

# 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 laws of England and Wales, Scotland and Northern Ireland that incept, are renewed, or are varied after August 2016 (unless insureds reach an agreement with insurers that the provisions of the Act will apply straightaway to policies which incept, renew, or are varied before then).

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

- Insurance warranties in consumer and non-consumer insurance contracts.
  - Fraudulent claims in consumer and non-consumer insurance contracts.
- The Act will also bring into force the Third Parties (Rights against Insurers) Act 2010, which is not yet in force.
- Disclosure and misrepresentation in business and other non-consumer contracts.



The tables below compare the existing law with the key changes to be implemented by the Act.

## DISCLOSURE: KEY CHANGES

CURRENT LAW	INSURANCE ACT 2015
The insured has a duty to disclose every material circumstance which is known to the insured.	<p>The insured has a duty to make a <b>“fair presentation of the risk”</b> to the insurer.</p> <p>This means that the insured must:</p> <ul style="list-style-type: none"> <li>• Disclose every material circumstance which it <b>knows or ought to know</b>; or</li> <li>• Failing that, the insured must give the insurer <b>sufficient information to put a prudent insurer on notice that it needs to make further enquiries</b> for the purpose of revealing those material circumstances.</li> </ul> <p>The insured must also:</p> <ul style="list-style-type: none"> <li>• Make the disclosure <b>“in a manner which would be reasonably clear and accessible to a prudent insurer”</b>; and</li> <li>• Must not make misrepresentations.</li> </ul>
<p>The insured is deemed to <b>“know”</b> every circumstance which, in the ordinary course of business, ought to be known to him.</p> <p>In the context of a business insured, the knowledge of the directing mind and will is attributed to the insured.</p>	<p>A business insured is taken to know what is known to the insured’s <b>“senior management” and individuals “responsible for the insured’s insurance”</b> (which includes risk managers and any employee who assists in the collection of data, or who negotiates the terms of the insurance).</p> <p>An insured “ought to know” what would have been revealed by a <b>“reasonable search”</b> of information available to the insured.</p>
The duty to disclose material facts is owed by the insured and also independently by the broker.	The broker’s independent duty of disclosure is abolished, but the broker’s knowledge is attributed to the insured.
Single (draconian) remedy of <b>avoidance</b> ab initio for non-disclosure and misrepresentation.	<p>A new regime of <b>proportionate remedies</b> for non-disclosure and misrepresentation is introduced.</p> <p>Unless the non-disclosure or misrepresentation is deliberate or reckless (in which case avoidance is still available to the insurer), the onus is on the insurer to show what it would have done had it received a fair presentation of the risk:</p> <ul style="list-style-type: none"> <li>• The insurer is still entitled to avoid the policy if it can show that, had it received a fair presentation of the risk, it would not have entered into the contract at all; but</li> <li>• If the insurer shows that it would have entered into the contract, but on different terms (other than premium), the insurer may treat the policy as having included those different terms from the outset; or</li> <li>• If the insurer would have entered into the contract but only at a higher premium, the insurer <b>may reduce the amount to be paid on a claim</b> proportionately. For example, if the premium would have been GBP400,000 rather than GBP300,000, then the insurer need only pay 75% of any claim.</li> </ul>

## INSURANCE WARRANTIES (AND OTHER TERMS): KEY CHANGES

CURRENT LAW	INSURANCE ACT 2015
Breach of warranty discharges the insurer's liability under the insurance contract in its entirety, and permanently, from the date of breach.	Warranties act only as suspensive conditions.  The insurer's liability is <b>suspended</b> while the insured is in breach of warranty, but can be restored if the breach of warranty is subsequently remedied by the insured.
"Basis of contract" clauses operate to convert the insured's pre-contractual representations (including answers to questions on the proposal form) into warranties.	"Basis of contract" clauses are completely abolished.
Breach of warranty discharges the insurer's liability under the insurance contract in its entirety, even if the breach is only trivial or does not in any way relate to the insured's loss.	The insurer may not rely on the insured's breach of a warranty or other policy term to avoid paying a claim <b>if the breach could not have increased the risk of loss</b> . This applies to breaches of warranties and other terms which would tend to reduce the risk of loss of a particular kind or at a particular location or time. However, this does not apply to policy terms which define the risk as a whole.

