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Insurance Act 2015

A guide to fair presentation

Guide 2016

The following content was prepared through a series of roundtable discussions and interviews with insureds and Airmic sponsors. Airmic would particularly like to thank the following organisations for their contribution: Ace, AIG, Allianz, Aviva, Axa Corporate Solutions, Herbert Smith Freehills, Mactavish, Marsh, Willis, TBIAS, XL Catlin and Zurich.

The content of this paper does not constitute legal advice. Airmic members are advised to consult their brokers, insurers and lawyers should they require any advice on any matter that is the subject of this briefing.

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Introduction

The Insurance Act is the most fundamental change to the law of England and Wales, Scotland and Northern Ireland governing commercial insurance and reinsurance since the Marine Insurance Act 1906. The Act, which will govern polices placed, amended or renewed after 12th August 2016, makes amendments to the Marine Insurance Act 1906 to reflect modern commercial practice. The Act aims to address the imbalance between insurer and insured rights by making significant changes to several areas, including the following:

- The duty of disclosure and the remedies available to the insurer in the event of material non-disclosure and misrepresentation
- The interpretation of warranties and terms not relevant to the loss
- The abolition of Basis of Contract clauses.

Risk and insurance managers are strongly in favour of the provisions of the Act. In advance of its preparation, 97% of Airmic members advised that they fully supported the need for legal reform of the Marine Insurance Act 1906 (*Airmic Duty of Disclosure and Misrepresentation survey, 2012*), and 85% of Airmic members advised that the new disclosure requirements and insurer remedies are good news for policy holders (*Airmic Insurance Act 2015 - Are you ready? survey, 2015*).

Although the Act intends to move insurance law to a position that is more favourable to the insured, it is critical that policyholders fully understand its implications. Insureds must begin considering and preparing for the new 'duty of fair presentation', which provides clarity to the type of information a policyholder must provide to the insurer before entering into an insurance contract.

This paper aims to outline the challenges of fair presentation and identify steps that Airmic members can take to prepare for August 2016.

Insurance managers must take control of understanding the duty of fair presentation

At the time of writing, the primary focus of the market is on ensuring that policy wordings comply with the provisions of the Act. Insurers and brokers are beginning to release guidance on how the process of disclosure will take place. However, over 50% of Airmic members report that they have received no information on the duty of fair presentation from their broker or insurer (*Airmic Insurance Act 2015 - Are you ready? survey, 2015*).

Airmic recommends that members are proactive in taking control of the review of their insurance disclosure processes from the outset and that they do not wait for their brokers or insurers to release information.

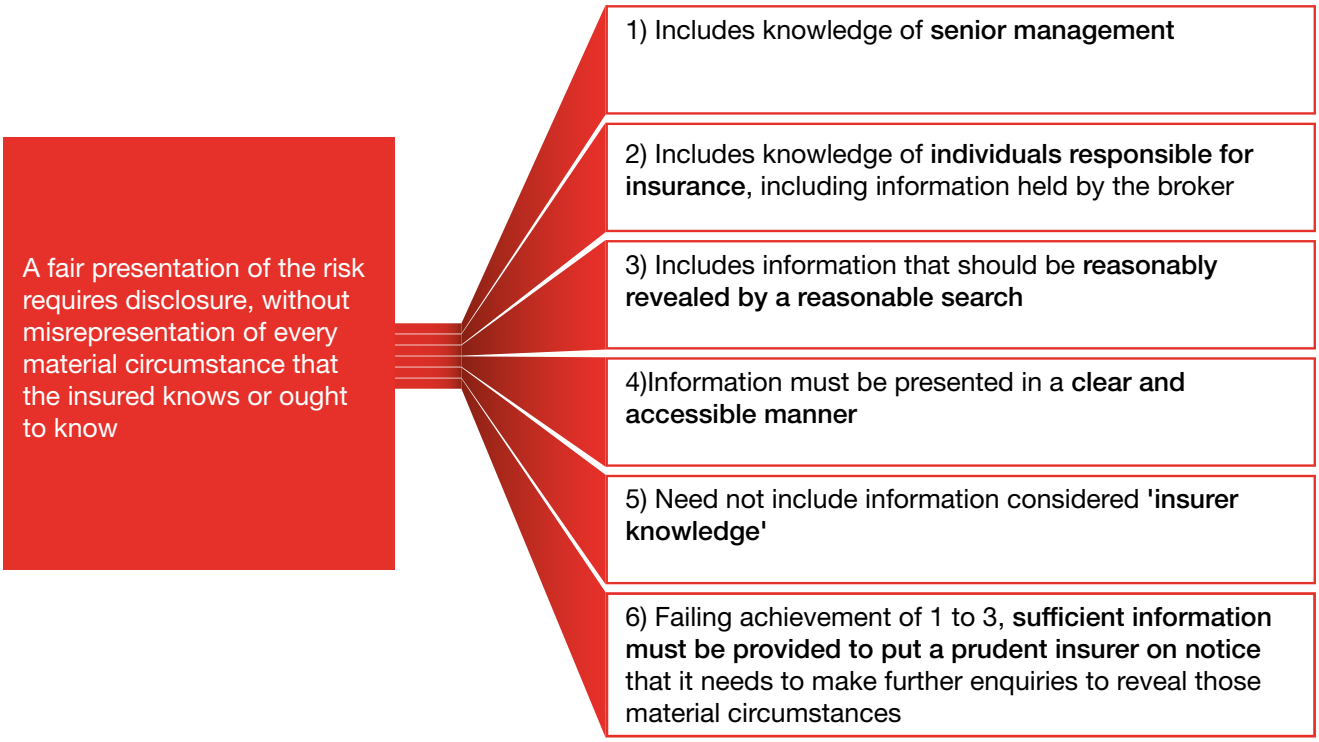
Group Insurance Manager, Support services firm: '*There appears to be a wide range of knowledge and information currently available on the provisions of the new Act. However, in the absence of any proper detail on how the new Act will be applied in practice, there may be some misunderstanding and misconception amongst certain insureds that there is no need to take action before August 2016, if at all. The repercussions that ensue may be significant.*'

