

MARKET BULLETIN

REF: Y4921

Title	Australia: Insurance Contracts Amendment Regulation 2015 and Duty of Disclosure
Purpose	To inform the Lloyd's market of changes affecting insurance contracts emanating from recent reforms of the duty of disclosure
Type	Event
From	Kim Swan, Senior Manager, International Regulatory Affairs General Counsel Division +44 (0)20 7327 6677 LITA@lloyds.com
Date	25 August 2015
Deadline	From 28 December 2015 all insurance contracts must meet the new requirements
Related links	Market Bulletin Y4720 Lloyd's Wordings Repository (which contains the new LMA model 'notices')

Background

The principal legislation governing Insurance Contracts in Australia is the Insurance Contracts Act 1984 (coupled with the Insurance Contracts Regulations 1985).

On 28 June 2013, the Insurance Contracts Amendments Act 2013 (the Act) was given Royal Assent. The new Act made several amendments to the Insurance Contracts Act 1984, including to duty of disclosure obligations (see Appendix 1), and affected all Australian contracts of insurance covered by that Act. The effective date of the changes brought in by the Insurance Contracts Amendments Act 2013 was staggered from the granting of Royal Assent, with the effective date of the changes to "Duty of Disclosure" obligations being 28 December 2015. On 12 September 2013, Lloyd's released [Market Bulletin Y4720](#) regarding the Act, which included an outline of the revised Duty of Disclosure.

The Insurance Contracts Amendment Regulation 2015 (No.1) (the Regulation) came into effect on 21 April 2015 and amends the Insurance Contracts Regulations 1985 to prescribe the new recommended wording for 'notices' used to notify insureds of their duty of disclosure under s.22 of the Insurance Contract Act 1984. This bulletin outlines the various requirements in both the Act and the Regulation regarding the provision of such notices.

All contracts of insurance entered into (or revised) from 28 December 2015 onwards are required to meet the new requirements of s.22. For contracts entered into prior to

28 December 2015 insurers may continue to use the wording set out in the previous regulation.

The duty of disclosure

A duty is imposed on insureds to disclose to the insurer matters that are relevant to the insurer's decision to accept the risk and, if so, on what terms. The duty is imposed up to the time that the contract is entered into. If the insured fails to disclose relevant matters to the insurer as required, the insurer then has the opportunity to deny or reduce indemnity or cancel the policy completely, depending on the circumstances of the non-disclosure. In order to rely on this opportunity, the insurer is required to inform the insured of their duty of disclosure in accordance with the requirements set out under the Act/Regulation.

Notice to the insured of the duty of disclosure

Insurers have an obligation, before the policy is entered into, to inform the insured clearly in writing of the general nature and effect of the duty of disclosure and its application.

The Australian Government, under the Insurance Contracts Regulations, has prescribed the content of the 'notice' to be given to the insured to inform them of their duty of disclosure.

There are prescribed (s.22) notices set out in the Regulation which should not be varied, although there are exceptions:

- where the notice has already been given at inception or a previous renewal and there are no changes to a policy; and
- where a broker acts as agent of the insured - there is no requirement to provide notice where the contract is arranged by a broker acting as the agent of the insured (and the insurance broker is not acting under a binder), as the broker instead has a duty to provide expert advice.

Timing of notification

The insurer still has to provide notice of the duty to disclose before or at the time the contract is entered into but:

- The notice will now tell the insured that the duty applies until the policy is entered into. This does not mark a change in the duties of the insurer, but the requirement to include it in the notice is new.
- If an insurer's acceptance or counter offer is made more than two 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 cannot rely on any non-disclosure after that last disclosure.
- The Act now also requires that the s.22 (or s.40) 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 s.40(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 s.40(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).

Insurers will have to amend notification documentation and sales procedures to accommodate both the new requirements and the reminder notice requirements.

Insurers also need to consider how these changes may impact claims that were previously denied due to non-disclosure and whether they need to formulate specific questions at the time of proposal or renewal.

Format of notice

As noted above, the Regulation, which came into effect on 21 April 2015, prescribes the new wording ('notices') insurers may use to inform insureds about their duty of disclosure.

In particular, the Regulation prescribes the form of words (notices) for:

- Written notices in relation to:
 - contracts of general insurance (i.e. other than 'eligible contracts');
 - life insurance;
 - 'eligible contracts' of insurance;
 - the duty of disclosure in relation to a person who will be insured by others under contracts of life insurance;
- An oral notice in relation to 'eligible contracts' of insurance.

Please note that 'eligible contracts' are new policies 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.

The standard notices/prescribed forms are set out in [Schedules 1 - 2 of the Regulation](#).

