On 12 February 2015 the UK Parliament passed the Insurance Act 2015 (the Act) which will introduce the most significant changes to British commercial insurance law for at least 100 years. These changes to non-consumer insurance law follow the statutory reform of consumer insurance law in the Consumer Insurance (Disclosure and Representations) Act 2012. The Act was given Royal Assent on 12 February 2015 and will come into force for new contracts and variations agreed from August 2016, although some insurers have made clear that they are working on the basis that the Act is in force already and all insurers will no doubt be reviewing their contract wordings and underwriting approach in anticipation of the new laws.

The Act is the result of a detailed review of insurance law conducted by the Law Commissions of England and Wales and of Scotland. The review was prompted in part by a perception that, in some respects, the current law was outdated and unsuitable for the modern business environment. The new Act seeks to address these issues through a mixture of (i) radical amendment in areas where the existing laws were no longer thought to achieve a proper balance between the interests of the insured and the insurer, and (ii) the codification and clarification of the existing law to reflect the gloss placed by the Courts over many years on other areas of the law.

In the following sections we provide a recap of the reforms and some additional comment on the Act’s final passage through Parliament.

PLACEMENT
Presentation of the risk

Under the terms of the Act an insured must make a ‘fair presentation’ of the risk to the insurer at the time of placement. In order to make a fair presentation, the insured must disclose to the insurer every material circumstance which is known to it or which ought to be known to it or, failing that, the insured must give the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal the material circumstances.

These provisions replace the previous duty of utmost good faith at placement contained in sections 17-19 Marine Insurance Act 1906. By placing greater emphasis on the underwriter to ask questions, these provisions are an important departure from the existing law which placed the burden squarely on the insured to identify and disclose all the material circumstances of a risk. The Law Commissions hope that this will lead to greater dialogue between insured and insurer and encourage insurers to identify in advance the information which they require to write the risk.

Whether a circumstance is material is defined (as now) as whether it would influence the judgment of a prudent underwriter in determining whether to take the risk and on what terms.

Examples of material circumstances for the purposes of a ‘fair presentation’ are provided in the Act. They are: special or unusual circumstances relating to the risk; any particular concerns which led the insured to seek cover; or anything which those concerned with the class of insurance and field of activity would generally regard as being something that would be dealt with in a ‘fair presentation’. It is hoped that insurers and brokers will develop protocols to assist with the latter category of information.

Insured’s knowledge

The Act also seeks to clarify what an insured will be taken to know and what efforts he or it should make to search for material information to enable it to make a fair presentation of the risk to insurers. Thus, if the insured is an individual, the insured’s ‘knowledge’ will be limited to what is actually known by that individual and what is known by others who are responsible for the insured’s insurance – this can include agents of the insured such as brokers. If the insured is an organisation (i.e. not an individual) the organisation’s knowledge covers what is known by ‘senior management’ or those individuals responsible for the organisation’s insurance (again, including both agents and employees of the organisation). The explanatory notes which accompany the Act suggest that ‘senior management’ is likely to include the organisation’s board, but can also be wider than the board: the extent to which ‘senior management’ does run wider than the board depends on the structure of the relevant policyholder and will be a question of fact in each case.

For both individuals and organisations, the insured is not taken to know confidential information that is known to individuals responsible for the insured’s insurance where such confidential information is acquired through a business relationship with a person who ‘is not connected
with the contract of insurance’. This is intended to protect the position of brokers who may hold relevant confidential information on behalf of different clients.

Obligation to conduct a reasonable search

> The Act provides that an insured ought to know, and ought to disclose to insurers, material information that ‘should reasonably have been revealed by a reasonable search of the information that is available to the insured’, whether the search is conducted by making enquiries, or by other means. What constitutes a reasonable search will depend on the circumstances of each case and will require careful consideration by insureds and their advisers. It is clear, however, that the insured may be required to search outside its own organisation, for example by making enquiries of its broker, in order to satisfy this requirement. There may also be uncertainty as to precisely what is required in the context of both facultative and treaty reinsurance.

> We point out that, for the clauses relating to the insured’s knowledge, the final version of the Act includes numbering and some minor wording alterations to recent draft versions of the Act.

What the insurer knows, ought to know and is presumed to know

> As with the current law of utmost good faith the Act makes clear that there are certain categories of information which the insured does not have to disclose as part of a fair presentation. The Act defines such items of information as those that diminish the risk, or information that the insurer knows, ought to know, or is presumed to know. The insurer may also waive information – either expressly or implicitly.

> The Act stipulates that for the purposes of deciding whether a fair presentation has been made, the insurer will be taken to know only information that the individuals who participate in the underwriting decision actually do know. In addition, the Act provides that insurers ought to know any information that an employee or agent of the insurer knows and ought reasonably to have passed on to the underwriter, and relevant information available to the underwriter that is held by the insurer. (The requirement that the information should be held by the insurer is important and, among other things, is intended to forestall the possibility that it may be said that underwriters ‘ought to know’ something because it is, for example, readily available on the internet).

> An insurer is presumed to know what is common knowledge and that which an insurer offering insurance of the class in question could reasonably be expected to know in the ordinary course of business.

Presentation of the risk and data dumping

> The Act deals with the perceived issue of ‘data dumping’ and states that the insured’s presentation should be reasonably clear and accessible to the prudent insurer. It also acknowledges, however, that a fair presentation may be contained in one document or oral presentation.

