



Insurance Act 2015

Taking advantage of the Insurance Act's benefits now



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Herbert Smith Freehills

As one of the world's leading law firms, Herbert Smith Freehills advises many of the biggest and most ambitious organisations across all major regions of the globe. Its insurance and reinsurance lawyers have an outstanding reputation in complex, high profile insurance and reinsurance disputes and for providing strategic legal advice and representation to corporate policyholders. Herbert Smith Freehills is Airmic's Preferred Service Provider on insurance law issues and has assisted Airmic in producing a number of its technical guides over the past few years including this most recent briefing on the Insurance Act 2015. These practical tools assist Airmic members, Airmic partner brokers and insurers to promote legal certainty in their insurance contracts.

Executive summary

“this briefing is intended to assist members who may wish to act now to take advantage of some of the benefits the Act provides.”

AIRMIC members will be aware that the *Insurance Act 2015*¹ (the Act) received Royal Assent on 12 February 2015.

The Act does not come into force until August 2016, but the objective of this briefing is to assist members who may wish to act now to take advantage of some of the benefits the Act provides. This is not intended to be an implementation guide, but includes an endorsement that may be used to amend some of the existing terms of a policy to replicate some of the benefits for policyholders of the new Act. Airmic will be producing a follow up guide to this briefing, looking at how members can prepare internally for the Act.

This briefing builds on Airmic’s recent guidance – ***The Insurance Act 2015: What members need to know***² and the work undertaken by Airmic in its guides on:

- ***Basis Clauses***³ (published in 2013)
- ***Warranties***⁴ (published in 2013)
- ***Disclosure of material facts and information in business insurance***⁵ (published in 2011).

This briefing has been produced with the assistance of Herbert Smith Freehills LLP as a preferred service provider to Airmic.

The content of the briefing relates to the position under English law and does not constitute legal advice. Members are advised to consult their lawyers should they require advice on any matter that is the subject of this briefing. Herbert Smith Freehills is happy to discuss any queries that members may have⁶.

¹ <http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted>

² <http://www.airmic.com/tech-doc/insurance-act-2015-what-airmic-members-need-know>

³ <http://www.airmic.com/tech-doc/basis-clauses>

⁴ <http://www.airmic.com/tech-doc/warranties-insurance-policies>

⁵ <http://www.airmic.com/tech-doc/disclosure-material-facts-and-information-business-insurance>

⁶ Please contact Paul.Lewis@hsf.com

Options available to Airmic Members

Airmic has developed an endorsement for policyholders who wish to amend their policies to take advantage of some of the benefits of the Act before August 2016.

The intention of the endorsement is to amend some of the existing terms of a policy. It seeks to amalgamate a number of different endorsements, some of which will be familiar to members from previous Airmic guides. The endorsement covers the following areas:

- Basis clauses
- Warranties
- Terms not relevant to the actual loss
- Remedies for non-disclosure and/or misrepresentation.

The endorsement is included at the Annex and might helpfully form the basis of discussions with insurers.

Use endorsement with care

It is important to be aware that not all sections of the endorsement will be appropriate for all members. This is not a 'one size fits all' approach. Members should discuss the options with their insurance broker in the first instance and may need to seek independent legal advice.

Current policy wording must be reviewed carefully to identify which elements of the endorsement members might wish to use. By way of example:

- It may be that some policies already put a member in a more advantageous position than they would be under the Act such that a member may not wish to use part or all of the endorsement.
- Care must be taken to ensure that the sections of the endorsement that are used are compatible with the existing terms of the policy, for example in the use of defined terms, cross references and clauses that deal with priority of inconsistent terms.

Going forward

Airmic recommends that members begin speaking to their insurers and brokers now, not only to consider taking advantage of the Act before August 2016, but also to ensure their own compliance with the Act when it comes into force.

Members will have to review the way in which they prepare underwriting information and consider how best to:

- conduct and record a 'reasonable search' for material information
- structure underwriting information to comply with the duty to give a 'fair presentation of the risk'.

It will be crucial that members get this right to protect themselves and avoid being subject to the various remedies open to insurers under the Act.

A follow up guide to the disclosure process will be issued later in the year by Airmic to its members to assist them as they prepare internally for August 2016.

The new legal framework has significant advantages for business insurance policyholders and we urge Airmic members to work with their brokers and insurers now to maximise the benefit of the Act

John Hurrell CEO of Airmic



Annex: Sample endorsement

Recital

The Insured and the Insurer wish to vary the terms of this Policy to reflect certain provisions of the Insurance Act 2015 as if those provisions were already in full force and effect.

General

1. This Endorsement amends the Policy with effect from inception unless stated otherwise.

Basis clauses disapplied

2. The Insurer agrees that notwithstanding any other provision in the Policy, any provision in this Policy or any other document to the effect that a statement or statements made by or on behalf of the Insured (including but not limited to statements made in proposals for insurance) form part of or are the basis of the Policy shall be of no effect.

