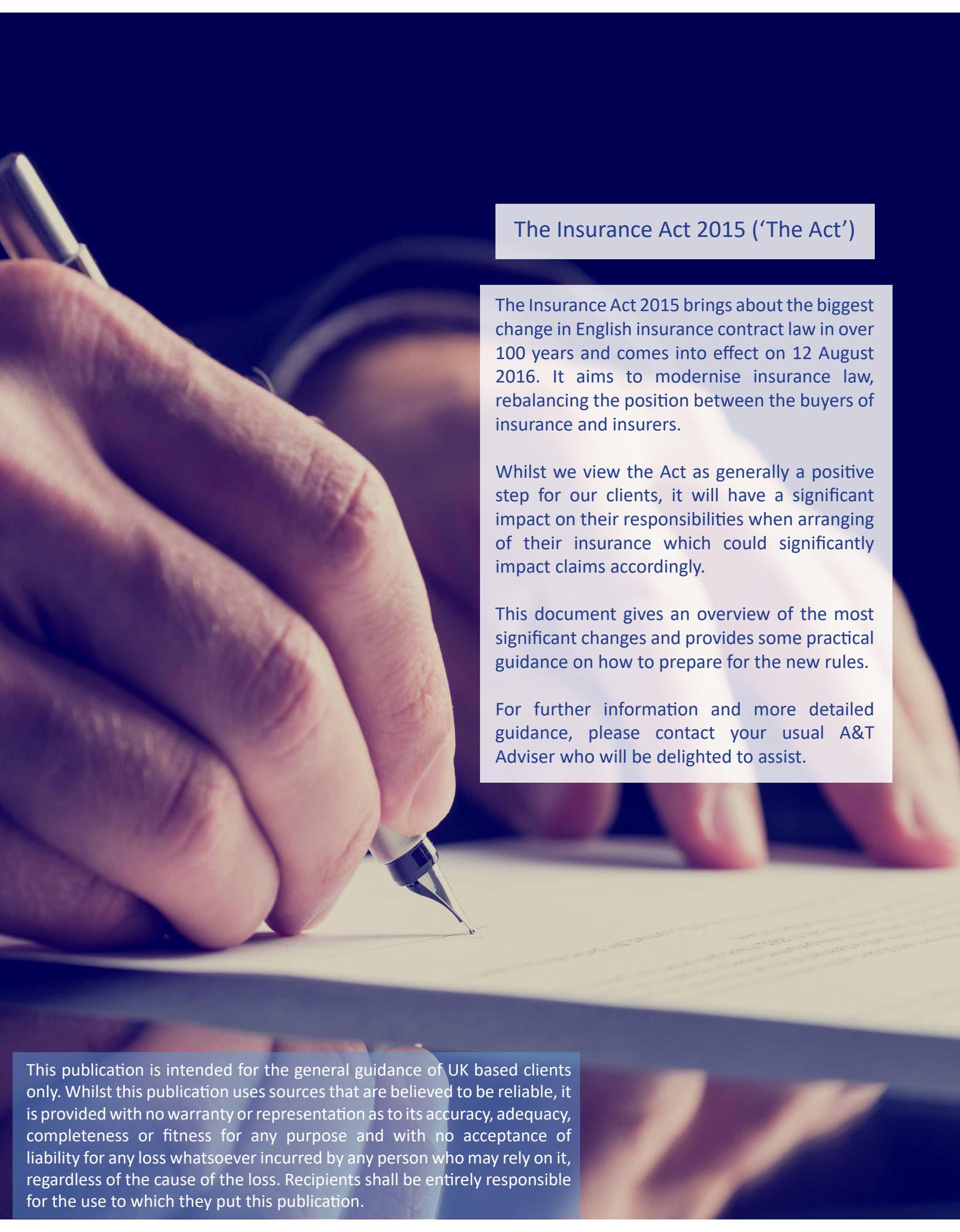




INSURANCE
LAW



A Guide to
The Insurance Act 2015

A close-up photograph of a hand holding a silver fountain pen, writing on a document. The background is blurred, showing another person's hand and part of a document. The lighting is warm and focused on the pen and the hand.

The Insurance Act 2015 ('The Act')

The Insurance Act 2015 brings about the biggest change in English insurance contract law in over 100 years and comes into effect on 12 August 2016. It aims to modernise insurance law, rebalancing the position between the buyers of insurance and insurers.

Whilst we view the Act as generally a positive step for our clients, it will have a significant impact on their responsibilities when arranging of their insurance which could significantly impact claims accordingly.

This document gives an overview of the most significant changes and provides some practical guidance on how to prepare for the new rules.

For further information and more detailed guidance, please contact your usual A&T Adviser who will be delighted to assist.

