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Practice Group(s):

Consumer Financial Services

Investment Management

Amendments Allow Insurers to Utilise Electronic Communication Channels

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Insurance Contracts Amendment Act 2013 (Cth) Receives Royal Assent Allowing Insurers to Communicate Efficiently in the Digital Age

Recent amendments to the *Insurance Contracts Act 1984 (Cth)* (IC Act) include significant changes to electronic communications which, in combination with amendments to the *Electronic Transactions Act 1999 (Cth)* (ET Act), will allow insurers to rely on electronic means of communication with their customers regarding insurance contracts.

Background

The IC Act requires insurers to provide certain information to customers 'in writing', including:

- the general nature and effect of the duty of disclosure
- the extent of the insurer's liability where a claim is less than the minimum amount specified by the contract
- the inclusion of any unusual terms in the insurance contract
- whether the contract provides cover in respect of flood
- the effect of a provision that seeks to limit the liability of the insurer by reference to non-payment of an instalment of the premium
- the inclusion of any averaging provisions in the contract
- the expiration date of an insurance contract
- the exclusion or limitation on the right the insured might have to subrogation
- upon written request, providing a written statement outlining the provisions of their insurance contract, unless they have been previously provided with this statement
- providing written reasons where the insurer does not accept an offer to enter into a contract of insurance, cancels an insurance contract, indicates an intention not to renew insurance cover or offers terms that are less advantageous to the insured.

The ET Act generally applies to permit organisations to use electronic communications to meet regulatory requirements to provide information in writing.

Historically, the IC Act has been expressly excluded from the scope of the ET Act and insurers were required to provide customers with the types of information listed above either in person or by post.

Amendments to the IC Act and ET Act

On 28 June 2013, the *Insurance Contracts Amendment Act 2013 (Cth)* (Act) received Royal Assent. It will formally commence by the end of the year.

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In drafting the IC Act, Parliament expressly acknowledged in its explanatory memorandum the "increasing use of electronic communication in the context of the IC Act", and supported "the notion of updating the IC Act to allow for communication by electronic means". It also explains that the amendments "allow insurers to deliver notices, other documents and information to customers electronically, ... directly or indirectly, through an intermediary site such as the insurer's internet banking site".

The amendments to the IC Act will allow insurers to communicate with their customers electronically through platforms such as email, internet websites, or via emerging platforms such as the digital mailbox services provided by companies like Digital Post Australia and Australia Post, potentially saving time and cost, and increasing the ease of communicating with their customers via the customers' preferred means.

The amendments regarding electronic communication will come into effect on a date fixed by proclamation (or 29 December 2013 at the latest). Regulations to the ET Act have also been amended to give full effect to the amendments in the IC Act, and to remove the exclusion of the IC Act from the ET Act, which will commence at the same time.

Notably, these changes do not apply to certain insurance contracts which are not covered by the IC Act, such as private health insurance, worker's compensation and motor vehicle injury compensation.

Remaining Issues for Insurers

Insurers will need to ensure that their chosen methods for electronic communication are capable of meeting the ET Act's requirements, and that their customers have consented to receiving those communications electronically. Insurers will also need to seek their own legal advice and confirm that the IC Act, as amended, will apply to their particular circumstances.

ET Act Requirements

As noted in the explanatory memorandum, the definition of 'electronic communication' is intended to have the widest possible meaning and is likely to cover a broad range of electronic communication including email, internet websites where members login to manage their account and receive information from their service providers, and digital mailbox services.

The ET Act requires that certain conditions are met before information can be sent electronically. In particular:

- at the time the information is given, it must be reasonable to expect that the communication will be readily accessible and useable for subsequent reference by the recipients
- the recipient must have consented to the communication being sent by electronic means
- if the information is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that the information be given in accordance with particular information technology requirements or by a particular kind of electronic communication, that these requirements are met
- if the information is required to be given to a Commonwealth entity, or to a person acting on behalf of a Commonwealth entity, and the entity requires that particular action be taken by way of verifying the receipt of the information, that this requirement is met.

Readily Accessible and Useable for Subsequent Reference

'Readily accessible' is not defined in the ET Act. The explanatory memorandum explains that the notion of readily accessible is intended to mean that information contained in the electronic communication should be readable and capable of being interpreted. It also explains that the

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concept of 'subsequent reference' means that the communication must be capable of retention, but does not have to actually be retained.

