will constitute 'negligence' for the purposes of industrial manslaughter offences. Under the laws in Victoria, Queensland, the ACT and NT, conduct is 'negligent' and warrants criminal punishment if it:

- involves a high degree of the risk of death; and
- falls short of the standard of care that a reasonable person would exercise in the circumstances.

Although this definition of 'negligence' reflects the common law and some statutory tests for manslaughter by criminal negligence, we are yet to see guidance material from regulators on what this means for WHS and the first prosecution of an industrial manslaughter offence is only just underway in Queensland.

In the two Territories, reckless conduct can also constitute the grounds for the offence of causing death or of causing serious harm to a worker. Apart from Western Australia, this very high threshold does not appear anywhere else.

Defences – easy to state but …

There is a degree of harmony when it comes to defences to a charge of industrial manslaughter. In Victoria, the NT and ACT, all of the defences available to a person charged with manslaughter under the common law or other legislation, such as mistake of fact, extraordinary emergency and insanity can be raised in response to an industrial manslaughter charge. Although not stated in Western Australia, this is likely to be the position there too. Queensland allows many of those defences but not 'accident'. It will be interesting to see just how these defences will be pursued and how effective they will be.

What does it mean?

Unquestionably, industrial manslaughter offences, with their variable definitions, inconsistent applications and defences, and potential overlap with existing offences will create challenges to organisations seeking to meet WHS duties and achieve safe workplaces.

To navigate the separate tests, national employers will need to devote resources to updating legal compliance systems and documents. However, the existing systems most organisations have will be solid foundations on which to build another floor to accommodate and address the peculiar aspects of the industrial manslaughter laws.

Culture focus

It has been observed that determining a breach of industrial manslaughter laws should involve an assessment of whether there is a failure by an organisation or individual to create a 'culture of compliance' in respect of safety[3]. It will likely require a holistic examination and documentation of an organisation's behaviours and actions that demonstrate a culture of safety awareness and compliance in respect to a broad range of safety issues.

While we wait for some formal guidance and the dust to settle, it is an ideal time to check on these fundamentals of a robust culture of compliance:

- Board knowledge and involvement – appropriate information flows to board members about safety issues and risks and responses;
- Managerial oversight – there are established safety risk committees and groups operated by senior personnel who scrutinise the daily operation and effectiveness of the organisation's safety systems;
- Risk and issue identification, understanding and controls – appropriate systems are in place to identify risks, communicate knowledge about those risks throughout the organisation and implement controls that can be monitored and verified;
- Proactive approach to safety – the organisation's financial and other resource allocation decisions reflect a focus on the prevention of incidents and unsafe actions;
- Incident investigation – protocols are available and followed to detect risk patterns and early warning signs of potential fatalities;
- Good records are kept of the systems, actions and training.

The laws might not be in harmony, but the approach to safety in the workplace can always be.

* *See Issue 1 Footnotes page 26.*

Key Takeaways

Alignment on penalties hides major differences between the laws states and territories are passing.

Industrial manslaughter offences are outcome-based offences, triggered by an event – a workplace death. This is different to existing risk-based offences – where liability comes from conduct exposing someone to risk.

How risks are identified and controlled will remain key issues in responding to the new laws

National employers will need to update policies, legal compliance systems and documents.

Mark Beaufoy and Michael Ashforth

THE VICTORIAN ENVIRONMENT PROTECTION AMENDMENT ACT 2018 WHAT SHOULD YOU BE TELLING THE BOARD?

AS A CONSEQUENCE OF THE COVID-19 CRISIS, THE VICTORIAN GOVERNMENT HAS DELAYED THE IMPLEMENTATION OF THE ENVIRONMENT PROTECTION AMENDMENT ACT 2018 (**THE NEW ACT**). THE EPA REFORM UNIT HAS ANNOUNCED THAT THE NEW COMMENCEMENT DATE WILL BE 1 JULY 2021.[1]

In the midst of businesses dealing with the COVID-19 pandemic and the associated economic impact, this will be a welcome relief. The delay provides business with more time to:

- prepare for the commencement of the new legislation, including understanding the new duty-based regime and the associated policies and guidelines,
- reviewing and updating risk assessments and environmental management procedures and systems,
- training staff and briefing management or the Board EHS or Risk Committee.

