British Insurance Brokers' Association

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THE INSURANCE ACT 2015
AN IMPLEMENTATION GUIDE

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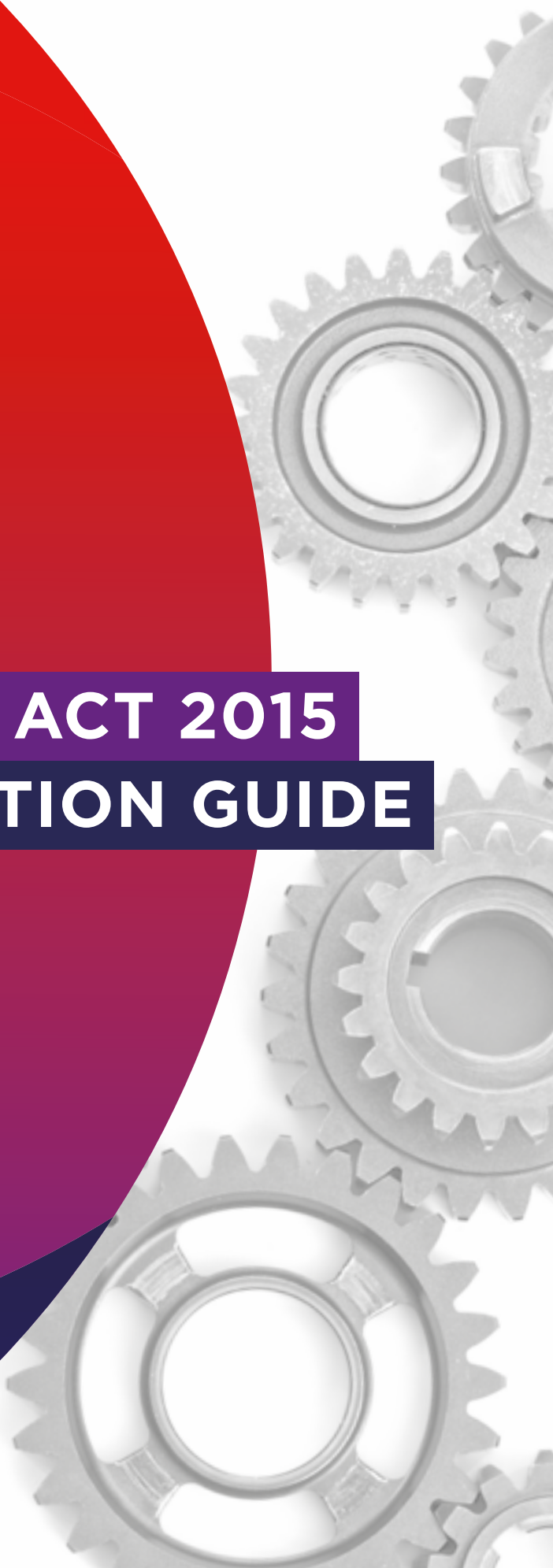
RSA



INTRODUCTION

Steve White

Chief Executive, BIBA

"I am delighted that BIBA, in conjunction with Mactavish and guide sponsors Ageas and RSA, is bringing you this important Implementation Guide to help you meet the challenges brought about by the Insurance Act 2015. This Act is a result of a fundamental review of insurance law that should lead to fairer outcomes for customers, something BIBA fully supports.

During the tour of the BIBA regions in autumn 2015 it became apparent that you wanted our support to enable you to comply with the new operational requirements of the Act. We have responded to this feedback with this new guide that builds upon our original Introductory Guide. We also undertook well-received technical presentations across the UK to set the scene ahead of the new era.

I would like to express my sincere thanks to the many members, advisory boards and technical committees that provided valuable input into this project. Bruce Hepburn, the Chief Executive Officer of Mactavish and David Hertzell, the former Law Commissioner who led the Bill through Parliament, have been instrumental in interpreting the law to provide this essential guidance.

Our aim is to bring a general understanding to the market and a mutually beneficial way forward and in this respect we are grateful to Ageas and RSA for their support. This Implementation Guide consists of three versions: firstly this main document, then to assist brokers it also comes with an accompanying mini guide that summarises the key points and a customer leaflet that members can share in order to highlight the customer's new responsibilities under the Act. Our Technical team is available if members have any further queries."

BIBA
British Insurance Brokers' Association

Bruce Hepburn

Chief Executive Officer, Mactavish

"Mactavish has been closely involved in the Insurance Act, contributing much of the primary evidence to the Law Commissions to support the passage of the Bill through Parliament and undertaking compliance work to implement the Act for brokers, customers and insurers. We are delighted to produce this follow-up Implementation Guide following the Introductory Guide that we produced with BIBA last year.

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The intention of this guide is to get beyond individual details of the Act and deal with its underlying objectives. Some aspects will no doubt be challenging, but we believe the broking community will flourish after August 2016 if it helps customers engage with these challenges head on. This means recognising that quick fixes to get around individual measures are not a reliable solution. The Act creates a unique opportunity to reset the focus of the insurance industry - with brokers leading the way. Mactavish and BIBA want to provide all the support that we can - so we urge readers to use the contact details at the end of this guide to get in touch if they would like to know more."

David Hertzell

Senior Adviser, Mactavish and former Law Commissioner

"Market participants told the Law Commission that the law should support a professional approach by policyholders, brokers and insurers alike. The Insurance Act 2015 seeks to do that and this implementation guide will help brokers to satisfy those professional standards. That in turn supports the government's desire to promote the UK as a leading provider of insurance products and services as well as supporting the domestic economy."

Mactavish

François-Xavier Boisseau

Chief Executive Officer, Ageas Insurance Limited

"The principles of the Insurance Act introduce a necessary modern framework to our industry for the benefit of our customers. We recognised the magnitude of its importance last year and became one of the UK's first insurers to adopt the Act's principles into our business. Ensuring the successful implementation of the Act is just the start – we're fully behind firmly embedding it with our brokers and their clients. This guide was built on the foundations of practical feedback that only the broker community can provide and we're grateful to BIBA and Mactavish for delivering a tool that offers clear and meaningful support for brokers to make the most of the Act's opportunities."

ageas

Stephen Lewis

CEO UK & Western Europe, RSA Insurance Group Plc

"The Insurance Act is the most important change to our legislative landscape for over a century, helping to modernise the industry and improve the service we provide to our customers. This guide contains everything our partners need to know about the Act in a compact, accessible and easy to use way."

RSA

The power of partnership

Supporting brokers through the Insurance Act changes

Choose Ageas for

- extensive choice of Personal and Commercial products
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- access to specialist underwriters
- expertise in niche and schemes products

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Your Partner in Insurance.

For information about our Personal and Commercial products please call your Ageas Account Executive or visit ageasbroker.co.uk

INDUSTRY ACCREDITATION

"LIIBA is delighted to have been included in the publication of this helpful guidance to the Insurance Act, which will be useful to brokers of all sizes."

Geraldine Wright, Company Secretary, London and International Insurance Brokers' Association (LIIBA)

"This new BIBA/Mactavish guide on the Insurance Act is essential reading for any industry professional and is presented in such a way that the components of the Act are described to make clear the changes brokers and Insurers need to consider in order to be compliant."

Sian Fisher, CEO, Chartered Insurance Institute (CII)

"As the most fundamental reform to insurance contract law in over a century, Airmic believes the Insurance Act will have a major influence on market practice and improve the level of professionalism across the market. We welcome the new BIBA/Mactavish guide as a really positive contribution to this process."

