

The value of statutory liability cover in an increasingly regulated world

With regulatory activity on the rise, having appropriate statutory liability coverage in place remains a critical risk management strategy.

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REGULATORS SET TO RAMP UP ACTIVITIES

In the post Royal Commission world, regulator activity in Australia has reached new levels. Increased public scrutiny and greater government funding has meant that regulators are encouraged to take significant amounts of investigation and enforcement action against offending businesses. While there has been a brief hiatus due to the impact of COVID-19, various regulators have signaled their intent to ramp up investigation and enforcement action in the second half of 2020.

Regulator activity can arise in response to many business activities, ranging from an insured’s communications with its customers and the statements it makes publicly, to the workplace it provides for its employees and the way in which it carries on its business. There is a significant amount of legislation in Australia that can impose a fine or penalty on a company, in addition to legislation which holds directors personally liable and accountable.

A non exhaustive list of regulators with the powers to investigate and prosecute under a range of laws is shown in *Figure 1* to the right.

For insureds, regulator prosecutions can lead to significant risk – particularly given that most regulators prioritise holding organisations publicly accountable, rather than achieving a commercial resolution of the dispute.

Some of the most significant and active regulators in Australia are the Workplace Health & Safety (**WHS**) regulators in each state and territory.



Regulator:



Legislation:

Workplace Health & Safety Regulator in each state or territory	<ul style="list-style-type: none"> Workplace Health and Safety legislation such as the <i>Work Health and Safety Act 2011 (NSW)</i>
Environmental Protection Agency (EPA)	<ul style="list-style-type: none"> Environmental Protection Agency legislation such as the <i>Contaminated Land Management Act 1997 (NSW)</i>
Australian Communications and Media Authority	<ul style="list-style-type: none"> <i>SPAM Act 2003 (Cth)</i>, <i>Broadcasting Services Act 1992 (Cth)</i> <i>Telecommunications Act 1997 (Cth)</i> <i>Radiocommunications Act 1992 (Cth)</i>
AUSTRAC	<ul style="list-style-type: none"> <i>Anti-Money Laundering & Counter Terrorism Financing Act 2006 (Cth)</i>
Office of the Australian Information Commissioner	<ul style="list-style-type: none"> <i>Privacy Act 1988 (Cth)</i>
Fair Work Ombudsman and Fair Work Commission	<ul style="list-style-type: none"> <i>Fair Work Act 2009 (Cth)</i>
Australian Securities and Investment Commission (ASIC)	<ul style="list-style-type: none"> <i>Corporations Act 2001 (Cth)</i> (over 370 sections impose a fine or penalty) <i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
Regulatory professional bodies	<ul style="list-style-type: none"> Industry specific legislation

Figure 1: Regulators and relevant legislation

WORKPLACE HEALTH & SAFETY

WHS risks affect nearly all businesses. It can be complex for insureds managing these risks given the regulatory variations across the jurisdictions, the significant changes and developments in WHS law in 2020 and the impact of the COVID-19 pandemic.

INSURABILITY OF FINES IN NSW

On 10 June 2020, the *Work Health and Safety Act 2011 (NSW)* was amended to prohibit the insurance of WHS fines and monetary penalties.

Insurers are still able to provide indemnity for incidents that occurred before 10 June 2020. They can also still cover investigation costs, defence costs, prosecution costs and the costs of compliance for enforceable undertakings. These items remain a significant part of insureds' exposure in a WHS prosecution.

The recent *Bankstown-Lidcombe Hospital* case highlights the significant value that insurance still provides for WHS matters in New South Wales, given investigation, defence and prosecution costs routinely far outweigh the fines imposed.

The *Bankstown-Lidcombe Hospital* case involved a fatality and serious injury at the hospital where nitrous oxide and oxygen lines had been cross-connected. The prosecution costs ordered against the contractor came to \$150,000, and the defence costs are likely to have been a similar amount.

If the contractor had insurance in place, both of those costs would have been covered. The fine of \$100,000, which is not coverable by insurance, was for an amount that was far less than the prosecution and defence costs.

