

MARKET BULLETIN

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Title	Australia: Insurance Contracts Amendment Act 2013 and Privacy Amendment (Enhancing Privacy Protection) Act 2012
Purpose	To inform the Lloyd's market of changes affecting insurance contracts emanating from recent reforms of Australian insurance contracts and privacy legislation.
Type	Event
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Deadline	

1. Summary

On 28 June 2013 the [Insurance Contracts Amendment Act 2013](#) was given Royal Assent. The new Act amends the *Insurance Contracts Act 1984 (Cth)* and will affect all Australian contracts of insurance covered by that Act (it does not cover reinsurance and contracts covered by the *Marine Insurance Act 1909* and some other limited carve outs¹).

The effective date of the changes brought in by the *Insurance Contracts Amendment Act 2013* is staggered from the granting of Royal Assent.

On 12 December 2012 the [Privacy Amendment \(Enhancing Privacy Protection\) Act 2012](#) was given Royal Assent. The new Act amends the Privacy Act 1988 to create a single set of 'Australian Privacy Principles' (APP), applying to both government agencies and private sector organisations, which will replace the previous Information Privacy Principles (IPPs) for the public sector and the National Privacy Principles (NPPs) for the private sector.

All of the changes implemented by the *Privacy Amendment Act* take effect in March 2014.

¹ The *Marine Insurance Act 1909* does not apply to a contract of marine insurance made in respect of a marine pleasure craft unless the contract is made in connection with the craft's capacity as cargo.

2. Changes to the Insurance Contracts Act 1984 relevant to Lloyd's Australian business (IC Act)

2.1 Duty of utmost good faith

Section 13 of the IC Act required an insurer and contracting insured to comply with the duty of utmost good faith in relation to a contract of insurance. Third Party Beneficiaries (TPB) did not benefit from the duty (See 2.5 below for information on TPBs). The amended Act now extends the obligation to TPBs but specifies that the duty only commences after the contract is entered into and not before.

Additionally, a breach of the duty is now considered a breach of the Act and the Australian Securities and Investments Commission (ASIC) may now take action against an insurer under the Corporations Act. This power also covers claims handling and settlement services which are not strictly considered financial services and could result in a banning order or cancellation of an insurer's Australian Financial Services Licence (AFSL).

- You need to consider if your documentation needs to be updated and if your claims procedures regarding TPBs need to be enhanced. We expect procedures are already likely to take the above into account in practice.

2.2 Unbundled contracts

The IC Act now stipulates that where contracts contain both insurance cover captured by the IC Act and insurance not caught, e.g. a contract containing both marine insurance and insurance caught by the IC Act, these parts of cover will be treated as separate contracts. Thus the IC Act cover and non-IC Act cover has been 'unbundled'.

- You need to check if you have such policies and review the terms and your claims practices to take the unbundling rules into account.

2.3 Electronic Communication

From **28 December 2013** the notices, information, documents and statements which must be provided to the insured under the IC Act may now be issued by electronic means.

Please note that all of the notices and documentation obligations (other than the renewal notice obligation) do not apply where a broker is acting for the client.

The government will also, in due course, release a regulation pertaining to the content and legibility of electronic notices and documents to make certain that notices provided under the IC Act can be digested by the recipient without interruption or distraction.

- From **28 December 2013** you may provide notices and documentation to policyholders using electronic means and processes may be adapted accordingly.
- Any changes to processes should take into account the Electronic Transactions Act 1999, SPAM Act, the Privacy Act 1998 and Chapter 7 (Financial services and markets) of the Corporations Act 2001.

2.4 Subrogation

From **28 December 2013** for new contracts and renewals the current default subrogation rules in section 77 have been repealed and replaced with a new set of default rules. The new rules apply where an insurer that is liable under a general insurance policy has a right of subrogation and an amount is recovered, whether by the insurer or insured. The rules seek to amend the practice of subrogation to ensure just results and are extended to apply to TPBs.

The rules can still be varied in the terms of the policy and by any agreement made after the relevant loss has occurred. The default rules give persons undertaking recovery the right to more than they were previously able to recover, e.g. administrative and legal costs incurred in connection with recovery and interest. There are also new rules setting out how joint recoveries are to be managed.

- They will have a significant effect and you need to consider whether the default rules are appropriate for you and if not, change them as appropriate.

2.5 Third Party Beneficiaries and Rights of Third Parties

A third party beneficiary (TPB) is a person specified in the policy as entitled to claim but who is not a contracting insured and the following applies to all new or renewed contracts from **28 June 2014**.