While 1 July 2021 looks like it will be the new commencement date, if we get through this COVID-19 crisis more quickly, that date could be brought forward.

The new regime moves away from the protection and prohibitions of the current *Environment Protection Act 1970*, aimed at dealing with impacts of pollution, and introduces positive duties and prevention mechanisms aimed at preventing pollution from occurring. The duty-based system is based on work health and safety legislation.

The key change is that 'duty holders' need to be proactive in complying with the new Act. An offence can be committed without actually causing pollution or mishandling waste. If you fail to have the systems in place to prevent risks to human health and the environment from pollution and waste, you will contravene this new legislation.

Company directors and officers can be held personally liable for the contraventions of their company, or for not being proactive in ensuring the business complies with the new duties under the Act.[2]

The new regime also introduces a new risk-based permissions system (registrations, permits, licences),[3] higher penalties for criminal offences,[4] as well as civil penalties and the new director and officer liability provisions.[5]

The EPA will be given more teeth by the introduction of new compliance and enforcement powers, including the power to compel attendance at an interview for investigating a breach of the Act, and to issue a range of remedial orders including 'stop work' and 'prevention' notices.[6]

The Victorian Government has invested a significant amount of money resourcing the EPA, including training more than 400 enforcement officers, and it is expected that the EPA will continue this current active compliance approach and proactively enforce compliance under the new Act.

The new duties

The new duties can be broadly grouped into two categories:

1. duties that apply to a 'person engaging in an activity' (the general environmental duty and pollution and waste related duties); and
2. duties that apply to the 'person in management or control' of land (contaminated land duties).

The General Environmental Duty

The centre piece of the new regime is general environmental duty (**GED**)[7], which requires that:

'a person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.'

The GED imposes a positive obligation on entities engaging in activities that may give rise to risks of harm to human health or the environment from pollution or waste. Duty holders will need to the understand risks presented by their activity and identify how those risks can be controlled or managed. The GED applies to everyone – to industry in all sectors, manufacturers, mining and resources, energy producers and providers, real estate developers, contractors working on infrastructure projects, commercial, retail, and residential developments.

From experienced companies with extensive environmental, health and safety systems,[8] to mid-tier and small businesses which may need to adopt new environmental management systems to comply with this new duty. The EPA will be releasing guidelines and compliance codes to help business in these different sectors, but preparation should not wait for this.

Once risks and possible controls have been identified, the duty holder is then required to implement 'reasonably practicable measures' to eliminate or reduce the likelihood of those risks eventuating.

General guidance on the concept of what is 'reasonably practicable' is found in section 7 of the new Act, which provides that the following matters need to be taken into account:

- the likelihood of those risks eventuating;
- the degree of harm that would result if those risks eventuated;
- what the person concerned knows, or ought reasonably to know, about the harm or risks of harm and any ways of eliminating or reducing those risks;
- the availability and suitability of ways to eliminate or reduce those risks;
- the cost of eliminating or reducing those risks.

Sections 25(4)[9] and 25(5)[10] of the new Act provides a non-exhaustive list of more specific ways in which the GED may be breached.

Other duties

In addition to the GED there are several other duties which are imposed on:

- the person undertaking the activity; and
- the person in management and control of contaminated land.

Compliance with these duties requires significant preparation. This should start now to be ready for 1 July 2021. These duties and the actions required a summarised in the table below.

Duty	Duty to respond to harm and restore after an incident (section.31)	Duty to notify of certain pollution incidents (section.32)	Duty to manage contaminated land (section.39)	Duty to notify of certain contamination (section.40)
Duty holder	Person undertaking the activity	Person undertaking the activity	Person in management or control	Person in management or control
Content	If a pollution incident has occurred that causes harm to human health or the environment, a person who is engaging in that activity must, so far as reasonably practicable, restore the affected area to the state it was in before the pollution incident occurred.	The person engaging in the activity must notify the Authority, as soon as practicable, after the person becomes aware or reasonably should have been aware of the occurrence of the notifiable incident.	A person in management or control of land must notify the EPA if the land has been contaminated by notifiable contamination as soon as practicable after the person becomes aware of, or reasonably should have become aware of, the notifiable contamination.	A person in management or control of land must notify the EPA if the land has been contaminated by notifiable contamination as soon as practicable after the person becomes aware of, or reasonably should have become aware of, the notifiable contamination.
Action recommended	Ensure that your policies and procedures require appropriate reporting of and response to incidents that may give rise to a duty to respond and restore. Ensure that incident reporting and response policies and procedures are being properly implemented and are effective.	Ensure that your policies and procedures require appropriate reporting of incidents that may give rise to a duty to notify. Ensure that incident reporting policies and procedures are being properly implemented and are effective.	Collect all environmental reports, data for all land under your management or control and engage an environmental consultant to review those reports and determine whether the contamination is 'prescribed notifiable contamination' that gives rise to a duty to notify and/or a duty to manage.	In addition to undertaking the recommended action in relation to the duty to manage, ensure that the duty to notify of certain contamination is contemplated by your policies and procedures in relation to pollution incidents and the duty to restore.

