

You and the Insurance Act 2015

This guide includes important information
on commercial insurance policies –
please read this carefully



HOWDEN

You and the Insurance Act 2015

On the 12th August 2016, the Insurance Act 2015 came into effect. This affected commercial insurance policies subject to the laws of England, Wales, Scotland or Northern Ireland that are taken out, renewed and/or altered. It was the biggest reform to insurance law since the Marine Insurance Act of 1906 and modernises how insurers approach commercial insurance policies and clarifies what information you, the client, are required to provide to your insurer.

Purpose of this guide

This guide is not intended to advise you on your legal rights and obligations but hopefully will provide a good background to inform your conversations with us about your insurance business. At the end of the leaflet there is a glossary that defines the important terms highlighted through the guide.

We are here to help

The Act places the duty on you, the insured, to make a **fair presentation** of the risk to insurers by disclosing every **material circumstance** that you know or ought to have known following a **reasonable search**.

In addition the Act requires all risk information to be presented in a **clear and accessible** manner. This aims to avoid any so-called "data dumping" and also requires that known concerns or unusual risk factors are adequately highlighted.

Providing us with as much information about your business, its operations and the risk controls you have in place, in as clear a manner as possible, will allow us to use our market knowledge to obtain the most suitable insurance terms and relevant cover for your business.

How does the Act affect you?

Duty of fair presentation

You must make a **fair presentation** of your business to insurers so that they can assess the risks and offer terms. We will help to do this on your behalf but we cannot fully assume what is a legal duty on the insured: you know your business best and we need you to supply us with all the relevant information. Some of the information we will require will come from the completion of a fact find or a proposal form. However, as every business has unique aspects you must advise of any **material circumstances** known to you or arising from your enquiries. In particular, this should include any unusual activities or additional facts that may influence an underwriter's decision in accepting the risk.

These could include but are not limited to:

- Any unusual process or procedure within your business not normally found in your industry;
- Incidents that may have happened within your business that you have decided not to claim for (but might affect the potential for a future claim);
- Inquiries by the Health and Safety Executive (HSE) or other regulatory bodies;
- Any proposed acquisitions or mergers;
- Any new activities or services being offered or innovation in product/service use;
- Any new processes or operational developments which could increase risk;
- The construction of your property and whether it has any unusual features;
- Whether an insurer has asked to carry out any risk improvements;
- Any financial irregularities;
- The type of stock held, for example whether it is valuable, high-risk or flammable;
- Products exported and/or imported outside the UK, in particular with North America, China or India;
- Changes of directors, non-executive directors or partners.

Such information should be disclosed before any insurance is taken out.

You must disclose all material information known to **senior management** and the people who arrange insurance at your company.

You will also need to disclose information revealed by a **reasonable search**.

A **reasonable search** may involve enquiries across operational management or even external service providers where activities may relate to risk (such as IT). The enquiries required will vary from case to case based on where relevant information is held and who is responsible for managing the risks concerned. You may also need to speak to beneficiaries of the policies concerned.

We would strongly recommend you keep a record of the information you have obtained, who you spoke to and what the outcome was.

Mid-term adjustments, changes to the business and risk features

You need to keep your insurers informed of any changes to your business and its operations during the period of insurance. This could include, but won't be limited to, drivers with motoring convictions, employees/employers with criminal charges or convictions, HSE investigations, acquisitions, changes to manufacturing processes and minor incidents that did not result in an insurance claim.

You should also let us know in advance if you increase or change the security used to protect your property, and either stop any existing or adopt any further risk management programmes.

At renewal, you have the same duty of disclosure as when you first took out the insurance, and you must tell us of any actual or proposed changes to the business that may influence how an insurer views your business and consider the necessary enquiries set out earlier in this document.

Although we will have asked specific questions about your business operation originally, this does not replace the need for you to carry out another **reasonable search** when it comes to renewing a policy.

Failure to disclose

Under the Act, where an insured person or company is found to have breached its duty of **fair presentation**, the insurer has a number of proportionate remedies available (unless these are further amended by the policy itself):

1. Deliberate or reckless breach of the duty of fair presentation

Insurers do not have to fulfil the insurance contract, i.e. they still have the right to avoid the entire policy.