Structure of the paper

This paper builds on two Airmic briefings – The Insurance Act 2015: what members need to know (which can be found in Appendix 1 of this guide) and The Insurance Act 2015: Taking Advantage of the Insurance Act's benefits now. Here, Airmic aims to break down the duty of fair presentation and suggest how members can review their own internal processes when considering their own compliance with this duty.

Diagram 1 breaks down fair presentation into six components highlighted by Airmic members as particular areas of concern. This paper looks at each component in turn and suggests key issues that Airmic members should consider when reviewing their own compliance with the duty of fair presentation.

Diagram 1:
Six key elements of fair presentation



Section 1: Fair presentation: An Overview

Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.

Section 3 (1), Insurance Act 2015

The Insurance Act 2015 provides a more structured framework for the information that a commercial insured must provide to an insurer before it enters into or renews an insurance contract or when a contract is varied or amended. In particular, the duty of fair presentation is more specific on whose knowledge must be disclosed.

Insureds should consider **what** information they need to disclose, **who** holds this information and **how** they will capture it.

Bruce Hepburn, CEO at Mactavish: *The overriding objective of the Insurance Act is to professionalise insurance placement. The Act compels businesses to understand their risk in more detail and shifts insurer focus towards clarifying and defining coverage.*

Airmic members will get much greater protection against insurers avoiding claims, but only if they improve their practices. Airmic members need to start by asking themselves what is a reasonable investigation into their own business' risk – not what their peers are doing, what the broker or insurer requires, or what off the shelf best practice looks like.

For Airmic members this challenge also needs to be seen as a massive opportunity. It explicitly places the risk manager at the centre of a company's web of information. This is a once-in-a-century change in the legal basis of the role, and needs to be grasped with both hands.

Airmic members should seek to agree a disclosure process and timeline with insurers and brokers

Airmic has previously recommended that members begin their placement / renewal process 180 days before policy inception. In preparation for the new Act, it is advisable for members to commence even earlier. Policyholders are encouraged to meet their insurers as soon as possible to discuss their information requirements, a process of reasonable search and agree a timeline for disclosure. Policyholders will then be in a position to review their internal collection processes against the requirements of the Act and the requests of insurers.

Appendix 2 is a suggested insurance placement timeline from the Airmic guide Achieving insurance efficacy, with additional considerations included to reflect the new duties of the Act.

Director of Insurance, Telecoms: *'We recognise that getting ready for the Act is a huge task and are effectively using our renewal before August 2016 as a 'dummy run'. We have already engaged our insurers and brokers, and have developed a tripartite relationship where we can put a fresh pair of eyes on our current disclosure process and conclude which elements satisfy the duty of fair presentation and what needs to change.'*

Insurers are in support of the Act

The research for this paper included interviewing a large number of the insurers used most frequently by our members. Overall, there is strong support for the Act as an increase in direct meetings between the insurer and policyholder should lead to a better understating of the organisation's risks and more relevant cover. However, insurers do encourage members to get in touch at least six months before renewal to allow sufficient time to discuss and carry out an appropriate disclosure process.

All insurers interviewed are taking action now to ensure their own compliance with the new requirements. Insurers are revising their policy wordings and updating protocols for reviewing and responding to disclosure submissions.

The duty applies to all commercial insurance policies governed by English and Welsh, Scottish and Northern Irish law. Members who utilise a captive should consider the implications, as both inward and outward captive placements will need to comply with the new law so that risk is transferred effectively to the insurance market. There must be complete and transparent communication of knowledge between the insured, captive and insurer.

Test of materiality

The duty of fair presentation requires the insured to disclose every material circumstance that it knows or ought to know. It is worth highlighting that the test of materiality remains unchanged from the Marine Insurance Act 1906: '*It would influence the judgement of a prudent insurer in determining whether to take the risk, and if so, on what terms.*'

Immediate actions for Airmic members

1. **Identify which polices are governed by English and Welsh, Scottish and Northern Irish Law**, particularly those polices placed overseas.
2. **Contact insurers and brokers more than six months ahead of renewal.**
   Discuss the duty of fair presentation and how this relates to your policies.
3. **Establish the elements of the disclosure process which need to be enhanced or amended to comply with the duty of fair presentation.**
   Break the process into 'compliant', 'compliant but could be improved' and 'must change' to focus attention appropriately.
4. **Raise awareness of the Act across the business.**
   Organisations need to be aware of the increased duties of disclosure.
5. **Be cautious when making amendments to policies after August 2016.**
   Even if polices are placed before August 2016, any amendments made after August 2016 must comply with the duty of fair presentation.