New Permissions

The new Act will introduce a new, much broader, permissions regime. Works approvals and licences will be replaced by development and operating licences. The activities that will require permission under the new Act[11] expands on those listed in Environment Protection (Scheduled Premises) Regulation 2017. The number of activities for which permission is required will increase from around 51 to 78. The new Act also introduces new permit and registration requirements for activities that present a lower level of risk.

Businesses should be aware that under these new permission requirements, activities for which no permission is currently required may require permission under the new Act.

Regulation, Standards pushed back

Supporting the implementation of the new Act, exposure drafts of the Environment Protection Regulations and Environmental Reference Standards were released for public comment between 2 September - 31 October 2019. These were expected to be finalised in April or May 2020. It is anticipated that the finalisation of the Regulations and ERS will now be delayed.

There have been a number of other policies and guidelines released by EPA in draft in relation to the new duties, powers and requirements under the new Act. Finalisation of these policies and guidelines may also be delayed.

On 18 December 2019 the EPA released:

- Draft Regulatory Strategy (Publication 1800: Regulatory strategy - 2020-2025 draft);
- Draft Compliance and Enforcement Policy (Publication 1798: Compliance and enforcement - Draft policy).

On 30 March 2020 the EPA released the following guidance on operating licences:

- Publication 1850: Guidance for Operating Licences; and
- Publication 1851: Implementing the general environmental duty: A guide for licence holders.

On 3 April 2020, in conjunction with the EPA, the Department of Environment, Land, Water and Planning (DELWP) released draft exposure amendments to the Victorian Planning Provisions and associated Ministerial Direction and Practice Note dealing with potentially contaminated land. Submissions on the proposed changes, which can be provided via Engage Victoria, were to be made until 5 May 2020. The public consultation period has been extended to 2 June 2020.

How to prepare – what do I need to do and what do I need to tell the board?

To ensure that you are prepared for the 1 July 2021, you should consider undertaking the following actions:

1. Establish a project working group responsible for ensuring the business is familiar with the new duties, permissions, powers and prepared for the implementation of the new regime.[12]
2. Review risks and hazards associated with the company's operations including preparing a risk register.
3. Review current company policies, procedures and risk management processes. Ensure that those policies are updated to align with requirements of the new Act.[13]
4. Train staff on the new EP Act to ensure that existing and revised policies, procedures and processes are implemented appropriately.
5. Identify whether the business has any management or reporting obligations in relation to land under the management or control of the business;[14]
6. Consider need for any new permissions and start process of engaging with EPA early on application process.[15]

How to prepare – what do directors and officers need to do?

Similar to the approach required under OHS legislation, directors and officers have an obligation to exercise 'due diligence' and to demonstrate that a proactive approach to meeting the duties under the new Act is being taken by both them and their companies. This involves:

1. Acquiring knowledge and keeping up-to-date about environmental matters;
2. Understanding their businesses, including risks to human health and the environment;
3. Ensuring the business has the right resources and processes in place to eliminate or minimise risks;
4. Ensuring the business has the right processes to receive and respond to reports of incidents, hazards or other issues, and processes to comply with duties; and
5. Verifying that the processes and resources set out above are being used.

Next steps

With the implementation of the new Act delayed for around 12 months, businesses now have an excellent opportunity to ensure they are prepared. Certainly, we expect the EPA will take the view that businesses will now have no excuse for not being ready. We recommend that businesses aim to have trained all staff, identified risks and hazards to the environment and human health in the business, made the necessary changes to policies and procedures, and undertaken appropriate investigations into land under the management or control of the business well in advance of the new Act coming into force.

