Insurance Act 2015

The Insurance Act 2015 (the "**Act**"), has a significant impact on the operation of your insurance policy, including your disclosure obligations towards insurers, warranties and fraud. The Act also impacts upon the remedies insurers may adopt in the event of your obligations not being complied with.

The purpose of this note is to highlight some of the areas changed by the Act and to explain the steps you need to take to comply with it.

The Act introduced some new obligations, which are coupled with strict remedies for insurers. We therefore recommend that you read this guide carefully. If you have any queries in relation to the content of this guide, please contact your usual consultant who will be happy to explain your obligations.

What policies are caught by the Act and from when does it apply?

The Act applies to all new non-consumer insurance policies and those policies commencing before 12 August 2016 but whose terms are varied after that date.

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 policyholder's senior management, or those responsible for arranging insurance, following a reasonable search.

We explore below the meaning of the key components of this obligation:

- "material circumstance" – this is anything which would influence the judgement 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 it would typically include any factors pertaining to the risk to be insured including prior claims, your financial history, convictions of key personnel, absentee information 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 or 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 risk, if relevant.
- "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. In practice you will need to demonstrate that appropriate enquiries were made to establish material circumstances that were known or ought to be known by senior management and others you rely on, such as advisers, consultants and specialists. What is reasonable will depend upon the nature of your business, the policy you are purchasing and who is best placed to provide the 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 not be provided in an ambiguous way. The 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 (e.g. 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 (e.g. it was a simple 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, the 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 (e.g. if insurers would have excluded that particular activity or imposed additional conditions which you did not comply with).

If insurers would have provided the policy but charged an increased premium, the amount insurers will pay will be reduced by 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 will 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 of 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 do) something or a promise to maintain a certain state of affairs.

Insurers can no longer rely on basis of contract clauses to convert all representations into warranties. Furthermore, in the event of a breach of warranty, Insurers can 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 (e.g. 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

Insurers are 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.