John Hurrell, Chief Executive, Association of Insurance and Risk Managers in Industry and Commerce (AIRMIC)

"CILA welcomes this explanatory document from BIBA/Mactavish to aid their members in the understanding of this new legislation. Working together with BIBA on this and other projects is demonstrative of insurance professionals seeking to ensure that customers are treated fairly."

Malcolm Hyde, Executive Director, Chartered Institute of Loss Adjustors (CILA)

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- Customer Factsheet
- Broker Mini Guide

SETTING THE SCENE: INSURANCE ACT 2015 A GAME CHANGER FOR THE UK INSURANCE INDUSTRY

The Insurance Act 2015 ('the Act') has received a great deal of attention in insurance circles, both during its consultation period and since it was passed into law. The new regime will govern every business insurance (or reinsurance) contract placed, renewed or amended under English or other UK law on or after 12th August 2016 (and it is the date the insurance is placed, rather than policy inception, which counts).

The Act's underlying purpose is a laudable one: to encourage professionalism amongst all parties involved in commercial insurance. The Act is a short and fairly simple document. However, it also raises a number of tricky practical questions and creates potential hazards for the broker and customer. It subtly re-engineers the foundations on which insurance policies are built.

WHY IS THE INSURANCE ACT IMPORTANT? ACCORDING TO ITS AUTHORS:

1. It seeks to update and modernise an antiquated area of law, out of line with modern business practices and the richness of information available;
2. It intends to provide a neutral framework that is fair to both customer and insurer;
3. It looks to ensure that any concealment of material information, or other poor or sharp practices, find no support in the law whether they concern a risk or how an insurance policy is expected to work;
4. It aims to encourage dialogue and promote industry practices which support the understanding of risk;
5. It retains a central place for the key principle of good faith on which the industry has always depended.

It is hard to argue that any of this is not well-intentioned. However, as a new piece of legislation, the Act also introduces considerable uncertainty. It is 'principles-based' legislation and, given the nature of our common law system, much of the practical detail will need to be worked through by the Courts based on litigation. Historic case law may need to be reinterpreted in a new light.

Much of this uncertainty naturally falls on the broker's shoulders. Although the Act directly addresses the parties to the insurance contract (the customer and insurer), its focus is on the transfer of risk information and the communication of how insurance policies work. In practice therefore, the broker is at the coal face of most of the Act's impact.
The challenge for the broker is to make sure that this uncertainty is understood and shared, with insurers and customers both playing their part and not unduly delegating responsibility. Without this shared understanding and co-operation the risk is that the broker takes on an unfair compliance load, and a disproportionately heightened errors and omissions exposure, simply as a consequence of their intermediary role.

The essential aim of this guide is to equip brokers to cope with this challenge.

Mactavish
GROUP

INSURANCE ACT 2015
EXPERTS

Unique insight into the changing legal landscape and placement practices

We help policyholders, brokers and insurers adapt to the new law

A new leader in insurance dispute resolution

WHAT WE DO:
EXPERTS IN POLICY RELIABILITY AND DISPUTE RESOLUTION

Policy Reliability

- Broker Insurance Act Compliance
- Fair Presentation Compliance
- Policy Wording Analysis / Drafting
- Risk Analysis
- TOBA Adaptation

Dispute Resolution

- Claims Governance
- Claims Negotiation
- Dispute Resolution

www.mactavishgroup.com

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RSA

THE INSURANCE ACT 2015

TIME TO MAKE SOME CHANGES

The Insurance Act 2015 comes into effect on 12th August 2016 and, since the act was passed, RSA has been working hard to prepare ourselves and our customers for the changes it will bring.

It is important for all parties – insured, broker and insurer – that all policy cover is fit for purpose under the new legislation and that everyone understands the risks presented.

We at RSA have embarked on a programme of change since adopting the Act in July 2015 to support this view.

WHAT HAVE WE BEEN DOING?

- We're updating our core policy wordings, removing basis of contract clauses and updating terms and conditions to ensure our products align with the Act. All changes will be confirmed prior to the Act becoming effective, so customers will be aware.
- We've put education at the forefront, developing a series of training sessions to support our brokers. This training includes a series of webinars which will demonstrate the key changes and explore the potential challenges this might bring, particularly the new duty of fair presentation. You can sign up to our webinars at www.rsabroker.com/insurance-act
- For further support when it comes to the new duty of fair presentation, we've started working alongside our customers. To understand the new duty we have created a guide that explains some practical steps that can be taken to assist in this area. This guide is available via your usual underwriting or sales contact, or can be downloaded at www.rsabroker.com/insurance-act
- To make things easier for our e-traded business, we've reviewed and streamlined our question sets so they're easier to understand. We've also put in place a fair presentation guarantee under which we will regard this as a fair presentation of risk, as long as:
  - A broker provides full answers, given in good faith.
  - Any assumptions made on the statement of fact are correct.

We believe the Insurance Act 2015 offers a genuine opportunity to create a risk partnership between insurers, customers and brokers.

Whatever your concern, our underwriters are here to help you.

STRUCTURE OF THIS GUIDE

This is the second of two BIBA/Mactavish guides on the subject.

The first part, Insurance Act 2015: An Introductory Guide*, summarises the changes included in the new Act and the key questions that market participants needed to think about in advance of the August 2016 deadline. This second guide focuses in more detail on helping brokers to prepare their customers and to avoid compliance failure themselves, while also raising awareness of the corresponding challenges facing insurers.

While intended to be of practical assistance, this Implementation Guide does not contain legal advice nor advice as to what the Insurance Act requires or how to act in any particular situation. This would be impossible due to the breadth of subject matter and variety of situations to which the Act may apply.

IMPLEMENTATION GUIDE SECTIONS

CHALLENGES OF IMPLEMENTATION
Builds on the explanation of the Act in the Introductory Guide and details nuances which brokers need to be aware of once they understand the core concepts in the first guide. This "devil in the detail" section covers some more challenging aspects of the Act which brokers will need to invest time in thinking through.

IMPLEMENTATION MEASURES
Maps out implementation ideas from the perspective of customers, brokers and insurers. The aim is to ensure that brokers can respond effectively but are also alert to potential developments which place compliance risk on the broker. Simplified leaflets for brokers and customers are also available.

BROKER TOOLKIT
Updates the broker toolkit from the Introductory Guide to give brokers a checklist to refer to once the legislation goes live.

*Available to download from www.biba.org.uk or www.mactavishgroup.com

SECTION 1: THE CHALLENGES OF IMPLEMENTATION - **1.1 THE DEVIL IN THE DETAIL**

As set out more fully in our Introductory Guide, the Act builds on much of the existing insurance law framework, but also makes a number of important changes.

The two most important changes directly affect how an insurance policy is arranged:

Firstly, the Act redefines the customer duty of disclosure as one requiring a 'fair presentation' of risk, with additional guidelines around how a risk needs to be investigated and described to meet the new standard.

Secondly, the Act amends the way in which warranties and other terms operate in insurance policies. The insurer has a responsibility to explain this to customers (as appropriate for the type of policyholder and class of insurance) in order to treat them fairly.

In practice the broker will engage heavily with both of these roles, which cover some complex issues.

This guide therefore would be incomplete without a stark warning to brokers that **there is increased advisory risk associated with the Insurance Act**. It is new legislation affecting every business that buys insurance subject to English or other UK law, and its impact needs to be explained. This risk is increased by any gaps in a broker's understanding, for obvious reasons. However, it is also increased by any insurer commitments which are incomplete or unclear, especially when promoted publically and if such high level pronouncements are not converted into accurate policy wordings. Brokers would be wise to remain alive to this concern.

Insurers are operating in a competitive market place and naturally seek to differentiate themselves by setting out their commitments on interpreting the Act. However, this may run the risk of over-simplification and when recommending an insurer on the basis of a broad-brush commitment it is important to consider whether such advice is as good as it may initially seem.

