THE INSURANCE ACT 2015

What is the Insurance Act 2015?

On 12th August 2016, the Insurance Act 2015 (the Act), comes in to force and will affect every business insurance policy placed, renewed or amended after this date. The Act is the result of a Law Commission report produced in 2014 which highlighted failings in the existing laws of the Marine Insurance Act 1906 currently governing the insurance market. Having revealed that the existing laws are not in line with modern day best practices, this reform was deemed essential to create a simpler and fairer position for all.

As you would expect, this is a detailed piece of legislation. We have attempted in this document to drill down to what we consider to be the key aspects of the Act and how it directly affects you, our customers/business colleagues, regardless if you are acting for the policyholder or are the policyholder.

The Act does make some fundamental changes to the insurance process and these are generally viewed as being to the advantage of the policyholder. However, the key factors materially affecting us all in terms of the provision of information relative to the risk being insured have not changed.

If you want to read the Act in full, you can do this by visiting **www.legislation.gov.uk**.

What is the ultimate aim of the Act?

The two main aims are to:

1. Introduce greater clarity around what information is provided to insurers from the policyholder/their representatives/agents.
2. Create a fairer position should the insurer find themselves in a position that they have not been provided with the necessary information they need to correctly assess/ underwrite the risk.

The result should be that the Act will help to make sure that all parties clearly understand what each needs to know and what will happen in the event of a claim.

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Information Provision – "Fair Presentation of Risk"

The existing obligations of good faith and ensuring accuracy of material information both remain, but the Act does specify what policyholders/their representatives/agents must do in order to fulfil their part of the equation. There are two key elements to consider:

a) Reasonable Search

This is a new obligation which will vary from one business to another:

1. The policyholder/their representatives/agents must make adequate enquiries within their business to identify and verify information relevant to the risk(s) concerned.
2. These must include all relevant knowledge of the "senior management" of the business and those involved in buying the insurance (including the insurance broker).
3. Reasonable enquiries must also be made of any third parties involved with the business, including external consultants, contractors and anyone insured by the policy.

b) Clear & Accessible

This relates to presentation of risk information:

1. This addresses the clarity of presentation and how insurers are able to assess the risk from the information provided to them. Data dumping of large amounts of information without signposting is unacceptable.
2. There is also an additional requirement to adequately highlight unusual activities and/or known areas of concern that could affect the risk.

Aquilla Comment

We believe that our clients and agents understand the importance of providing quality information at the placement of a new risk and at each renewal, but also at any time there is a change that could affect the risk in between renewals.

However, it makes very good business sense to take this opportunity to review your processes as well as to make sure it is understood by those who are involved with insurance matters that any material changes to the risks on an ongoing basis are notified when the change actually happens.

A mantra you could adopt is "if you are in any doubt, it is best you let us/your broker/insurer know of any material change".

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Remedies

This is where there has been a major shift from the existing approach by insurers following a claim. Currently, when there is a claim (or before, if a presentation is discovered to be inadequate by the insurer), the insurer can void the policy and can refuse to pay the claim, even if the failure of the policyholder did not materially/directly have an influence on the claim, e.g. not undertaking weekly inspections at a vacant property and the property is destroyed as a result of a nearby building exploding. In this scenario, insurers will currently not pay the claim as the requirement to visit has been breached.

Under the new rules, if the breach of any insurer Requirement/ Warranty did not materially have an effect on the claim occurring, the insurer will no longer be able to refuse to pay the claim.

Furthermore, the insurer will now have a series of responses to consider, based on two initial key criteria:

1. Deliberate/Reckless – if the policyholder/agent is seen to be such, the insurer will still be able to avoid the policy, refuse to pay all claims and retain the premiums paid.
2. Not deliberate/Reckless – insurers will now apply proportionate remedies.

What does Proportionate mean?

There are four key scenarios:

1. The insurer must consider what they would have done had they known the complete position.
2. If the insurer would not have accepted the risk at all then they may avoid the policy and refuse to pay all claims, but must return the premiums paid.
3. If the insurer would have underwritten the policy, but on different terms, e.g. a higher excess, then those changed terms will apply retrospectively.
4. If the insurer would have charged a higher premium, then the claim settlement will be reduced proportionately.

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Fraudulent Claims

As is currently the position, if a fraudulent claim is made, the insurer:

1. Is not liable for the claim and may recover any payments made, and
2. May cancel the policy with effect from the date of the fraudulent act and keep the premiums paid, but
3. Will remain "on cover" for the period before the fraudulent act.

Aquilla Comment

Overall, this is a much better approach in the event an insurer has not received all the information they should otherwise have reasonably expected. How this eventually pans out in reality, we can only wait and see, however, the intention to offer a fairer set of solutions is a very welcome step.

Contracting Out

Insurers will be able to Contract Out in full or in part of the new law and this situation will mainly occur if the insurers wish to apply more stringent (or "disadvantageous", as they are classified in the Act), terms than those available under the Act.

For this to be effective, the insurer's position must be brought to the attention to the policyholder or their representatives in a way that satisfies the transparency requirements of the Act. In such circumstances, insurers cannot Contract Out of the abolition of the basis of contract clauses and cannot recreate a clause with the same effect.

In order to be effective, any insurer intending to Contract Out must:

1. Take sufficient steps to draw the changed/disadvantageous terms to the policyholder's/their representative's attention.
2. This must be done before the contract is entered into and the variation of the contract is agreed.
3. The changed/disadvantageous terms must be clear and unambiguous as to its effect.

Aquilla Comment

Some insurers are already intending on Contracting Out of certain parts of the Act and we would make our clients aware of the particular stance being taken.

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The Way Forward

Even if you consider that you/your clients have a sound understanding of what is required in terms of correctly presenting your/your clients' risks to the insurers, we strongly recommend:

1. You should immediately take this opportunity to review the risk information already provided (construction, occupation, refurbishments, works, security etc.), to ensure that there are no misunderstandings of the risks insured by the insurer.
2. You should review how and whether or not you keep Aquilla/ your insurance broker updated of material changes preferably as and when they occur.
3. You must satisfy yourselves that your personnel dealing with insurance matters have the right experience and understanding of what is required of them and acknowledge the responsibility that is being taken on by them.

Aquilla Comment

It should be assumed that even if a client has had their risks insured with the same insurer for many years, the insurer's Underwriter may very well require/seek an update/clarification of the information they already have. This is more likely to affect portfolios of properties where, perhaps, a view may have been taken in respect of certain properties. Clients are best advised to commence their review as soon as possible and give themselves plenty of time before the renewal of their policy(s) in order to avoid last minute panics and so that a thorough a review as possible is undertaken.

Should you wish to discuss this in more detail either in respect of the Act or how this specifically relates to your business placed through Aquilla, please do not hesitate to speak to myself or the Director at Aquilla you usually work with.

If you only remember one thing, may I perhaps suggest the following:

"If there is anything material you know in relation to a new risk or you are aware of a material change to an existing risk, let us/your broker/insurer know. If there is any doubt as to whether we should be told or not, tell us and let us assist you in that decision making".

We hope that you find this is helpful and makes the position clear. However, if you would like to learn more, you may find the following links useful.

http://www.blmlaw.com/images/uploaded/File/497.05.2016_TFC_Reform_of_Commercial_Insurance_Law_Guide_FINAL-DIGITAL.pdf

http://www.dacbeachcroft.com/publications/publications/insurance-act-2015-on-the-statute-books-today-february-2015

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