Marsh ProBroker

September 2015

# Broker Adviser

## The Insurance Act 2015 – Issue Two

**When the Insurance Act 2015 comes into force on 12 August 2016, it will significantly impact your clients' disclosure obligations when they 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 clients do not comply with their new duties, insurers will have a new range of "proportionate remedies", which could include reducing claim payments significantly.
- Clients will have to disclose information known by their senior management and by the individuals responsible for arranging their insurance.
- Clients will have to carry out a reasonable search for information that they ought to know, which could include making enquiries of people outside their organisation, such as external consultants.
- Clients will have to disclose their information to insurers in a "reasonably clear and accessible" manner.

### How can Your Clients 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 clients' responsibilities as regards the pre-contractual duty of disclosure, and will provide insurers with a number of new remedies should clients fail to comply with their duties. For example, under the Act:

- Clients will have a duty to disclose relevant information known by their "senior management" and anyone responsible for arranging their 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 a board of directors.
- Clients will have a new duty to carry out a "reasonable search" for the information that they "ought to know". As this requirement includes not only information held within their organisation, or information in their possession or control, but also information "held by any other person", in practice this could extend to people outside their organisation, such as external consultants. This new duty is likely to increase their disclosure burden.
- Clients will have a new stand-alone duty to present disclosure information to insurers in a "reasonably clear and accessible" manner which could require clients to signpost, structure, and index the information. Insurers might even ask them 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 both the client and you will need to be ready for that.
- If a client doesn't disclose all relevant information to insurers or even if they 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 a claim under the policy.

*Continued overleaf*

  - If insurers can show that the different term would have reduced or extinguished their liability in respect of claims they have already paid, a client may have to reimburse the insurer for those paid claims.
  - Instead of charging an additional premium, insurers may be able to reduce 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 clients in a worse positon than they 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 and your clients 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 are placed, renewed, or varied as from 12 August 2016, we recommend that you start preparing your clients now, by encouraging them to think about the following practical points in advance:

### Which of Their 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, clients should think about whether they have any policies that will be affected, even if such policies have been placed abroad.

### 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, you, as the client's broker, can look to try and pre-agree with your insurers, if possible, what information the client will search for and disclose, and how they will search and disclose, so as to give insurers sufficient time to ask questions about what has been disclosed.

### Identify who is Their "Senior Management"

As clients will have a duty to disclose relevant information known by their "senior management" (as defined by the Act), clients should consider now who within their organisation falls within the definition.

### Identify who is Responsible for Placing Their Insurance

Clients will also have a duty to disclose relevant information known by the individuals responsible for placing their insurance, such as their employees who assist in the collection of data or who negotiate their insurance, and also you, as their broker. Again, clients should think about and identify who falls within these categories.

### Raise Awareness of the Act Internally

Clients should think about how they will start to raise internal awareness within their organisation about the Act and the new duties of disclosure required under it.

### Raise Board Awareness

Clients should think about how they will raise awareness with their board/senior partners about the Act and the important changes it will make to how they collect information for the disclosure process.

### Review the Data-gathering Process

Clients should think about whether they currently ask enough questions of senior management and of any colleagues responsible for their insurance or whether they need to adapt their standard data-gathering process to be more in-depth.

### Identify who has Information That Clients "Ought to Know"

The new duty to carry out a "reasonable search" for information that clients "ought to know" (and to disclose it to insurers) requires the client to make enquiries not only within their organisation but also of "any other person" who may have relevant information. Clients should think about which individuals or entities fall within this requirement, such as you, as their broker and any entities (such as subsidiaries) or individuals to be covered by the insurance. The reasonableness of the search they carry out will depend on factors such as the size and complexity of their organisation. Marsh has worked closely with the British Insurance Brokers' Association (BIBA) who recommends that, based on the structure of the client's business, they should think about:

- Who they will need to consult for the insurances they buy (for example, property damage, business interruption, public liability, and professional indemnity, etc.).
- How much time they should allow for it – how they will carry out this search, for example, whether by visits, discussions with key staff, or questionnaires.
- For policies they buy as a business which provide cover to individuals (for example, directors and officers liability, pension trustee liability, and medical malpractice, etc.), how they 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.
- They should think about how they will record that they have carried out a "reasonable search" so that they can verify to insurers (for example, if later challenged in court) that they have done so.

### Prepare for Personnel and Broker Changes by Capturing Information

Remember that if your client changes their broker, or has a change of personnel within their organisation, this could present challenges when ensuring that they disclose the information that they are deemed to "know" and that they "ought to know". Clients should 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 you, as the Client's Broker, Will Keep

Your knowledge, as their broker, will now be treated as part of your client's actual knowledge that is to be disclosed. As the broker, make sure you have a clear agreement with your client 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 Your Client Will Present Their Information

Think about and discuss with your client and insurers how the client will present their 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 hope to provide 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 your clients 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 which contains clauses clients could consider using to amend some existing terms of their policies, to help them meet 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 nondisclosure 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 may be beneficial to discuss with 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 existing policies may already give the client better protection than the clause offers. If your client is interested in amending its existing policies to get some of the benefits of the Act now, we suggest they discuss their options with you (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 a client decides not to amend their policy before then, their policy wording will remain as it is, until their 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.

We hope the above pointers will help you and your clients to start preparing for the Act. If you have any queries about the Act, please do not hesitate to get in touch with us.

## CONTACT US

**Should you require any clarification or assistance, please contact the team by:**

✉ marsh.probroker@marsh.com

☎ 0345 600 8466