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Expert insurance buyers

The insurance act 2015

An Introductory Guide

BIBA
British Insurance Brokers' Association

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Building corporate resilience.

INTRODUCTION

Steve White
BIBA Chief Executive

The Insurance Act 2015 is a very positive step in the development of our industry. It should lead to fairer outcomes for customers and we were pleased to play our part in assisting its passage through the Houses of Parliament.

Brokers can use this guide to help bring their staff up to speed on the operational changes they may need to consider. We have also written it from a customer perspective so that brokers can help support customers in understanding their new duties.

This guide helps to summarise what is coming, what you need to know and how to start preparing for it. Please remember, this is only a starting point. The approach by insurers will become clearer as we get closer to the August 2016 implementation date and after that case law will inevitably develop. We will issue further guidance as and when there is progress.

The Insurance Act is a key Manifesto point for BIBA and our thanks go to Mactavish for their huge efforts in helping us put this together and to the former Law Commissioner David Hertzell himself, who not only created the Act but helped author this guide too, now as a member of the senior Mactavish team.

Thanks also go to sponsors Aviva and QBE for their support.

Our technical team is available if members have any further queries.

Bruce Hepburn
Chief Executive Officer, Mactavish

Successful implementation of this legislation should lead to more reliable insurance placement, which will speed up access to recovery and increase the ability of both insurer and insured to forecast claim payments. To achieve this, it is vital that all parties understand the critical implications of this long overdue change in the law – the first in over 100 years – and use this transition period to review processes and systems to prepare for the significant additional demands it places on them. It is hoped that this guide sets out some useful areas to consider before the change goes live in August 2016.

David Hertzell
Special Adviser to Mactavish and Former Law Commissioner

During my tenure as Law Commissioner, I oversaw eight years of research and review which clearly demonstrated very real and pressing operational difficulties for policyholders, brokers and insurers across the market. As a response to the market's demand for change, the Insurance Act 2015 modernises and clarifies the law; providing a framework for insurance placement in the 21st Century. However, it will now be up to all market participants to work together to realise the full substance of the reform. I see this guide as an important first step towards this by setting out where policyholders and brokers may want to focus ahead of August 2016. It is my hope that the new law and the practices associated with it will provide a solid foundation for this thriving sector of the British economy for many years to come.

OUR SPONSORS

Aviva has consistently championed these reforms, which will provide customers with more certainty as to the performance of their commercial products. This core aim of improved reliability affords us a huge opportunity to demonstrate how our industry is working to improve the service and security we provide to customers. The challenge is now to deliver the potential offered by the Act. Realising this will require insurers, brokers and customers to work together effectively. This guide provides the industry with a strong base to support understanding of the Act and for developing effective improved placement practice.

Angus Eaton
MD Commercial General Insurance UK

QBE has been fully engaged with the Law Commission's work and is supportive of the Insurance Act 2015, as we believe that it will address existing anomalies, providing greater certainty and delivering positive outcomes for clients. We recognise that the transition to a new legal framework will present challenges, for brokers especially, and we are committed to supporting brokers and clients through this period of change. All stakeholders need clear usable guidelines to understand how this principles based legislation is going to impact on their work and risk transfer. QBE welcomes this excellent guide from BIBA and Mactavish and are delighted to be part of this market leading, once in a century, initiative.

David Hall
Managing Director, Retail
QBE European Operations

We would also like to thank AIRMIC, LIIBA and the CII for their input and support for this guide.