Section 1:1 Fair presentation: Actual knowledge – the knowledge of senior management

An insured who is not an individual knows only what is known to one or more of the individuals who are - (a) Part of the insured's senior management'

Section 4(3)(a), Insurance Act 2015

The Insurance Act 2015 specifies that the insured must disclose material information known by senior management to the insurer. This includes 'blind-eye knowledge' which is suspected by the individual. The Act describes this as 'those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised'. Although the Act's guidance notes advise that this definition is to be construed relatively narrowly, the Act applies to the full range of commercial insureds, and provides no distinctions based on organisational size; therefore the meaning of this duty in practice is a concern for Airmic members. At the time of writing, 49% of members reported that they were yet to identify the individuals within the organisation who fit the definition of 'senior management'.

The challenge of capturing knowledge of 'senior managers' is two-fold:

1. For larger policyholders, senior management potentially includes a large number of individuals in many different territories.

   Members should, as a priority, seek to agree a specific and brief list of 'senior management knowledge holders' with their brokers and insurers as a priority, and therefore restrict the individuals whose actual knowledge must be disclosed to the insurer. Members should take significant care in preparing such a list, and shouldn't simply use a suggested list provided by HR or their insurer.

2. Senior management has generally been accepted to include management aware of strategic risk as well as 'the Board'. However raising insurance onto the Board agenda has historically been a challenge for insurance managers. Airmic's recent work with the Institute of Directors on Critical Business Insurance' aims to tackle this challenge by identifying six reasons why the Boards should not ignore insurance.

Airmic members can engage their Board in a variety of ways, e.g. developing a successful working relationship with the CFO or in-house legal team.

Head of Insurance, Transport: *We have asked the Board to sign off a list of 'senior management' who will be responsible for making representations on behalf of the Board. The Board's authority and direction then acts as a successful driver for the individual in question to complete this duty.'*

Paul Lowin, Regional Commercial Manager at AXA Corporate Solutions: *'It is impossible to provide generic advice regarding subjects such as what constitutes 'senior management'. Each organisation has its own organisational nuances and the only way these can be catered for in respect of the design of disclosure processes and requirements is through close tri-partite discussion and knowledge pooling between clients, brokers and insurers. We believe that the willingness to invest time and resource in the discussion process is key to all parties benefiting from the provisions of the Act.*

Group Insurance Director, Property: *'We are agreeing with our lead insurer the level of information that sits within senior management, who is defined as "Senior" within that agreement, who holds the information and how we will obtain it. We have separately agreed the depth of information required during the policy period and where this will be sought from, as we believe this is at a more operational level. We have subsequently diarised input/output meetings with the individuals in the identified positions so that the insurance team can educate them on their duties and they feel comfortable in sharing appropriate knowledge.'*

Six first steps for Airmic members - 'senior management'

1. **Agree with insurers and brokers which positions fall within senior management.** Seek to incorporate into contracts where possible.
2. **Review the corporate structure and identify the highest level of senior management.** Additionally identify any positions with oversight of strategic and operational risk.
3. **Identify both the positions and the individuals that fall within senior management.** Monitor recent and ongoing changes in personnel that affect these positions to ensure relevant information is collected at the initial disclosure and for ongoing notification of material changes.
4. **Begin now.** Senior management input may require collection of information from overseas, which will take longer to collect.
5. **Prepare business unit packs that outline the information required from the business and that will be disclosed.** These can then be signed off by a controller, CFO or head of operations for each area, who effectively holds responsibility for the information disclosed.
6. **Raise awareness and engage individuals immediately, and keep up the momentum.** Attribute the costs of insurance and the costs of covered losses for the business area in question over the last year, to demonstrate the value of insurance.

Section 1:2 Fair presentation: Actual knowledge - the knowledge of individuals responsible for insurance, including the broker

An insured who is not an individual knows only what is known to one or more of the individuals who are – (b) responsible for the insured's insurance'

Section 4(3)(b), Insurance Act 2015

The Insurance Act specifies that the insured must disclose material circumstances known by those individuals who participate '*in the process of procuring the insured's insurance, whether the individual does so as the insured's employee or agent, as an employee of the insured's agent or in any other capacity*'. This includes 'blind-eye knowledge' which is suspected by the individual.

Airmic members report two areas of concern with regards to this duty

1. Airmic members will need to specifically identify those involved in the purchase of insurance for the organisation. Whilst the identity of individuals involved within the insured organisation is normally well established, the Act provides more clarity on the role of the broker, who is treated by the Act in the same way as the insured's own staff. Therefore, the knowledge acquired by individual brokers (both within placement and servicing teams) must be established and disclosed to the insurer.

   Airmic members should take specific action to understand how broker knowledge is captured and recorded, and how it is then communicated to the insurers. Airmic members may wish for all information to be consolidated by a central team within a broker, which they can then review and sign off before submission. Where possible, these instructions should be included in the terms of business agreement and service level agreement.

2. Airmic members have expressed concern about the interpretation of the Act with regard to confidential information. The Act advises that the insured does not have a duty to disclose confidential information known by the insured's agent when that knowledge is acquired through a business relationship with a person who is not connected with the contract of insurance. Here, 'connected with a contract of insurance' is explained to mean persons for whom cover is provided by the contract, or if the contract is one of reinsurance, any persons connected to the underlying contract.

