

ADVISER

THE INSURANCE ACT 2015 – ISSUE 2

Did you know that when the Insurance Act 2015 comes into force on 12 August 2016, it will significantly impact your disclosure obligations when you take out, renew, or vary any business insurance that is subject to the laws of England and Wales, Scotland, and Northern Ireland?

For example, under the new Act:

- If you don't comply with your new duties, insurers will have a new range of "proportionate remedies", which could include reducing your claim payments significantly.
- You will have to disclose information known by your senior management and by the individuals responsible for arranging your insurance.
- You will have to carry out a reasonable search for information you ought to know, which could include making enquiries of people outside your organisation, such as external consultants.
- You will have to disclose your information to insurers in a "reasonably clear and accessible" manner.

HOW CAN YOU START PREPARING FOR THE MAJOR CHANGES TO BE BROUGHT IN BY THE INSURANCE ACT 2015?

When the Insurance Act comes into force it will bring in the biggest change to UK insurance contract law in more than 100 years. While generally a positive step forward for insureds, it will have a significant impact on your responsibilities as regards the pre-contractual duty of disclosure, and provide insurers with a number of new remedies should you fail to comply with your duties. For example, under the Act:

- You will have a duty to disclose relevant information known by your "**senior management**" and anyone responsible for arranging your insurance. Under the Act, "knowledge" will include matters that these individuals suspect but deliberately refrain from confirming or from making enquiries about.

- "**Senior management**" will be defined as "those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised". In practice, this could extend beyond the board of directors.
- You will have a new duty to carry out a "**reasonable search**" for the information that you "**ought to know**". As this requirement includes not only information held within your organisation, or information in your possession or control, but also information "held by any other person", in practice this could extend to people outside your organisation, such as external consultants. This new duty is likely to increase your disclosure burden.
- You will have a new stand-alone duty to present your disclosure information to insurers in a "**reasonably clear and accessible**" manner, which could require you to signpost, structure, and index the information. Insurers might even ask you to re-present information if they do not think it has been disclosed in a comprehensible way.
- Insurers may ask more questions during the underwriting process, so you will need to be ready for that.
- If you don't disclose all relevant information to insurers, or even if you do so but don't provide it in the appropriate manner, insurers may be able to apply new "**proportionate remedies**". For example:
 - Insurers may be able to vary the policy terms and the policy will then be treated as if it had been written on those terms from the outset. For example, insurers could apply an exclusion which might have the effect of excluding your claim under the policy.

- If insurers can show that the different term would have reduced or extinguished their liability in respect of claims they have already paid, you may have to reimburse the insurer for those paid claims.
- Instead of charging you an additional premium, insurers may be able to **reduce your claim payments** significantly.
- As insurers will have a wider range of remedies for non-disclosure than under the existing law, they may be inclined to use them more often than they use the current sole remedy of policy avoidance.
- Provided they meet certain “transparency requirements”, insurers will be able to “contract out” of much of the new Act, which could put you in a worse position than you would be under the new Act.

As you can see from the above examples, the Insurance Act 2015 will bring in important changes. Here are some first steps that you can take to start preparing now.

PREPARE NOW FOR THE NEW DUTY TO MAKE A FAIR PRESENTATION OF THE RISK

Even though the new duty to make a “fair presentation of the risk” will only relate to policies that you place, renew, or vary as from 12 August 2016, we recommend that you start preparing now, by thinking about the following practical points in advance:

- **Which of your policies will be affected?**
As the changes will affect all insurance and reinsurance policies governed by **the laws of England and Wales, Scotland, and Northern Ireland**, think about whether you have any policies that will be affected, even if such policies have been placed abroad, or if you are an overseas insured with

policies that are subject to one of the applicable laws. In both cases, your overseas risk managers and directors will need to be familiar with the new law and with how it will affect the placement/renewal process after August 2016.

- **Start the renewal process earlier**
Be ready to start the placement/renewal process earlier than usual, to leave enough time for data-gathering. This way, we can look to try and pre-agree with your insurers what information you will search for and disclose, and how you will search and disclose, so as to give insurers sufficient time to ask questions about what you have disclosed.
- **Identify who is your “senior management”**
As you will have a duty to disclose relevant information known by your **“senior management”** (as defined by the Act), start considering now who within your organisation falls within the definition (set out above).
- **Identify who is responsible for placing your insurance**
You will also have a duty to disclose relevant information known by the **individuals responsible for placing your insurance**, such as your risk managers, your employees who assist in the collection of data or who negotiate your insurance, and your broker. Again, think about and identify **who** falls within these categories.
- **Raise awareness of the Act internally**
Think about how you will start to raise internal awareness within your organisation about the Act and the new duties of disclosure required under it.
- **Raise your board’s awareness**
Think about how you will raise awareness with your board about the Act and the important changes it will make to how you collect information for the disclosure process.

