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CIEEM Insurance Services
Administered by the MFL Affinity division of McParland Finn Ltd

The Insurance Act 2015: What you need to know

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The Act amends the law in relation to insurance contracts entered into or renewed on or after 12th August 2016, as well as to any variations to existing policies after that date.

The key areas that you need to be aware of are as follows:

- The requirement for a "fair presentation of the risk" to insurers at the proposal stage
- Changes in the law on policy warranties, mainly affecting claims handling by insurers

There are other provisions in the Act, but we do not propose to deal with those here.

The Duty of "Fair Presentation"

Under current insurance law, you have a legal **duty to disclose** to insurers **all material information relating to the insurable risk** – whether required by a proposal form or otherwise – that may influence the judgement of insurers in determining whether or not to provide you with insurance and, if so, on what terms.

The Insurance Act 2015 replaces the duty of disclosure with a revised obligation to make **a fair presentation of the risk** to insurers. Your primary duty remains the requirement to disclose everything material that **you know or ought to know**, but the information must be presented in a way which would be **"reasonably clear and accessible" to a prudent insurer.**

Knowledge

Under the Act, you must actively disclose all relevant information known by **you, your senior management and/or your insurance team (including your brokers).** You must also disclose any other information that you, your management or your insurance team do not know, but **ought to know following a reasonable search.** What is reasonable will be determined by the size and complexity of your business and may extend to enquiring of external persons, such as past or present insurance brokers. **It is particularly important not to make assumptions about what you have told existing brokers or insurers. If there is any doubt, you should declare the information.**

You should work with MFL as your brokers to ensure that presentations to insurers are as comprehensive as possible, in order to avoid the negative consequences of breach of the duty of fair presentation.

Insurer Remedies

The Act makes some important changes to the remedies that are available to an insurer in the event of a breach by an insured of their disclosure obligations.

- If the new duty to make a fair presentation is breached, the insurer will generally be able to avoid the contract (and retain the premium) if the non-disclosure is fraudulent or reckless.
- In other cases, a scheme of proportionate remedies will apply, depending on **what the insurer would have done if a fair presentation had been made.** For example, if the insurer can show that it would not have entered into the contract on any terms if it had had full knowledge of the facts, it may still be able to avoid the contract and refuse to pay claims, although it will have to return the premium. If it would have entered into the contract on different terms, those terms may be held to apply (although this does not include terms relating to premium). If the insurer would have charged a higher premium, it would be entitled to reduce any claim in the same proportion that the actual premium bears to the premium the insurer would have charged if a fair presentation had been made.

Warranties

A warranty is a term of an insurance contract which must be complied with exactly, whether or not material to the risk.

Examples of warranties include:

- Confirmation that your sub-consultants hold their own Professional Indemnity Insurance
- Premium payment warranties
- Alarm specification warranties

Under the current law, the remedy for a breach of warranty is that the insurer is discharged from any liability under the policy from the date of the breach, even if the breach of warranty had no causal connection to a loss and the breach can be remedied. For example, a fire claim, which was caused by overheating computer equipment, could be turned down for the breach of a burglar alarm specification warranty.

Under the Insurance Act 2015:

- A breach of warranty will **suspend** rather than discharge the insurer's liability
- The insurer will be liable to pay claims that arise **after the breach has been remedied**
- In certain circumstances, the insurer cannot rely on a breach of warranty **if non-compliance would have not affected the type of loss that has occured** (e.g. the hypothetical fire claim mentioned above would be paid, in spite of the breach of burglar alarm warranty).

"Basis of contract" clauses

Declarations in a proposal form or policy that certain representations made by an insured are warranted to be true and accurate, thereby converting pre-contract representations into warranties, will be abolished. That is indeed good news!

Contracting out

Apart from the "basis of contact" clauses mentioned above, insurers are free to contract out any part of the Act, provided they take sufficient steps to draw an insured's attention to the relevant policy terms, and that their effect is clear and unambiguous. MFL is talking to all insurers with whom it deals to identify any instances where they wish to contract out of the Act. The effect of contracting out may be either positive or negative, depending on the detail of the policy form. We will explain the implications of any such term to our clients in all cases.

We are here to help

Please contact your usual MFL adviser if you wish to discuss the implications of the main provisions of the Insurance Act.

Contact the CIEEM Insurance Services team to discuss your PI arrangements:

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W: www.cieem-insurance.co.uk