A related concern was raised at an Airmic roundtable considering the implications of fair presentation: how should confidential and market-sensitive information held by the insured be referred to? Participating brokers and insurers suggested that policyholders should reference the existence of any confidential information, and explain how it impacts the risk. This should be sufficient to place the insurer 'on enquiry' (see section 1.6). However, individual members should ensure that they discuss any individual circumstances with their brokers.

Six first steps for Airmic members - 'individuals responsible for insurance'

1. **Prepare a list of who internally and externally is responsible for insurance procurement.**
   As a starting point, consider the risk/insurance team, the procurement team, individuals giving instructions to the broker, the employees who collect risk data, the brokers and other intermediaries, and the actual individual broker or agent of the insured.

2. **Identify both the positions and the individuals who hold these positions.**
   Monitor recent and ongoing changes in personnel that affect these positions to ensure relevant information is collected at the initial disclosure and for ongoing notification of material changes.

3. **Clarify the actual knowledge of the individuals at the broker or any other agent responsible for the insured's insurance, including any independent information collected by the broker.**
   Ensure that there is clear agreement with the broker on who is responsible for capturing, storing and disclosing this information to the insurer.

4. **Request to have oversight of any communication between the broker and insurer.**
   Insist on reviewing and signing off submissions to gain full understanding of the submission and to ensure that no information has been 'diluted'.

5. **Be aware where the broker may have been involved in the organisation's insurance for longer than the insurance team.**
   Discuss with the broker how knowledge gained from previous placements, but that is still relevant, is recorded and disclosed. When changing broker, allow extra time to record the knowledge of the previous broker.

6. **Seek to agree a specific and brief list of individuals who are 'responsible for the insured's insurance' with the broker and insurer, to contain the actual knowledge that must be disclosed.**

Section 1:3 Fair presentation: Information the insured ought to know, reasonably revealed by a reasonable search

Whether an individual or not, an insured ought to know what should reasonably be revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).

Section 4(6), Insurance Act 2015

The Act describes the material information that an insured ought to know as that which *should reasonably be revealed by a reasonable search*. This includes information held:

- within the insured organisation itself
- by persons covered by the insurance, e.g. co-insureds, subcontractors or the supply chain
- by the broking firm used as a whole, not just the individual agent, e.g. information collated in a portfolio generally referring to an industry area
- any other person e.g. other agents, not only those involved in the procurement of insurance.

'Reasonable search' casts the net of what must be disclosed much wider

The concept of reasonable search is the greatest concern for Airmic members. Only 39% of members have mapped out how a reasonable search would be carried out across their organisation (*Airmic Insurance Act 2015 - Are you ready survey? 2015*). The term is intentionally broad to allow application to the entire range of commercial insureds and is consequently open to wider interpretation. David Hertzell, former law commissioner agrees that '*this is an area where case law is likely to eventually play a big role*'.

It is therefore vital that policyholders engage with their brokers and insurers now to clarify and document a common interpretation of reasonable search that is satisfactory for all. Of equal importance, having agreed a process of reasonable search with insurers, the insured must take care to complete the search and evidence it in full to create a thorough and traceable audit trail. Brokers have additionally suggested that they will seek to gain agreement that, where a lead insurer has approved a disclosure process, follow underwriters accept this.

Paul Lewis, Partner at Herbert Smith Freehills: *'Reasonable search should be a key focus for policyholders. Airmic members should think carefully about what a reasonable search looks like for their organisation and look to engage in a dialogue with insurers on this sooner rather than later. Those policyholders who can demonstrate a thorough disclosure process carried out with the Act in mind are more likely to find favour with insurers when it comes to seeking agreement to the scope of particular aspects of the duty of fair presentation.'*

Nigel Bamber, Head Client & Broker Management UK/Ireland at XL Catlin: *'We encourage insurance managers to contact us now, and absolutely before they commence their process of reasonable search. By discussing what information is required, who holds it and how it should be collected we believe that data collection can be more practical and efficient.'*

The Act requires the search to reveal information that would reasonably have been revealed by a reasonable search. This can offer some defence to the insured, for example, where the organisation operates over hundreds of sites over many territories. Insurance managers should discuss this application with their brokers and insurers. However, members should take care to sense check the information revealed, to ensure that all material circumstances that they are aware of are disclosed.

Although the Insurance Act is generally a positive step forwards, the new duty to carry out a reasonable search creates challenges for insureds. As insureds need to have a clear understanding of their responsibilities we expect insurers to work closely with us and our clients to agree clear parameters around the scope of the search that insureds need to conduct".

Siân French, Coverage Consultant and Senior Vice President, FINPRO UK, Marsh Ltd.

Six first steps for Airmic members - 'reasonable search'

1. **Begin now.**
   Sufficient time needs to be given to consider a reasonable search with brokers and insurers, to carry it out and to give insurers time to ask follow-up questions before providing a quote. In advance of carrying out a reasonable search, propose the methodology to the insurer and ask for comment and guidance on both the scope and level of detail of the search.

2. **Request to meet with insurers and brokers to propose a reasonable search method early, and certainly before commencing the search.**
   Propose a process of reasonable search to insurers and consider their feedback and suggestions. Where possible, ask for sign-off that the proposed process fulfils the requirement of 'reasonable search'.