This will normally be from inception, except where the breach relates to a variation of the insurance, i.e. a mid-term amendment, in which case it will be from the date the amendment takes effect. On top of this, the insurer can keep any premiums paid.

A deliberate or reckless breach might include supplying false or inadequate information, as well as fraudulent behaviour. A deliberate or reckless breach also occurs if the insured does not care whether it was in breach of its duty, for example if the insured was irresponsible and took no care to ensure the information supplied was correct.

It is for the insurer to show that a breach was deliberate or reckless.

2. Any other breach of duty of fair presentation

Breaches that are neither deliberate nor fraudulent, allow the insurer to look at a proportionate solution based on the position had the breach not taken place and the relevant information been available.

For example:

- If the insurer would not have accepted the insurance (or variation) on any terms at all, the insurer does not have to fulfil the insurance contract (or variation) and can refuse all claims. The insurer must return the premium, however;

- If the insurer would have accepted the insurance but on different terms (other than the premium), the insurance contract will be treated as if those different terms applied, from inception;
- If the insurer would have charged a higher premium, the insurer may proportionally reduce any claim payment, for example if the premium charged is 75% of what the insurer would have charged, the claim payment will be reduced to 75% of what the insurer would have paid out.

The insurer must demonstrate what their position would have been in the absence of breach.

Warranties

The Insurance Act allows insurers to suspend cover where there has been a **breach of warranty** rather than discharge their liability altogether, i.e. if something you originally disclosed or agreed to do turns out to be false or not done, the insurer will not pay out for any claim you may make. However, under the new Act cover is reinstated as and when the breach has been rectified.

In addition, where the warranties are designed to reduce a specific risk of loss and these warranties are breached the insurer will only be able to refuse cover if the warranty was relevant to the loss that occurred. However it is up to the insured to show that the **breach of warranty** could not have increased the risk of loss that occurred in the circumstances in which it occurred.

However, you should be wary that this additional protection does not apply to any warranties or other policy conditions which “define” the entire risk, such as the minimum or maximum age of a driver. It also does not apply to policy conditions relating to requirements following a loss, such as notification.

Fraudulent claims

The Act provides that the insurer:

- Will not be liable to pay fraudulent claims;
- Can elect to terminate the insurance contract and refuse to pay claims relating to losses suffered after the fraudulent act and can keep any premiums already paid;
- But, importantly, will remain liable for all legitimate losses suffered before the fraud (a change to the previous legal position).

Where a group of companies is insured, the Act provides that the insurers will have the same remedies available in respect of a fraudulent claim that is made by one beneficiary under the group’s insurance contract. However, the remedies only apply in relation to the fraudulent beneficiary and not to the group as a whole.

Contracting out of the Act

Although insurers do have the option to opt out of most parts of the Act, they are obliged to take sufficient steps to draw attention to any “disadvantageous terms” before you take out the contract of insurance. Note that insurers do not need to specifically identify such terms as deviating from the Act, provided they are clearly explained.

Summary

We hope you find this guide useful. However in any circumstance where you are unsure please talk to us so that we can assist your understanding. We will of course help you through the process and guide you through the fact finding process to ensure that you are offered insurance that is both competitive and covers your business risks.

Glossary of terms

Breach of warranty – A warranty is an undertaking by an insured person or company that a statement is true or a condition will be fulfilled. If the statement turns out to be false or the condition is not fulfilled, the warranty is said to have been breached.

Data dumping – The presentation of information in a manner which is unstructured and without adequate signposting to the important aspects.

Fair presentation – The disclosure of every material circumstance which the insured knows or ought to have known after they have performed a reasonable search.

Knows or ought to have known – This is the information you should know about the business’s operation and personnel or ought to have known following a reasonable search.

Material circumstance – A circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium and/or terms of the insurance in determining whether to accept the risk. This refers to any prudent insurer and not just to the insurer who has been offered the risk.

Reasonable search – The Act states that a reasonable search should include a search being made of the information available to the insured’s organisation or “held by any other person (such as the insured’s agent or a person for whom cover is provided by the contract of insurance)”.

Senior management – Those individuals who play significant roles in the making of decisions about how the insured’s activities are to be managed or organised.

