

Purpose

On 9 July 2024 WorkCover WA issued a Bulletin clarifying that insurance brokers cannot access a worker's personal information from an insurer without consent given by the worker. The broking industry has raised concerns with the position stated in the Bulletin. This supplementary note clarifies WorkCover WA's Bulletin and some of the misunderstandings about the legal position and its impacts.

Background

In response to queries from insurers and brokers WorkCover WA published a Bulletin on 9 July 2024 clarifying there is no provision in the *Workers Compensation and Injury Management Act 2023* (WCIMA23) or the consent authority in the approved *Workers Compensation Claim Form CF1* that authorises disclosure of workers' personal information to insurance brokers.

WorkCover WA expects licensed insurers and insurance brokers to have systems in place to ensure consent is obtained from workers before personal information is disclosed to insurance brokers.

The Bulletin indicated this position is consistent with WorkCover WA's *Insurance Brokers Principles and Standards of Practice*:

3.10 Worker consent authority

Employers and insurers should have informed consent from an injured worker to share the worker's personal health or financial information with a broker.

A broker should ensure a worker's consent has been obtained prior to receiving / accessing the worker's personal health or financial information.

This includes access to information provided by the employer.

Issues

The legal position

There are some misconceptions about the legal position on privacy. There are two components in the legal position: collection and disclosure of personal information.

Privacy Act 1988

The Commonwealth *Privacy Act 1988* regulates how personal information is handled. The *Privacy Act* includes 13 Australian Privacy Principles (APP) and provides that an APP entity (which includes insurers and other businesses and individuals) must not breach an APP. State privacy legislation is currently before the state parliament.

An offence is committed under the *Privacy Act 1988* if information is disclosed, unless one of the exceptions set out in that Act applies. Limited permitted disclosures are authorised, none of which apply to insurers or brokers except:

- Disclosures made with the consent of the individual. Note that required elements of consent at law must be met – person giving consent must do so voluntarily, be given adequate information as to what they are consenting to, have capacity to understand, provide and communicate their consent.

Also relevant in the context of workers compensation claims is the collection of 'sensitive information' (includes medical and health information) as there are particular protections provided for under the *Privacy Act* to the collection of sensitive information about individuals. One of the permitted exclusions is if the collection of sensitive information is required or authorised by or under an Australian law (as insurers are required and authorised to do under the *WCIMA23*).

In the absence of consent by the worker, brokers are not authorised under the *Privacy Act 1988* to collect sensitive information about workers and insurers are not permitted to disclose personal information (including health information) to brokers. That has always been the legal position and nothing in the *WCIMA23* changes that position.

WCIMA23

Certain scheme participants are entitled to collect or use personal information about individuals because they perform a statutory function under the *WCIMA23*. In particular, insurers and self-insurers are authorised under the *WCIMA23* to collect and use personal and sensitive information about workers due to their role in assessing and managing claims and making liability decisions.

Because of this right to collect information, the *WCIMA23* provides for a default position of confidentiality on the disclosure of information a person obtains under authority of the Act or their position or office. Like the *Privacy Act 1988* there are some exceptions that permit disclosures including with the consent of the individual to whom the information relates.

In the absence of consent by the worker there is nothing in the *WCIMA23* that permits brokers to collect personal information about workers and nothing in the *WCIMA23* that authorises insurers to disclose personal information to brokers. This is the same legal position as the 1981 Act.

Consent authority

There are two consent authorities in the approved *Workers Compensation Claim Form CF1*.

Consent 1 - medical & return to work options

I authorise any doctor who treats me to discuss my medical condition, in relation to my claim for workers compensation and return to work options, with my employer and with their insurer.

This consent authority facilitates discussion and communication between the treating doctor and the employer/ insurer in relation to medical issues and return to work.

Consent 2 – assessing and managing claims

I consent to my employer's insurer and its appointed service providers collecting personal information, inclusive of sensitive information such as medical information about me and using it for the purpose of assessing and managing my workers compensation claim, including determining liability and whether my claim is true. This consent extends to my employer's insurer disclosing my personal information, inclusive of sensitive information, to other insurers, medical practitioners, workplace rehabilitation providers, investigators, legal practitioners and other experts or consultants for the purpose of assessing and managing my claim. My personal information, inclusive of sensitive information, may also be disclosed as required or permitted by law. I also consent to my employer's insurer disclosing my personal details to WorkCover WA which is authorised to use this information to fulfil its functions and obligations under the Workers Compensation and Injury Management Act 2023. I have read all the information on this form regarding the consent authority and I consent to the Insurer dealing with my personal information in the manner described.