3. **Consider who the policy covers, in terms of both organisations e.g. subsidiaries and individuals e.g. retired directors and officers.**
   Insureds should look to agree with insurers who are the 'knowledgeable persons' with insurers and to agree a formal process for collecting information from them.

4. **Identify all contact points with the broker, across all divisions.**
   Seek clarity and assurance on how all information is collated, stored and disclosed.

5. **Document and evidence the reasonable search.**
   Once agreed, the reasonable search should be carried out in full, and documented. This includes follow-up questions and responses, to create a full audit trail of disclosure

6. **Review any additional IT technology needed for undertaking and evidencing a reasonable search.**
   Consider the benefits of risk management and insurance software. It is worth noting that the implementation time for such software (and all other data collection processes) can be significant.

Section 1:4 Fair presentation: Clear and accessible manner

A fair presentation of the risk is one -
(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer

Section 3(3)(b), Insurance Act 2015

The Act adds an additional duty on the insured, for the benefit of insurers, to present the disclosure in a clear and accessible manner. This duty applies whether a disclosure is made on paper or online. Insurers report a huge variety in terms of content, scope and structure of insurance disclosures. Although 70% of members believe that their disclosure information is presented in a clear and accessible manner, 50% believe that they will need to make changes to the form of their presentations in light of the Act (Airmic Insurance Act 2015 - Are you ready survey? 2015).

The requirement aims to discourage 'data-dumping'

The clear and accessible requirement aims to combat overly brief or cryptic submission and overly large submissions. Data dumping is a practice whereby a policyholder provides a huge amount of information on the basis of avoiding non-disclosure. Brokers have advised that this has traditionally been a problem for reinsurers, but can also occur where insureds seek cover for joint ventures or multiple subsidiaries.

Airmic recommends that policyholders clearly structure, signpost and index their submissions to ensure they are easy to navigate and highlight key information and changes. Large insureds that use data rooms will need to take extra care not to overload these with poorly organised files as this will most likely fail to comply with the clear and accessible provision of the Act.

Charles van Oppen of TBIAS, has prepared "Tips on how to make your insurance presentation 'clear and accessible" (see Appendix 3). Policyholders should consider these features when producing an insurance disclosure pack or submission.

Impact on internal data collection

Policyholders should already be considering how this requirement will impact on their data collection processes and systems for collecting, storing and accessing information. This can be a time consuming and difficult task as information collected from the business is often provided in a form that is not immediately useful to insurers. Policyholders should begin thinking about incorporating any changes to their protocols now, in order to allow time for these to become established before August 2016

Charles van Oppen, Consultant at TBIAS, *"Producing a submission that is 'clear and accessible' is down to thorough project planning. A quality submission not only meets the basic requirements of insureds in buying a dependable product, it also differentiates insureds who want to demonstrate their company's commitment to professionalism both in the market and internally with the Board."*

Five first steps for Airmic members - 'clear and accessible manner'

1. **Contact brokers and insurers early.**
   Any necessary technology and process changes can take some time to incorporate into the business. Insurers may ask for information to be presented in a more accessible way once a submission has been made, so policyholders will need plenty of time to respond to questions

2. **Be wary of relying on last year's content and format.**
   Ask your insurer which information is of most use to them and make sure that this is highlighted within the submission. Ask for clarity on how a disclosure can be structured to make it easily navigable.

3. **Incorporate signposting, indexing and sub sections to aid navigation of the disclosure**
   As data dumping is no longer acceptable, take advantage of your broker's expertise on disclosure presentations and what makes a good submission.

4. **Make full use of exception reporting.**
   Comment on the relevance of each piece of information and highlight where something is special or 'abnormal' to your organisation, compared to similar risks. If there was a specific reason why a particular cover was purchased, ensure that this is flagged.

5. **Avoid pointing towards the organisation's website.**
   Insurers have commented that marketing literature is unlikely to fulfil the insurance requirements, and there is little control over whether the information on the website changes and therefore there is no traceable audit trail.

6. **Agree with insurers and brokers how changes to information will be updated.**
   Flag to insurers which information is likely to change, and record any changes in a clear manner. Beware of removing any data as a result of a change, as this may prevent the creation of a suitable 'audit trail' for the disclosure.

Section 1:5 Fair presentation: Insurer knowledge

In the absence of enquiry, [the duty] does not require, the insured to disclose a circumstance if -
(a) it diminishes the risk
(b) the insurer knows it
(c) the insurer ought to know it
(d) the insurer is presumed to know it
(e) it is something as to which the insurer waives

Section 3(5), Insurance Act 2015

The Act provides detail on '*insurer knowledge*', which describes the information the insured does not have to disclose in order to achieve fair presentation, and which consists of;

- information held by the insurer and accessible to the individual(s) underwriting the risk, including any insurer agent, e.g. a coverholder
- information that an employee of the insurer or any of its agents knows and ought to have passed on to the individual(s) underwriting the risk
- information that an insurer underwriting the risk in question reasonably would be expected to know in the ordinary course of business
- common knowledge.

Insureds should not rely on this knowledge to limit their disclosure

1. Insurer's knowledge can and does vary widely, and therefore the scope of information known by any individual underwriter cannot be guaranteed.