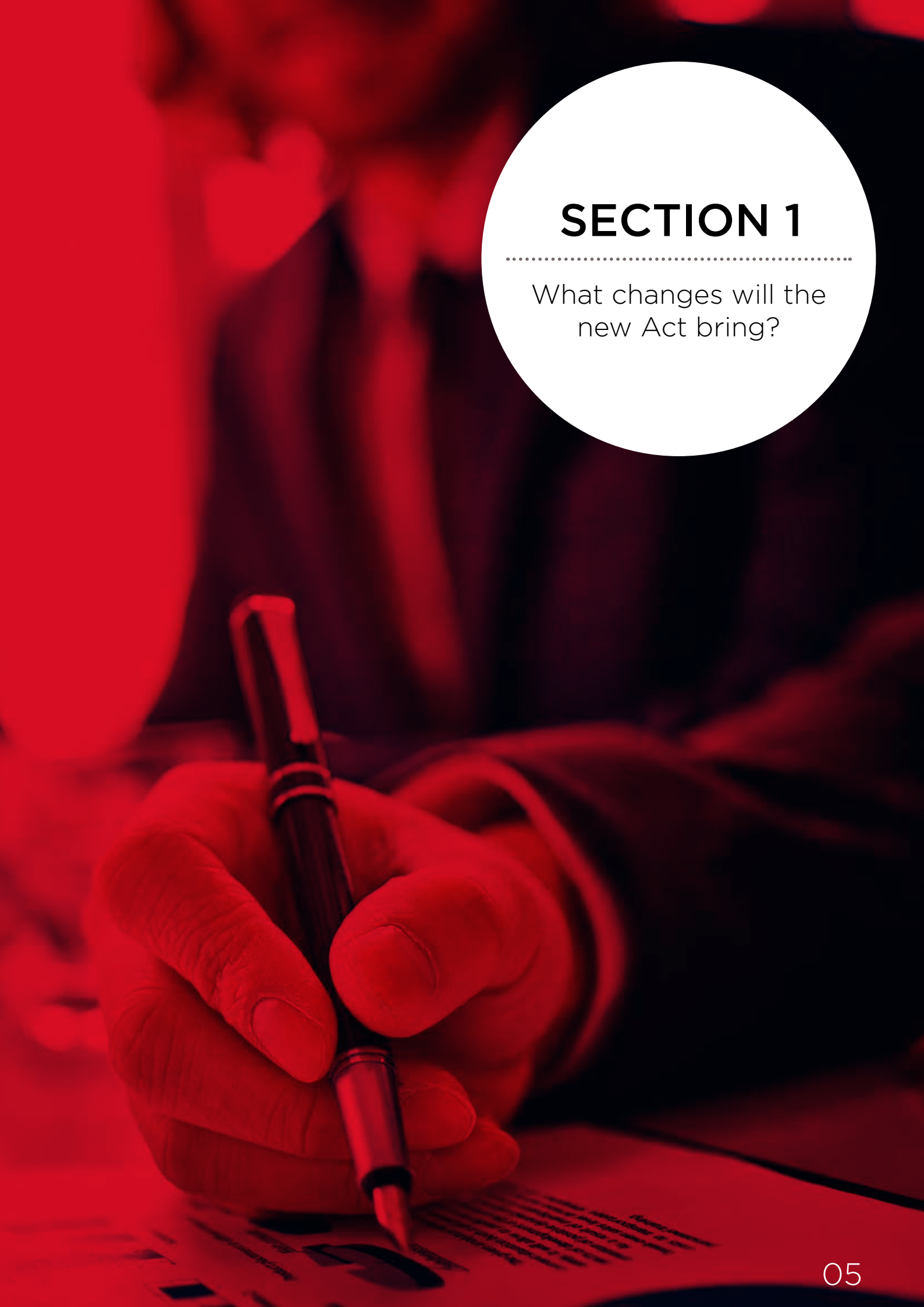
The Marine Insurance Act 1906 has been the bedrock of the industry for over 100 years. The changes that will come into force in August 2016 will inevitably have a significant impact on how insureds and insurers approach policies, and on the role of insurance brokers as agents, acting as the conduit between the two contracting parties.

The Insurance Act 2015 applies to all policies governed by the laws of England and Wales, Scotland and Northern Ireland that are placed (or varied) after 12th August 2016. The new law is principles based, rather than a rigid code: this is to reflect the fact that it applies to micro-businesses as well as FTSE 100 insureds and reinsurance, and its duties therefore need to be flexible. The Act applies to both business and consumer insurance, although the new duty to make a fair presentation only applies to business insurance contracts with the consumer equivalent dealt with under the Consumer Insurance (Disclosures and Representations) Act 2012.

This guide sets out:

1. How the law will change.
2. Areas which insureds should start to think through in advance of their first renewal under the new regime.
3. Questions that brokers will need to consider within their own organisations and in their relationships with both clients and insurers.
4. Finally, it suggests what brokers might want to have in their toolkit by August 2016 to ensure minimal disruption to business.

Having agreed that change was necessary, the industry now needs to work together in advance of the new law coming into force to ensure a smooth transition that preserves and enhances the reputation of the UK insurance market. This guide provides a starting point for the journey towards August 2016.



SECTION 1

What changes will the new Act bring?

THE DUTY OF FAIR PRESENTATION

The new duty of fair presentation sets out a more structured framework than the duty of disclosure it will replace. The core obligation remains broadly similar, in line with the market view that disclosure is fundamental to the international competitiveness of the UK insurance industry. However, in the Insurance Act there is much greater specificity about whose knowledge needs to be captured when preparing a presentation of risk for the market.

The diagram overleaf summarises how the various parts of the Act come together to form the revised duty, which will apply at every renewal and to any variation of the contract after 12th August 2016. At its centre is the existing core requirement to disclose important/ relevant information known to the insured (or which they ought to know) that would affect the judgment of a prudent insurer in deciding whether to accept the risk, and on what terms. However, this is formulated slightly differently under the new Act. The insured's primary duty remains that they have to disclose everything material that they know or ought to know. Failing that, the insured must disclose enough information to put a prudent insurer on notice that it needs to ask further questions to uncover material facts.

The Act then goes on to explain *whose* knowledge counts. This requires balance – it is clearly unreasonable to expect that every material fact known by an intern or one of many hundreds of engineers will be accessible to the person(s) responsible for purchasing the insurance, but insurers need to have relevant information to accurately price and evaluate the risk.

