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Insurance Brokers of Somerset

The Insurance Act 2015
Explanation and Guidance Brief

The Government made some of the most significant changes to insurance law in over a century when they announced the Insurance Act 2015.

The main purpose of the Act is to create a fairer balance between customers and insurers. To achieve this it introduces obligations on customers to provide information about their risk and limits the action that insurers can take if this information proves to be insufficient or inaccurate.

This document highlights some of the key changes and explains the steps you need to take to comply. We recommend that you read this guide carefully. If you have any queries please contact us and we will be able to help.

So, what's changing?

In summary, the following are the main changes:

- New responsibilities for policyholders to provide **all relevant information** to underwriters.
- Policyholders must involve **all relevant senior management** when compiling information for insurers.
- The potential remedies for insurers for non-disclosure or fraud, making a more level playing field between the insurer and policyholder.
- Changes around how insurers must deal with a breach of warranty making the position fairer for the policyholder.
- Option for insurers to 'opt out' of much of the Act.

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

The Act applies to all commercial insurance policies commencing on or after 12 August 2016. The Act also applies to policies commencing before this, but whose terms are varied after that date. So adding any assets, vehicles or other changes to a policy will mean that the new requirements will apply.

Some insurers have stated their intent to adopt the new regime early, either in whole or in part. Whilst there are potential benefits to customers, if the new disclosure obligations are also imposed early you will need to make sure you understand and fulfil them.

So what do you need to do?

We know that every customer is different, and the new requirements will affect each business in different ways. The size and complexity of some businesses may also mean action is required well in advance of the implementation date.

When you first renew a policy under the new Act (or make an amendment once the Act is in force) you should take the time to carefully identify who within your business needs to be involved in gathering the relevant information.

You should also take into account changes to the information required by insurers, which now includes not only facts that you know, but those that you 'ought to know'.

Your usual Luker Rowe contacts will be on hand during meetings or over the phone to advise and support you in adapting to the changes and are available to answer any questions you may have.

The following pages look at the requirements in more detail.

Duty of Fair Presentation

The Act requires policyholders to make a 'fair presentation of the risk' to the insurer. This applies for all renewals as well as new policies.

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**.

The information provided must also be **reasonably clear and accessible**.

Each of the highlighted terms plays an important part in meeting your obligations and you should take steps to understand them. These are explored in the table below:

Key Term	Definition
Material circumstance	This is anything which would influence and the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. There is no specific definition of 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, your business activities, details of your premises, fire/security arrangements, health and safety issues and hazardous materials/processes.
Known or ought to be known	You are obliged to disclose not only 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. Please also note that any relevant information you provide to us, whether in a formal or informal setting, will form part of the presentation of the risk to insurers.
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. You must take steps to understand who in your business falls within this definition and ensure they are part of any information gathering when providing information which is required by the insurers. This might include people like site managers, risk managers, operational and business managers.
Reasonable search	The extent of your search will depend on the nature of your business, the type of insurance you wish to buy and who within your organisation is best placed to provide information.
Reasonably clear and accessible	All information must be provided to insurers in a reasonably clear and accessible manner. The new rules also prevent policyholders from concealing key facts amongst large volumes of less relevant or immaterial information.

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:

Type	Definition
Deliberate or reckless	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 void 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.
Not deliberate or reckless	If your failure to present the risk fairly was neither deliberate nor reckless (e.g. a simple oversight on your part), insurers may still be able to void the policy if they can demonstrate that the policy would not have been provided if they had been aware of the full facts. In such cases, insurers would repay the policy premium to you. They would not be required to make payments in respect of claims and you would need to repay any claims payments already made. If, however, insurers would have provided the policy but on different terms, the policy would be treated as if those terms had applied from the beginning. Additional terms could be, for example, increased excesses or specific exclusions. This could result in a claim being declined (e.g. if insurers would have excluded a particular activity or imposed additional conditions which you had not complied with.) If insurers would have provided the policy but charged an increased premium, the amount insurers will pay will be reduced in proportion to the difference between the premium actually paid and the premium that would have been charged had the risk been fairly presented. 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. Previously, insurers could refuse to pay a claim if the policyholder breached a warranty, even if the breach was unconnected with the loss or if the breach was remedied before the loss occurred.

The ability to avoid claims in such circumstances is now removed and insurers can only suspend cover for periods where a warranty is not complied with.

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 a breach could not have increased the risk of that loss occurring, insurers must still pay the claim.

This removes the classic example where an insurer could use the failure to set a burglar alarm as a reason not to pay for fire damage.

Finally, insurers often use a 'basis of contract' clause to convert all information given by policyholders to insurers into warranties. This enables insurers to refuse to pay claims if any part of a risk presentation or proposal form is inaccurate.

From August 2016 the position will be fairer for policyholders as the Act specifically removes this as an option.

Fraud

Historically, in the event of a fraudulent claim being made against the policy, all cover under the policy would cease and insurers were entitled to retain the premium. The policyholder would also have to repay any claims payments already made.

When the Act is introduced, insurers will be 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.

Insurers Opting Out

One final point to consider is that insurers are given the ability to 'opt out' of the majority of the new Act. As such, they could elect to remove some of the potential customer benefits or add further obligations.

It is not yet clear which insurers might utilise this or in what circumstances.

In such cases, insurers are required to make these clear to the customer and we would draw these to your attention and help you understand the implications.