There is a lack of case law on the meaning of "readily accessible so as to be useable for subsequent reference" in relation to the ET Act. However, given the broad definition of "electronic communication" in the ET Act, and the Parliamentary intent outlined in the explanatory memorandum, it is likely that communications by email are capable of meeting this requirement, and it is likely courts will interpret the legislative requirements broadly. The New South Wales Supreme Court considered the applicability of equivalent NSW legislation (albeit with slightly different wording) in relation to email, and found that if an email has been sent and is capable of being retrieved, then it has been 'received' by the recipient, even if it has not actually been opened or read.¹

Solutions developed by emerging digital post organisations such as Digital Post Australia and equivalent digital mail services of Australia Post are also likely to be capable of satisfying the requirements of the ET Act. Depending on the actual content of digital post provided by a "sender" through the platform, the communication is likely to be readable and capable of being interpreted. Although these services may require recipients to have an internet connection at the time they want to receive digital mail or to access digital mail that they had previously received but not separately downloaded or printed, this is, in a sense, no different to the use of web-based email. It is therefore likely that digital post will also be deemed both readily accessible and capable of subsequent reference.

The amendments to the IC Act also enable insurers to communicate non time critical information via login to the insurer website, or via a third party intermediary's website – such as the insured's internet banking site, an example expressly referred to in the explanatory memorandum to the Act. Whether specific websites will meet the above requirements will depend upon the features of the particular site, but in general such websites are capable of satisfying the requirements of the ET Act.

Consent

Of course, insurers will also need to obtain individuals' express or inferred consent to receiving electronic communications. Historically, organisations such as banks have been able to provide material electronically but have struggled to effectively obtain similar consents from individuals. Obtaining this consent with certainty requires specific interaction with customers, generally on an individual basis. Procedural issues associated with obtaining these consents is likely to remain a key obstacle for insurers to overcome if they are to provide communications via email or via specific websites. The issue may be more easily overcome by using solutions such as the emerging digital post platforms, where individuals expressly sign up to the third party's service for the specific purpose of receiving electronic communications from a variety of their service providers.

Commonwealth Entity Requirements

For information required to be given to Commonwealth entities, the platform will also need to be able to meet any particular requirements set out by the entity in relation to the electronic communication. Insurers will need to be mindful of any current and potential future requirements in communicating with Commonwealth entities, even if their chosen platforms allow communication in accordance with the ET Act.

Insurers will need to ensure that their chosen methods for electronic communication are capable of meeting the ET Act's requirements, and will need to ensure that they have obtained the express or inferred consent of their customers, to receiving those communications electronically. Insurers

¹ *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd & Anor* [2012] NSWSC 1123.

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will also need to seek their own legal advice and confirm that the IC Act, as amended, will apply to their particular circumstances.

Other Regulatory Requirements

Finally, insurers will also need to be aware of and consider the implications of other applicable regulatory guides and industry standards (eg issued by the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority) that may outline further conditions in relation to the provision of insurance contracts by electronic means. For example, ASIC Regulatory Guide 168 states in relation to Product Disclosure Statements that "access to the documents being relied on must be reasonable, convenient and inexpensive for the client. If accessing the material would require material involvement by a third party (such as going to an internet cafe or a library to access an electronic version) or the proposed access is inconvenient or expensive, then it may be difficult to believe on reasonable grounds that the client had access to the information."

Conclusion

The changes to the IC Act together with the associated changes to the ET Act regulations mean that insurance companies will soon be free to use email, digital post solutions and potentially websites accessed via login, as a means of communication to provide information directly to customers in relation to their insurance contracts.

These legislative changes also clear the way for organisations that provide emerging electronic communication solutions to deliver electronic communications between insurers and their customers and assist with the difficult consent issues, which will potentially accelerate the migration of customers from paper to digital channels.

In addition to the changes discussed in this article, the Act also makes other changes, including changes relating to the duty of utmost good faith, third party beneficiaries, disclosures and misrepresentations, subrogation and ASIC's powers. Therefore, it is essential that organisations seek separate legal advice on the impact these changes will have on their organisations and its particular circumstances.

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