For insureds who are not individuals, the Act therefore distinguishes between information known to senior management and (if different) the buyers of insurance, which is assumed to *be* known, and information held by other areas of the business or any other person which *ought* to be known if a reasonable search is conducted. Sole traders or other individual business insureds will be taken to know anything which is known by a person who is responsible for the insured's insurance as well as their own knowledge and information obtainable through a reasonable search. These categories are shown as the arrows on the left of the diagram.

The Act then specifies what information the *insurer* should be able to find within its own organisation rather than expecting the insured to disclose it. These categories are shown as the arrows on the right of the diagram.

The Insurance Act reflects the reality that insurers will already hold information about the risk, either specifically about the particular insured in question or about that type of business. However, it also responds to the fact that businesses are vastly more complex than they were in 1906, with knowledge held relatively disparately across organisations.

The new Act recognises that any data gathering process may not be infallible and sets out updated rules in respect of misrepresentation. Every material representation as to a matter of fact must be substantially correct (i.e. a prudent insurer would not consider the difference between representation and reality to be material) and every material representation as to a matter of expectation or belief must be made in good faith.

There will also be a new and additional requirement that the information must be presented in a way which would be reasonably clear and accessible to a prudent insurer. This is designed to prevent overly brief submissions but also to combat the reverse scenario where hundreds of potentially relevant files are provided in a data room without any signposting or direction on what is particularly material.

The key principles behind this duty are *reciprocity* and *balance*. This is also reflected in the rights that the insurer has in the event of breach of the duty. There will be a new proportionate system that still allows for avoidance in some cases but replaces the avoidance-only regime of the 1906 Marine Insurance Act.

REMEDIES FOR BREACH

- If the breach was deliberate or reckless, the insurer can avoid the contract from inception and can keep the premium. The insurer must prove that the breach was deliberate or reckless.
- If the breach was not deliberate or reckless, then there are a number of options available to the insurer if they wish to impose a remedy. More than one remedy can be applied - the insurer must show that they would have acted in that way if the breach of duty had not occurred.
    - If the insurer would not have written the risk if it had known the information which has come to light, then it can **avoid the contract** but it has to repay the premium.
    - If the insurer would have charged a higher premium, then it can **proportionately reduce** any claims payments.
    - If the insurer would have included new terms, or imposed different terms other than with respect to premium such as conditions/warranties, exclusions, different extensions, sub-limits, etc., the contract is to be treated as if it had been **entered into on those terms**.

THE DUTY OF FAIR PRESENTATION: HOW IT FITS TOGETHER

Insured's knowledge

What **MUST** be actively disclosed

- Knowledge of senior management
- Knowledge of the insurance team, including brokers
- Information which would be revealed by a reasonable search

A fair presentation of the risk requires clear and accessible disclosure, without material misrepresentation, of:

Every material circumstance which the insured knows/ought to know;

Or, failing that,

Sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those material circumstances

Insurer's knowledge

NOT required to be disclosed

- Information held by the insurer and accessible to the underwriter relevant to the risk
- What an insurer writing this risk would reasonably be expected to know
- Common knowledge

BROKER Q&A

Q What is a material circumstance?

- The definition of material circumstance remains the same as it did under the 1906 Act – it is something that would affect the judgment of a prudent insurer in deciding whether to take the risk and, if so, on what terms.
- However, the 2015 Act includes further clarification and provides some examples of the type of thing that could be a material circumstance:
  - special or unusual facts relating to the risk;
  - any particular concerns which led the insured to seek insurance cover for the risk;
  - things which should be dealt with in a fair presentation of risks of the type in question, in the view of those involved in buying or selling that insurance.

Q The 'further enquiries' variant of fair presentation seems like a weakening of the duty – is it?

- The 'further enquiries' test is derived from a common law principle that already exists – this new law simply formalises it. Rather than watering down the duty, it is consistent with the existing approach adopted by the courts and tackles concerns around the potential issue of underwriting once a claim has happened.
- It is also important to note that where it has been used it has been subject to an overriding requirement for a fair presentation of the risk to have been made: it is not meant to give rise to a two-stage process where the insured gives a brief description of the risk and then the insurer is required to ask all the questions.

Q Who counts as senior management for an insured?

- The Act defines senior management as anyone playing a *significant* role in the making of decisions about how the insured's business activities are to be managed or organised. The Act does not include a precise definition as there will be a wide range of businesses purchasing insurance under this law.
- The intention (as expressed in the guidance notes that were given to Parliament) is that this category will be construed relatively narrowly, with other members of management being questioned when the insured undertakes a reasonable search of information.

Q Why are brokers included in the insured's insurance team category?

- The broker is normally the agent of the insured for business insurance placements. Individual placing and servicing brokers may know different information about a business and its risk than the internal policyholder staff arranging the insurance. The new law treats these individuals at broker firms in the same way as the clients' internal staff responsible for insurance – any knowledge (except for confidential information acquired through a business relationship with an unconnected person) they hold is to be classified as something that the insured organisation knows.
- Information held by the broking firm as a whole – i.e. the broker's corporate knowledge – is not treated in this way: this would be subject to the reasonable search requirement.

Q What does a reasonable search involve?