2. The Act advises that information must be 'held by' the insurer and be 'readily available' to the underwriter(s) in question. Therefore, the systems and processes used within a particular insurer are critical. Again, these can vary widely between different insurers.

3. Insurers cannot be expected to be 'experts' in a particular industry

It is wise for members to assume that their underwriter has no prior knowledge of their business.

Director of Insurance, Telecoms: *'Our business, like so many commercial industries is cloaked in jargon. We believe it is our role to educate the insurers on our business and industry, and therefore take the time to explain the meaning of all terms'.*

Six first steps for Airmic members - 'insurer knowledge'

1. **Do not presume that insurers have any prior knowledge of the insured business.**
2. **Meet with insurers now.**
   Seek to prepare a defined list of subject matters and knowledge that they hold about the business, and therefore identify the additional information they require.
3. **Seek to gain clarity on how information obtained by any employee of an insurer or any its agents is collated and shared across the insurer as a whole.**
4. **Be extra cautious.**
   If in doubt, ask the insurer whether a particular circumstance is known or must be disclosed. If still in doubt, disclose.
5. **Where one insurer is looking at two separate lines of business, ensure that full disclosure is made to both of the underwriters.**
   Ask insurers which information is shared, but as a default, assume that nothing is shared.
6. **Take additional care when changing an insurer.**
   Do not assume that any information held by a previous insurer would be held by a new insurer. Clarify with the broker how information on previous claims, risk control / loss adjustor surveys, etc. would be passed on.

Failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances

Section 3(4)(b), Insurance Act 2015

The Act provides insureds with a fall-back position if they fail to disclose all the material information which they know or ought to know. Thus, the insured can satisfy the duty of fair presentation by providing sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal that information. It is hoped that this 'second limb' of disclosure will prevent insurers from taking a passive role during the disclosure process, as they will be required to ask questions where there is any uncertainty about the risk.

It is difficult to predict the issues that will result in further information requests. It is likely that post August 2016, disputes will result in more guidelines for underwriters on information requirements, providing more certainty for the policyholder.

Bruce Hepburn, CEO at Mactavish: *'The Act is at the same time incredibly demanding but also rewards best practice. Putting insurers on notice is a good example of this and one of the many we have looked at in detail. It will require careful attention to the quality of the presentation and then absolute control over how insurer enquiries arising through the placement process are managed - an area where current market practices are hugely inconsistent and brokers and insurers both often lack the formalised processes required'*

Insureds should not rely on the 'further enquiries' variant of fair presentation

Although the requirement can provide some additional protection for the insured, it is important that policyholders don't rely on this Act to give an overly brief description of the risk.

The submission must still be made in a clear and accessible manner, with appropriate signposts for the insurer to identify where further questions may be required. Insurance contracts are based on utmost good faith, and the insured will not have satisfied the duty of fair presentation if they deliberately hold back information from the insurer. In particular, where a policyholder is aware that information may be more limited, e.g. for a specific overseas territory, this limitation should be flagged to the insurers.

Members should aim to agree a disclosure process with their insurer and broker

The 'further enquiries' variant of fair presentation could lead to an increased number of follow-up questions from the insurer post initial disclosure and subsequently increase the length of the disclosure process . Airmic recommends that policyholders take control and look to agree a process of disclosure, including a formal protocol for handling follow-up questions, with their insurers before they begin collecting any disclosure information.

Five first steps for Airmic members – sufficient information to put a prudent insurer on notice

1. **Agree a full disclosure policy with insurers before commencing data collection.** This should include a formal process and timescale for receiving and responding to insurer questions.
2. **Start early.** Policyholders should be prepared for insurers to ask more questions after reviewing the disclosure, which could increase the timescale for placement and renewal.
3. **Document all communications.** Where questions are asked by the insurer, either directly or via the broker, record the question, response and any follow-up communication. Take care to record when a question and response is made, and to whom.
4. **Review systems and processes.** A robust technical system will be required to ensure all follow-up questions are handled and recorded appropriately. System changes can take some time to implement.
5. **Share information across all insurers.** If one insurer within the programme requests clarity for further information, share the question and response with all insurers, including the captive if applicable.

The Insurance Act goes well beyond the duty of fair presentation, and brings in a number of key changes to the terms and operation of insurance policies. The following sections outline a few of these changes, and highlight some of the key issues that Airmic members should be aware of.

Policyholders should review their policy wordings

52% of Airmic members report that they have already reviewed their policy terms in light of the Act (Airmic Insurance Act 2015 - Are you ready? survey 2015). Insurers too are currently focusing their attention on ensuring that their policy wordings comply with the new provisions.

As an overall recommendation members should treat with care policy wordings that have been made Insurance Act compliant and carefully review any changes with their brokers for the following reasons:

- Some provisions in current policy wordings may be more favourable to the insured than the provisions of the Act, for example, innocent disclosure clauses.
- Policy wordings that have been made Insurance Act ready in advance of August 2016 may have sought to introduce the duty of fair presentation. This could lead to unintended consequences if the policyholder hasn't addressed its own compliance with this duty.

