

Preparation for Fair Presentation under The Insurance Act 2015

The Insurance Act 2015 comes into effect on 12 August 2016. The purpose is to update the law which is now over 100 years old in order to reflect the way that the insurance market has changed over this time and to achieve a fair balance between insurers and their commercial ("non-consumer") customers.

The Act concerns the following areas:

- Duty of fair presentation
- Knowledge of the Insured and Insurer
- Remedies for breach of duty of fair presentation
- Warranties and other terms
- Remedies for fraudulent claims

In this communication we are concerned with fair presentation, what constitutes knowledge and remedies for the breach of the duty.

Until the Act takes effect the position is that an insured must disclose every material circumstance (i.e. every circumstance that would affect the underwriting decisions of a prudent insurer) known to them before the conclusion of the contract. This will be replaced by a duty to make a fair presentation of the risk which must disclose:

- every material circumstance that the insured knows or ought to know; or
- sufficient information to put the prudent insurer on enquiry; and it must be
- made in a "reasonably clear and accessible" manner; and
- the facts disclosed must be "substantially" correct and the representations as to expectation or belief are made in good faith

There is no requirement to disclose anything that:

- diminishes the risk, unless the insurer asks
- is known or ought to be known by the insurer
- is information that is waived by the insurer
- is something that the insurer is presumed to know.

Knowledge of the insured is differentiated depending on whether the insured is an individual or otherwise (e.g. companies and organisations).

For individuals: knowledge includes what is known to the individual and anyone who is responsible for the insurance.

For organisations: knowledge is the information known to anyone who is part of the "senior management"¹ (i.e. key decision makers) and anyone who is responsible for the insurance.

In both cases the insured is deemed to know what should reasonably have been revealed by a reasonable search² of information available to the insured including information held within their organisation or by other parties (e.g. their insurance broker).

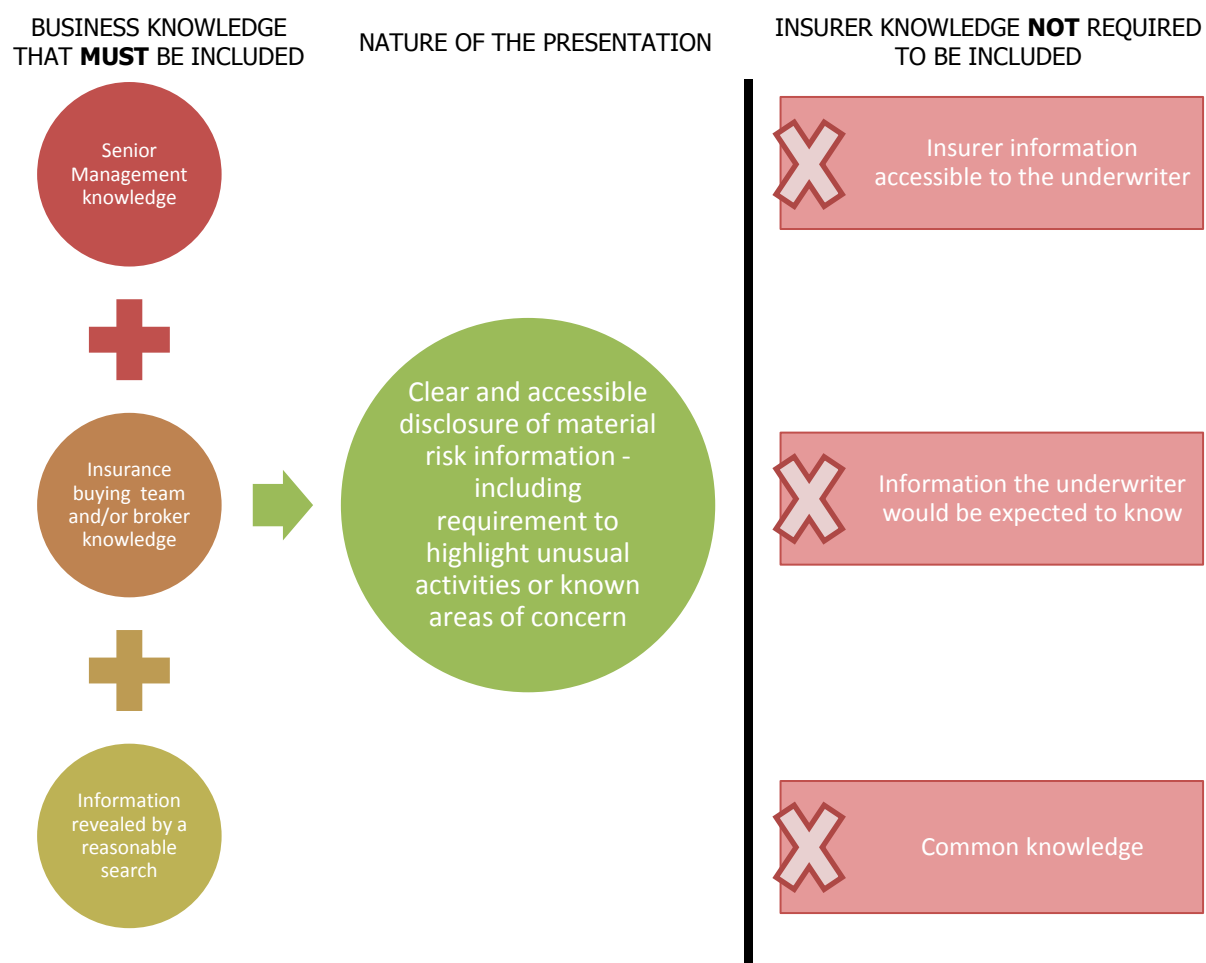
¹ Individuals who play significant roles in the making of decisions about how the business activities are managed or organised which may include (but not necessarily limited to) directors; partners, company accountant or financial controller; persons with a controlling influence such as majority shareholders with control over decisions even if not directors; staff managers; process and production managers; health and safety officers; fleet managers.