This consent authority is substantively the same as under the 1981 Act. The consent authority addresses both collection and disclosure of personal information and therefore overcomes the constraints that would otherwise have applied under the *Privacy Act 1988* and *WCIMA23*. The consent authority is specific to information collected by insurers and disclosed via claim processes.

In terms of collection of personal information, the consent authority is only applicable to the employer's insurer and its appointed service providers for the purposes of assessing and managing claims – it is not applicable to the employer or an agent of the employer such as a broker. It also doesn't matter what brokers call themselves; the only consideration is whether a person is authorised to collect personal information and disclose information to others. The consent authority in the claim form does not apply to an employer, broker, agent, or consultant of the employer.

In terms of disclosure of personal information, the consent authority authorises the insurer to disclose personal information to specific classes of person for the purpose of assessing and managing the claim. Under the *WCIMA23* an insurer is required to assess and manage claims but requires assistance to do so: the consent authority enables them to give information to persons that assist them. It is not applicable to the employer or agent of the employer such as a broker.

Has the law on broker access to personal worker information changed?

No. The position on worker consent described in the Bulletin is the legal position that has always been in place. There is no change in the transition from the 1981 Act to the *WCIMA23*: brokers have never been entitled to access worker's personal information in the absence of a written consent authority.

Clause 3.10 in the *Insurance Brokers Principles and Standards of Practice* is not a law. It is a statement of the effect of what the *Privacy Act 1988* requires: it is an offence to collect and disclose personal and sensitive information about an individual unless permitted by that Act or disclosure is made with the written consent of the individual.

The *WCIMA23* provides for licensed insurers and self-insurers to collect and use personal information about workers due to their role in assessing and managing claims and making liability decisions. This was the case under the 1981 Act.

Because of this right to collect information the *WCIMA23* also provides for a default position of confidentiality on the disclosure of information a person obtains under authority of the Act or their position or office. This was also the case under the 1981 Act.

Like the *Privacy Act 1988* there are some exceptions that permit disclosures including with the consent of the individual to whom the information relates.

There is a consent authority in the approved *Workers Compensation Claim Form CF1*, which is substantively the same as it was under the 1981 Act. The consent authority addresses both collection and disclosure of personal information and therefore overcomes the constraints that would otherwise have applied under the *Privacy Act 1988* and *WCIMA23*. The consent authority is specific to information collected and disclosed by insurers.

In the absence of consent by the worker, there is nothing in the *WCIMA23* or claim form consent authority that permits brokers to collect personal information about workers and nothing in the *WCIMA23* or claim form consent authority that authorises insurers to disclose personal information to brokers.

Does this mean brokers cannot perform a role in injury or claims management?

The Bulletin (and the legal position on privacy) does not say a broker cannot perform claim and injury management functions on behalf of an employer. The Bulletin simply clarifies that consent of the worker is required if those functions require accessing personal information of a worker.

Brokers need to show written consent of the worker before the insurer is permitted to disclose the worker's personal information. This is a requirement of the *Privacy Act 1988* and the *WCIMA23*.

Can WorkCover WA permit broker access to worker information on claims before 1 July 2024?

No. WorkCover WA is not authorised to make decisions on how the privacy laws operate before or after 1 July 2024. As indicated above there is nothing in the *WCIMA23* or *Insurance Brokers Principles and Standards of Practice* that changed the law on broker access to workers' personal information.

Clause 3.10 in the brokers' principles and standards is a statement of the effect of what the *Privacy Act 1988* requires.

Will WorkCover WA draft a consent authority for brokers to use?

No. The consent authority in the *Workers Compensation Claim Form CF1* is limited to an authority for the employer's insurer and its appointed service providers to collect and disclose personal information for the purposes of assessing and managing claims by the insurer.

Should insurers refuse to release any information or engage with brokers?

WorkCover WA encourages cooperation and collaboration between scheme participants. If an employer or broker provides an insurer with evidence of a worker's consent it is WorkCover WA's expectation that the information covered by the consent is provided.

The Bulletin is addressing restrictions on broker access to personal information about workers. For detailed definitions on what the *Privacy Act 1988* applies to see section 6 of that Act ("personal information", "sensitive information", "health information" and "health service"). Also see section 505(1) of the *WCIMA23*.

If the information a broker seeks from an insurer without consent is not restricted or limited by the *Privacy Act 1988* or the *WCIMA23* there is no barrier in providing the information to the broker.