## REMEDIES FOR FRAUDULENT CLAIMS

CURRENT LAW	INSURANCE ACT 2015
Co-existing remedies of forfeiture under common law and avoidance under statute.	A new single statutory regime for fraudulent claims.  The insurer: <ul style="list-style-type: none"> <li>Is not liable to pay fraudulent claims.</li> <li>May elect to terminate the contract, and refuse to pay claims relating to losses suffered <b>after</b> the fraudulent act; but whether or not it terminates the contract, the insurer will remain liable for all legitimate losses suffered <b>before</b> the fraudulent act.</li> </ul>

## CONTRACTING OUT

The new Act will be a **default regime** for all business insurance contracts. However, the Act does allow parties to **contract out** of the default regime (**apart from** as regards the prohibition on basis of contract clauses), and to contract into an alternative regime, provided any "disadvantageous term" (i.e. any term which puts the insured in a worse position than it would have been in under the new default regime) meets certain "**transparency requirements**".

These requirements are that (i) the insurer must take sufficient steps to draw the disadvantageous term to the insured's attention in advance; and (ii) the disadvantageous term must be clear and unambiguous as to its effect.

## IMPLICATIONS

The Act will put insureds in a better position than under the existing law. The Act has been welcomed by insurers, as well as insureds and brokers, and some insurers have already indicated that they are willing to reflect the reforms in the language of their policies in advance of August 2016. We believe that now it has received Royal Assent, the Act is also likely to start driving practical change in the way business is placed and underwritten in the London market. As the Act does not come into force until August 2016, you may wish to consider with us whether, depending upon the terms of your existing policies, it would be advantageous for you to look to apply some or all of the Act's provisions to policies which are due to inception or renew before then.

Even though the Act does not come into force until August 2016, we recommend that you start to think about the following points:

- The changes will only affect policies governed by the laws of England and Wales, Scotland and Northern Ireland. Therefore, consider which of your policies will be affected. For example, you might have a policy placed abroad in a local market that is subject to English law, or you may be an overseas insured with a policy placed in London, subject to English law. 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.
- We may need to start the placement/renewal process earlier than usual, so that we can look to engage and pre-agree with your insurers what information you will search for and disclose, and in what manner.
- Underwriting presentations will need to be **structured**, so as to comply with the duty to make a "fair presentation of the risk".
  - It will no longer be acceptable to deluge insurers with electronic information in the expectation that "material circumstances" will be found somewhere within it.
  - **Structuring, indexing, and signposting** should now be used in underwriting presentations, to highlight key information to underwriters; and presentations should not be overly brief or cryptic.
- Consider how best you will carry out a "**reasonable search**" for information.
  - Start thinking now about how you will collate and present the disclosure information to insurers, and who within your organisation has that information.
  - Remember that a change of broker, or a change of personnel within your organisation, could present challenges when ensuring that a reasonable search has been carried out.
  - As you may need to provide evidence that you have carried out a "reasonable search", consider your

internal record-keeping procedures, and how you will verify that you have carried out a reasonable search for information. So that we can best assist you in ensuring that a reasonable search is carried out, and as the knowledge of the broker will now be treated as part of your knowledge, have a clear agreement with us regarding who will be responsible for searching for and storing information which may need to be disclosed to insurers (for example, records of historic site surveys).

We hope that these initial comments on the Act provide a useful summary, and assist in highlighting some of the key issues which will be relevant. Here at Marsh, we will be looking to help you prepare for the Act coming into force. We will also be engaging with insurers on your behalf, for example, by looking to agree protocols with insurers on the types of information required to be disclosed for different lines of insurance and different types of insured.

We will keep you updated and will issue further guidance as the market's preparations for the Act develop. In the interim, if you have any queries, please do not hesitate to get in touch with your usual Marsh contact.

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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