INSURANCE ACT 2015 - FREQUENTLY ASKED QUESTIONS

The Insurance Act 2015 ("the Act") will come into force on 12th August 2016, 18 months after it received Royal Assent, and has already been the subject of a Griffin bulletin.

Griffin will be delivering presentations to the Membership in the first quarter of next year to explain the changes and their practical impact on brokers.

The period before the Act comes into force is intended to give businesses the opportunity to prepare for the changes which it will bring in. Griffin has recently issued a Circular to Members identifying some areas where there may be early activity that Members should be alert to. Griffin has also advised a number of Members on similar issues relating to the Act and we have collated them as a series of questions and answers in this bulletin.

1. DO THE CHANGES BROUGHT IN BY THE ACT APPLY TO ALL OF OUR BUSINESS?

Some of the changes only apply to Business Insureds, but others apply to all insureds.

The new disclosure rules will only apply to Business Insureds. A Business Insured is any insured other than a Consumer. The Act defines a Consumer as *"an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession".*

The prohibition of Basis of Contract clauses will now apply to all insureds, having already been prohibited for Consumers under the Consumer Insurance (Disclosure and Representations) Act 2012.

All of the other provisions of the Act apply to both Consumer and Business Insureds, although insurers can contract out of most of them when dealing with Business Insureds. They cannot contract out with Consumers, and they cannot contract out of the prohibition of Basis of Contract clauses at all.

2. DOES THE ACT APPLY TO REINSURANCE CONTRACTS AS WELL AS INSURANCE CONTRACTS?

Yes, the Act applies to both insurance and reinsurance contracts.

3. WILL THE ACT AFFECT POLICIES WHICH ARE ALREADY IN PLACE WHEN IT COMES INTO FORCE ON 12TH AUGUST 2016?

Most of the Act will only apply to contracts of insurance entered into after 12th August 2016. However, Part 2 which deals with disclosure obligations of Business Insureds, will also apply to any variations agreed after 12th August 2016 to existing contracts of insurance.

4. IF THE NEW DISCLOSURE RULES FOR BUSINESS INSUREDS APPLY TO VARIATIONS ON EXISTING CONTRACTS AS AT 12TH AUGUST 2016, SHOULD WE BE ADVISING BUSINESS INSUREDS NOW OF THE CHANGING DISCLOSURE OBLIGATIONS IN CASE THERE IS A VARIATION TO THEIR CONTRACT?

As matters stand Business Insureds should receive a standard warning of the duty to disclose all material facts in relation to the risk at placement. That warning should advise them that the duty will arise again in the event of a variation to the contract. If there is such a variation to an existing contract on or after 12th August 2016 we would recommend that the broker, **at that point**, advises the Business Insured of the new disclosure requirements applicable to the contract.

5. WILL THE ACT APPLY WHERE WE PLACE BUSINESS FOR AN OVERSEAS (RE)INSURED BUT THE CONTRACT IS SUBJECT TO THE LAWS OF ENGLAND AND WALES?

Yes. The Act applies to all insurance and reinsurance policies which are governed by the laws of England and Wales, regardless of where the (re)insured is based.

6. WHAT ABOUT WHERE WE PLACE BUSINESS FOR AN OVERSEAS (RE)INSURED AND THE CONTRACT IS SUBJECT TO THE LAWS OF A FOREIGN JURISDICTION?

If the policy is governed by the laws of some other jurisdiction the Act will be irrelevant, since it only applies to policies governed by the laws of England and Wales.

7. HOW WILL THE ACT APPLY TO COVERHOLDER ARRANGEMENTS?

A Binding Authority Agreement is a contract for insurance rather than a contract of insurance and so the Act will not apply to it. Where declarations are made under these agreements on or after 12 August 2016, and are governed by the laws of England and Wales, the Act will apply. The new disclosure rules will apply to variations made on or after 12 August 2016 by Business Insureds to existing declarations.

8. HOW EXTENSIVE DOES THE SEARCH FOR INFORMATION HAVE TO BE TO SATISFY THE REQUIREMENT TO GIVE A 'FAIR PRESENTATION'?

The new disclosure rules require Business Insureds to:

- disclose every material circumstance which the insured knows or ought to know; or,
- failing that, to disclose sufficient information to put a prudent insurer on notice that it needs to make further enquiries.