- There is no 'one size fits all' answer to this, as what counts as reasonable is intended to be flexible and will be determined by the size and complexity of the business. The insured must take reasonable steps to ensure that it extends to any other person who may hold material information. This could apply to information held by the broker, other agents (e.g. advisers, outsourced service providers) and even (if reasonable) other third parties.

- Where a policy is being purchased to cover a subsidiary or specific people, it would be expected that a reasonable search would include gathering information relevant to the cover from these beneficiaries. This could cover information about other policies that are placed abroad for foreign subsidiaries if, for example, there are material circumstances such as large claims.

- The format of the search will need to be adapted for the business, e.g. its size, geographical spread, organisational structure.

- The Act only requires the search to pick up what would have reasonably been revealed by a reasonable search: for example, such a search would not necessarily be expected to prompt an admission from a junior employee of their own negligence.

Q What information is the insurer expected to already have?

- Depending on the insurer's systems and processes, this could cover anything from 'big data' held in the insurer's electronic systems right through to information on previous claims or insurer specific loss adjuster reports.

- This uncertainty means, as a general rule, that it will be important for insureds not to make assumptions about what the underwriter already knows about them and in fact it would be safest to presume that insurers hold no prior knowledge of an insured at all, particularly immediately after August 2016 as insurers continue to review their internal procedures.

Q If the insured fails to make a fair presentation can the insurer impose new terms AND reduce claims proportionally?

- Yes they can. The law seeks to put the insurer in the position it should have been if a fair presentation had been made at renewal.

- If an insurer wishes to impose further remedies (e.g. charge additional premium as well as proportionately reducing a claim) this would be contracting out of the Act and the insurer would need to follow the steps summarised in the contracting out section on page 12.

Q What counts as deliberate or reckless?

- Fraudulent activity would clearly be included in this category, but 'deliberate or reckless' may be broader than fraud on its own. An insured will have acted deliberately if it knew that it did not make a fair presentation and was in breach of the duty. An insured will have acted recklessly if it did not care whether or not it was in breach of the duty.

Q What happens if, in the event of breach which is neither deliberate nor reckless, a new term is imposed which would have affected other claims or with which the insured has not/could not have complied?

- The principle behind the remedy is that the contract will be adjusted to be as it would have been if information had been provided to the insurer correctly before the policy was entered into.

- If a new condition/warranty is applied which the insured would have breached then the insurer will have all the rights it would usually have in the event of that breach. This would include suspending liability if it is a warranty or repudiating claims if this is an option available to the insurer (see section overleaf for further details on the operation of warranties and conditions).

- If a new exclusion or sub-limit or different extension is added, if this would have affected any previous claims then those losses may also need to be adjusted.

WARRANTIES AND CONDITIONS

The new Act makes three adjustments to how policy terms will operate:

1. Basis of contract clauses will be abolished for business insureds, having already been abolished for consumers under the Consumer Insurance (Disclosure and Representations) Act 2012. These provisions turn information provided by the insured into warranties, so that any change (even if trivial or immaterial) would lead to termination of the contract.

2. Breach of warranty will no longer automatically terminate the policy. Instead, breach will lead to suspension of liability and, if the breach is remedied (either directly or if the risk becomes essentially the same as that which was originally anticipated), then liability will automatically resume.

   a. Policyholders should still take great care not to breach warranties as some breaches can never be remedied – meaning that the contract will remain suspended for the rest of the policy term. For example, if there is a warranty that a building is built of bricks and mortar when it is actually built of wood, then that breach can never be remedied.

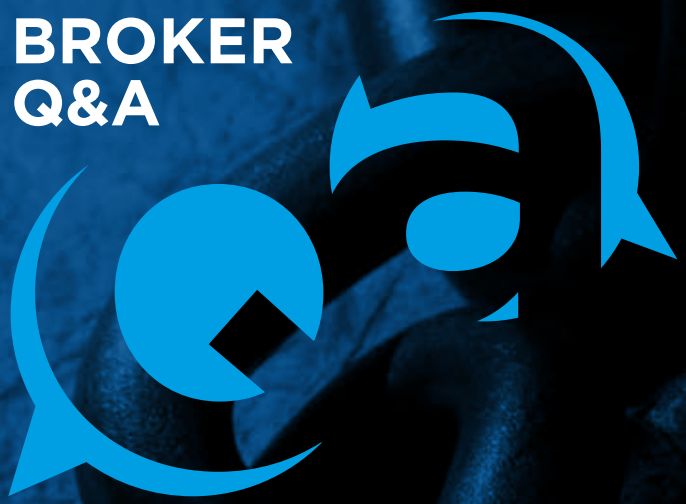
   b. In addition, if a loss is suffered once liability has been resumed and the insurer can prove that something that occurred in the suspended period contributed to the loss, then the insurer does not have to pay the claim.

