Dear Fiona,
Further to my correspondence with Dallas Booth we thought it would be useful for you to have a copy of the Lloyd's Underwriters submissions in their entirety which were previously sent to the ICA. The responses to the proposal to amend the legislation originate from Lloyd's Underwriters in London who are authorised to conduct business in Australia. The more salient and important responses are as follows:

1. One of our leading professional liability syndicates raised a point which does not appear to have been addressed in Allens Arthur Robinson's response to the ICA and is as follows:

"We broadly welcome the changes made as it will enable us to underwrite professional liability business with more confidence in Australia. There is one point of detail which seems however amiss. The reason insurers might not be able in the present circumstances to deny a claim that has been advised late is because of the operation of law, not because of the late advice. The late advice is the true reason why they should be able to deny the claim, not the reason why they should not be able to deny it. It therefore seems quite confusing that the proposed change refers to situations where "the insurer may not refuse to pay a claim..... by reason only that the Insured ..... did not give notice of those facts during a period provided for in the contract ...."
"I suggest that the wording be amended so as to replace the words "by reason only" in 54A(1) with "notwithstanding".

2. Another syndicate specialising in general liability, professional indemnity and medical malpractice stated that for the most part they agreed with the comments made by Allens Arthur Robinson. Their inhouse Legal Counsel made these specific comments.

" I note the proposal to introduce Section 54(a)with the stated aim of remedying the perceived harm caused by the decision in FAIvAHC.
The effect of that decision was to make the Australian jurisdiction unattractive to international insurers in view of the uncertainty in writing claims made policies. The purpose of the amendment is supposedly to reintroduce certain certainty and to permit truly "claims made" cover. However, in my view, the cure could be worse than the disease.
The proposed solution is designed to restrict the circumstances under which an insured can make a late notification on a claims made policy. Under the proposed amendments, late notification of actual "claims" will still be permitted, however late notification of facts which may give rise to a claim will not be. As AAR point out, there is an inherent difficulty in determining what constitutes a "claim". The consultation paper invites submissions as to whether "claim" should be defined for the purposes of the legislation. I would emphatically submit that it should ***NOT*** *be defined.*
Like most other insurers who are still writing claims made policies in Australia, we have amended the definition of "claim" in our policy wordings to be as restrictive as possible. "Claim" is effectively defined as the issue of proceedings against the insured. The reason for this tight definition is to minimise the circumstances where late notification is available. However, if a definition of "claim" is introduced to the legislation and it is wider than the definition in our policy, then the effect of the legislative amendment will be to permit ***more*** *late notifications rather than less. This will make writing Australian claims made policies even less certain than it is now. Not to put too fine a point of it, if the purpose of the legislative amendment is to correct a perceived problem following the FAIvAHC decision, if a wide definition of "claim" is permitted to slip in and the late notification of "claims" is permitted unamended, then the effect will be to make the problem worse and not better.*
AAR submit that there should be no distinction between "claims" and "facts which may give rise to a claim". AAR submit that both should be excluded from relief under Section 54 of the ICA. I would agree wholeheartedly with this submission.
However, such a solution is less favourable to insureds and therefore maybe less palatable to the legislature. In the alternative I would submit that if the present proposed wording is to proceed, any suggestion that it be coupled with a definition of "claim" should be strenuously resisted. At least, if "claim" is not defined in the legislation, we are free to retain our current

tight definitions and therefore restrict the circumstances under which late notification is still available.

Extended Reporting Period

As a trade off for closing the door on late notification of circumstances which might give rise to a claim, it is proposed to introduce a legislative amendment providing for a statutory extended reporting period of 45 days.

I would submit that this length is too long and does not serve interests of either insured or insurers. 21 days should be more than sufficient for awareness of incidents to filter up the hierarchy and be notified to insurers. The longer the Extended Reporting Period the greater the likelihood that something extra has happened during the new policy period to trigger the notification and it is not a genuine reflection of awareness prior to expiry. This raises dual insurance / policy shopping issues discussed below. Currently, when Extended Reporting Periods are given, there is additional premium charged. The initial reaction of underwriters is that the proposed statutory 45 day ERP will be addressed by increasing the premium. By introducing an unnecessarily long ERP, the Government is forcing the consumer to buy more cover than they need. It is usually large institutional insureds who request and buy ERP cover; this is because they need time for incident notifications to filter upwards from their many facilities. Small businesses and individual insureds know at expiry whether there are any new incidents to notify and require only a short ERP. Therefore, by stipulating 45 days, the legislature is forcing additional unnecessary premiums on all insureds which will hit small insureds in particular.

