The Insurance Act 2015:
An Overview for Businesses

- The Insurance Act came into effect on 12 August 2016 and affects all commercial insurance policies governed by UK law.
- The Act is designed to shift the power imbalance from insurers to businesses.
- The Act introduces a new 'duty of fair presentation', requiring insureds to capture more knowledge from more people in their organisations.

The Insurance Act 2015 replaces the 110-year-old Marine Insurance Act 1906. Many industry insiders are hailing the Insurance Act as the most significant change to UK insurance contract law in more than a century.

The Insurance Act is designed to make it harder for insurers to wriggle out of paying claims. Consultancy group Mactavish estimates that 45 per cent of large or strategically significant commercial insurance claims are disputed. And on average, these disputes take three years to resolve and result in only 60 per cent of the amount claimed.

The Insurance Act 2015 (the Act), a piece of legislation designed to modernise and support Britain's insurance sector, became law on 12th February 2015, and applies to all commercial policies governed by UK law beginning or renewed from 12th August 2016. The Act ushers in a more modern regime for the industry by replacing the 110-year-old Marine Insurance Act which governs contracts between businesses and insurers.

The government believes that updating the regulations will lend transparency to the industry, redress an imbalance in power which sometimes overly favours insurers, and lower the number of legal disputes—resulting in businesses saving an estimated £100 million over the next 10 years due to lower litigation and transaction costs.

The Act is 'principles based' rather than a rigid code, meaning everyone from small to medium-sized enterprises (SMEs) to FTSE 100 employers can apply the new changes. As an employer, the Act ushers in key changes that alter how you buy cover.

What Changes Does the Act Bring?

The Act introduces these four broad changes:

1. **The Duty of Fair Presentation:** The duty of fair presentation replaces the previous duty of disclosure and further specifies whose knowledge needs to be captured for the insurer when applying for cover. The actual Act states, 'Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.' It then specifies that the 'fair presentation of risk' must:

   - Be 'clear and accessible to a prudent insurer', meaning that sending overly brief or huge 'dumps' of data to an insurer when applying for cover is unacceptable.
   - Be 'substantially correct, and […] made in good faith'; and
   - Include 'every material circumstance which the insured knows or ought to know', or failing that, include 'sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

   The Act defines information that the insured 'ought to know' as anything which would be revealed by a reasonable search of available information. This means that the Act will require insureds to make adequate enquiries within their business to identify and verify information relevant to the risks they are trying to insure. These enquiries should capture all relevant knowledge of the business' senior management (those who 'play significant roles' in making management or organisational decisions) and those involved in buying the insurance (including the broker).

   Depending on your organisation, these relevant enquiries could also extend to third parties involved with the business, such as external consultants, contractors and other people insured by the policy. Should an insured fail the duty of fair presentation, insurers have a new system of proportionate remedies that replaces the previous avoidance-only regime. These 'remedies for breach' depend on whether the breach was deliberate or reckless, or not.

   - If the breach was deliberate or reckless, the insurer 'may avoid the contract and refuse all claims' as well as keep the premium. However, it falls on the insurer to prove that the breach was deliberate or reckless.
   - If the breach was not deliberate or reckless, the insurer has several options:
     - If the insurer would not have written the policy based on the uncovered information, it may avoid the policy but must return the premium.
     - If the insurer would have charged a higher premium based on the uncovered information, it may proportionately reduce claim payments.
     - If the insurer would have written the policy but on different terms based on the uncovered information, the contract is to be treated as if it had been entered into on those terms.

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2. **Warranties and Conditions:** The Act abolishes **'basis of the contract'** clauses, which automatically transform pre- contractual information supplied to insurers into a warranty. Under the Marine Insurance Act, any change in the information supplied to insurers (even if trivial or immaterial) would lead to termination of the policy. Abolishing these clauses helps shift more power back to the insured.

   In the event that the insured does **breach a warranty,** the cover is merely suspended rather than automatically terminated under the Marine Insurance Act. The Insurance Act allows the insured to remedy the breach, and then cover will be automatically reinstated. However, not all breaches can be remedied, so policyholders should still make every effort to comply. The British Insurance Brokers' Association uses the example that, if there is a warranty that a building is made of bricks and mortar when it is actually built of wood, then that breach can never be remedied, and the policy would be effectively suspended for the rest of the policy term (i.e. terminated).

   Lastly, the Insurance Act eliminates insurers' ability to avoid a policy for any breach of warranty even when that breach was not relevant to the actual loss. For example, if an insured breached a warranty in their policy that they must have working fire alarms but suffered a flood, the insurer would not be able to avoid paying the flood claim just because the insured did not install fire alarms. This is referred to as **'terms not relevant to the actual loss'**.

3. **Fraudulent Claims:** The Act clarifies and harmonises insurers' remedies in the event of fraudulent claims. Under the Act, insurers do not need to pay fraudulent claims (even if there are honest elements to it) but are still liable for losses occurring before the fraudulent act. Insurers have the option of terminating the policy at the time when the fraudulent act was committed and may recoup anything paid out after the fraudulent act.

4. **Contracting Out:** Think of the Insurance Act as a 'default regime'—insurers must follow it, but they are allowed to contract out of requirements (except for the abolition of the basis of contract clauses) provided that any alternative terms (or, as the Act classifies them, 'disadvantageous terms') meet certain transparency requirements:

   - Insurers must take sufficient steps to draw the disadvantageous terms to the insured's attention before the contract is entered into or the variation agreed.
   - Disadvantageous terms must be clear and unambiguous.

How Can I Comply?

Although the new Act may seem complex, it only requires you to make small changes to your insurance-buying process. It does place more responsibility on your shoulders, but in return, the Act protects your business and ensures your cover is as effective as possible. The Act can be easily applied provided you take certain measures, such as the following:

- Investigate whether there is anything special or unique about the risk your business faces that should be clearly indicated to insurers.
- Understand who counts as 'senior management' and those involved in buying insurance in your business.
- Assess your data-gathering process—does it need to be more in-depth to ensure insurers have all the necessary information to write your policy?
- Determine whom in your business needs to be consulted as part of a reasonable search for information related to the insurance you purchase as a business.
- Ensure that you consult with any third parties or individuals in your business that may have material information that may need to be shared with insurers (external consultants, contractors, etc).
- Establish a process for documenting that you undertook a reasonable search for information.
- Leave more time for renewing your insurance, especially for gathering the necessary data for insurers, as now you will likely need more data, presented in a clear and accessible manner.
- Research your business risks so you have a comprehensive understanding of what data insurers may need.
- Check with kdh Insurance Brokers to see whether any 'contracting out' of the Act applies to your policy.
- Discuss with kdh Insurance Brokers whether your policy should include the sample Insurance Act clause from the Association of Insurance and Risk Managers (Airmic), which grants extra protection to policyholders, located here: **www.airmic.com/news/insurance-act-clause.**

For more information on purchasing insurance compliantly and successfully, contact kdh Insurance Brokers today.

We at kdh Insurance Brokers are committed to raising industry standards, promoting transparency, and verifying that our clients have the cover they need for their businesses to thrive. We will continue working hard to ensure that the Insurance Act has nothing but a positive effect on your insurance.