EXAMPLES OF INSURER POSITIONS AND BROKER ADVISORY RISKS ARISING

The insurer commits to follow the Act 'in principle', but does not reflect this in the detail of its policy wording. For example, if the wording conflicts with the Act by stating a worse position for the customer - such as allowing the insurer to avoid the entire policy in the event of any material non-disclosure instead of the proportionate remedies available under the Act. Points to consider:

- Could the insurers be deemed to have adequately 'contracted out' of the Act, despite 'in principle' commitment to adopt it, if the wording is clearly and unambiguously to a harsher effect?
- Might the broker consider warning the customer that the policy wording is inconsistent with the Act and may amount to contracting out?

The insurer promotes its offer by waiving the application of 'average clauses' (which look to reduce insurer liability in line with under-declaration of values) for a given market segment, provided the customer acts in good faith when presenting the risk. Points to consider:

- Would the insurer have a near-identical remedy and be able to reduce a claim settlement for underinsurance as a result of the proportionate remedies available under the Act for misrepresentation (in this case as to the values insured)?
- If under-declaration affects only one component of insured values (e.g. building contents), does the proportionate remedy reduce a claim in accordance with the under-declared proportion of premium for that component only or as a proportion of the premium as a whole?
- What exactly is the 'good faith' requirement in this context and what does it demand of both broker and customer? What happens if it is breached since good faith is now only an interpretative principle under the new Act, i.e. no specific remedies are triggered by its breach?

The insurer presents bespoke drafting of a policy term as 'equivalent to' or 'compliant with' the Act. Points to consider:

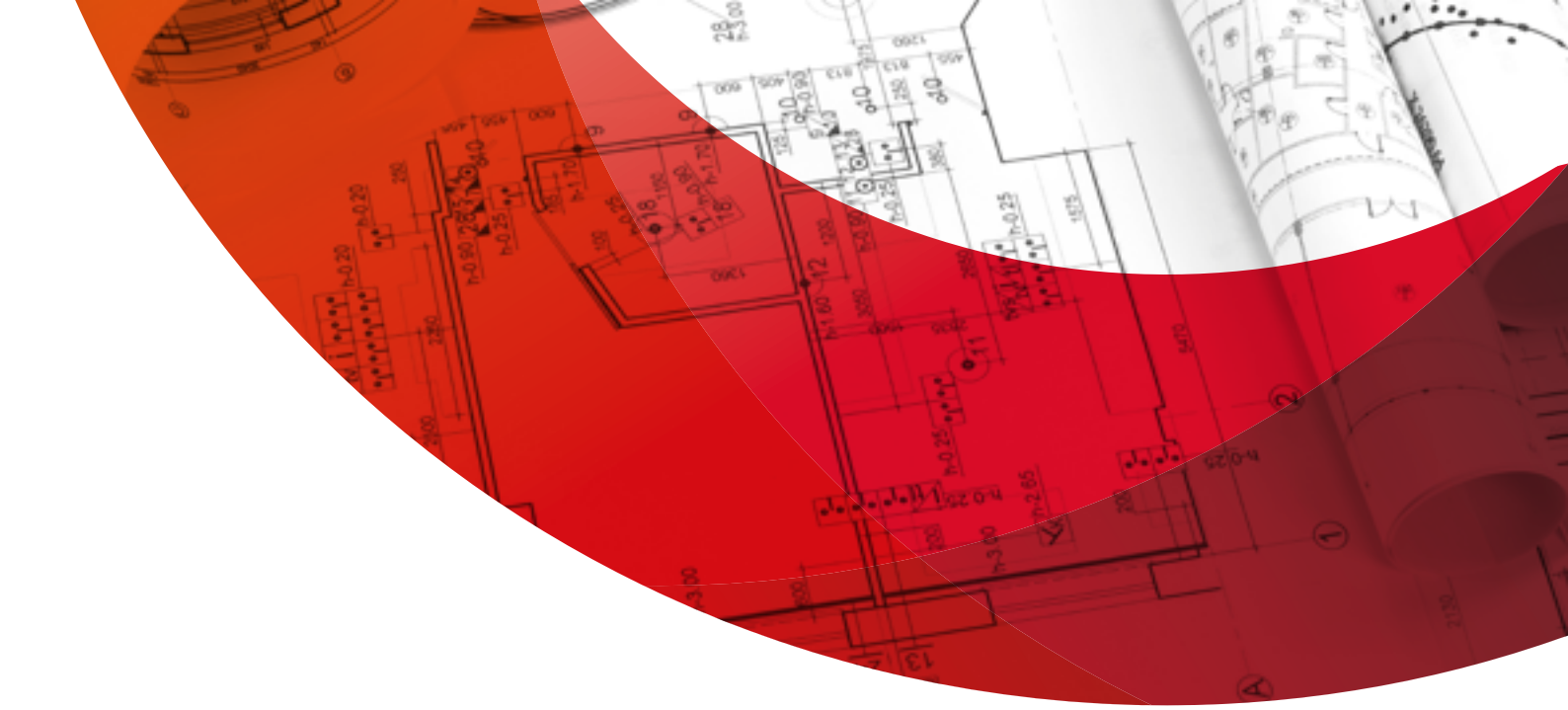
- Who is certifying that the wording means the same as the Act unless it follows the Act exactly, given a vast array of alternative 'Insurance Act drafting' currently in play across the market?
- Recent experience of 'Act-compliant' clauses suggests that such variations include many subtle but sometimes significant changes which cannot accurately be represented to the customer as equivalent to the Act.

The insurer signs off on disclosure as being a 'fair presentation' without understanding the customer's processes or enquiries; as a result, the customer is led to believe that they have met the new fair presentation requirements. Points to consider:

- Can a broker be sure that sign-off cannot later be challenged by an insurer on the basis of an 'unknown unknown'?
- Could an insurer argue that had they known a specific detail (such as the failure to consult with a particular manager whose knowledge later turns out to be relevant) then they would not have considered the presentation to be fair?

The well-intentioned insurer creates a 'user-friendly' policy document or accompanying literature which is short and accessible or uses 'Plain English', but although helping to reduce complexity, this may introduce ambiguities not present in a more comprehensive policy wording.
Points to consider:

- Are such policies and policy terms always clear and unambiguous or do they require additional advice from the broker?
- Is there potential for simplified terms to mask aspects of uncertainty in the policy which could be disadvantageous to the customer and/or trigger 'contracting out' requirements?



Overall, there are three main questions brokers need to ask when considering any insurer making a headline statement relating to the Act:

1. Is the statement consistently reflected throughout all policy documentation?

2. Are there any circumstances where the insurer may want or be required to take a different view and how would this be determined (e.g. where reinsurers are involved)?

3. Are such commitments always advantageous to the customer under all conceivable circumstances? If not, how can the insurer make sure there is adequate 'contracting out', explaining possible consequences of the policy term(s) concerned to customers in clear and unambiguous terms?

Headline insurer statements are just one of many aspects of the Insurance Act that require a degree of caution from brokers. There is also a wide range of questions around how the Act will apply in practice - and there may be no definitive answers available. Judicial decisions will be required to work out this detail over time and apply the Act's overall framework to the range of insurance classes, customer sizes and sectors and sales channels across what is a diverse industry.

To protect themselves, brokers are advised to make themselves aware of the key questions to ask, to avoid the risk of misadvising their customers.

Some of the issues below have been noted during the eight years of the Law Commissions' consultation process, including BIBA's contribution as well as commentary from a range of industry bodies such as the LMA, LIIBA and IUA* during the passage of the legislation.