3. A new regime will apply to non-compliance with terms which would tend to reduce the risk of a particular type of loss (i.e. loss of a particular kind, at a particular location or at a particular time) – although this does not apply to any term defining the risk as a whole. For these types of term, insurers will not be able to use breach of warranties, conditions precedent or other terms to exclude, limit or discharge their liability if the insured can prove that non-compliance with the term *could not* have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Although not quite the same as requiring actual causality, this replaces the current situation where a breach could lead to repudiation of a claim even if it was unrelated to the loss that occurred. Where compliance with a term which does not define the risk as a whole does not tend to reduce the risk of a particular type of loss (e.g. a condition precedent requiring prompt notification after a loss arises), this additional protection does not apply.

All the changes to the warranty and condition regimes will apply to and be beneficial for both business and consumer insureds, although in the event of a claim they may result in more protracted negotiation (as opposed to straightforward repudiation of a claim or a rapid settlement negotiation based on the insurer's contractual rights).

This adjustment may lead to terms being enforced to the letter: whereas previously some judges had worked hard to construe terms in a more favourable light for policyholders, and insurers waived some of their rights in order to preserve relationships, as the new regime now reflects a fair contracting position, insurers (and the courts) may seek to apply remedies strictly.

BROKER Q&A



Q Can insurers still create warranties of information now that basis of contract clauses have been abolished?

- Insurers can still create warranties based on the information provided – but these will need to be specific policy terms in the usual way. The new law only makes it impossible to use a sweep up provision to make all the information into warranties.
- Care will have to be taken by all parties to ensure that any such warranties are identified and complied with.

Q If warranties are now only suspensory, what is the point of them? Will they not all be replaced by conditions precedent?

- While the practical difference between the two types of term is open to debate, it is important to note that for warranties insurers have the right to reject claims if the loss can be attributed to something happening during the period when the policy was suspended due to breach, even if that breach has been remedied and the policy restored.
- There may be arguments that certain kinds of conditions precedent are in fact warranties. Even if not a warranty, if compliance with a condition precedent would tend to reduce the risk of a particular type of loss, the protection described in point 3 above would apply.

Q Who has to prove that the risk of loss in the circumstances which actually occurred could not have been increased by breach of a term?

- Importantly, it is the insured's responsibility to show that the breach could *not* have increased the risk of the loss.
- Policyholders should remember that this limitation to the impact of any breach of conditions precedent or other terms only applies where the term would tend to reduce the risk of a loss of a particular kind or at a particular location or time.

FRAUDULENT CLAIMS

The Act tidies up what happens in the event that a fraudulent claim is made by a policyholder. The new law confirms that the insurer will be liable for losses up to the fraudulent act but can treat the policy as having been terminated at the point when the fraudulent act was committed. It also confirms that the insurer does not have to pay the fraudulent claim (*including* any honest element), and can recoup anything paid out after the fraudulent act (or, if more than one, the first fraudulent act).

For a group insurance contract, the remedies will only apply in respect of the individual(s) who were fraudulent, not all the insured parties.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT

The Insurance Act will also allow the Third Parties (Rights against Insurers) Act 2010 to be brought into force. It also allows the Secretary of State to update the Third Parties Act in the future when new insolvency regimes are introduced. The main purpose of the Third Parties Act is to simplify existing compensation procedures when an insured becomes insolvent.

CONTRACTING OUT

For business insureds, insurers will be able to contract out of the new law and introduce more stringent (or "disadvantageous", as they are classified in the Act) terms. For this to be effective **the change must be brought to the attention of the insured or the insured's agent (i.e. broker) in a way that satisfies the transparency requirements set out in the Act.** There is one exception to this: insurers cannot contract out of the abolition of basis of contract clauses and cannot recreate a clause with the same effect.

To be effective, any contracting out must satisfy the transparency requirements set out in the Act:

- The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention. How this is interpreted will depend on the circumstances of the transaction and the characteristics of the insured.
- This must be done before the contract is entered into/ the variation to contract is agreed.
- The disadvantageous term must be clear and unambiguous as to its effect.

The Act is also clear that the requirement for the insurer to take sufficient steps to draw the disadvantageous term to the insured's attention **is not breached** if the broker had actual knowledge of the term (prior to contracting) but hadn't passed this information onto the insured.

BROKER Q&A

Q Does every term which contracts out of the Act, even if it is a relatively minor change, need to be flagged to the insured?

- If it is disadvantageous then it must be raised with the broker (if an advised sale) or with the insured. In an advised sale it is up to the broker to pass that information onto its client – there is no requirement for the insurer to confirm that the broker has done this.

Q What is the expected format for flagging contracting out for the broker's attention?

- This very much depends on the extent to which insurers decide to contract out of changes as standard (as is suggested as a possibility in the guidance notes), and produce wordings to this effect.
- If the market ends up in a position where insurers have contracted out of certain parts of the Act as standard and they have clearly publicised this, then advising the broker that the placement is on a particular form of wording may well be sufficient.
- Alternatively, rather than using standardised policy forms, insurers could contract out by highlighting clauses which contract out for the broker's attention on a policy by policy basis. As long as the clause itself is clearly expressed then it does not need to explicitly state that the effect is to contract out of the Insurance Act 2015. The assumption is that brokers will have sufficient knowledge of the law to be able to infer this.