The IC Act will now be amended to clarify that when an action is brought by a TPB, an insurer may raise defences relating to the conduct of the insured which occurred either before or after the policy was entered into (e.g. non-disclosure by the insured). Additionally, the rights under sections:

- Section 41 – This gives insureds and TPBs the right to request that the insurer notify whether they admit a liability policy applies to a claim and whether they will conduct the defence. A failure to do so prevents an insurer relying on the fact that an insured or TPB has settled, compromised, made an admission or payment in breach of contract.
- Section 13 – the duty of utmost good faith is to be extended to TPBs.

The IC Act provides under section 51 that, where an insured cannot be located, under a contract of liability insurance a third party may bring an action against an insurer directly to recover an amount under the policy equal to the liability of the insured. The IC Act will now be amended so a third party can do the same in relation to a TPB covered under the relevant policy.

- The rights and obligations of TPBs should be understood compared with the rights and obligations of the contracting insured. A failure to do so can result in disputes.
- You should check liability policy documentation isn't inconsistent with the change and change liability claims procedures where appropriate.
- You should consider how this may impact group or master policy arrangements.

2.6 Duty of Disclosure Obligations

These changes apply to contracts entered into or renewed from **28 December 2015**.

Reasonable person test (s21 (1) (b))

Currently, an insured has a duty to make a prior disclosure of every matter they know to be a matter relevant to the decision of the insurer whether to accept the risk, and if so, on what terms, or a matter which a 'reasonable person' in the circumstances could be expected to know to be a matter so relevant to the insurer.

Two new non-exclusive factors have been added which can be taken into account when considering what a reasonable person in the circumstances could be expected to know, being:

- The class of persons who would ordinarily be expected to apply for cover of that type; and
- The nature and extent of cover provided by the policy.

Eligible contracts changes

Currently under the IC Act enhanced duty of disclosure obligations apply in relation to new business "eligible contracts" but not on renewal to which the standard duty under section 21 applies.

An eligible contract is essentially defined in Regulation 2B as a policy where one of the insureds is a natural person and the contract is wholly one or more of the following types - motor vehicle, home buildings, home contents, accident & sickness, consumer credit and travel insurance.

New Business

The amended IC Act determines that, for new eligible contracts, if an insurer is unable to foresee which matters are relevant to the risk presented by a particular contract then it is difficult to justify expecting an unsophisticated insured to realise its relevance.

As such insurers may no longer ask 'catch all' questions of the insured and require them to disclose each exceptional circumstance that is known to them. Now the insurer will only be permitted to ask specific questions for new business eligible contracts.

A failure to do this means the insurer waives its rights regarding a breach of the duty of disclosure.

Renewal, variation, reinstatement or replacement

Upon renewal the insurer can no longer rely on the current broad duty under section 21 and must instead ask specific questions and/or provide a copy of any matters disclosed previously it wants the insured to notify changes of. If an insured provides no response regarding these past disclosed matters before renewal, they are deemed to have disclosed no change.

If the insurer does not do the above or asks a non-specific question they waive the duty in relation to their relevant failure.

A past breach of the duty by the insured can still be relied on by the insurer even if the insurer failed to comply with the above new requirements on renewal. Insurers can opt in earlier to this requirement if they wish.

Section 21 will still apply for a variation, reinstatement and replacement of an eligible contract and for all non-eligible contracts (e.g. professional indemnity insurance)

Notice to the Insured of the Duty of Disclosure

Insurers have an obligation, before the policy is entered into, to clearly inform the insured in writing of the general nature and effect of the duty of disclosure and its application. There is a prescribed form of writing which can be used and which should not be varied, though there are exceptions where a broker acts as agent of the insured and where the notice has already been given at inception or a previous renewal and there are no changes to a policy.

The insurer still has to provide notice of the duty before or at the time the contract is entered into (this is not applicable where a broker acts for the client) but:

- The form of notice will change for eligible contracts to take the above into account and new versions are to yet to be provided by Government.
- The notice will now tell the insured that the duty applies until the policy is entered into, which is how the duty currently works but it does not form part of the notice.
- If an insurer's acceptance or counter offer is made more than 2 months after the insured's most recent disclosure under the duty, then the insurer's acceptance or counter offer must remind the insured that the duty applies until the proposed contract is entered into. If not, the insurer can't rely on any non-disclosure after that last disclosure.
- The Act now also requires that the s22 or s40 notices are given again where a contract variation provides insurance cover that was not provided before the variation.

This also applies in relation to the required notice under s40(2) for liability contracts which exclude insurers from liability where a claim is not notified before the expiration of the contract. This notice must inform the insured whether the contract covers events which occurred before the contract was entered into and of the protection afforded by s40(3) (i.e. if facts which may give rise to a claim are notified to an insurer during the policy period then the claim is judged to have occurred in the period).