The hospital entered an enforceable undertaking to avoid prosecution for the same incident. That undertaking cost \$536,500, with some of the costs potentially covered by insurance.

The significance of investigation, defence and prosecution costs, relative to fines and penalties, is also shown in the recent Liberty Specialty Markets (Liberty) statistics set out in *Figure 2* below.

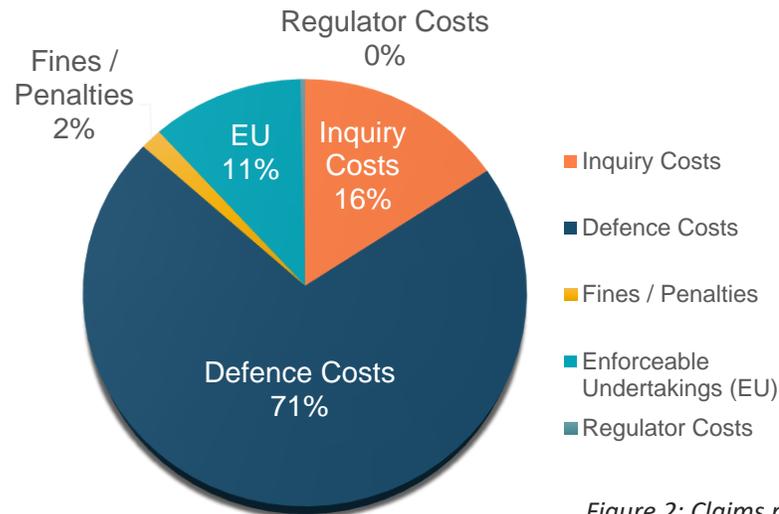
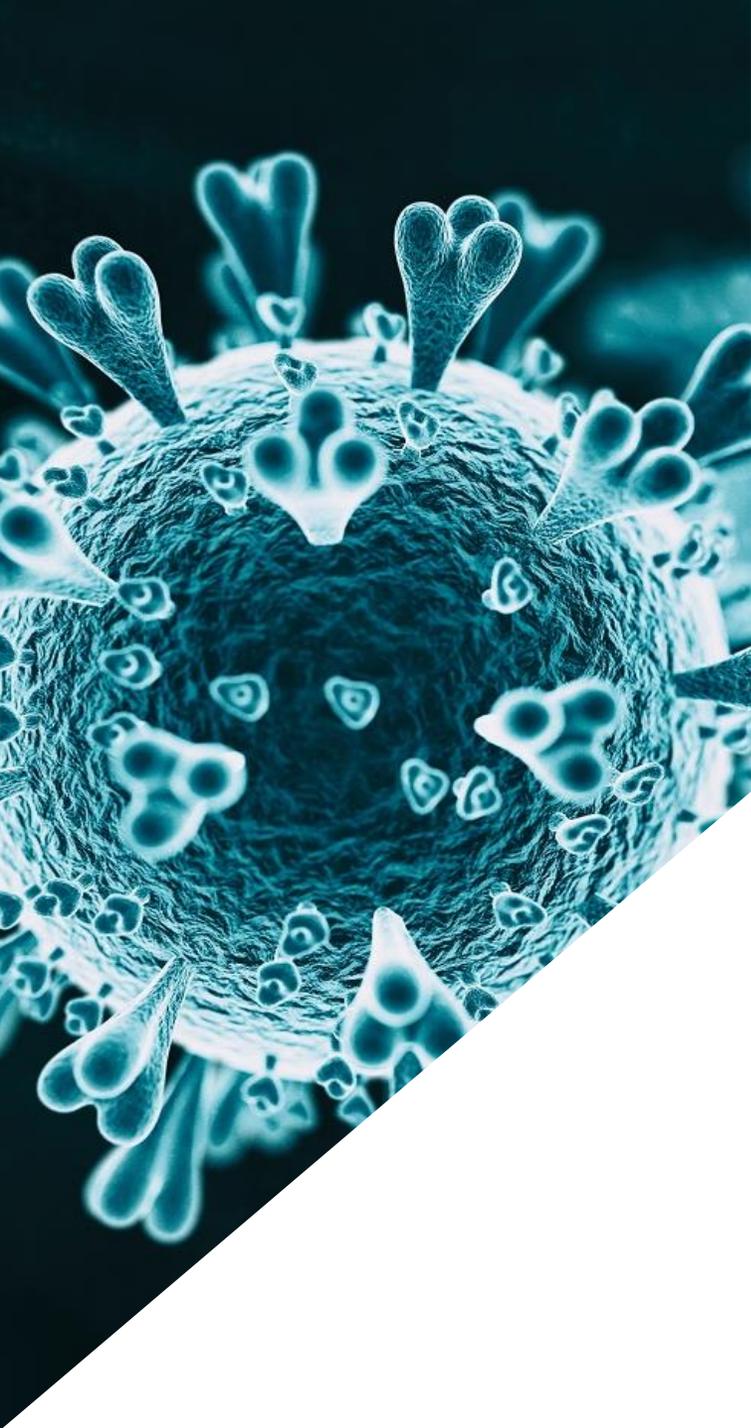