Dual insurance / Policy Shopping. The wording of Section 40 as it currently stands is much wider than the terms of the industry "deeming" clauses which were in widespread use prior to FAIvAHC. In essence, Section 40 permits notification of facts which may give rise to a claim. This is broader than the traditional industry extension permitting notification of "circumstances likely to give rise to a claim". Most liability policies carry an exclusion for circumstances likely to give rise to a claim of which the insured was aware prior to inception. However this exclusion is narrower than the wording of the Section 40 deeming provision. Therefore, potentially, the introduction of the statutory ERP will result in overlap between policy years. That is to say, facts which may give rise to a claim maybe notified within 45 days after expiry of the earlier policy or, alternatively if the insured chooses, the notification could be made under the new policy. This encourages "policy shopping" i.e. if the previous year carries a higher excess or is close to exhausting the limit of indemnity, the claim can be made on the new year's policy. Equally, if the earlier year carries a lower excess, the insured may elect to "push back" a notification, which had it been notified before renewal, may have increased the premium. I know that if the insurer can show prejudice (lost premium) as a result of the late notification, this can be raised in defence, but we are regularly advised that it is very difficult to prove such prejudice and to do so we would need to air commercially sensitive underwriting protocols. All these are matters which favour the insured and increase the risk to the insurer. The insurer can (and probably will) address the increased risk by increasing the premium, but that is exactly what most insureds want to avoid.

Requirement to notify the insured of the terms of section 40

It is proposed to introduce a new obligation to notify insureds within 30 days prior to expiry, of the effect of section 40 (3). I agree completely with AAR's analysis of the problems which will arise if this amendment is introduced. If introduced, it will necessitate further administrative costs which will ultimately be passed on to policyholders.
I would also submit that the amendment needs to be tightened to make it clear that insurers are entitled to rely on brokers making the requisite notification."

3. A syndicate which is currently only writing professional indemnity and D&O classes in Australia welcomed the move to bring greater clarity to the "claims made" coverage rather

than having to adapt policy wordings to cater for the issue. As regards the terms of the recommendations, these specific comments were made with respect ot Section 40:

" Subsection 40(2): As we provide cover through a Lloyd's broker our expectations would be that the broker takes the necessary steps to ensure that the policy holder is aware of the need to identify any claims or circumstances prior to the renewal date. Sub-section 40(3), the provision of 45 days beyond renewal date in which to report circumstances discovered prior to the renewal date is probably a reasonable period (although we would have preferred 30) N.B (i) it is very important that this is kept strictly to such availability and does not extend to be become a full blown discovery period whereby the policyholder is provided with the extra 45 days in which to serach out any 'circumstances' prior to renewal date. Many D&O policies do automatically provide discovery period. N.B (ii) in order to avoid potential dual insurance within the 45 day period it will be necessary for the new insurer to have an exclusion of 'any matters known at inception which might give rise to a claim'. We should build this into our policies as standard. This is particularly so where policies provide innocent non-disclosure cover".

Whilst some underwriters at Lloyd's are suggesting that 30 days statutory ERP is sufficient and others are hoping for a 21 day period, it is clear that collectively it is considered that 45 days is too long.

4. Another Lloyd's syndicate prepared a very comprehensive response which I have attached in its entirety ("Issued Raised" document).

5. We have a general comment to make in respect of Section 47:

"As for Section 47, perhaps we can support the ICA submission by agreeing that Section 47 (question 8.8) should be clarified to show that a formal diagnosis is not needed, by inserting the words such as "symptoms of the disease or illness" following "aware of"

6. Another Lloyd's syndicate stated that fundamentally the recommendations of the review are an improvement of the situation that currently exists on claims made policies, but could be further improved/clarified as follows:

*"a) The 45 day discovery provision states that insureds should notify underwriters as soon as 'reasonably practicable' but no later than 45 days after expiry. This means that Insureds have **up to 45 days** but may well have to notify earlier. To avoid confusion it would be better to reduce the 45 day period to say 21 days in exchange for deleting the words 'reasonably practicable'.*

b) The Notice provision should be further amended so that where an Insurance Broker arranges the Insurance Policy it is their obligation to give notice, as Insurers will not be able to monitor that these notices are being properly dispatched.

c) These amendments should equally apply to claims made against Insureds during the period of cover not simply 'circumstances'."

If you wish to discuss further please don't hesitate to contact me.

Kind regards,

Keith Stern
Lloyd's Australia