The Introductory Guide covers the three main areas of change and how they relate to broker responsibilities in a Q&A format; this is not repeated here. However, from subsequent market comment and Mactavish's implementation work with early adopters of the Act, more details about the areas of uncertainty and practical concern for brokers have emerged; we highlight the most pressing ones here under the same three headings:

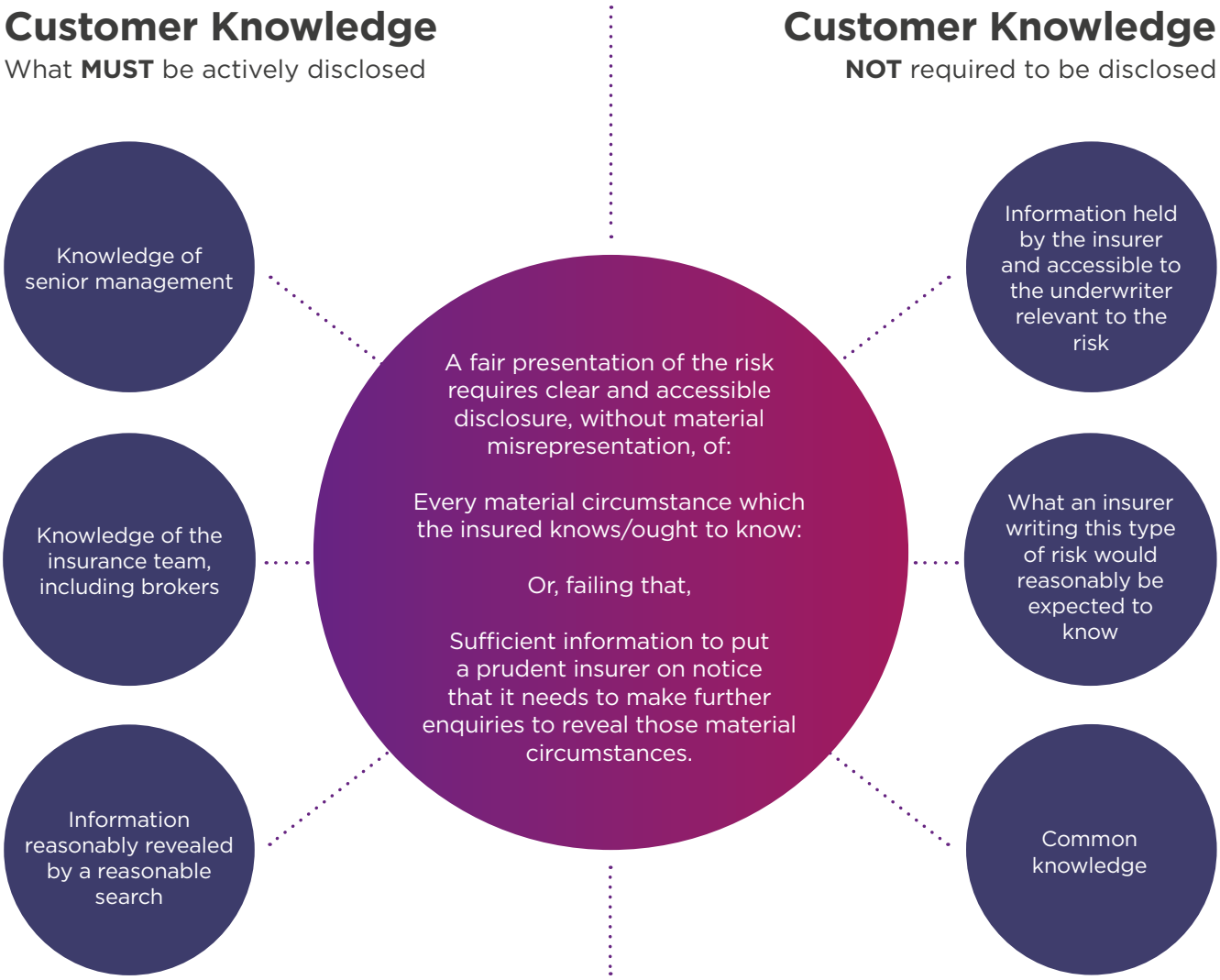
- Fair Presentation and Reasonable Search
- Warranties and Conditions
- Contracting Out

*Insurance Act 2015 LMA/IUA Guide, available from www.lmalloyds.com/act2015

1.2 FAIR PRESENTATION AND REASONABLE SEARCH

The most obvious change in the Act, the new duty of fair presentation, is a more structured framework for disclosure that includes far greater specificity about necessary knowledge, enquiries and presentation of risk information. Figure 1 summarises how the various aspects of the duty come together, as explained more fully in the Introductory Guide:

Figure 1 – The duty of fair presentation: how it fits together



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AVIVA
Good thinking

On your side in championing industry reforms

By your side to explain how they affect you

From day one we've fully supported the changes the Insurance Act 2015 is bringing to the industry. It brings reform that will offer customers greater clarity and transparency around the cover their policies provide.

The Act will mean changes in processes and procedures for brokers and insurers alike. We've already started by holding broker masterclasses and introducing new clearer policy wording, as well as a 'Fair Presentation of Risk Guarantee' for small business risks, so you know exactly what information our underwriters require.

To find out more about what we're doing to support you and your clients, speak to your Aviva sales manager.

"These reforms will provide customers with more certainty as to the performance of their commercial products. They give the industry the opportunity to demonstrate how we are working to improve the service and security we provide. This will require insurers, brokers and customers to work together effectively."

Angus Eaton
MD Commercial General Insurance, Aviva

On your side, by your side

FAIR PRESENTATION AND REASONABLE SEARCH: EXAMPLE CHALLENGES

How can brokers help customers determine who their 'senior management' should include?

- Senior management is defined in the Act as "individuals who play significant roles in making decisions about how the insured's activities are **to be** managed or organised."
- Agreeing on a single workable definition is impossible for most customers since the relevant set of individuals may vary between types and sizes of customer or by class of insurance.
- The words '**to be**' in the definition are significant. They imply a higher level of management or oversight than those managing or organising the business on a day to day basis.
- Depending on the circumstances this could include individual investors, non-executive directors, shadow directors, SME director family members or individuals employed by parent companies. Customers will be required to think through where to draw the line given the management of their particular organisation.
- It should be noted that even where individuals are not considered to be senior management for the purpose of fair presentation, there is still a separate duty to make reasonable enquiries of relevant individuals not falling within the definition.

How do brokers advise customers concerning what insurers already know (or should know)?

- The Act sets out several categories of material information that customers do not need to disclose. It is likely that customers will look to their broker for guidance on these issues, such as what historic data is accessible to underwriters or what an underwriter writing a given type of risk should already be aware of.
- This is made more difficult by the wide variance between insurers, and classes of insurance, in how underwriters work. It would be prudent for brokers not to assume too much and the safest course of action may often be to advise customers to work on the basis that underwriters have no prior knowledge.
- If insurers are assumed to already have specific information (such as historic surveys), or to know about industry-wide risk issues, it may be advisable for this to be confirmed in writing and/or specifically referenced within a customer's disclosure.

The concept of 'reasonable search' defines what an insurance buyer 'ought to know' and covers a potentially broad range of sources. This may increase the burden on customers, although as set out in the BIBA/Mactavish Introductory Guide, "there is no 'one size fits all' answer to this, as what counts as reasonable is intended to be flexible and will be determined by the size and complexity of the business."

What is the role of 'good faith'?

