The Insurance Act

When does the Insurance Act come into force?

The Insurance Act 2015 came into force on the 12th August 2016 and changed the way the law deals with the duty of disclosure for commercial insurance contracts. The purpose of the Act was to update the law to reflect the way in which the insurance market has evolved in modern times with the aim being to achieve a fair and balanced regime between insurers and insureds.

What you need to do?

Under the Act, insurance contracts are still based on good faith and you will have a duty to make a fair presentation of the risk to insurers which will include disclosure of:

- ✓ Every material circumstance which as an insured you are expected to know or ought to know about the risk for which you are seeking insurance; or
- ✓ Sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those material circumstances.

You must ensure that any information you provide is correct to the best of your knowledge and subject to you having conducted a reasonable search for information. This could require you to obtain or verify information with a number of sources who may hold or have access to important information about your business or the insurance risk.

This may include key decision makers or those with responsibility for arranging your insurance (including us as your broker) or other parties that carry out outsourced functions for your business such as (but not limited to):

Senior managers and those with accountability for managing functions relevant to the risk	Persons covered by the insurance e.g. co insured or sub contractors
Persons normally involved in arranging insurance for the organisation	Employees who may have in-depth or specialist knowledge on processes and procedures
Risk managers	Outsource contractors and service providers

What happens if I make a misrepresentation?

In the event that you make a misrepresentation of information which is considered to be deliberate or reckless i.e. you were aware that you were making a misrepresentation or did not care whether or not you were misrepresenting the risk, an insurer will be allowed to avoid your policy, which means that any claims you make will not be met and no refund of the insurance premium will be made.

If however you make a misrepresentation of information which is not deliberate or reckless i.e. you appropriately carried out your duty to make a fair presentation but made an honest mistake or omission there are a number of remedies which may be applied by the insurer to achieve a fair outcome as follows:

- If the insurer can prove that it would not have written the policy at all, the insurer can avoid the policy but must return the premiums paid.
- If the insurer would have accepted the risk but on different terms, the contract is to be treated as if it included those terms.
- If the insurer would have entered into the contract but charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.

Warranties & Terms

The Act also includes changes to the way that the law deals with insurers rights in the event of breaches of warranties and terms. These changes will affect both commercial and personal insurance contracts.

Clauses which have the effect of turning representations made by you into a warranty will be prohibited under the Act.

An insurer will no longer be able to avoid a policy where a breach of warranty occurs; instead cover will be suspended for the period that you are in breach of the warranty. This means that where it is possible you may be able to remedy the breach of warranty and continue with the insurance policy; However Insurers will not be responsible for a loss during any period where cover was suspended for a breach of warranty.

The insurer cannot avoid a policy or limit or discharge its liability for non-compliance with any terms which are not relevant to the loss or did not increase the risk of loss which has occurred.

In order to ensure that you remain fully protected, you must continue to advise us of any warranty on the policy that you cannot comply with.

An insurer may wish to contract out of certain elements of the Act subject to your understanding and agreement and we will advise you of the implications of this should the situation arise.

As your insurance broker you can rest assured that we are on hand to help you understand your obligations under the Act and to guide you through the process of gathering the information required to make a fair presentation. We will undertake to present this information to insurers on your behalf in a way which is clear and accessible.

We will contact you in good time before your next renewal to formally start the process. In the meantime if you would like to discuss the insurance act or any other related Insurance matters please contact us.

INSURANCE ACT 2015 AND FURTHER DEVELOPMENTS

FACTSHEET

Background

The Law Commission in 2014 highlighted failings in the existing laws which resulted in the 2015 Act being introduced to implement the commission's recommendations of "ensuring a better balance of interests between policyholders and insurers".
The Insurance Act 2015 received Royal Assent on 12th February 2015 and came into force on 12th August 2016. It is the most significant reform of UK insurance contract law since the Marine Insurance Act 1906.

Since its introduction, there have been further developments of the Act with the Enterprise Bill and Third Parties Act coming into force in August 2016 and May 2017.

INSURANCE ACT 2015

All new and renewal contracts of insurance taken out on or after the 12th August 2016, as well as amendments to existing contracts made after that date will be governed by the Act. It applies to both business (commercial) and consumer insurance, although the new duty to make a fair presentation only applies to business insurance contracts with the consumer equivalent dealt with under the Consumer Insurance (Disclosures and Representations) Act 2012.