Figure 2: Claims paid to date as at 30 August 2020 under Liberty Professional and Financial Risks statutory liability policies





EARLY LEARNINGS FROM INDUSTRIAL MANSLAUGHTER

Another recent change has been the introduction of industrial manslaughter laws, which expose individuals to the risk of jail terms if there is a fatality in the workplace even when an individual's actions may have no direct link to the fatality. All states, other than New South Wales, South Australia and Tasmania, have implemented, or are in the process of passing, legislation to introduce the industrial manslaughter offence.

The first industrial manslaughter conviction this year saw two company directors sentenced to 10 months imprisonment – a sentence wholly suspended for 20 months. Another individual business owner has recently been charged with an industrial manslaughter offence.

Recent prosecutions show people in middle management positions tend to be significantly more exposed to the risk of being prosecuted as individuals than others higher up in the management structure.

For individuals, the cost of defending themselves against an industrial manslaughter charge can run into hundreds of thousands of dollars. That risk makes it critically important they are indemnified for defence costs.

THE RISE OF ENFORCEABLE UNDERTAKINGS

One feature of increased regulator activity has been the rise of the enforceable undertaking. These often involve the insured rectifying the breach internally, raising community engagement and awareness, and improving practice within the relevant industry.

This trend is likely to continue, as the unavailability of insurance for monetary fines may drive an increase in the number of insureds considering entering an enforceable undertaking instead of risking a prosecution.

THE IMPACT OF THE PANDEMIC

In the past, businesses have been fined for not complying with protocols and guidelines relating to virus exposures. For example, several vets in Queensland were prosecuted for not complying with Hendra Virus protocols regarding horse treatments.

COVID-19 will similarly lead to regulatory actions. The Victorian regulator has already announced that it will be investigating the COVID-19 related deaths in various aged care facilities in Victoria. These investigations could lead to prosecutions against the aged care facility operators under the *Occupational Health & Safety Act 2004 (Vic)* and the state's new industrial manslaughter laws. The Victorian regulator has also recently issued improvement notices to 203 workplaces for breaches of their COVID Safe Plans.

Beyond implementing COVID Safe Plans, insureds need to ensure that no retaliatory action is taken against people who express concern about COVID-19 in the workplace. Qantas is being investigated regarding its alleged suspension of an aircraft cleaner who raised concerns about workers being exposed to COVID-19. Victimisation, or retaliatory action against someone who raises a concern about COVID-19, is potentially a breach of the discrimination provisions of the WHS legislation and/or the *Fair Work Act 2009 (Cth)*.

THE VALUE OF STATUTORY LIABILITY INSURANCE

A critical component of any statutory liability risk management plan is having appropriate insurance cover for unintentional breaches of legislation by an insured entity and its directors, officers and employees. This type of insurance, which includes critical workplace health & safety cover, has extremely wide-ranging application for businesses of all sizes and is relevant to all industries.