- Although the specific remedy of avoidance for breach of the duty of good faith is removed, the principle of good faith is still contained in the Act and required to fulfil the new duty of fair presentation (and failure may cause insurers to apply other remedies available under the Act).
- The LMA/IUA guide gives an example of a simple voluntary disclosure statement: "the insured has had no claims in the last five years". Even if this statement is sufficient to put insurers on notice as to the fact that there may have a been a loss six years prior, if the broker knows of such a prior loss that is particularly significant they may wish to volunteer this additional information to avoid any potential dispute.
- Another challenging 'good faith' example brokers may wish to consider is whether it needs to be disclosed if other insurers, who were invited to quote, declined to write a risk. Again there is no single solution: if an insurer's reasons are clearly documented and based on a material risk concern, making that concern clear is likely to be prudent; if declinature is based purely on commercial grounds or an insurer's general risk appetite then it is less likely to be material.

To what extent might brokers advise on the boundaries of a 'reasonable search'?

- Decisions about the extent of necessary risk enquiries, and how they may vary across areas of the customer's business and for different types of risk, are often complex, even for smaller businesses.
- Developments in insurance market practices and the technology used for data analysis will also ensure this standard is not static; what is reasonable today could be deemed too basic or lacking in breadth tomorrow, with the result that 'reasonable search' becomes more extensive over time.
- Broker advice may therefore need to remain cautious: the customer must take responsibility for deciding on what is reasonable for their business and for specifying any limitations which could be formally agreed with the insurer.

What are the consequences of the requirement to extend 'reasonable search' to include all beneficiaries of the cover?

- The Act states that a reasonable search should include information available to the insured's organisation or "held by any other person (such as the insured's agent or a person for whom cover is provided by the contract of insurance)."
- In some cases, particularly in a Directors' and Officers' insurance or similar liability context, or where a group of companies and contractor interest is being insured, this requirement may become very demanding if there are a large number of potential beneficiaries.

1.3 WARRANTIES AND CONDITIONS: EXAMPLE CHALLENGES

How has the burden of proof regarding a breach of a policy term changed?

- Historically, the burden of proof has generally rested with the insurer (unless stated otherwise) to establish either that a breach of policy term/condition/warranty has occurred, or that an exclusion applied. That basic position remains but the new regime is more complicated.
- Under Section 10 of the Act, the effect of a breach of warranty is now to suspend liability rather than to discharge the insurer from all liability under the policy. Therefore, in practical terms it will often fall to the customer to prove that a breach has been rectified.
- Section 11 of the Act helps the customer by preventing risk mitigation terms (whether a warranty or other term) being applied where they are irrelevant, for example a breach relating to fire extinguishers being used to deny an unrelated flood claim.
  - However, it is now up to the customer and their broker to establish not just that a breach did not affect loss but also that it could not have increased the risk of loss in the circumstances concerned. This is a potentially onerous evidential burden and opens up a new area of dispute.
- It would be wise for brokers to satisfy themselves as far as possible that customers understand that the protection offered by Section 11 (Terms not relevant to the actual loss) does not extend to all policy terms. There are two important exceptions::
  - Terms which define a risk as a whole, although this is a potential grey area that is likely to become clearer as case law develops (and may apply differently for a single line policy than for a cross-class policy that covers many types of risk).
  - Terms which govern post-loss behaviour, for example even an inconsequential delay in notification of a claim, in breach of the requirements of a condition precedent to liability, could still be used by an insurer to decline a claim.

Is there a new requirement to disclose breaches of risk mitigation terms?

- A feature of the 1906 Marine Insurance Act was that there was not a pre-contractual duty to disclose facts which were relevant only to the insured's ability to comply with a warranty. Since, under the old law, the breach of warranty would anyway discharge all insurer liability, disclosure of facts relating to a breach of warranty by the customer (as at the time of contracting) was generally not required.
- The new Act makes warranties suspensory (i.e. the insurer is again liable once the breach is rectified, where the breach is capable of being rectified) which is obviously of benefit to customers. However, facts relevant to the insured's propensity to breach a warranty (or, indeed, any condition tending to mitigate risk) might now be material for the purpose of fair presentation – such as significant or repeated past instances of breaching important risk management obligations in the policy, from waste handling to security or fire protection system maintenance.
- The safest approach would be for the customer to monitor its compliance with risk mitigation terms and disclose material failures to comply with them. This approach is in line with the overall objectives of the Act but could require disclosure relating to a large number of obligations depending on policy detail. This would be a demanding departure from current practices.

1.4 CONTRACTING OUT: EXAMPLE CHALLENGES

How will the requirement to flag disadvantageous terms work in practice?

- In its 2016 Manifesto BIBA calls for the insurer to bring to the attention of the broker, via an important notice or other means, any disadvantageous terms arising because they choose to contract out of the Act's requirements.
- However, a policy may include terms which vary the position under the Act and are normally advantageous to the customer, but not in every conceivable situation.
- A case in point is insurers offering to substitute the Act's proportionate claim reduction with a premium adjustment, in the event of non-disclosure or misrepresentation where facts come to light which would have increased premium. This would usually be better for the customer as claims on the policy would still be paid in full. However, in the event of a small claim that suggests a significantly different view of the risk, the additional premium adjustment applied across the entire policy period may mean the customer is worse off.
- The safest response is to ensure that every term which departs from the position under the Act is flagged.

What is the broker's role in bringing such disadvantageous terms to the attention of the customer?

- The insurer has met their duty if they make the broker aware of a 'disadvantageous' term before the policy is agreed, provided it meets the 'clear and unambiguous' requirement.
- This means that brief or numerical references to model clauses (such as those published by the LMA*), or standard policy forms agreed between broker and insurer, may suffice. There is also no need for such wording to explicitly state that its effect is to contract out of the Act, provided the impact is clear.
- These standard wording efficiencies are commonplace across the market, but wherever their content differs from the Act, the onus is likely to be on the broker to highlight this to the customer in any advised sale scenario (as covered in the Introductory Guide).
- Particular care will be required where the broker is aware of the insurer's full terms before policy negotiations are concluded, but this information has not been shared with the customer.
- One potential concern, again flagged in the Introductory Guide, is that whilst overarching basis of contract clauses have been abolished by the Act, insurers may still create specific warranties or conditions precedent to liability based on critical aspects of risk information provided. Care may have to be taken by all parties to ensure that such terms are identified and complied with.

*http://www.lmalloyds.com/actclauses

SECTION 2:
IMPLEMENTATION MEASURES - A BLUEPRINT

While Section 1 reviewed challenges within the Act, this section outlines what can be done to comply with it. In particular, this draws on Mactavish's recent extensive practical experience of working with customers, brokers and insurers to apply the Act to their businesses.

Firstly, none of what follows should be considered as absolute requirements: the basis of the Act is that it sets out high-level principles and it is up to participants to think through how they are reasonably applied to a specific set of circumstances, customer or policy. There is no one-size-fits-all answer. This section aims to provide ideas which may help to achieve (and demonstrate) compliance with the spirit as well as the letter of the new law.

Secondly, before getting into any detail, in addition to an overall commitment to professionalism there are two overarching principles which will stand brokers and their customers in good stead across all areas of Insurance Act implementation:

Record keeping

The Act creates a new focus on operational processes on all sides of the insurance transaction: the enquiries and checks run by the customer; the questions raised and underwriting rationale of the insurer; the knowledge recorded by the broker. This makes the clarity and detail of such records absolutely critical.

Allowing adequate time

More time is likely to be needed while new processes prompted by the Act are bedding in, but also more generally to ensure all elements of a 'fair presentation' are met and that all underwriting queries are followed through. Insurance Act compliance is generally inconsistent with a last-minute approach.