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* *See Issue 1 Footnotes page 26.*

* Issue 1 Footnotes

Page 8 Prohibition on work health and safety insurance

[1] Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor [2013] SAIRC 22

[2] SafeWork NSW v Macquarie Milling Co Pty Limited; SafeWork NSW v Samuels [2019] NSWDC 111

Page 12 Rising heat in the Boardroom Directors' duties in the face of climate risks

[1] https://www.kwm.com/en/au/knowledge/insights/the-high-courts-timely-reminder-on-directors-duties-20190326

[2] https://www.kwm.com/en/au/knowledge/insights/directors-duties-asic-track-record-civil-penalty-proceedings-20161108

[3] https://www.kwm.com/en/au/knowledge/insights/asic-v-vocation-20190702

[4] In an opinion published by Noel Hutley SC and Sebastian Hartford-Davis in October 2016 (and updated in March 2019), the authors opined that Australian courts will most likely consider that climate change risks are foreseeable, and that directors who fail to consider those risks may be liable for breaching their duties of care and diligence.

[5] ASIC expects companies to include in their annual directors' reports a discussion of climate risk when it could affect the company's achievement of its financial performance or disclosed outcomes (underpinned by sophisticated scenario analysis), including any relevant comments as to how risk factors that are within the control of management will be managed. See further, ASIC Report 593: Climate risk disclosure by Australia's listed companies (September 2018); Final Report from the G20 Financial Stability Board's Task Force on Climate Related Financial Disclosures (June 2017) which ASIC has endorsed.

[6] ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (fourth edition) (February 2019) ("ASX Principles").

[7] Australian Securities and Investments Commission v Meredith Hellicar & Ors [2012] HCA 1

[8] Australian Securities and Investments Commission v Vocation Limited (in liquidation) [2019] FCA 807.

[9] See ASIC Regulatory Guide 228 (in relation to prospectuses) and ASIC Regulatory Guide 247 (in relation to directors' reports).

[10] Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7.

[11] Guy Abrahams v Commonwealth Bank of Australia VID879/2017; Mark McVeigh v Retail Employees Superannuation Pty Ltd ACN 001 987 739.

[12] ASX Principles, Recommendation 7.1.

Page 16 Industrial manslaughter

[1] Safe Work Australia, 'Review of the Model Work Health and Safety Laws' (Final Report, December 2018) 23.

[2] Western Australia, Parliamentary Debates, Legislative Assembly, 20 February 2020, 948 (Bill Johnston, Minister for Mines and Petroleum; Energy; Industrial Relations).

[3] See for example, Worksafe Queensland, 'Best Practice Review of Workplace Health and Safety Queensland' (Final Report, 3 July 2017) 112; Explanatory Memorandum, Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019 (Vic) 7.

Page 22 The Victorian Environment Protection Amendment Act 2018 | What should you be telling the Board?

[1] See KWM update 'COVID-19 delays new Victorian Environment Protection Act' at https://www.kwm.com/en/au/knowledge/insights/covid-19-delays-new-victorian-environment-protection-act-20200422

[2.] Failure to exercise due diligence (s 349): if a company commits and offence, s 349 will make an officer of that company liable for the same offence if that officer failed to exercise due diligence to prevent the commission of the offence by the company. This provision only applies in relation to certain specified offences such as the duty to notify of contaminated land, breaches of permission conditions, and unlawful deposit of waste. The onus will be on the prosecution to establish that the officer failed to exercise due diligence. When determining whether an officer failed to exercise due diligence, regard will be had to what the officer knew, or ought reasonably to have known, whether or not the officer was in a position to influence the body corporate; and what steps the officer took, or could reasonably have taken, to prevent the commission of the offence.

Defence of diligence (s 350): where a company commits an offence, an officer of that company is also deemed to have committed the same offence. This provision applies in relation to, among others, the duty to notify of certain pollution incidents and in relation to the GED. A defence is available where an officer can prove that they exercised due diligence to prevent the commission of the offence by the body corporate. When determining whether the officer exercised due diligence, regard will be had to the matters outlined above (knowledge, influence, reasonable steps).