The new law is principles based, and replaces rules which no longer reflect good commercial practice and aims to provide greater clarity around what information a client has to provide their insurer and a fairer position should the client fail to provide that information. The Act will make sure all parties clearly understand what each needs to know and what will happen in the event of a claim.

Summary of the key elements of the Act:

- Duty of fair presentation
- Remedies (see separate factsheet)
- Warranties (see separate factsheet)
- Fraud (see separate factsheet)
- Contracting out

FAIR PRESENTATION

The new duty to make a fair presentation of the risk is one of the most fundamental changes brought about by the Act. Whilst the general requirement to disclose facts "that are material to the prudent insurer" has not changed, the Act sets out in more detail the type of information that needs to be disclosed, who needs to disclose it, and how it needs to be disclosed.

The intention is that the client and their broker disclose all relevant information before the insurance contract, or any change in cover commences. Both the insurer and the insured are encouraged to make sure that they are clear as to what information the insurance contract will be based on.

Insured's knowledge – what must be actively disclosed:

- Knowledge of senior management
- Knowledge of the insurance team, including brokers
- Information which would be revealed by a reasonable search
- Insurer's knowledge – not required to be disclosed:
- Information held by the insurer and accessible to the underwriter relevant to the risk
- What an insurer writing the risk would reasonably be expected to know
- Common knowledge
- A fair presentation of the risk will require clear and accessible disclosure, without misrepresentation of:

- Every material circumstance which the insured knows, or ought to know;

or, failing that,

- Sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those material circumstances.

Insurers will need to demonstrate pro-active underwriting, but brokers still need to make a fair presentation. There is a new and additional requirement that information must be presented in a way which would be reasonably clear and accessible to a prudent insurer. This is designed to prevent overly brief submissions, but also to combat the reverse scenario, where potentially relevant information/files are provided (data dumping), without any signposting or direction on what is, particularly material.

CONTRACTING OUT

Insurers will be able to choose to contract out of the new law in whole or in part for non-consumer policies and apply more stringent or "disadvantageous" terms than those available under the Act.

Where an insurer chooses to do this, they must do so prior to entering into the contract and must draw the insured's attention, or the insured's agent (e.g. broker), to any disadvantageous terms in a way that satisfies the transparency requirements set out in the Act.

However, the one exception is that insurers cannot contract out of the abolition of 'basis of contract clauses" and cannot recreate a clause with the same effect.

The Act is also clear that the requirement for the insurer to take sufficient steps to draw the disadvantageous term to the insured's attention is not breached, if the broker had actual knowledge of the term (prior to contracting), but hadn't passed this information onto the insured.

THE ENTERPRISE BILL - INTRODUCING THE LATE PAYMENT OF CLAIMS

The Enterprise Bill received Royal Assent on 4th May 2016 and introduced "Late payment of Claims" remedies into the Insurance Act (in a new Section 13A) when it came into force on 4th of May 2017.

Measures include a requirement for every insurer to pay sums due within a reasonable time (which includes, a reasonable time for the insurer to investigate and assess a claim) giving policyholders a legal right to enforce prompt payment of insurance claims and provide for limited compensation to be payable by an insurer where a policyholder suffers additional loss because of the insurer's unreasonable delay in payment.

What is reasonable will depend on all relevant circumstances though factors such as the type of insurance; the size and complexity of the claim; compliance with any relevant statutory or regulated rules or guidance; and any matters outside of the insurer's control would need to be taken into account.

Where an insurer can show there were reasonable grounds for disputing the claim (either the amount payable or whether anything is payable at all); the insurer will not breach the terms of the Section 13A merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but the conduct of the insurer in handling the claim may be a relevant factor in deciding whether any terms were breached, and if so, when.

Remedies (for example, damages) available for the breach of the terms in Section 13A are in addition and distinct from any right to enforce payment of the sums due; and any right of interest on those sums (whether under the contract, under another enactment, at the Court's discretion or otherwise).

The Act goes on to set out the position with regards contracting out of the terms regarding payment of claims for both consumer and non-consumer policies, and additional time limits for actions for damages for late payment of insurance claims.