The following sections detail customer, broker and insurer measures being developed and implemented during the run up to the Act going live. In each case, the analysis focuses on the two greatest areas of challenge for each group, and considers the measures available in three categories:

1 Good practice

Measures which are likely to be relevant to most insurance transactions, and should be considered even if their application may be more restricted in relation to simpler policies.

2 Added value

More advanced or complex measures which still apply to many transactions.

3 Market leaders

More difficult measures to implement which, although demanding and as yet undertaken by relatively few market participants, would provide a robust means of meeting the Act's requirements.

2.1 - INSURANCE ACT: COMPLIANCE FOR CUSTOMERS

From a customer perspective, the Act is a balance between providing the legal basis for fairer claims outcomes in return for a fair presentation of the risk. Although the former duty to disclose every material circumstance was extremely demanding, for pragmatic reasons the industry actually developed much more limited expectations. For the customer this came with the risk of an unfair and disproportionate impact on claims if that limited risk information later proved inadequate. The duty of fair presentation aims to tackle this problem head on. Figure 1 on page 16 sets out necessary steps and enquiries on all sides of the transaction. This is unsurprisingly the principal area of concern for customers. The core question, which is already being routinely asked of brokers, is: what do we need to do differently?

It is hopefully clear by now that doing nothing differently is risky and likely to be an unsatisfactory answer for a broker to give. Equally, giving overly definitive answers presents risks too. The whole concept of fair presentation requires the customer to work through what is reasonable within the context of its own organisation.

The duty of fair presentation is made up of various constituents, including maintaining the existing duties to ensure that every material representation to a matter of fact is 'substantially correct' and that every material representation to a matter of expectation or belief is made in 'good faith', but there are two newly defined areas where customers are most likely to ask questions:

1. **What are the boundaries of 'reasonable search'?**
2. **How can we ensure information is presented in a 'clear and accessible' manner?**

The table to the right summarises some potential steps that customers can take to protect themselves.

Key Conclusions - Customer implementation

1. Timing

Implementing even part of these procedures will take more time, even for smaller or simpler businesses where information is relatively consolidated.

Differences between customers mean it is not possible to be overly prescriptive but some important considerations are:

a. Significant additional time may need to be allocated to risk information collection and validation in the first post Insurance Act cycle, perhaps starting a month or more earlier than 'normal'.

b. Once such processes are established, review timescales may need to be extended generally to allow for additional review and sign-off of risk information and to record the enquiries made. For smaller businesses this may mean starting the information gathering process earlier pre-renewal, for larger and complex businesses it could require starting earlier still prior to renewal.

c. Timing decisions must balance the need to conduct and record a reasonable search with making sure information is not overly out of date by renewal. This could mean some compromise – which itself may need to be clearly disclosed as part of the risk presentation.

d. Time periods should also build in the fact that insurers may be more likely to challenge or make enquiries on certain elements of the presentation prior to accepting it.

2. Broker partnership

The fair presentation standard makes clear that responsibility for insurance disclosure cannot simply be outsourced to the broker, but must involve customer and broker working together. This requires:

a. Seeking to establish clarity on respective broker and customer responsibilities around building risk information.

b. Making effort to clearly set out broker processes to make them more easily understood by the customer, and to consistently record material information arising from both broker interactions with the wider customer business **and** broker dealings with insurers.

Potential steps that customers can take to protect themselves

ACT COMPLIANCE: CUSTOMERS	CONDUCTING A REASONABLE SEARCH	CLEAR AND ACCESSIBLE PRESENTATION
GOOD PRACTICE	Knowing what risks are insured and tailoring the search to find information relevant to those risks Documenting who and what is involved in gathering and checking risk information Updating guidance to individuals responsible for providing information relating to their responsibilities under the Act	Consistent indexing and signposting – pointing insurers to what is relevant to them Concerns improving presentation standards and also emphasising known risk concerns (e.g. a trend arising from uninsured minor incidents)
ADDED VALUE	Reassessing the adequacy of sources consulted in the light of how business information is held Clarifying what 'sign-off' realistically involves for both operations and management/the Board (to ensure full approval of accuracy and completeness) Reviewing where searches may need to be broadened to cover a) additional parts of the organisation or other insured parties and/or b) relevant third party knowledge (consultants, contractors and agents, including the insurance broker)	Providing bespoke supporting guidance and summaries to help insurers through all wider documents relevant to the risk provided, e.g. websites, risk management policies, etc. Ongoing appraisal of operations throughout the year to identify and flag any changed or unusual risk factors on a consistent basis
MARKET LEADERS	Explicitly agreeing senior management definitions and search limitations with insurers Automating 'sign-off' within the IT systems used for information gathering, e.g. through Enterprise Risk Management systems or bespoke spreadsheet tools Running investigative enquiries or analysis into complex aspects of risk beyond the traditional dataset required for placement	Designing additional checkpoints to stress-test clarity and completeness with a wider internal audience Highlighting specific gaps or weakness in risk information for insurer approval

2.2 - INSURANCE ACT: COMPLIANCE FOR BROKERS

It is clear that the duties imposed on both sides of the insurance relationship will have significant impact on the role and responsibilities of the broker as intermediary. Brokers will be expected to provide advice to customers, aid the data gathering process and provide appropriate guidance on policy wordings – in particular where insurers wish to contract out.

For many businesses, the broker is the expert adviser on all matters concerning insurance and will naturally be expected to provide guidance on obligations arising under the Act. Yet these include customer-specific and legally untested concepts.

In addition, a broker may itself hold a great deal of knowledge of their customer's business. Relevant knowledge held by the broker (as the agent of the customer) is considered customer knowledge and therefore must be disclosed wherever relevant (unless confidential to another customer, unconnected with the policy).

There are two key questions for brokers:

1. **How can we provide pragmatic advice to customers without taking on an unfair exposure?**
2. **What is the best way to handle material information?**

The table to the right summarises some potential steps for brokers to consider.

Key Conclusions - Broker implementation

1. Timing

Implementing even the 'good practice' elements in the table on the right is likely to take more time both in respect of working with customers and for internal broker activities. Whilst requirements may vary between customers due to the relative complexity of the organisation and insurance programme, consideration may be given to the following:

a. Customer risk information collection may need to start earlier than previously, to allow for capture of information across the broker organisation as well as chasing down potentially more customer sources and sign-off points than have previously been involved.

b. Insurers may need to be encouraged wherever possible to make draft policy wordings available prior to renewal (or explanatory documentation which sets out material aspects or proposed changes to an existing wording). This helps avoid a potential errors and omissions exposure with the broker if they were previously aware of policy detail which is not properly explained to the customer.

c. Brokers may need to work with insurers to minimise last-minute changes of policy form by insurers if they do not allow sufficient time pre-renewal for proper review and discussion of the impact of these wordings with the customer.

d. Extended time may be needed for insurers to make enquiries about the risk, to ensure both that brokers have an opportunity to request or validate responses and that every material answer is given to all participating insurers.

2. Roles, responsibilities and remuneration

a. The Act makes it critical for brokers to agree practical responsibilities around their customer's fair presentation duty, as well as formal delineation within the TOBA – customising where necessary to accommodate customer-specific variations in workload or responsibility allocation.

b. The clarification of duties under the Act reinforces high-value elements of the broker role, creating the opportunity for a quality broker to move broker remuneration negotiations away from a commodity competition.