- New standard notice forms will be released in forthcoming regulations.
- You will have to amend notification documentation and sales procedures to accommodate the new requirements and the reminder notice requirement.
- You also need to consider how these changes may impact claims that were previously denied due to non-disclosure and whether you need to formulate specific questions at the time of proposal or renewal.

3. Privacy Amendment Act

The amended Privacy Act creates a single set of Australian Privacy Principles (APP), applying to both the government and all private sector organisations. This replaces the previous dual system.

The new APPs apply to Lloyd's underwriters' operations in Australia, meaning coverholders, service companies and processes where information is collected, used or stored by any Australian entity, such as a third party claims administrator or broker. The changes take effect from **March 2014**.

Essentially, the new APPs:

- Provide clear and strong controls around the use of personal information for direct marketing;
- Extend privacy protections to information gathered incidentally;
- Make it easier for consumers to access and correct information held about them;

- Tighten the rules on sending personal information outside Australia;
- Afford a higher standard of protection to “sensitive information” – which includes health related information, DNA and biometric data.

3.1 Key Implications

The amended Privacy Act will have implications for Managing Agents and Australian coverholders. These may involve taking steps to improve staff training and revise Lloyd’s own procedures. Furthermore, all privacy statements and policies should be revised to reflect the new legislation.

APP 1, 3 & 4 Collecting, Managing and Dealing with Personal Information

Procedures for handling and collection of personal information from clients and prospective clients need to be up to date. Personal information should be collected from the individual themselves (unless unreasonable or impracticable to do so) and this collection should be reasonably necessary for one or more of the entity’s functions or activities. This applies to information both which an insurer has ‘solicited’ for and which is provided by a person ‘unsolicited’.

APP 5 Notification of Collection

Coverholders will need to provide insureds and prospective insureds with the notification information set out in APP 5.2 at the time of the collection of their information, unless it is impracticable to do so.

- Current notices and scripts will need to be updated to include the material required in APP 5.2.

APP 6 Disclosure of Personal Information

Insurers will have to obtain an individual’s consent prior to disclosing that person’s information to any other person for a purpose other than for which the information was collected (unless exempt).

APP 7 Direct Marketing

If a Coverholder holds personal information the Coverholder must not use or disclose that personal information for the purpose of direct marketing unless an exemption applies. For example they will be exempt if the individual from whom the personal information was collected knows that the Coverholder may use or disclose the information, the Coverholder has provided a simple means for the individual to request not to receive direct marketing communications from the Coverholder and the individual has not made such a request to the Coverholder. Other exemptions also apply

- Coverholders should review their marketing processes to ensure that where personal information is used for direct marketing it falls within one of the relevant exemptions.

APP 8 Cross-Border Disclosure

Such steps as are reasonable in the circumstances must be taken to ensure that any overseas recipient of personal information does not breach the Privacy Act. These steps are not required if the individual consents to the disclosure where they have been informed the steps have not been taken or if the overseas recipient is subject to an equivalent privacy regime which allows the individual to enforce his or her rights. Disclosure will include storing of information on a computer server where the server is situated overseas.

- Any Coverholder disclosing policyholders’ personal information overseas (e.g. to a claims administrator) should ensure that it confirms that the overseas recipient is compliant with the Privacy Act or equivalent legislation or they must obtain the individual’s consent.

APP 9 Government Information

There are enhanced restrictions on the use of government generated identifying information for the categorising or identification of policyholders. Exemptions to this prohibition include where it is reasonably necessary for the entity to verify the identity of the individual for the purposes of the entity's activities or functions.

- Underwriters and coverholders will need to be sure that they fall within one of the exemptions if they wish to adopt or use government related identifiers.

APP 10 Quality of Personal Information

A Coverholder must take such steps as are reasonable in the circumstances to ensure that collected information is accurate and kept up to date. Quality assessments should take place for this purpose.

- Where a disclosure of personal information is made the Coverholder should take such steps as are reasonable to ensure that the personal information is accurate, up-to-date, complete and relevant having regard to the purpose.

APP 11 Security of Personal Information

Coverholders need to have procedures which are sufficient to protect personal information held by them from misuse, interference and loss and from unauthorised access, modification or disclosure. Furthermore, all personal information which they are not required to keep under their AFSL licensing conditions, arrangements with insurers or otherwise should be destroyed or de-identified.

- Managing Agents should immediately review coverholders' procedures in relation to the security of personal information.

APP 12 Access to Personal Information

Individuals should be granted free access to their personal information, unless an exemption applies.

- Processes should be reviewed to ensure that access to information is granted in accordance with APP 12.

APP 13 Correction of Personal Information

Individuals should have the ability to request and make corrections to their data with the insurer and other persons to whom their data has been transferred.

Further Information

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