THIRD PARTIES (RIGHTS AGAINST INSURERS) REGULATIONS 2016

The Third Parties (Rights against Insurers) Act 2010 as amended by the Insurance Act 2015 and the Third Parties (Rights against Insurers) Regulations 2016 came into force on 1 August 2016.

It has introduced some significant change with third parties from that date being allowed to bring claims directly against the insurers of insolvent insured companies; as previously the claim first had to be brought against the insolvent insured company where they (or their administrator) had to admit liability before the claim could be considered by their insurer.

This direct route means third party claimants may have a new incentive to make claims and there may be opportunistic lawyers looking to bring speculative actions on their behalf.

The impact of this regulation on Brokers will come from freedom of information requests.

Under the terms of the Act, third party claimants (and their lawyers) may ask Brokers for information about what insurance cover existed in the insolvent companies' assets, who the insurer was, what the terms of the policy were, whether the insurer had previously declined cover etc.

This information would allow the third party's lawyer to assess whether it is worth bringing a claim in the first place. Brokers need to advise their staff that under the act they could be receiving these requests and that there is a 28-day deadline to respond (otherwise there could be court orders issued). It is also important to establish the identity of the person or organisation requesting this information and what information is permissible to disclose to them.

Brokers need to ensure they have a process in place so that when these requests arrive, there is a responsible person who is able to recognise these requests so that they are dealt with appropriately and within the required timescale.

Q&A

Q1

What is a reasonable search?

There is no specific answer; reasonable is intended to be flexible dependent on the complexity and size of the business. The insured is required to take reasonable steps to ensure that it includes any other person(s) who may hold material information, which, as well as persons within the firm may include persons outside of the firm, not only the broker, but other third parties e.g. accountant, solicitor.

Q2

What information could an insurer be expected to have?

This could be historical information held on the insurers systems, previous claims, loss adjuster reports, what an insurer/underwriter writing a given type of risk should already be aware of, however it is important not to make assumptions and if any doubt, it may be safer to work on the basis that insurers hold no prior knowledge.

Q3

What is data dumping?

Data dumping is when a large amount of data/information is submitted to an insurer as part of the risk presentation, without making it clear what is actually relevant to the risk. Information should be submitted in a reasonably clear and accessible format.

Q4

What is considered to be a 'reasonably clear and accessible' format?

Some examples are: Improved and consistent presentation standards; pointing insurers to what is relevant to them; consistent indexing and signposting; emphasising known risk concerns (e.g. a trend arising from uninsured minor incidents).

Q5

Would relatively minor changes which contract out of the Act need to be notified to an insured?

If it is disadvantageous, then it must be raised with the broker (if an advised sale) or with the insured. In an advised sale, it is up to the broker to pass that information onto its client, there is no requirement for the insurer to confirm that the broker has done this.

INSURANCE ACT - REMEDIES, WARRANTIES AND FRAUD FACTSHEET

BACKGROUND

The Insurance Act 2015 received Royal Assent on 12th February 2015 and came into force on 12th August 2016. It is the most significant reform of UK insurance contract law since the Marine Insurance Act 1906.

The Act applies to commercial insurance customers and commercial insurers and aims to clarify commercial insurance law.

This factsheet will look at 3 aspects of the Act which are

- Remedies (following a breach in the duty of fair presentation)
- Warranties
- Fraud

REMEDIES

Where a fair presentation has not been made, then the remedy an insurer can apply changes from the single 'all or nothing' principle of avoidance of the policy, to a response that varies depending on whether or not the breach of fair presentation was deliberate or reckless.

If the breach was deliberate or reckless, the insurer can avoid the contract from inception and can keep the premium. The insurer must prove that the breach was deliberate or reckless.

If the breach was not deliberate nor reckless then there are a number of options available to the insurer if they wish to impose a remedy, but the insurer must show that they would have acted in that way if the breach of duty had not occurred:

- If the insurer would not have accepted the risk at all, then they may avoid the policy and refuse all claims, but must return the premiums paid
- If they would have underwritten the policy but on new or different terms (other than with respect to premium such as conditions/warranties, exclusions, different extensions, sub-limits etc), then those changed terms will apply retrospectively
- If they would have charged a higher premium, then the claim settlement can be reduced proportionately e.g. if the premium based on the information given was £500 but the insurer would have charged £1000 had a fair presentation been made, then the claim would be reduced by 50%.