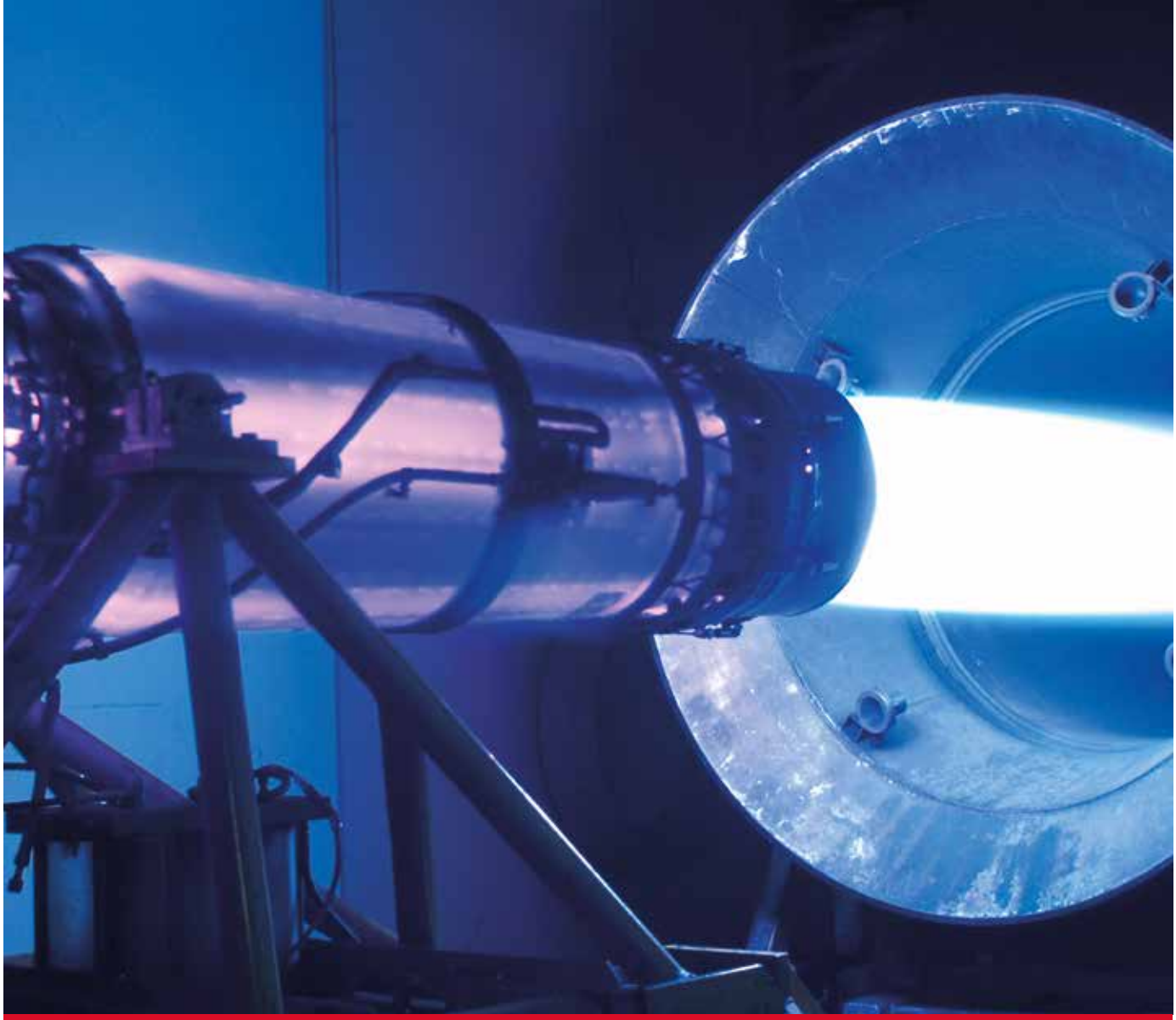
SECTION 2

What should insureds be thinking about ahead of August 2016?

Placement will be where the majority of the change created by the Insurance Act 2015 will be felt: while the changes to conditions, warranties and fraudulent claims will lead to different claims outcomes going forward, *all* business insureds will need to comply with the new duty of fair presentation at *every* renewal.

Two key messages need to be borne in mind by insureds (and considered with their broker) when planning for renewal under the new Act, which may not have been appreciated to date:

1. Insureds should leave more time for renewal (particularly data gathering) or they could risk failing to comply with their statutory duties and missing the opportunity to benefit from the additional defences that the new law provides. *This is a major consideration for the insured.*
2. While the new remedies for breach of the duty of fair presentation are clearly more proportionate than the current avoidance-only system, there still is significant risk that cover will be compromised if insureds fail to provide the information that insurers need. It is also more likely that both the courts and insurers will follow the law as written, because the new regime is now deemed to be fair and balanced between the two contracting parties.



