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20 April 2018

Ms Marie Boland
2018 Review of the model WHS laws
Safe Work Australia
GPO Box 641
Canberra ACT 2601

via email: 2018Review@swa.gov.au

Dear Ms Boland

2018 Review of the model WHS laws

Thank you for the opportunity to provide a submission to the 2018 review of the model work health and safety (**WHS**) laws.[1]

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 42,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD's experience is that the overwhelming majority of company directors take health and safety matters very seriously. Aside from legal obligations and ethical expectations, good corporate governance demands that directors and officers pay particular attention to the health and safety of employees and others within the workplace.

Therefore, the AICD welcomes the review of Australia's model WHS laws currently under way (**Review**). The AICD strongly supports robust and effective laws that ensure the health and safety of employees in the workplace. Laws in this area must be fair, balanced and consistent.

In this submission the AICD has limited its comments to question 37 of the consultation paper, which asks for comments on the availability of insurance products which cover the cost of work health and safety penalties.

1. Executive summary

- D&O insurance plays a fundamental role in workplace health and safety matters – any proposed changes to the availability of insurance would need to be approached with an abundance of caution.

- In the case of WHS, there is the possibility that an individual can be held liable because of their role with a company, for example directorship, without the need for some culpability to be established – this makes the availability of insurance crucial.

[1] The model laws comprise the *Model Work Health and Safety Bill, Model Work Health and Safety Regulations,* and model Codes of Practice.

- The common law already adopts a carefully balanced approach to cases involving an insured seeking to claim under a policy with respect to their alleged criminal liability.

Our key comments are outlined in further detail below.

2. The current approach to D&O insurance

The AICD supports strong penalties for officers who fail to exercise their duties under WHS laws. There are clearly many types of offences under the WHS laws where the availability of insurance would be inappropriate.

However, to ensure that criminal WHS matters are resolved properly and justly, and in consideration of the complexity involved in establishing the due diligence defence, the AICD views it as critical that directors and officers continue to be able to obtain and rely upon insurance for legal costs associated with defending any proceedings brought against them under the WHS laws. To prevent this would essentially mean directors could incur significant legal costs until such time as their guilt or innocence is established. This would not be in the interests of justice, nor in accordance with established corporate and insurance practice.

In particular, the AICD queries whether any change to the model WHS laws is necessary – as the consultation paper appears to imply - given that the law already imposes several limits on the availability and enforceability of insurance through the common law, and to a more limited extent, the *Corporations Act 2001* (Cth) (**Corporations Act**).

Under the common law, the general rule is that a contract of insurance is not enforceable in respect of criminal acts.[2] This rule reflects the long-held principle that the availability of such insurance is contrary to public policy. To the extent that insurance policies are being sold which provide insurance for this type of conduct, they may be deemed unenforceable.

In effect, the common law prohibits insurance for intentional criminal acts, but recognises that there are occasions where an honest person may unintentionally commit a criminal offence in the course of their professional duties. Given that many offences impose liability without any fault element, or subject to a negligence-based test, the common law has developed a degree of flexibility by providing capacity for individuals to manage some of the risks associated with their professional or business undertakings, notwithstanding that the conduct may be deemed criminal.

Therefore it has become an established legal principle that where a criminal act was unintentional the common law will, in certain circumstances, permit recovery from an insurer. In determining whether the contract of insurance is enforceable, an assessment is undertaken with regard to a number of factors, including the seriousness of the offence, the extent to which a person was involved in the offence, the likelihood that the indemnity will prevent deterrence, the likelihood that enforceability of the contract would promote the interests of innocent victims, and the public interest in the observance of contracts.[3]

This multi-factorial test thereby grants the court flexibility to undertake a considered assessments of the specific, often complex, facts before it.

In particular, the public policy reasons for disallowing insurance in relation to fines and penalties has rested on there being some culpability on the part of the insured.[4] In relation to Category 1 and 2 WHS offences, in particular, there is the possibility that an otherwise honest and well-

[2] *Burrows v Rhodes* (1899) 1 QB 816 at 828.
[3] *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513.
[4] *Burrows v Rhodes* (1899) 1 QB 816 at 828.

intentioned individual can be held liable. For this reason, there are instances where insurance has been made available to protect an individual or organisation where is no wilfulness or recklessness their part.[5]

The attempt at balancing these considerations is also found in the *Corporations Act 2001* (Cth), which prohibits some types of recovery, while enabling insurance to be obtained for other activities, such as civil penalty provisions. Specifically, the Corporations Act imposes targeted prohibitions on both indemnity and insurance for individuals:

- Section 199A(2) prohibits a company from indemnifying a person against a liability owed to the company in certain circumstances.

- Section 199A(3) prohibits a company indemnifying a person against legal costs incurred in defending an action in certain circumstances, including where a person is found guilty in criminal proceedings.

- Section 199B(1) prohibits a company from paying the premiums for an insurance contract for conduct involving a *wilful* breach of duty, or a contravention of ss 182 (improper use of position) or 183 (improper use of information) [emphasis added].

These provisions further restrict the availability of insurance and indemnity, while providing some capacity for officers and directors to obtain insurance for contraventions of the law, including civil penalty provisions. In this way the law has attempted, over time, to strike a careful balance between prohibiting an inappropriate transfer of risk to a third party, while enabling some defrayment of risk by contract, where appropriate.

3. The Benefits of Insurance to Workplace Health & Safety

From a broader public policy perspective, it is also worth highlighting the important role which WHS can play in maintaining and indeed improving WHS practices.

Some important benefits that flow from insurance are as follows:

- Insurers often contribute to WHS by taking a proactive role in assisting their customers with preventative WHS initiatives. Indeed, insurers can use their economies of scale and cross-sector coverage to improve standards and practices across entire industries. Insurers are also in a position to bring considerable expertise in WHS practice, whereas an individual business may not have this capacity due to their smaller size and limited resources. Therefore, removing the capacity for insurers to provide insurance against fines and penalties also removes their capacity to influence risk mitigation.

- Many D&O insurance policies provide funding for independent investigations and legal costs associated with responding to a workplace incident. Insurance for such costs ensures directors receive appropriate, accurate and rigorous reports and legal advice, thereby enabling directors to properly understand and respond to a safety issue at the workplace.

- The funding of legal costs by an insurer facilitates the administration of justice by providing a director or officer with adequate funding for legal representation until such time as their guilt or innocence is established. Such insurance therefore facilitates the expeditious and fair resolution of any proceedings, while avoiding the complications associated with self-represented litigants. It also enables an insured to obtain legal advice which may ultimate

5

contribute to understanding how to improve processes and procedures, with the ultimate result of better safety outcomes.

Accordingly, in our view, there continues to be sound policy reasons for continuing to allow insurance for WHS matters, including for fines and penalties.

4. Next steps

We hope our comments will be of assistance in considering this complex area of law and policy. If you would like to discuss any aspect of this submission further, please contact Mr Matthew McGirr, Policy Adviser, on (02) 8248 8431 or at mmcgirr@aicd.com.au.

Yours sincerely

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