² What constitutes a reasonable search will depend on the circumstances of each case and be determined by the size and complexity of the business but could include the need to ask questions of people both inside and outside of the business.

Knowledge of the insurer would generally be only of those involved in the process of agreeing to take the risk and deciding upon terms and only where information has been passed to or is readily available to those individuals.

If there has been a breach of the duty of fair presentation insurers would have to show that they would not have entered into the contract or would have done so only on different terms. The remedy would then be proportionate to the circumstances that would have been applicable had the breach not occurred, unless this was deliberate or reckless in which case the insurer can avoid the policy and keep the premiums paid. The insurer must prove that the breach was either deliberate or reckless in order to take that action.

FAIR PRESENTATION: WHAT IT INCLUDES



Source: BIBA and Mactavish Group

Contracting out of the Act

The Act allows for insurers to “contract out” of all or part of the Act (other than a total ban on “basis of contract clauses”³) and we will monitor insurers’ intentions in this respect and whilst we expect that any such action to be relatively uncommon there will certainly be cases where this happens to a greater or lesser extent. Some insurers have indicated that they will (or have already) adopted the principles of the Act early and policy wordings may be changed or interpreted along the lines required regardless of the contract wording which would generally be in an insured’s favour. Where any insurer contracts out of part of the Act it must be clear in drawing an insured’s attention to any resultant unfavourable feature.

³ Some proposal forms and policies currently include these, effectively turning representations made and answers to questions into warranties allowing insurers to avoid claims if statements made are inaccurate, even if the statement is minor or immaterial



Your Action Required



Much of what the new Act does is to be more specific to clarify existing duties, or to adapt them for the realities of 21st century business. It is not necessary to scrap current practices and start from scratch as this is clearly impractical – but there will be changes required so that the systems currently used to prepare material for market presentation meet the new standard.

Areas that you should consider in preparation might 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 (property damage and business interruption, public liability, professional indemnity, 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. directors and officers liability, personal accident, 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 you have considered the answers to these key questions you will be in a position to decide what needs to be done to update your procedures in preparation for your renewal under the new law.

As your broker we will assist in any way that we can to help you decide what changes you need to make, if any.

For additional information we strongly recommend that you [view this short video](#).

Notice: This communication is a summary of the change in law and nothing contained in it constitutes legal advice or specific advice in relation to any particular circumstances.