Proportionate remedies

The Marine Insurance Act 1906 was criticised for allowing the insurer the sole remedy of avoiding the policy from its inception in the event of material non-disclosure or misrepresentation. The Act introduces a series of 'proportionate remedies'. Where a breach is not considered deliberate or reckless the insurer can:

- avoid the policy and return the premium, where it can prove it would not have entered the contract
- treat the policy as if it included different terms, where it can prove it would have entered the contract, but on different terms and/or
- 'reduce proportionately' (as per the Act) any claims, where it can prove it would have entered the contract, but at a higher premium

On this last point, some policyholders and insurers have suggested that it may be preferable for the insured to pay the additional premium that would have been charged, rather than face a reduced claim. If a policyholder wants to consider contracting out of the remedy that provides for the proportionate reduction in claims, they should take care to consider which approach is more appropriate for them in light of claims frequency and, critically, severity.

Warranties and other conditions

The Act reforms the law on warranties and makes them "suspensive conditions". This means that an insurer's liability will no longer be discharged from the moment of breach. Instead, breach of warranty will suspend an insurer's liability while the insured is in breach of the warranty but, if and when the breach is remedied, the insurer will be back on risk.

Policyholders should be aware that some insurers are amending their wordings to replace warranties with conditions precedent or introducing sweep-up clauses (clauses which provide that all the obligations on the insured in the policy are conditions precedent to the insurer's liability). This will in some cases negate the benefit that an insured gets of being able to remedy a warranty under the Act. If the pre-contract discussion identifies very specific situations which the insurer will not cover, then consider the introduction of specific, narrowly framed exclusions rather than broadly framed warranties or conditions precedent affecting other situations in unintended ways.

The Act also provides that breach of a loss mitigation term (any term which tends to reduce the risk of loss of a particular kind or at a particular location/time but not terms which define the risk as a whole) cannot be relied on by an insurer if the insured can show that the breach could not have increased the risk of loss that actually occurred in the circumstances.

It's important that the wordings are looked at carefully and are fully tested to ensure coverage and claims certainty. There is no replacement to simply going over the wording explicitly and ensuring full understanding by the insurance team and the relevant parts of the business.

Contracting out

Parties can choose to contract out of the provisions of the Act (except for the abolition of basis clauses). Any policy term which would put the insured in a worse position than under the Act must comply with certain transparency requirements. This means that the term must be brought to the attention of the insured before the contract is entered into and must be clear and unambiguous as to its effect.

Policyholders must, therefore, ensure that care is taken in drafting any policy terms which seek to contract out of the Act. Helpfully, to the extent an insurer seeks to contract out of the Act, this should be clear from the wording and the effect of the term clearly stated. However, policyholders should be aware that an insurer can satisfy the requirement under the Act to bring such a term to the attention of the insured by bringing it to the attention of the broker.

Damages for late payment and the Enterprise Bill

Obliging insurers to pay compensation to commercial policyholders if valid claims are not paid within a reasonable timeframe was a key part of the Law Commission's original recommendations. Perhaps surprisingly insurers have not historically been obliged to do this under English insurance Law despite it being a long-established principle of general contract law for other transactions.

The requirement was dropped from the Insurance Act 2015 as being too contentious, following opposition from London Market insurers. It was reintroduced via the Enterprise Bill in September. Amendments sponsored by Mactavish and Airmic have resolved insurers' concerns, while maintaining the original objective of making insurers responsible for damages if they unreasonably delay or withhold payment or mishandle a valid claim.

The amendments tabled by Mactavish with Airmic support were debated in the House of Lords in November and should allow the Enterprise Bill to be passed in 2016. This is a huge step forward, providing greater security for companies who rely on insurance and levelling the playing field to negotiate fairer outcomes following a major claim.

Mactavish

Appendix 1 - The Insurance Act 2015: What Airmic members need to know

Below, Airmic has summarised the key changes in the law covering disclosure, warranties and fraudulent claims. The following was released in Airmic News In February 2015.

Disclosure: 'Duty of Fair Presentation of Risk'

The Act amends the existing duty on the insured to disclose any fact material to the risk.

Considerations for Airmic members:

- The duty applies to both pre-inception disclosure and where changes in risk are relevant to a proposed variation in the insurance contract:
- The insured must disclose every material circumstance they know or ought to know including:
  - what is known by the senior management of the insured
  - what is known by those persons responsible for organising the insurance for the organisation
  - what ought to be known in the ordinary course of business
  - what can be revealed by a reasonable search of information available to the insured.
- Where material information is not known by the insured, sufficient information for a prudent insurer to know to make further enquiries must be provided.
- Information must be presented in a reasonably clear and accessible manner, and include a relevant structuring of the information
- The insured has a duty to not make misrepresentations
- A range of proportionate remedies is available to the insurer in the event of a breach of disclosure
  - **Deliberate or reckless breach:** The insurer can avoid the contract, refuse all claims and retain the premium;
  - **Careless breach (not deliberate or reckless):** If the insurer would not have entered into the contract, the insurer may avoid the contract, refuse all claims and return the premiums paid. If the insurer would have entered into the contract, but on different terms, the contract is to be treated as if on those terms from the outset. If the insurer would have entered into the contract at a higher premium, the insurer may proportionately reduce the amount to be paid on a claim.

Warranties: 'Suspensive conditions'

The Act amends the existing rules where even minor breaches of warranties unrelated to the loss can provide insurers with a defence to a claim.