Warranties rendered suspensory

3. The Insurer agrees that, where there has been a breach of a warranty in the Policy which would result in the Insurer being automatically discharged from any liability, such a breach shall result in any liability of the Insurer under the Policy being suspended only from the date and time at which the breach occurred and up until the date and time at which the breach is remedied, if it can be remedied, with the result that the Insurer will have no liability to the Insured for any loss which occurs, or which is attributable to something happening, during the period of suspension.

Terms not relevant to the actual loss

4. Where there has been a breach of a term of the Policy, whether express or implied, other than a breach of a term that defines the risk as a whole, and compliance with such term would tend to reduce the risk of loss of a particular kind and/or loss at a particular location and/or loss at a particular time, the Insurer shall not be permitted to rely on the breach of the term to exclude, limit or discharge its liability under the Policy if the insured shows that the breach of such term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

Insurer's remedy for non-disclosure and/or misrepresentation

5. If the insured or its agent to insure negligently or innocently fails to disclose and/or misrepresents a material circumstance prior to entering into this Policy the following provisions apply:
 - (a) If, but for the said failure to disclose and/or misrepresentation, the Insurer would not have entered into the Policy on any terms, the Insurer may avoid the Policy and refuse all claims, but must in that event return the premiums paid.
 - (b) If, but for the said failure to disclose and/or misrepresentation, the Insurer would have entered into the Policy, but on different terms (other than terms relating to the premium), the Policy is to be treated as if it had been entered into on those different terms if the Insurer so requires.
 - (c) In addition, if, but for the said failure to disclose and/or misrepresentation, the Insurer would have entered into the Policy (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the Insurer may reduce proportionately the amount to be paid on a claim, such proportionate reduction to be calculated in accordance with the formula set out in paragraph 5(d) below.
 - (d) In paragraph 5(c) above "reduce proportionately" means that the Insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the Policy (or, if applicable, under the different terms provided by paragraph 5(b) above) where:

$$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

Insurer's remedy for non-disclosure and/or misrepresentation in relation to variations

Premium increased or not changed

6. If the insured or its agent to insure negligently or innocently fails to disclose and/or misrepresents a material circumstance prior to a variation of this Policy and the total premium was increased or not changed as a result of the variation the following provisions apply:
 - (a) If, but for the said failure to disclose and/or misrepresentation, the Insurer would not have agreed to the variation on any terms, the Insurer may treat the Policy as if the variation was never made, but must in that event return any additional premium paid.

- (b) If, but for the said failure to disclose and/or misrepresentation, the Insurer would have agreed to the variation on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms if the Insurer so requires.
- (c) In addition, if, but for the said failure to disclose and/or misrepresentation, the Insurer would have agreed to the variation (whether the terms relating to matters other than the premium would have been the same or different), but would have increased the premium or increased the premium by more than it did the Insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation in accordance with the formula set out at paragraphs 8 and 9 below.

Premium reduced

- 7. If the insured or its agent to insure negligently or innocently fails to disclose and/or misrepresents a material circumstance prior to a variation of this Policy and the total premium was reduced as a result of the variation the following provisions apply:
 - (a) If, in the absence of the said failure to disclose and/or misrepresentation, the Insurer would not have agreed to the variation on any terms, the Insurer may treat the Policy as if the variation was never made and may reduce proportionately the amount to be paid on a claim arising out of events after the variation in accordance with the formula set out at paragraphs 8 and 9 below.
 - (b) If, in the absence of the said failure to disclose and/or misrepresentation, the Insurer would have agreed to the variation on different terms (other than terms relating to the premium) the variation is to be treated as if it had been entered into on those different terms if the Insurer so requires.
 - (c) In addition, if, in the absence of the said failure to disclose and/or misrepresentation, the Insurer would have agreed to the variation (whether the terms relating to matters other than the premium would have been the same or different), but would have increased the premium or would not have reduced the premium or would have reduced it by less than it did the Insurer may reduce proportionately the amount to be paid on a claim arising out of events after the variation in accordance with the formula set out at paragraphs 8 and 9 below.

8. In paragraphs 6(c), 7(a) and 7(c) above “reduce proportionately” means that the Insurer need pay on the claim only Y% of what it would otherwise have been under an obligation to pay under the terms of the Policy (whether on the original terms, or as varied, or under the different terms provided for by virtue of paragraph 6(b) or 7(b) as the case may be), where:

$$Y = \frac{\text{Total premium actually charged}}{P} \times 100$$

9. In the formula in paragraph 8 above, “P”:
- (a) in a paragraph 6(c) case is the total premium the insurer would have charged;
 - (b) in a paragraph 7(a) case is the original premium;
 - (c) in a paragraph 7(c) case, is the original premium if the insurers would not have changed it, and otherwise the increased or (as the case may be) reduced total premium the insurer would have charged



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