Content of notice

1. Where the duty of disclosure obligation is in writing:

A new wording for the 'notice' warning about the duty of disclosure is prescribed, and is relevant to three types of policies: general insurance; 'eligible contracts' of insurance; and life insurance. As Lloyd's underwriters are not currently licensed to write life insurance in or from Australia, we have restricted our commentary below to general insurance and 'eligible contracts' of insurance.

- The wording in relation to general insurance policies provides that there is a duty under the relevant Act to disclose every matter that the insured knew or could reasonably be expected to know that is relevant to the insurer's decision to accept the risk and, if so, on what terms. The duty exists before the policy incepts. The 'notice' sets out those matters which are not required to be disclosed, being: (i) that which diminishes the risk; (ii) that which is common knowledge; (iii) that which the insurer in the ordinary course of business knows or should know; or (iv) that which has been waived by the insurer.
- The new wording in relation to 'eligible contracts' inserts an obligation on the insured, if asked a specific question by the insurer. The insured must disclose anything that the insured knows about the risk and anything that a reasonable person in the circumstances would include in the answer.

- Insurers may no longer ask 'catch all' questions of the prospective insured and can only ask specific questions for 'eligible contracts', otherwise they waive their right to rely on a breach of the duty of disclosure (see Appendix 1, 'new business' section).
 - In all cases, the 'notice' reminds the insured that failure to comply with the duty will entitle the insurer to reduce its liability, cancel the contract or, in the case of fraudulent non-disclosure, avoid the contract completely.
 - The duty applies to new policies, renewals, extensions, variations and reinstatements of general insurance policies.
 - The duty applies to new 'eligible contracts' and their renewals.
2. Where the duty of disclosure obligation is stated orally:
- In the case of a new 'eligible contract' of insurance, if the warning ('notice') is made orally, the Regulation provides for the script of the words that can be used.
3. In addition to the above, insurers will also have to take the following step for contracts/policies entered into from 28 December 2015:
- If an insurer has notified an insured of their duty of disclosure (as required by s.22) but, as a result of dealings between the insurer and the customer, the insurer's acceptance of the insured's offer to acquire the product, or the insurer's counter offer to enter into another contract of insurance with the insured, occurs more than 2 months after the original notification ('notice'), a 'reminder' notification must be given to the insured by the insurer at the time that the acceptance or counter-offer is made. The prescribed form of this reminder is contained in Schedule 1B of the Regulation. The disclosure obligation arising out of the 'reminder' notification only applies to 'new matters' arising after the most recent disclosure by the customer.

If insurers choose not to use the prescribed forms they must still update their non-prescribed forms to take into account the changes. The new prescribed forms have been incorporated into Schedule 1 & 2 of the Insurance Contracts Amendment Regulations 2015.

Model 'Notices'

To assist Underwriters, the LMA has published model notices which replicate the prescribed content, as indicated in the Regulation:

Form No.	For use in the following circumstances:
LMA9108	Written notice for contracts of general insurance, other than 'eligible contracts'.
LMA9109	Written notice for 'eligible contracts' of insurance – new contracts.
LMA9110	Written notice for 'eligible contracts' of insurance – renewal of contracts.
LMA9111	Oral notice – words to inform of duty of disclosure for 'eligible contracts' of insurance.
LMA9112	Written notice - to remind of duty of disclosure – if acceptance/counter offer is more than 2 months since original notification – contracts of

	general insurance.
LMA9113	Written notice - to remind of duty of disclosure – if acceptance/counter offer is more than 2 months since original notification – ‘eligible contracts’ of insurance.

These notices are available on the Lloyd’s Wordings Repository. The LMA has not produced model ‘notices’ in respect of life insurance contracts, as [Lloyd's underwriters are not licensed to write life insurance in or from Australia](#) (see Section 3 of the Insurance Act 1973).

Effective dates

- Until 28 December 2015, insurers may use either current notices or the prescribed new notices.
- From 28 December 2015, Insurers will be required to use the new prescribed notices.

New ability to opt out

The Regulation also creates a new opt out regime for insurers that have previously opted into the ‘eligible contract’ regime, where previously an opt-in regime was in operation. Where an insurer has opted into the disclosure notice requirements (pursuant to s.21A), there will now be a mechanism for insurers to opt out of the eligible contract requirements if certain criteria are met. For example, to opt out an insurer must serve a notice to clearly indicate that the contract of insurance is no longer an ‘eligible contract’ of insurance (s.22).

Further Information

Lloyd's International Trading Advice
 Lloyd's Desk - Ground Floor
 Underwriting Room
 Telephone: +44 (0)20 7327 6677
 Email: LITA@Lloyds.com
www.lloyds.com/crystal

or

Tracey Bryan
 Compliance Manager
 Lloyd's Australia Limited
 Telephone: +61 (0)2 9223 0753
 Email: Tracey.Bryan@lloyds.com

Appendix 1

Amendments to the Insurance Contracts Act 1984

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

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 new 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).