

# The Insurance Act

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The Insurance Act 2015 aims to make insurance fairer for policyholders. The Act updated insurance law in three key areas:

- Disclosure and misrepresentation – what risk information you must present to the insurer, and how.
- Warranties – how breaches of warranty (and other similar policy terms) are dealt with by insurers.
- Fraudulent claims – what insurers can do if you make a fraudulent claim.

The Act aims to put you in a better position than under the previous law as it helps to clarify what information you need to disclose when taking out and renewing business insurance.

Insurers' remedies for non-disclosure, misrepresentation and breach of warranty are also fairer. However, to benefit from the law, you will need to comply with your duty of "fair presentation". Otherwise your ability to make a successful claim, the amount you can recover from insurers, and even whether you have any cover, will be at risk.

## Your duty to disclose

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- If you are a business and your insurance policy is governed by English law, you must, at all times, act with utmost good faith towards your insurer.
- Before your policy is placed, at renewal, and when varying or extending a policy you have a duty to make a 'fair presentation' of the risk, and you must disclose to your insurer all information, facts, and circumstances which are, or ought to be, known to you and which are material to the risk.
- The Insurance Act 2015 gives some guidance as to what a "fair presentation" of the risk means. You must disclose every material circumstance which is known by:
  - your senior management (the Act defines "senior management" as "those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised"); and
  - those individuals responsible for arranging your insurance (which includes risk managers and any employee who assists in the collection of data, or who negotiates the terms of the insurance, such as your individual brokers). If you are an individual taking out a business insurance policy, for example if you are a sole trader or a trustee, you must disclose the material information that you know and that is known by the individuals responsible for arranging your insurance.
- You must conduct a reasonable search for, and disclose, material information that is available to you.
- This includes both internal and external information, including information held by your agents, and also held by persons and entities who are to be covered by the insurance. If you are an individual taking out a business insurance policy, this means that it will not only be information that is known or held by you that may have to be disclosed.
- Your duty to make a fair presentation is not confined to answering the questions on a proposal form and / or asked by us.
- All material circumstances should be disclosed to your insurer regardless of whether or not your insurer has asked for the information.
- You must not make any misrepresentations to your insurer.
- You must provide the information to your insurer in a reasonably clear and accessible format.



## Material circumstances

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- Under English law, every circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium and / or the terms of the insurance and / or whether to accept the risk. This refers to “any” prudent insurer, not just the insurer who has been offered the risk.
- A circumstance may be material even if disclosure would not necessarily lead to an increased premium or declinature of the risk.
- Circumstances which may be considered material are:
  - Special or unusual facts relating to the risk
  - Any particular concerns which led you to seek insurance cover for the risk
  - Anything which would generally be understood as being something that should be disclosed.
- In the context of business insurance here are examples of situations / circumstances insurers are likely to regard as material, this list is not exhaustive:
  - Business activity (or change to business activity), including processes, products, and geographic presence
  - New companies, markets, acquisitions, or disposals
  - Additional premises/insurable items
  - Changes to premises
  - Higher than ordinary degree of risk or liability (specific to your business or industry-specific)
  - Business financial status
  - Loss history/experience, including paid and outstanding claims and potential claims/circumstances/ incidents/losses that were not reported as claims (whether insured or not)
  - Details of criminal charges and convictions of your organisation, its directors or employees; regulatory investigations or enforcement/ health and safety investigations and prosecutions
  - Any insurers’ previous declinatures, refusals to renew, imposed terms/ restrictions in cover, mid-term cancellations, etc.
  - Changes in construction and/or purpose
  - New/amended processes
  - Changes to fire protections
  - Increased storage of hazardous materials/attractive stock
  - Any attempted break-in or arson attack
  - Use of temporary/third party premises
  - Changes to business activities (including disclosing historic activities that have ceased)
  - The creation or acquisition of new companies for which cover is required
  - Products exported to, or work in, overseas territories (particularly the USA or Canada)
  - Work in or on hazardous locations such as offshore installations
  - Health and safety investigations/ prosecutions
  - Driving convictions
  - Corporate investigations/prosecutions
  - Undisclosed accidents
  - Changes to vehicle performance
  - Change of use of vehicle
  - Material differences in the travel pattern (different geographies, number of journeys, etc.).
- Remember this list provides examples only. If in doubt – disclose.



## When to disclose

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- Your duty to make a fair presentation applies throughout the negotiations preceding the placing of your policy until your insurer has agreed to accept the risk and has set the terms, price, and level of participation, and the contract has been finalised.
- After the policy has been placed, your duty to make a fair presentation arises again at renewal and during the policy:
  - if you wish to make changes to the policy so that the insurer takes additional risk; or
  - where there is an extension of the policy period; or
  - when a policy condition requires you to advise your insurer of a specific increase or alteration in risk.

## Points of note

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- If you are unsure whether a fact or circumstance should be disclosed, we recommend that you disclose the information anyway.
- The consequences of failing to comply with the duty of fair presentation and failing to disclose a material fact or circumstance will depend on the precise terms of your insurance policy and whether or not your failure was deliberate or reckless but could lead to your insurer reducing its claim payment, applying additional terms or even voiding the policy.
- The Insurance Act 2015 sets out the remedies that your insurer will have if you fail to comply with the duty of fair presentation. Your insurer's remedies will depend on whether or not your failure was deliberate or reckless:
  - If you deliberately or recklessly fail to comply with your duties, your insurer will be able to void the policy, that is, to treat it as if it had never existed, and may retain the premium.
- If your failure to comply with your duties was not deliberate or reckless, your insurer's remedy will depend on what the insurer can show it would have done had you made a "fair presentation of the risk":
  - If your insurer would not have entered into the contract on any terms, it can still void the contract but must return the premium
  - If your insurer would have entered into the contract but on different terms (not relating to premium), the contract may be treated as if it included those terms from the outset
  - If your insurer would have entered into the contract but would have charged a higher premium, the amount paid on a claim may be reduced proportionately.
- Under the Act, it will now be possible for cover to be reinstated once a breach of warranty is remedied, so you should keep a record of how you comply with your warranties / remedy any breaches so we can work with you and your insurers to get cover reinstated.
- Insurers will be allowed to contract out of all or parts of the Act (apart from the abolition of "basis of contract" clauses). However they can only do that if they meet certain "transparency requirements" and they must inform you and/or your broker how they propose to opt out, and the potential effect of opting out before the policy starts.