Much of what the new Act does is to add specificity to existing duties, or to adapt them for the realities of 21st century business. Ripping up current practices and starting from scratch is clearly impractical and unnecessary – but there will be changes required so that the systems currently used to prepare material for market presentation meet the new standard.

Areas that insureds need to consider, with the help of their brokers, could include:

1. Is there anything special or unusual about our risk compared to other similar businesses that should be flagged clearly to insurers?
2. Who is likely to count as 'senior management' and 'people responsible for placement of insurance' in our business?
3. Do we ask enough questions of senior management at the moment or do we need to adapt our standard data gathering process to be more in-depth?
4. Based on the structure of the business, who needs to be consulted as part of a reasonable search for the insurances we buy as a business (PDBI, PL, PI, etc.)?
   a. How much time should we allow for people to gather information and respond to us?
   b. What is the best format to do this in – formal written questionnaire, short discussions with key staff, site visits?
5. For policies that we buy as a business which provide cover to individuals (e.g. D&O, PTL, medical malpractice, etc.), how can we ensure that we check that those individuals have no material information that needs to be shared, without requiring that several individuals each fill in a lot of forms?
6. How can we document that a reasonable search has been undertaken and signed off by appropriate people, in case we need to rely on it in court?

Once policyholders have started to think about the answers to these key questions they can start to update their procedures in preparation for renewal under the new law.

SECTION 3

What support could insurers provide to the brokers they work with?

Given the level of change that the Act introduces, it is clear that insurer input will be needed in order for brokers to provide insureds with the advice they seek. There are two areas in particular where this is likely to be necessary: how insurers see the new duty of fair presentation working and how contracting out will work in practice.

FAIR PRESENTATION:

There are three key challenges for insurers and brokers to try to work through to ensure that placement under the new regime continues to run as smoothly as possible:

1. How much time insurers will need to review a submission to be able to ask further questions, if necessary;
2. What insurers want to see in submissions for certain types of business model/ sector/ different policies, so this can be factored into how insureds approach their reasonable search; and
3. Clarifying what information insurers hold about insureds as standard that are exemptions to the duty of fair presentation.

It is clear that insurers will need to set aside more time to review submissions in order to avoid inadvertently waiving their rights. To advise insureds adequately on appropriate renewal timetables, this will need to be worked through by brokers and insurers together.

Insurers will also need to provide guidance on what they expect to be covered in submissions for certain types of risk/ insurance, so that insureds can include this information as standard. This is already a feature of the market to some extent, but clearly needs review ahead of August 2016 to ensure that insurers can adequately specify what additional information they would expect to see in a good quality submission. There is also a real possibility that as different insurers take legal advice on the new law that there will be a significant degree of market variation in standards, on which brokers will need to advise clients.

Insurers clearly hold information about insureds from a variety of sources – but insureds need to be aware of any limitations to this knowledge, e.g. if the underwriter cannot access historic claims records in detail, or if information known to the PI underwriter cannot be viewed easily by the PL underwriter at the same insurer. Otherwise, there is a possibility that insureds will mistakenly believe that insurers already know core information about their business – particularly where they have been on risk for a long time – and will not provide it in their market submission, which could cause problems down the line.

CONTRACTING OUT:

The new law will have a significant impact on insurers - and as the market settles down into the new regime there may be wide variation between the stances taken by different market participants, based on differing legal perspectives. While market consensus on the need for reform of the law was broadly achieved, the legal profession was more divided on how the law might be interpreted. All parties should therefore be aware that until enough judgments are made in the courts, there will be a degree of uncertainty about how some elements of the Act will be handled – and insurers may look to manage this through contracting out.

SECTION 4

Broker toolkit for 2016

The contracting out regime could be the most difficult administrative area to handle once the Act goes live and the extent to which changes have to be flagged could vary enormously. However, it is in everyone's interest to ensure that where contracting out has happened, it is clearly understood, as:

1. The insurer may be exposed to risk it is not intending to take on if it fails to meet the transparency requirements, and will also need to be able to demonstrate to the FCA that it is treating its customers fairly;
2. The insured needs to know what terms their contract is subject to and whether there are extra duties they need to be aware of; and
3. As an adviser to the sale, the broker has duties in regard to explaining the terms of the contract adequately to the insured.

Brokers may therefore wish to enlist the help of insurers at this preliminary stage, to ascertain:

1. Where an insurer has decided that it will contract out of a provision in the law for all its policies, that this is flagged as early as possible (so that insureds can be advised of this before the individual policies are finalised).
2. How far the market is prepared to move towards incorporating explicit references in the contract documents – produced *before* the start of the policy – to any intention to contract out, as this would seem to be the easiest way of ensuring that all parties are clearly aware of any disadvantageous terms.
3. Where there is to be contracting out on individual policies, a standard format that could be used across the market would help ensure that the information can reliably and clearly be relayed to the insured. For example:
    a. For the London market, could the market reform contract template be adjusted to include a disadvantageous terms section that could then be provided to insureds?
    b. For other markets, could this information be flagged on the schedule or other documentation in a standardised way before the start of the policy?

In order to support insureds at their renewals going forward, brokers may wish to consider the feasibility of preparing materials in advance of August 2016.