Remedies for breach of the duty of fair presentation

> The remedy of avoidance for a breach of ‘utmost good faith’ is abolished in the Act and replaced with a proportionate system of remedies for breach of the duty to make a fair presentation. These proportionate remedies are predicated on the insurer establishing that if it had received a fair presentation, it would have either:

a. not entered into the contract at all;
b. entered into the contract but on different terms (but would not have altered the premium charged); or
c. entered into the contract but with a higher premium.

If any of these criteria are satisfied the breach will be a ‘qualifying’ breach.

> Where a ‘qualifying’ breach is either deliberate or reckless (i.e. the insured knew it was in breach or did not care whether it was in breach) the insurer does still have the remedy of avoidance of the contract from inception and can retain the premium paid by the insured. The burden will be on the insurer to prove that a qualifying breach was deliberate or reckless.

> A more radical change is triggered where a ‘qualifying’ breach is not deliberate or reckless. In these circumstances, the overall objective set out in the Act is to put the parties into the position they would have been in had a fair presentation been made. If the underwriter is able to establish, on the balance of probabilities, that he or she would not have written the risk at all if a fair presentation had been made, the remedy will still be avoidance from inception with the premium being returned to the insured. If, however, the evidence is that in the event of a fair presentation the underwriter would have written the risk but on different terms, then the contract will continue but those additional or different terms will apply from inception. That may mean that some claims which had been paid before the breach of duty was discovered will have to be reversed or adjusted in light of the additional terms.

> If the evidence is that the underwriter’s response to a fair presentation would have been to charge a higher premium, the remedy will be for the contract to continue in force but for the amount of any claims payable under it to be reduced by the same proportion as the premium actually paid bears to the premium that would have been paid but
for the breach of duty. This means, of course, that if there are no claims, the insurer will not be entitled to any additional premium – even if the evidence is that he or she would have insisted on a higher premium had a fair presentation been made at the outset.

> It will be possible to combine the second and third of these remedies so that different terms may be imposed and claims reduced to reflect the premium that should have been charged.

**WARRANTIES**

**Warranties and basis of contract clauses**

> One of the Law Commissions’ key motivations for reform related to insurance warranties, the operation of which was viewed in many quarters as unnecessarily harsh. Under the Act, a breach of warranty will no longer terminate the contract automatically from the date of breach; rather, warranties will effectively become suspensive conditions unless the parties agree otherwise in the contract.

> Because under the Act a warranty will operate as a suspensive condition, a breach of warranty may now be remedied and the insurer’s liability will reattach from the date of the remedy (the insurer of course remains liable in respect of claims occurring, or attributable to something happening, prior to the breach). The Act does protect insurers from liability in respect of claims arising after the insured remedies a breach but where the loss ‘is attributable to something happening’ during the period of breach.

> In addition, in line with the recent reform to consumer insurance law, the Act provides that representations cannot be converted into warranties by way of a basis of contract clause in the proposal form. These clauses will be ineffective and insurers should therefore tread carefully when using boilerplate language in such forms.

**Terms not relevant to the actual loss**

> A late amendment to the Insurance Bill introduced into the Act a new concept designed to prevent insurers relying on the insured’s breach of a term designed to reduce the risk of loss of a particular kind or at a particular location or at a particular time to deny cover for losses of a different kind or at a different location or time. Thus, if the insured can prove that its breach of such a term ‘could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred’, the insurer will not be able to rely on that term to reject the claim. This section of the Act is intended to apply to warranties but also to conditions precedent and even to exclusions.

> It is easy to imagine dispute over whether a particular term is designed to reduce the risk of loss of a particular kind and, if so, of what kind and it will be interesting to see how this provision is construed in practice. It will be noted also that the onus on the insured will be to show that its breach could not have increased the risk of loss rather than that it did not increase the risk of loss.

**FRAUDULENT CLAIMS**

> Part 4 of the Act seeks to address perceived uncertainty in relation to the consequences of the insured making a fraudulent claim (although the term ‘fraudulent claim’ is not defined in the Act). Prior to the enactment of the Act, pre- and post-fraud claims would be untainted by a fraudulent claim. The Act remedies this situation. Where an insurer makes a fraudulent claim the insurer will not be liable to pay the claim. In addition, the insurer may also recover from the insured any sums paid by the insurer in respect of that claim and may also give notice to the insured that it has treated the contract as having been terminated at the time of the fraudulent act.

> If the insurer decides to treat the contract as terminated it may refuse all liability to the insured under the contract in respect of a relevant event after the fraudulent act and need not return any premiums paid under the contract.

> In group policies such as company healthcare policies, group members that make a fraudulent claim against the policy will only trigger the fraudulent claim remedy for the insurer for their own claim and not for any other policyholders.

**CONTRACTING OUT**

> Section 16 of the Act allows the parties to contract out of any of the provisions relating to the duty to make a fair presentation, warranties and fraudulent claims (other than the prohibition in Section 9 against basis of contract clauses). Contracting out will only be effective, however, if the transparency requirements stipulated in the Act are observed. These requirements apply to any term which is more ‘disadvantageous’ to the insured than the default position set out in the Act. The transparency requirements are that the insurer must take sufficient steps to draw the disadvantageous term to the insured’s attention and the term must be clear and unambiguous as to its effect. In deciding whether these requirements are satisfied, the Court will take into account the policyholder’s experience, resources and bargaining power and the circumstances of the transaction – presumably including such factors as whether or not the insurer is advised by a broker.

The Government has praised the Law Commissions and industry leaders for their assistance in the progress of what they call a “non-controversial Law Commission Act”. As with all new legislation, whether controversial or not, it remains to be seen how many of the changes will play out in practice.