- **Review your data-gathering process**
Think about whether you currently ask enough questions of senior management and your insurance team or whether you need to adapt your standard data-gathering process to be more in-depth.
- **Identify who has information you “ought to know”**
The new duty to carry out a **“reasonable search”** for information you **“ought to know”** (and to disclose it to insurers) requires you to make enquiries not only within your organisation but also of “any other person” who may have relevant information. Think about which individuals or entities fall within this requirement, such as your broker and any entities (such as subsidiaries) or individuals to be covered by the insurance. The reasonableness of the search you carry out will depend on factors such as the size and complexity of your organisation. We have worked closely with the British Insurance Brokers’ Association (BIBA), which recommends that, based on the structure of your business, you think about:
 - **Who** you will need to consult for the insurances you buy (for example, property damage, business interruption, public liability, and professional indemnity, etc.).
 - How much **time** you should allow for it.
 - **How** you will carry out this search, for example, whether by visits, discussions with key staff, or questionnaires.
 - For policies you buy as a business which provide cover to **individuals** (for example, directors and officers liability, pension trustee liability, and medical malpractice, etc.), how you can check that those individuals have no material information that needs to be disclosed, without each individual having to fill in a lot of forms.

– Think about how you will **record** that you have carried out a “reasonable search” so that you can verify to insurers (for example, if later challenged in court) that you have done so.

• **Prepare for personnel and broker changes by capturing information**

Remember that a change of broker, or a change of personnel within your organisation, could present challenges when ensuring that you disclose the information that you are deemed to “know” and that you “ought to know”. Start to consider what, if any, steps can be taken now to record all the relevant information prior to any changes taking place.

• **Agree what information your broker will keep**

Your broker’s knowledge will now be treated as part of your actual knowledge that is to be disclosed. Make sure you have a clear agreement with your broker regarding who will be responsible for searching for and storing the categories of the information which may need to be disclosed (for example, records of historic site surveys).

• **Think about how you will present your information**

Think about and discuss with your broker and insurers how you will present your disclosure information and underwriting presentations in a manner that is “**reasonably clear and accessible**”, and how such information will be **structured**. Remember, once the Act comes into force:

- It will no longer be acceptable for presentations to be overly brief or cryptic.
- It will no longer be acceptable to “data dump”, that is, to deluge insurers with an incomprehensible mass of unstructured electronic information without any signposting as to what is material.

– Underwriting presentations will need to be **structured, indexed, and signposted**, to highlight key information to underwriters.

The above is only a starting point and we will be providing further guidance, particularly once insurers’ positions become clearer, nearer the time the Act comes into force.

CONSIDER GETTING THE BENEFITS OF THE ACT NOW, BEFORE IT COMES INTO FORCE IN AUGUST 2016

While it may appear that the new duty to “make a fair presentation” under the Act is onerous and will increase the burden on you during the pre-contractual disclosure process, the Act is generally good news for insureds. For example:

- It will abolish “basis of contract” clauses.
- Where a warranty has been breached, cover will no longer be automatically and permanently terminated from the date of breach, but will simply be suspended until the breach has been remedied (provided it can be remedied).
- Insurers will not be able to rely on breach of certain policy terms (such as some warranties and conditions precedent) to repudiate liability for a loss if it is entirely unconnected with the breach that has occurred.
- Avoidance of the policy will no longer be the only remedy available to insurers for non-disclosure of material facts. Instead, a new range of “proportionate remedies” (including avoidance) will be available to insurers.
- Insurers will be required to play a more active role in the underwriting process.
- The Act will clarify the law relating to fraudulent claims.