For client servicing purposes, it may be useful to produce:

- **Suggested renewal timetables/ updated renewal plans**
  - It is likely that, particularly as all parties adjust to the new market standards, there will need to be a longer run-in to renewal, to include more time for reasonable searches and insurer enquiries about the information provided.
  - It may also help to allow more time to finalise policy documentation, as this will create time for the broker to review wordings and flag any disadvantageous terms to the insured.
- **Updated data gathering templates and advice on what to include in market presentations**
  - Where 'own brand' data gathering templates are currently provided to clients to give them an idea of key values/ facts to include in their disclosure, it may be valuable to review these in advance and see whether it might be helpful to include more open questions, or questions that move beyond the core data required to generate a price.
  - In their current guise these data gathering templates/ questionnaires are likely to be too brief to meet reasonable search requirements, so if only minimal changes are being made then insureds ought to be made aware that these are not substitutes for designing their reasonable search process.
- **Updated scheme wordings or 'boiler plate' clauses**
  - Where whole wordings have been adjusted or written by a broker, or specific clauses within a wider wording, it may be prudent to review these in advance to see whether they reflect a more onerous position for insureds than the new legal regime creates.
  - For example, there may be a need to remove any references to the historic duty of disclosure or operation of conditions precedent/ warranties.
- **A system for documenting knowledge held about a client internally**
  - As insureds will want to know what information is held about them by their broker, so that this can be incorporated into the fair presentation, it might be worth thinking about creating a system for this so it can be rolled out across all clients.

In addition to the discussions that insureds and insurers will need to have to create a framework for placement that takes into account the new law, brokers may wish to consider some areas internally:

- **Do TOBAs between brokers and insurers need reviewing?**
  - Where placement duties, claims management roles or other functions are specified in broker-insurer TOBAs at the moment, it could be useful to check these to see whether the division still makes sense in light of the new law.
  - It may also be worth considering whether any of the new duties created by the Act should be catered for in the TOBA.
- **Do client TOBAs or service level agreements need to be adjusted?**
  - Generally, given the new duties created for insureds by the new Act, it may be useful to get advice on whether the contract should deal with these explicitly, and limit any liability accordingly to reflect a position that the broker is comfortable with.
  - A particularly critical area for risk management is likely to be to ensure that brokers are not inadvertently accepting more liability for accuracy/ exhaustiveness of information being provided than they intend to now that insured knowledge explicitly includes anything held by the broker.
    - This may also include going into greater detail about the insured's duties with respect to fair presentation, so it is clear what brokers are taking responsibility for and what remains with the insured, e.g. who is responsible for checking information has been entered accurately, who ensures that the content is reasonably clear and accessible, etc.
  - Additionally, disclaimers on proposal forms, warnings on insurance registers, etc. may need to be updated so that they take into account the new position on fair presentation of risk and warranties/ conditions precedent.
- **Should guidelines be created to state whose knowledge counts for disclosure purposes within the servicing and placement teams?**
  - Establishing guidelines early on across the business may help to prevent confusion.
  - This is likely to be more relevant for larger brokers who may have senior client staff/ executives, account directors and/or managers, core servicing teams and separate placing teams for different lines of business.

WHAT'S NEXT?

This guide is intended to begin the journey towards law change in August 2016. As the market continues to develop its thinking on standards and processes, BIBA and Mactavish will both be developing further practical guides and tools to help brokers prepare themselves and their clients for the new legal regime.

ABOUT BIBA:

The British Insurance Brokers' Association (BIBA) is the UK's leading general insurance intermediary organisation representing the interests of insurance brokers, intermediaries and their customers. BIBA membership includes just under 2,000 regulated firms. General insurance brokers contribute 1% of GDP to the UK economy and BIBA brokers employ more than 100,000 staff. 54% of all general insurance is sold by an insurance broker and they arrange 79% of all commercial insurance business. Insurance brokers put the client's interests first, providing advice, access to suitable insurance protection and risk management. BIBA helps more than 400,000 people a year to access insurance protection through its Find a Broker service, both online and via the telephone. BIBA is the voice of the industry advising members, the regulators, consumer bodies and other stakeholders on key insurance issues.

To find your nearest BIBA broker visit the 'Find a Broker' section of the BIBA website, www.biba.org.uk or call BIBA's Find a Broker service on 0870 950 1790.

ABOUT MACTAVISH:

Mactavish

Mactavish is the UK's leading expert on insurance governance. The business specialises in the analysis of commercial risk, coverage analysis, insurance policy reliability, disclosure, placement procedures and conduct, and insurance governance standards. Mactavish is expert on the implications of the Insurance Act 2015, contributing heavily to the law reform process. We publish widely acclaimed research into the corporate insurance landscape and work with buyers, brokers and insurers to deliver improved insurance solutions.

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The company is unique in its focus on establishing standards across the insurance industry which will be fair and work for all parties.

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A member of our technical team will be delighted to talk you through any of the issues we have mentioned here or any other concerns you may have about your insurance programme.

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