The Insurance Act 2015

In February 2015, the Insurance Act 2015 (the Act) received Royal Assent and will become effective on 12th August, 2016. The Act has a significant impact on the operation of your insurance policy, including your disclosure obligations towards the insurers, warranties and fraud. The Act also impacts on the remedies insurers may adopt in the event of your obligations not being complied with.

The purpose of this notice is to highlight the key changes introduced by the Act, so we would recommend you read these notes carefully. If you require more information on these important changes, please contact your usual advisor, who will be happy to assist in explaining your obligations.

The Act applies to all non-consumer insurance policies commencing on or after 12th August, 2016, and also policies commencing before the 12th August, 2016, where the terms are altered after that date. It is thought that some insurers may adopt the new regime prior to the 12th August, 2016, and if this is the case with your policy, we will advise you accordingly at the time of quotation.

Duty of Fair Presentation

The Act imposes an obligation on all policyholders to "make a fair presentation of the risk" prior to the policy commencing. A fair presentation is one that discloses, in a manner that is reasonably clear and accessible, every material circumstance which is known or ought to be known, by the policyholders senior management or those responsible for arranging insurance, following a reasonable search.

We explore below the meaning of the key components of your obligation:-

- "material circumstance" – that is anything which would influence the judgment of a prudent insurer in determining whether to take the risk and if so, on what terms. There is no specific limitation on what constitutes a material circumstance, but would typically include any factors pertaining to the risk to be insured including prior claims, your financial history, convictions of key personnel and your business activities. You are not obliged to disclose something that reduces the risk to be insured.
- "known or ought to be known" – you are obliged to disclose material circumstances that you actually know, but also those that you ought to know. This means that if the information is readily available to you but you fail to disclose it owing to either a lack of enquiry of by "turning a blind eye", you will have breached your duty to fairly present the risk. Equally, any relevant knowledge we have, as your broker, must also be presented to insurers. We must therefore make you aware that all information you provide to us must form part of the presentation of the risks, if relevant. This includes any information you provide to us in a social or informal setting.
- "senior management" – your knowledge, for the purposes of the Act, includes (but is not limited to) that of all senior management. Senior management includes anyone

who has a key role in making decisions on behalf of the business, even if they do not sit on the Board or if they do not officially have a management role.

- “reasonable search” – you are obliged to undertake a reasonable search. What is reasonable will depend upon the nature of your business and the policy you are purchasing. We will provide you with advice in each case as to what might be reasonable. When considering the extent of your search, you should take into account the nature of the insurance you wish to purchase and consider who within your organization is best placed to provide relevant information.
- “reasonably clear and accessible” – all information must be provided to insurers in a reasonably clear and accessible manner. This means that information must be provided in an unambiguous way. The new rules also prevent policyholders from concealing key facts amongst large volumes of less relevant or immaterial information.

What does this mean in practice?

The amount of information to be provided will depend upon the nature of the risk and the insurance you are purchasing. We will guide you through that process, although you should take the time to carefully identify who within your business is best placed to identify any information that may be relevant to insurers when considering the particular risk and type of policy.

What happens if you do not fairly present the risk?

If you fail to comply with your obligations, insurers have differing remedies depending upon the nature of the breach and what would have happened had you fairly presented the risk.

- If you deliberately or recklessly fail to present the risk fairly (eg: you deliberately withhold key information, or fail to take any care when presenting the information), insurers are entitled to avoid the policy and retain all premiums. In other words, insurers can treat the policy as if it never existed, which would result in no claims being paid. You could also be required to repay any claims payments that have already been made.
- If your failure to present the risk fairly, was neither deliberate nor reckless (eg: it was simply an oversight on your part), insurers may still avoid the policy **if they can demonstrate** that the policy would not have been provided if you had represented the risk fairly. In this scenario, insurers would be required to repay the policy premium to you although, they would be required to make no payment in respect of claims and you would be required to repay any claims payments already made.
- If insurers **are able to demonstrate** that they would have provided the policy but on different terms, this policy would be treated as if those terms had applied from the beginning. Those additional terms could be, for example, increased excesses or additional exclusions. Those additional terms may result in no payment being made in respect of any particular claim (eg: if insurers would have excluded that particular activity or imposed additions conditions which you did not comply with)
- If insurers would have provided the policy, but **are able to demonstrate** that they would have charged an increased premium, the amount insurers will pay will be reduced by the proportion to the difference between the premium actually paid, and the premium that would have been charged had the risk been fairly presented. By way of example, if a fair presentation would have resulted in the premium doubling,

any claims payment under the policy would be halved. This is an extremely draconian policy remedy and therefore it is essential that you present the risk fairly. This remedy applies regardless of whether there is any connection between the shortcoming in the presentation or the risk and the subject matter of the claim.

Warranties

A warranty, in an insurance contract, is a promise by the policyholder to the insurer to do (or not to do) something, or a promise to maintain a certain state of affairs.

Under the old regime insurers can refuse to pay a claim if the policyholder breaches a warranty, even if the breach is unconnected with the loss, or if the breach is remedied before the loss occurs. Insurers routinely use a "basis of contract" clause to convert all presentations and information given by policyholders to insurers into warranties. This enables insurers to refuse to pay claims if any aspect of the presentation of a risk is inaccurate.

From 12th August, 2016, the position will be fairer for policyholders. Firstly, insurers will no longer be able to rely on basis of contract clauses to convert representations into warranties.

Furthermore, in the event of a breach of a warranty, insurers will only be allowed to refuse to pay a claim where the loss arose during a period of non-compliance. In other words, if you breach a warranty (eg: by failing to set a fire alarm), cover will be re-instated as soon as you re-establish compliance. Cover is simply suspended during periods of non-compliance.
Finally, if the warranty is designed to reduce the risk of a certain type of loss, or a loss at a certain place or time and the policyholder can demonstrate that the breach could not have increased the risk of that loss occurring, insurers must still pay the claim.

Fraud

Historically, in the event of a fraudulent claim being made against the policy, all cover under the policy ceased and insurers were entitled to retain the premium. The policyholder would also have to repay any claims payments already made. However, under the new regime, insurers will be entitled to terminate the policy from the date of a fraudulent claim or act, but must still cover claims arising from incidents occurring before the fraudulent act.

Contracting Out

Under the Act insurers are able to contract out of the new provisions, either in full or in part, other than those provisions prohibiting reliance on the basis of contract clauses.

However, if an insurer does contract out and providers terms which are disadvantageous to the policyholder, for those terms to be enforceable they must be:-

- Clear and unambiguous and
- Sufficient steps must have been taken to draw the term to the policyholder's attention prior to the policy inception.