Working with Herbert Smith Freehills, Airmic (the UK association for risk and insurance management professionals) has produced an [endorsement \(see page 5 of Airmic’s Insurance Act 2015 publication\)](#), which contains clauses you could consider using to amend some existing terms of your policies, to help you get some of the benefits of the Act now, before it comes into force in August 2016. It covers the following key areas in the Act:

NON-DISCLOSURE AND/OR MISREPRESENTATION

The Airmic endorsement incorporates the new proportionate remedies set out in the Act in the event of a non-disclosure and/or misrepresentation. The endorsement applies the new regime of remedies when there has been a breach of the current duty of disclosure, but does not incorporate the new duty of fair presentation of the risk under the Act.

BASIS CLAUSES

The Airmic endorsement disapplies any “basis of contract” clauses.

WARRANTIES

Warranties are rendered suspensory, such that the insurer’s liability is suspended while the insured is in breach of warranty, but can be restored if the breach is subsequently remedied by the insured.

TERMS NOT RELEVANT TO THE ACTUAL LOSS

The Airmic endorsement reflects the provisions of the Act, which provide that, where a term is designed to reduce the risk of loss of a particular kind or at a particular time/location, the insurer cannot rely on breach of such a term to avoid paying a claim if the breach could not have increased the risk of the loss.

Do bear in mind that the Airmic endorsement isn't a "one size fits all" approach. Current policies will need to be reviewed carefully to identify which elements of the Airmic endorsement it may be beneficial to discuss with your insurers. While a number of the clauses in the Airmic endorsement are likely to benefit all policyholders in principle, care needs to be taken to ensure they are compatible with a policy's existing terms. Particular care needs to be taken in using the clause incorporating proportionate remedies for non-disclosure, and/or misrepresentation, as your existing policies may already give you better protection than the clause offers. If you are interested in amending your existing policies to get some of the benefits of the Act now, we suggest you discuss your options with your usual Marsh contact (and, where necessary, seek independent legal advice).

The Airmic endorsement is designed to provide some of the benefits of the Act in the interim period between now and the date that the Act comes into force on 12 August 2016. If you decide not to amend your policy before then, your policy wording will remain as it is, until your first placement or renewal on or after 12 August 2016.

Once the Act has come into force in August 2016, then (unless the parties expressly "contract out" of it) the Act will apply to policies placed, renewed, or to variations made after that date, if they are subject to the laws of England and Wales, Scotland, and Northern Ireland.

The information contained herein is based on sources we believe reliable and should be understood to be general risk management and insurance information only. The information is not intended to be taken as advice with respect to any individual situation and cannot be relied upon as such.

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ATTEND OUR WEBINARS

Finally, together with Herbert Smith Freehills, we'll be running a series of webinars on discrete aspects of the Act.

If you would like to register your interest in our webinars, please contact [Carole Porter](#).

There will be plenty of opportunity for you to ask questions during and after the webinars and we'll send you a follow-up Adviser after each one, which will capture the important information that you need.

We hope the above pointers will help you to start preparing for the Act. In the interim, if you have any queries about the Act, please do not hesitate to get in touch with your usual Marsh contact.

FURTHER READING

THE INSURANCE ACT 2015 – ISSUE 1

MARSH June 2015

ADVISER

THE INSURANCE ACT 2015

The Insurance Act 2015 (the "Act") received Royal Assent on 12 February 2015, bringing about the biggest change to English insurance contract law in more than 100 years, and will come into force in August 2016. Marsh very much welcomes the Act and has been lobbying the Law Commissions to introduce these reforms since they started their consultations in 2006.

The Act redresses an imbalance in the existing law, which is sometimes overly in favour of insurers. For example, it abolishes basis of contract clauses; clarifies the insured's duties relating to pre-contractual disclosure of information, and introduces fairer and more proportionate remedies for non-disclosure and breach of warranty. Here at Marsh, we look forward to helping you prepare for and reap the benefits of the Act.

KEY CHANGES

The Act will affect all policies subject to the law of England and Wales, Scotland and Northern Ireland that engage, are covered, or are entered into after August 2015 unless insureds reach an agreement with insurers that the provisions of the Act will apply unilaterally to policies which "opt-in" (none of an opt-out before then).

The Act updates the statutory framework for insurance and reinsurance contracts in the following key areas:

- Disclosure and misrepresentation in business and other non-consumer contracts.
- Insurance warranties in consumer and non-consumer insurance contracts.
- Proportionate claims in consumer and non-consumer insurance contracts.

The Act will also bring into force the Third Parties (Rights against Insurers) Act 2015, which is not yet in force.

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