Where the insured is an organisation, the knowledge of its senior management, or those responsible for arranging its insurance, will be deemed to be the knowledge of the insured. Where the insured is an individual businessman (which is distinct from a Consumer) his knowledge will be deemed to be what is known by him and what is known to those who are responsible for arranging the insurance (which can include an external

risk manager or a broker). In each case the Business Insured needs to be advised to disclose information which should ***"reasonably have been revealed by a reasonable search of information available to the insured"*** and that includes information held by the insured's agents (e.g. the broker). The Business Insured will not be required to disclose any information which is already in the insurer's knowledge or in the public domain.

Particular issues may arise with reinsurance, (particularly with captives and fronting reinsurers), not least that a reinsured may need to extend its search beyond its own organisation to comply with the new duty. In addition, if an insured discloses sufficient information to put a prudent insurer on notice to make further enquiries but the insurer does not make those enquiries, it will be unable to avoid the underlying policy. However, its reinsurers could argue that the reinsured was in breach of the duty to make a fair presentation since it failed to make appropriate enquiries of the underlying insured.

9. HOW CAN WE BE SURE THAT THE SEARCH WHICH HAS BEEN CARRIED OUT WOULD BE CONSIDERED 'REASONABLE'?

There may be some uncertainty in this area, at least at the outset, and therefore the potential for disputes. It will be important for there to be dialogue with insurers to establish, as far as possible, what information they require. Guidance can also be sought as to how they would like the information presented together with confirmation as to any information which they already hold concerning a risk. There will also be a far greater onus on record keeping on the part of the broker and on clients/insureds, since both will need to be able to evidence the searches which have been undertaken. In particular a broker involved in the renewal of business year on year may be more familiar with elements of the risk than some personnel within the client. That information will need to be readily available when collating the presentation.

10. WHAT IS THE POSITION WHERE A BROKER BECOMES AWARE OF CONFIDENTIAL INFORMATION CONCERNING A RISK THROUGH ANOTHER BUSINESS RELATIONSHIP. IS THIS DEEMED TO BE KNOWLEDGE OF THE INSURED AND DOES THE BROKER HAVE TO DISCLOSE IT?

No. An insured will not be required to include in the presentation confidential information which its broker has acquired through a business relationship with someone who is not connected with the contract of insurance. This means that a broker is not under a duty to disclose information which it has learned as a result of placing an unconnected risk.

Where a broker is involved in both the insurance and reinsurance of a risk the contracts would be considered connected. Information which the broker knows through placing the insurance may need to be disclosed when placing the reinsurance. This may cause problems for larger brokers, who may not be aware that different teams are placing both the insurance and reinsurance of the same risk.

11. HOW WILL THE ACT APPLY TO PREMIUM PAYMENT WARRANTIES AND WILL IT WATER DOWN THEIR IMPACT?

Where a Premium Payment Warranty appears within an insurance contract, cover will be suspended for any period where the insured is in breach (unless the insurer waives the breach). Although suspension rather than termination may be considered a watering down of the previous position, it will be a brave insured who will be happy to remain without cover, and risk a claim during that period of suspension not being paid, whilst premium remains outstanding.

12. ARE INSURERS LIKELY TO CONTRACT OUT OF THE PROVISIONS WHEN DEALING WITH BUSINESS INSUREDS SINCE THEY ARE ENTITLED TO DO SO?

It is unclear what approach insurers will take although given that the Market is soft, it may be unlikely that insurers will contract out. If they do contract out, will they do so across the board, on a contract by contract basis, or only in respect of certain provisions within the Act? Some insurers may choose to contract out to avoid uncertainty when the Act first comes into force, and before any of its provisions have been tested in the Courts, but this may be commercially unattractive since the Act largely favours insureds. These are options open to them, provided, of course, that the insured agrees. Brokers need to exercise caution in seeking such agreement since contracting out is unlikely to be in the best interests of the insured.

Managers: Griffin Managers
Regis House
45 King William Street
London EC4R 9AN
Telephone 020 7407 3588
Facsimile 020 7403 3942
Email griffin@triley.co.uk

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