Accessorial liability (s 351): an officer liable for offences committed by a company where the officer was authorised or permitted the commission of the offence by the company or was knowingly concerned in any way (whether by act or omission).

[3] The number of activities for which a permission is required is increasing from around 51 under the Environment Protection (Scheduled Premises) Regulations 2017 to around 78 under the exposure draft Environment Protection Regulations.

[4] The penalty for breaching the GED will be 2,000 penalty units (currently $330,000) for individuals and 10,000 (currently $1.6 million) for corporations. This is twice the maximum penalty for any offence under the current legislation. For aggravated offences those fines double and for individuals may also result in up to 5 years imprisonment. In addition to increased penalties for criminal offences, the new regime will introduce new civil penalties. We consider that lower standard of proof required to prove contravention of a civil penalty provision (compared to the criminal standard of proof), will result in an increased number of matters prosecuted by the EPA.

[5] The new Act also introduces new provisions that, in certain circumstances, allow the EPA to direct obligations (such as environmental action notices or site management orders) to company officers.

[6] New notices include improvement notices (s 271), prohibition notices (s 272), notices to investigate (s 273), environmental action notices (s 274), site management orders (s 275) and non-disturbance notices (s 278).

[7] When issuing or varying a permission, the EPA or a council, may take into account measures the applicant has taken to comply with the GED, and may impose a condition requiring the permission holder to undertake specific measure to comply with the GED (Sections 54 & 69 of the new Act). The EPA or council may refuse to consent to the surrender of a licence if the licence holder has contravened the GED when engaging in the licensed activity.

[8] Some companies may already have environmental management systems (EMS) accredited to ISO 14001:2015 Environmental Management Systems or prepared in line with that standard. However, this is only a starting point or a framework for compliance and work needs to be done to align the that EMS with the duties and requirements of the new Act.

[9] S 25(4): the GED is contravened where a person fails to do the following in the course of business so far as reasonably practicable: use and maintain equipment, processes and systems in a manner that minimises risks of harm to human health and the environment from pollution and waste; use and maintain systems for identification, assessment and control of risks of harm to human health and the environment from pollution and waste that may arise in connection with the activity, and for the evaluation of the effectiveness of controls; use and maintain adequate systems to ensure that if a risk of harm to human health or the environment from pollution or waste were to eventuate, its harmful effects would be minimised; ensure that all substances are handled, stored, used or transported in a manner that minimises risks of harm to human health and the environment from pollution and waste; provide information, instruction, supervision and training to any person engaging in the activity to enable those persons to comply with the GED.

[10] S 25(5): A person conducting a business or undertaking and engaging in an activity that involves the design, manufacture, installation or supply of a substance, plant, equipment or structure contravenes the GED where they fail to do the following so far as reasonably practicable: minimise risks of harm to human health and the environment from pollution and waste arising from the design, manufacture, installation or supply of the substance, plant, equipment or structure when the substance, plant, equipment or structure is used for a purpose for which it was designed, manufactured, installed or supplied; provide information regarding the purpose of the substance, plant, equipment or structure and any conditions necessary to ensure it can be used in a manner that complies with the GED.

[11] See schedule 1 of the exposure draft Environment Protection Regulations.

[12] This may include briefing the Board / Board HSE risk committee to ensure that they are aware of, and understand the proactive requirements of, the new duties, permissions, powers, as well as the new Director and Officer liability provisions.

[13] Businesses will need to ensure that its policies promote proactive identification of risks associated with the activities of the business and implementation of reasonably practicable measures to eliminate or reduce the likelihood of those risks eventuating. Business and their officers will also need to ensure that the implementation of its policies and procedures are regularly reviewed to ensure that they are being implemented appropriately and are effective.

[14] This may require collecting all environmental reports, data for each site, and engage an environmental consultant to review those reports and determine whether the contamination is 'prescribed notifiable contamination' that gives rise to a duty to notify and/or a duty to manage.

[15] As the number of activities for which a permission is required is increasing from around 51 to 78 activities for which no permission is currently required may require permission under the new Act. Regard should also be had to the new environment reference standards that may impose new thresholds for activities that currently require permission, which may have the effect of triggering a permission requirement under the new Act.

In Issue 2 of Next.

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Navigating Change