Considerations for Airmic members:

- Warranties will become 'suspensive conditions' meaning that insurers' liability will be suspended while the insured is in breach of the warranty. Insurers will not be liable for any loss which occurs or is attributable to something happening while the insured is in breach of warranty.
- Once the breach is remedied, assuming it can be, (including where an insured takes an action later than a time limit stated in a warranty as long as the risk to which the warranty relates becomes essentially the same as that contemplated by the parties), the liability of the insurer will be restored.
- "Basis of contract" clauses will be abolished. Therefore, any warranties in the policy must be expressly agreed as a warranty between the insured and the insurer.
- In the event of a claim, an insurer cannot avoid liability based on the breach of any warranty or any term where the breach could not have increased the risk of the loss which actually occurred in the circumstances. However, this only applies to "risk mitigation terms" (terms which tend to reduce the risk of loss of a particular kind or at a particular location or time) and does not apply to terms which define the risk as a whole.

Fraudulent claims

The Act provides clarity over the remedies for insurers in the event of a fraudulent claim by the insured.

Considerations for members:

- Where the insured has committed a fraud in relation to a claim:
  - the insurer will have no liability to pay the claim
  - the insurer can recover any payments already made in relation to the fraudulent claim
  - the insurer can terminate the contract from the time of fraud, and refuse to pay claims for losses occurring after the fraud
  - the insurer does remain liable for all claims for losses suffered before the fraud;
  - the insurer can retain premiums already paid.
- In group policies the above applies, but only with regards to the fraudulent claimant: therefore ,innocent members of the group policy are not prejudiced.

Appendix 2: Suggested timeline for insurance placement / renewal

This Appendix develops the timeline for achieving contract and coverage certainty (Airmic's Efficacy of Business Insurance Guidance, 2014) to include additional steps in light of the requirements of the Insurance Act.

Policyholders are advised that for the first placement / renewal after August 2016 more time than outlined below may be required for stages 1 and 2.

Action	Days before inception
1. **Evaluate the insurance needs of the business**	**210 days**
• Review renewal plans to allow further time for information gathering and responding to insurer enquiries	
2. **Meet with insurers and brokers to establish disclosure processes**	**180 days**
• Discuss and agree information requirements of insurer • Clarify what constitutes 'insurer knowledge' with the individual underwriter(s) • Propose lists of senior management, individuals responsible for insurance and a process of reasonable search to the insurer, and consider feedback	
3. **Compile exposure and loss data to achieve full disclosure**	**150 days**
• Collect information agreed in stage 2. Document the information collected, who it is collected from and how it is collected. • Ensure that broker knowledge is incorporated into the presentation	
4. **Discuss with underwriters to ensure understanding**	**120 days**
• Ensure that insurance presentations are adequately presented, ordered and sign-posted • Record any insurer questions and the responses made	
5. **Legal and professional review of suggested wordings**	**90 days**
• Insurers are revising wordings in preparation for the Act; therefore ensure that changes are noted and understood • Where insurers are adopting the Act in advance of August 2016 discuss any changes with the broker and any additional obligations that come with the new regime • Ensure that any wordings that contract out of the Act are identified and understood, as these may introduce disadvantageous terms	
6. **Discussion, negotiation and testing, including scenario testing**	**60 days**
• Cross-check the policy coverage against the improved risk understanding that arises from greater analysis of the business risks	
7. **Formal agreement of all parties of the final terms and conditions**	**45 days**
8. **Ensure accurate and timely policy documentation issuance**	**30 days**
9. **Ensure compliance with regulatory, tax and warranty requirements**	**15 days**

Appendix 3: Tips on how to make your insurance presentation ‘clear and accessible’

TBIAS

Online presentations (e.g. Data Rooms)

Whether your online presentation is a simple password protected and secure file collaboration portal or a more sophisticated marketing submission website, the following points apply:

- User access must be managed and recorded to keep an audit
- Files must be easy to search and download
- Files should be labelled so they fall in numeric or alphabetical order
- File names should be intuitive and include version identification
- Where possible files should be ‘set to print’
- Updates should be dated and easily distinguished from original files
- Original files should not be changed
- The presentation and updates should be insurance policy period specific
- The presentation and updates should be periodically closed and archived

While many insureds are now providing files online, insurers may still want to print documents, in whole or in part, therefore the following comments on Printed Materials apply equally to online presentations.

Paper presentations (e.g. Printed Materials)

The following points apply to ‘hard copy’ presentations:

- Divide the presentation pack into clearly named sections
- Write an overview of the contents being provided (e.g. a site map)
- Address the report to the recipients and explain its purpose
- Use branding, logos and colours to make each file look part of a family of files
- Standardise formatting styles such as fonts, borders, headings and page numbers
- Use standard English and proof read your work
- Provide definitions and list [any] acronyms
- Put a contents list at the front of each section
- Index all charts and tables

Signposting and structuring

Whilst each insurance class will be subject to different content, consider using these key headings:

- Insured interest (Who is the insured?)
- Key changes (What has changed since last year?)
- Business / operational description (What are the processes, products and services?)
- Risk exposure metrics (How will my risk be rated? Scale etc.)
- Exposures explained (What are you insuring under the policy? Review the policy)
- Risk Management (How is the business governed and how are risks managed?)
- Loss experience (What does the loss record look like? Show trends, explain trends and notable losses and lessons learnt)

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