WARRANTIES

The Act changes the legal effect of warranties and makes three adjustments to how policy terms will operate:

- "Basis of contract" clauses
  These will be abolished for commercial insurance customers; as they have already been abolished under the Consumer Insurance (Disclosure & Presentations) Act 2012 for consumers. The Act prohibits the use of the term "basis of contract" in any proposal form or statement of fact that effectively turns the information provided on these forms into a warranty; any inaccuracies (even if trivial or immaterial to a claim), potentially could lead the insurer to terminate the insurance contract
- Breach of Warranty – Suspension of cover
  Previously the only remedy for a breach of warranty was a cessation of cover from the date of the breach. The Act changes this position, whereby cover is suspended until the policyholder remedies the breach (if the breach can be remedied). Some breaches can never be remedied which means that the contract will remain

suspended for the rest of the policy term, e.g. if a warranty is in place that the property is built of brick when it isn't, the breach can never be remedied. In addition, if a loss occurs once liability has been resumed and the insurer can prove something had occurred in the suspended period that contributed to the loss, the insurer does not have to pay the claim

- Breach of Warranty – immaterial to the loss
  Warranties that are not relevant to the loss can no longer be used by an insurer to refuse a claim. Under the Act, insurers will not be able to use breach of warranties, conditions precedent or other terms to exclude, limit or discharge their liability if the insured can prove that non-compliance with the term could not have increased the risk of the loss which actually occurred, e.g. breach of a warranty requiring an operational alarm to be in place could not be used to refuse a flood claim.

FRAUD

The Act sets out the remedies available to insurers in the event that a fraudulent claim is submitted by a policyholder.

Under the Act, insurers will be liable for losses occurring up to the fraudulent act, but can treat the policy as having been terminated at the point when the fraudulent act was committed and premiums can be retained at the discretion of the insurer.

It also confirms insurers do not have to pay the fraudulent claim (any element of it, including any honest element) and can recoup anything paid out after the fraudulent act.

The act also protects the insured in the circumstances where they have made a fraudulent claim (insurer cannot withhold any outstanding claims payments due on any legitimate claims that have occurred prior to the fraudulent claim).

For a group policy the remedies will only apply in respect of the individual(s) who were fraudulent and not all insured parties.

WHAT DOES IT MEAN FOR YOUR FIRM?

- Ensure your clients are aware of the implications of the Act (based on size and complexity of their business) and how to set up a reasonable search
- Decide how you will deal with any insurers that contract out – consider the implication on quality of advice
- Consider if your renewal timescales are appropriate
- Consider the implications on client documentation e.g. TOBA/statement of fact/letters
- Review your data gathering procedures/templates
- Review any scheme wordings in respect of warranties, basis of contract clauses
- Ensure you have a robust system in place for documenting knowledge held about a client internally

Q&A

Q1

What would be considered deliberate or reckless?

A breach will be deliberate if the insured knew that they had not made a fair presentation and was therefore in breach of the duty. If the insured does not care whether or not they were in breach of duty, they will have acted recklessly. The insurer will have the burden of proving if the insured's breach was either deliberate or reckless.

Q2

Now that basis of contract clauses have been abolished, can insurers still create warranties of information?

They can still create warranties based on the information provided, but these will need to be specific policy terms in the usual way. The new law only makes it impossible to use a sweep up provision to make all the information into warranties. All parties will need to ensure care is taken that such warranties are identified and complied with.

Q3

Can insurers impose new terms and reduce claims proportionally if the insured fails to make a fair presentation?

Yes they can. The law is intended to put the insurer in the position it should have been in if a fair presentation had been made at renewal. However if an insurer wishes to impose further remedies e.g. charge additional premium as well as proportionately reducing a claim, this would be contracting out of the Act and the insurer would need to follow the contracting out requirements.

Q4

Is the duty of utmost good faith now abolished?

The duty of utmost good faith survives under the Act, but the sole remedy of avoidance for its breach is abolished and replaced with a new range of proportionate remedies which depend on whether the insured's breach of the duty was deliberate or reckless.