The Liberty insurance solution to the risk posed by regulatory action is contained in the Business Practices Policy (BPP) and other policies offered by Liberty. The BPP offers statutory liability cover (including workplace health & safety), inquiry representation costs cover and employment practices liability cover.

The Liberty BPP generally responds to:¹

- the legal costs of dealing with a regulatory investigation, and defending a prosecution;
- a monetary fine or sum imposed by the regulator²;
- the external costs to be incurred in implementing an agreed enforceable undertaking (including 50% of any necessary charitable donation);
- the regulator’s costs; and
- the costs of engaging a public relations firm to assist with managing negative publicity arising from a regulatory prosecution.

Statutory liability and investigations cover under the BPP is triggered by either:

- the receipt of a written notice legally requiring the insured to attend an inquiry, being an investigation, inquiry, royal commission or other proceeding that is in connection with the insured’s business (inquiry representation cover), or
- the receipt of a written or verbal notice from a regulatory authority that alleges a contravention of an Act and imposes a penalty or asserts that the insured is liable to pay a penalty (statutory liability cover).

Significant reputational risks can arise for insureds from a regulator prosecution. The Liberty Claims Value Proposition ensures that:

- cover is determined in a timely fashion;
- there is utmost transparency in its indemnity decision;
- specialist legal advisers are engaged from the outset of the investigation to assist the insured to respond and protect their legal interests; and
- Liberty supports insureds throughout the life of the matter, in particular by supporting early resolution of a prosecution through entry into an enforceable undertaking and by advancing defence costs.

This coverage delivers real value for insureds as defence, investigation and enforceable undertaking costs are anticipated to continue to be the areas of greatest exposure, as shown in *Figure 3* below.

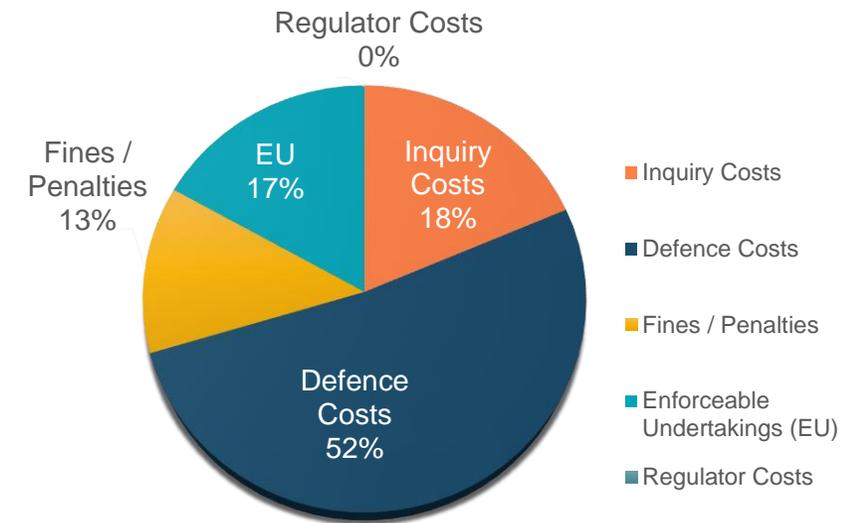


Figure 3: Claims Reserved as at 30 August 2020 under Liberty Professional and Financial Risks statutory liability policies

¹ Always have regard to your policy wording and policy schedule (including policy terms conditions and exclusions) which sets out the full scope of cover. This document is only intended to provide a summary of the highlights of the cover available. This summary does not form part of the policy terms and conditions.

² Save for those fines and penalties which are now uninsurable at law, including WHS penalties and fines in NSW

MORE INFORMATION?

With regulatory activity on the rise, having appropriate statutory liability coverage in place remains a critical risk management strategy – despite the changes to WHS legislation in NSW.

If you would like to know more about whether your business is appropriately protected, ask your insurance broker to get in contact Liberty's Angela Messih who can put you in touch with an underwriter to receive a quotation.

If you have any legal questions about this topic, contact Chris Mossman or Suzi Craig at Wotton + Kearney.

CONTACTS

For more information please contact us.



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