Potential steps for brokers to consider

ACT COMPLIANCE: BROKERS	CUSTOMER ADVICE	INFORMATION HANDLING
GOOD PRACTICE	Developing clear and consistent messaging to customers setting out their obligations under the Act Defining the broker's duty and particularly the formal duty of care – the basic law of agency has not changed but the scope of the broker's duty will likely need to be reassessed in light of the Act	Setting internal policies to capture and review relevant information arising from core risk data gathering and placement role (ensuring that corporate knowledge does not rely on individual executives who may leave) Instituting a consistent approach to capturing, verifying and responding to all insurer queries and ensuring every relevant market (including co-insurers) receives all material information
ADDED VALUE	Developing policy mechanics around the review of policy wordings (and preparation where compiled by the broker) including 'contracting out'. This may involve agreeing necessary ground-rules and templates with insurers (and being wary of the dual role created where a broker also has delegated underwriting authority) Developing and educating staff on limitations to advice which can be given to customers around a) wording interpretation and b) fair presentation compliance	Building in processes to capture and review all information arising from any ancillary roles of the broker, e.g. claims, surveys etc. Customer-specific adaptation of broker-customer TOBAs to reflect the broker role in the data gathering process and respective responsibilities for fair presentation
MARKET LEADERS	Tracking and advising on all risk and wording changes over time Specifying formal boundaries of advice within broker-customer TOBAs: from full service to non-advised or execution only	Collating all broker knowledge of the customer into insurer-ready, Act compliant format Reviewing broker-insurer TOBAs where feasible in light of the Act – TOBAs that include a clear definition of responsibilities may serve to reduce errors and omissions risk

2.3 - INSURANCE ACT: COMPLIANCE FOR INSURERS

For insurers, as well as for brokers who assume delegated underwriting authority, the critical Insurance Act implementation challenges focus on
a) the drafting and checking of policy wordings, including contracting out and
b) implications for underwriting procedures.

Insurers may undermine their claims position if shortcuts are taken or records are poor. In future, insurers are likely to require more evidence as to the impact that information would have had on underwriting decisions in order to justify proportionate remedies.

The Act pushes insurers to carefully consider the information to which their underwriters have ready access, and which customers may no longer have to disclose at all. The concept of further enquiry means that the insurer's position in the event of a loss might be undermined if they have failed to make due enquiry about a risk. None of this means existing underwriting tools are any less relevant, but greater standardisation of underwriting procedures is likely to assist in meeting the challenges presented by the new regime.

Getting contracting out right is also critical. In addition to any parts of the market which may contract out of the Act wholesale, insurers will need to review existing standard wordings for 'disadvantageous terms' and either bring these into line with the Act or contract out in accordance with the transparency provisions. The 'clear and unambiguous' threshold for contracting out is likely to vary depending on the nature of the placement, class of insurance and the sophistication of the parties involved.

The table on the right summarises the key steps some insurers are taking in respect of the Act.

Key Conclusions - Insurer implementation

1. Delegated authority

Brokers who have delegated authority arrangements (or even where acting as a captive manager) may need to consider the extent to which they also need to implement the range of insurer measures in the table on the right.

2. Different market segments will have varying contracting out requirements

A key challenge is developing standardised solutions which suit the requirements of different insurance classes, segments or sales channels. Engaging with insurers on this issue as soon as possible is useful to proactively agree an approach.

3. Wording uncertainty is a risk to the broker

It is important to be aware of the scale of challenge insurers are facing, given the sheer quantity of wordings which may require amendment to either comply with the Act or adequately contract out. Unresolved wording ambiguity in any element of the policy documentation set creates potential risk for brokers in recommending an insurer (as explored in Section 1).

Key steps some insurers are taking in respect of the Act

ACT COMPLIANCE: INSURERS	PROCEDURAL IMPLICATIONS AND UNDERWRITING POLICY	CONTRACTING OUT
GOOD PRACTICE	Reviewing systems for capturing detailed underwriting file notes regarding inducement (causing a particular underwriter to write the risk on the terms that they did) is critical to Insurance Act 2015 remedies Producing guidelines for customers and brokers around minimum insurer expectations to support fair presentation, and areas of common further enquiry	Review of all standard policy wordings against the Act and amending as appropriate Identifying all areas where contracting out is desired (including where a term might only occasionally be disadvantageous) Where contracting out, ensuring that every disadvantageous term is 'clear and unambiguous' as to its effect
ADDED VALUE	Developing policies to standardise information sources available to underwriters to establish clear boundaries of what customers are not required to disclose Such policies might include guidance in challenging areas such as historic submissions, claims and survey records, customer websites, subscriber information databases, submissions across other classes of insurance etc.	Revising policy summaries and/or factsheets to reflect the Act's provisions to ensure clarity is given before policy inception Review of all certificates to be issued under binding authorities for compatibility with the Act, including proper drafting of any contracting out terms
MARKET LEADERS	Ensuring careful controls around the creation and continuing review of policy wordings, in particular concerning 'equivalent' Insurance Act policy wording variants Building formal links between the level of comfort with a customer's fair presentation and the non-standard policy coverage that can be offered as a result	Review of agreed insurer-broker working practices across each area of the business to reflect respective responsibilities around contracting out and customer communication (amending insurer-broker TOBAs if appropriate)

SECTION 3:
BROKER TOOLKIT UPDATED

Our Introductory Guide concludes with a broker toolkit summarised here. Please see the Introductory Guide for more detail on these tools which remain of key importance for brokers to consider and implement.

Broker Toolkit from the Introductory Guide – Recap

Planning for an extended renewal timetable

To allow for fair presentation requirements and increased management of policy documentation given the potential for changes.

Updating broker 'Own Brand' data gathering templates

Reflecting the requirements of the Act within the guidance given to customer personnel supplying information, and ensuring standard templates do not exclude open-ended questions of the customer such that the broker inadvertently closes down a 'reasonable search'.

Updating scheme and boilerplate broker wordings

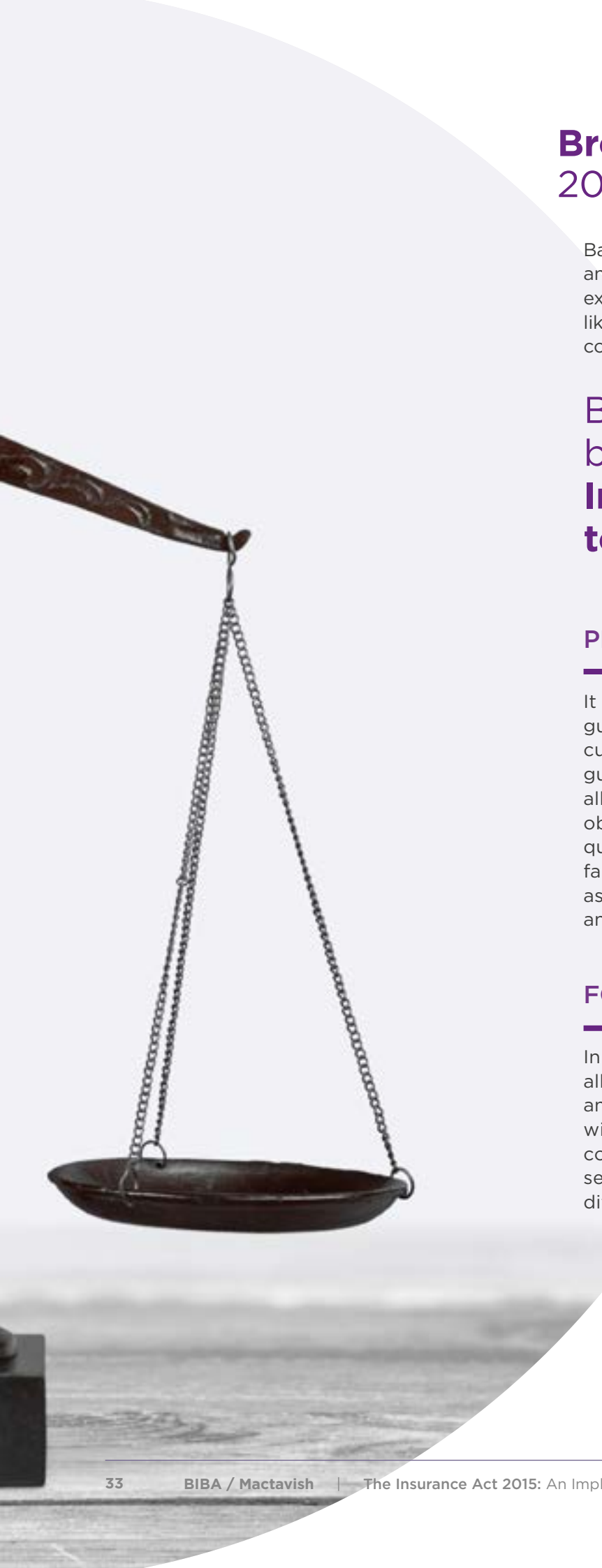
Careful review to identify potential areas of customer disadvantage and ensure adaptation where existing wording now constitutes 'contracting out'. In addition, is the scope of coverage clear enough (e.g. in terms of covered parties) to establish the limits of reasonable search required?

Developing systems to centralise knowledge held on a given customer

Wherever it arises from any of the various activities of the broker, or from disparate but potentially material questions raised by insurers.

Reviewing responsibility allocation

In insurer as well as customer TOBA agreements to prevent excessive concentration of errors and omissions risk with the broker and to provide clear expectations of each party.



Broker Toolkit – 2016 update

Based on the subsequent market commentary and early implementation work, we have extended this toolkit and highlighted the most likely dangers against which brokers might consider protecting themselves.

Being clear on the boundaries of **Insurance Act advice to customers**

PRACTICAL CLARITY

It may be helpful to develop standard guidelines on the advice to be given to customers on most of the subjects in this guide. In particular, it would be wise to avoid allowing customers to pass on their own obligations to their broker. For example, questions around what makes a presentation fair cannot be answered definitively by brokers as answers depend on the business concerned and how it is organised.

FORMAL CLARITY

In addition to standardising advice, the allocation of responsibilities between broker and customer may require amendment within broker-customer TOBAs, along with consideration of whether different market segments or stated service levels incorporate a different level of advice.

Being clear on **insurer requirements**

WORDING CONSISTENCY

Consistency of underlying wording innovations and market commitments – care should be taken to avoid the conflicts and ambiguity set out in Section 1 which may create advisory risk for the broker.

UNDERWRITER ENGAGEMENT

Specific expectations for fair presentation – while insurers are unlikely simply to 'sign-off' presentations as fair (and this may not help anyway given the potential for 'unknown unknowns'), more dialogue on requirements means a safer placement. Checklists and templates may not be exhaustive, but they help to manage the customer's and broker's risk.

CONTRACTING OUT PROTOCOLS

It would be helpful for brokers to understand the contracting out protocols used by their insurers, including a way to flag all non-standard terms before inception (even where terms may normally be advantageous) so that they cannot easily be missed by individual brokers.

WHAT'S NEXT? THE ENTERPRISE ACT - AND WHY IT MATTERS FOR BROKERS

This guide would not be complete without brief mention of the Enterprise Act, which received royal assent on 4th May 2016 and will come into force 12 months later, around 9 months later than the Insurance Act.

This Act is a collection of various measures, but includes an add-on to the Insurance Act, relating to damages for late payment of claims by insurers. The new provisions are subject to the same rules on contracting out, which could include any insurer limitations of liability for late claims payment, or exclusion of liability for more remote forms of loss.

This was a controversial legislative measure and needed careful consideration outside the remit of the Law Commissions' procedure for uncontroversial legislation. Mactavish led the industry wide negotiation on the legislation including drafting amendments to the Enterprise Bill to achieve unprecedented consensus, reaching agreement with the ABI, Airmic, BIBA, International Underwriting Association, LIIBA, Lloyd's, and Lloyd's Market Association. This was a very positive industry wide development. The Government subsequently adopted the Mactavish amendments to the Bill.

Damages for late payment is an important subject; it was originally included in the Insurance Act and then, after debate, removed. The core principle which the Enterprise Act reintroduces is that damages should be available if the business of a customer suffers recoverable losses as a result of the unreasonably delayed settlement of an insurance claim. This is already the case for late payments under most commercial contracts, but insurance has previously been exempt. Of course, there will continue to be many valid grounds for an insurer to question the validity or proper calculation of a claim and that is not the target of the Enterprise Act. The deterrent effect of the proposed changes is critical, requiring insurers to think carefully before delaying a large claim when doing so could seriously affect the customer. Interim payment of claims is also likely to become more frequent once the Enterprise Act becomes law.

This is a balanced approach and a vital improvement for customers. But there are several key points for brokers to consider:

1. ADVANCE DISCLOSURE

If a customer is financially vulnerable to late payment of claims, this itself may become material to the risk insured. In addition, disclosure of such vulnerability prior to placement may increase the customer's prospects of succeeding with a claim for damages for late payment (for a loss to be recoverable it must have been in the reasonable contemplation of the insurer as liable to result from late payment).

2. CONTRACTING OUT

Insurers may look to agree limits or exclusions from liability, at least for some market segments or classes, in order to protect themselves. Any such limit or exclusion would qualify as contracting out under the Insurance Act and would need to be brought to the customer's attention.

3. LEGAL ADVICE

If a customer has a potential damages claim, they may need separate legal advice. This claim is independent of the claim on the insurance policy, and is subject to the general principles of contract law applying to claims for breach of contract. Recoverability of loss depends on causation, proof of loss and the duty to mitigate loss (such as by raising funds from alternative sources where possible).

4. LIMITATION PERIOD

Following the final payment of a claim, a special limitation period of one year applies: the customer will have only a year in which to issue proceedings for any losses caused by the late payment.

CONCLUSION

In conclusion, the Insurance Act and the Enterprise Act can be viewed by brokers in two ways: difficult changes which create uncertainty and risk for the intermediary, or as an opportunity for a good broker to deliver real value to his or her customers by doing a high quality broking job. In reality, they are both.

The underlying objective and spirit of the law reform effort is to reinforce professional standards. Even though any new, principles-based framework creates implementation questions and challenges, we should not lose sight of this intention.
The proactive, disciplined broker stands to gain much from the new regime and the enormous potential for differentiation which it provides across all parts of the market.

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The British Insurance Brokers' Association (BIBA) is the UK's leading general insurance intermediary organisation representing the interests of insurance brokers, intermediaries and their customers. BIBA membership includes just under 2,000 regulated firms.

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Mactavish

Mactavish is the UK's leading expert on insurance governance and Insurance Act compliance. The business contributed heavily to the law reform process and is the adviser of choice for brokers, customers and insurers preparing for law reform and is now strongly supported by David Hertzell's presence on the team as the former Law Commissioner responsible for drafting the Act.

Mactavish publishes widely acclaimed research into the corporate insurance landscape and is unique in its focus on establishing standards across the insurance industry which are fair and work for all parties.

Support for brokers ranges from compliance audit work to frontline staff education, advisory guidelines and policy development, revising terms of business, policy wordings, scheme administration detail and managing emerging compliance risks. Mactavish also works extensively with customers, specialising in the analysis of commercial risk, coverage analysis, insurance policy reliability, disclosure, placement procedures and conduct, and implementing standards for the governance of insurance.

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To be read in conjunction with BIBA/Mactavish 'Insurance Act 2015: An Introductory Guide'

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