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Key Changes

The new law affects all policies subject to the Laws of England and Wales, Scotland and Northern Ireland that incept, are renewed, or are varied from 12 August 2016.

The new “duty of fair presentation” – Summary of Changes in relation to the Disclosure of Information

The ‘duty of fair presentation’ now requires a slightly different approach at renewal. In essence, a ‘reasonable search’ must be performed, with senior managers and the (internal and external) insurance team now being involved in the information gathering exercise.

The adjacent table compares the position pre and post The Insurance Act 2015.

Disclosure	Current Law	Insurance Act 2015	In Practice
What needs to be disclosed?	The insured has a duty to disclose every material circumstance which is known to them and not to misrepresent material facts.	<p>The insured has a duty to make a 'fair presentation of the risk' to the insurer.</p> <p>This means that the insured must:</p> <ul style="list-style-type: none"> • Disclose every material circumstance which it 'knows or ought to know' 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. <p>The Act gives some examples of what would constitute a material circumstance:</p> <ul style="list-style-type: none"> • Special or unusual facts relating to the risk • Particular concerns which led the insured to seek cover for the risk <p>Fair presentation of risk requirements apply throughout the policy year.</p> <p>You do not need to tell the insurer what is regarded as common knowledge (although care should be taken with this).</p>	<p>The type of information needed to be disclosed is not changing, but it is the client's responsibility to present information to the insurer in a clearer way and there is more obligation to highlight areas to the insurer.</p> <p>Insurers must seek clarification on anything they believe is unclear.</p>
How is disclosure made?	No explicit requirement.	<p>The insured must:</p> <ul style="list-style-type: none"> • Make the disclosure "in a manner which would be reasonably clear and accessible to a prudent insurer" 	<p>The information should not be too brief or too cryptic. No 'data dumping' is allowed.</p> <p>Information should be clearly indexed and sign posted.</p>
Whose knowledge is relevant?	The insured is deemed to 'know' every circumstance which in the ordinary course of business, ought to be known to them.	<p>A business insured is assumed to know what is known to the insured's 'senior management' and individuals 'responsible for the insured's insurance'. This includes brokers, risk managers and any employee who assists in the collection of data, or negotiates the terms of the insurance.</p> <p>The reasonable search requirement will also apply to information held by persons or entities who are covered by the insurance plus others who may hold information e.g. outside advisers and consultants, suppliers/ service providers and outsourced service partners.</p>	<p>There is no 'one size fits all, as every company is structured differently.</p> <p>It will be important to maintain a clear audit trail of how you have gathered the information presented.</p>

Key Changes at the Point of Claim - What Happens if the Duty of Fair Presentation is not met?

At present there is a single remedy of avoidance 'ab initio' (from inception of the contract) for disclosure and misrepresentation.

The insurers now have several remedies available to them. The adjacent table compares the position pre and post the Insurance Act 2015.

	Current Law	Insurance Act 2015	In Practice
Deliberate or reckless failure in the duty of fair presentation.	The insurer can avoid the policy.	<p>The insurer can:</p> <ul style="list-style-type: none"> • Avoid the contract • Reject claims • Retain the premium 	A deliberate breach is where the insured knew they were in breach and reckless refers to not caring whether or not the duty is fulfilled.
Not Deliberate or reckless failure, but the insurer would not have provided the Insurance on any terms.	The insurer can avoid the policy.	<p>The insurer can:</p> <ul style="list-style-type: none"> • Avoid the contract • Refuse claim • Must return the premium 	
Not deliberate or reckless failure, but the insurer would have applied different terms (e.g. exclusions or conditions but not premium).	The Insurer can avoid the policy.	<p>The insurer can:</p> <ul style="list-style-type: none"> • Continue with the insurance • Apply terms they would have applied and treat as if applied from the beginning of the policy 	
Not deliberate or reckless failure, but the insurer would have charged a higher premium.	The Insurer can avoid the policy.	<p>The insurer can:</p> <ul style="list-style-type: none"> • Continue with the insurance • Can proportionately reduce the amount to be paid on a claim 	<p>This is based on a formula. The insurer will only need to pay X% where X% is calculated as follows:</p> $X = \frac{\text{Premium Actually Charged}}{\text{Higher Premium}} \times 100$ <p>This remedy can apply in addition to applying different terms.</p>

Other Changes - Warranties, Basis of Contract Clauses and Fraudulent Claims

Warranties are terms in a policy requiring the policyholder to do something; for example, set an intruder alarm when premises are closed. The Act changes the law on warranties and other loss mitigation strategies used by insurers. It also abolishes Basis of Contract clauses. These changes generally improve the position for the insured.

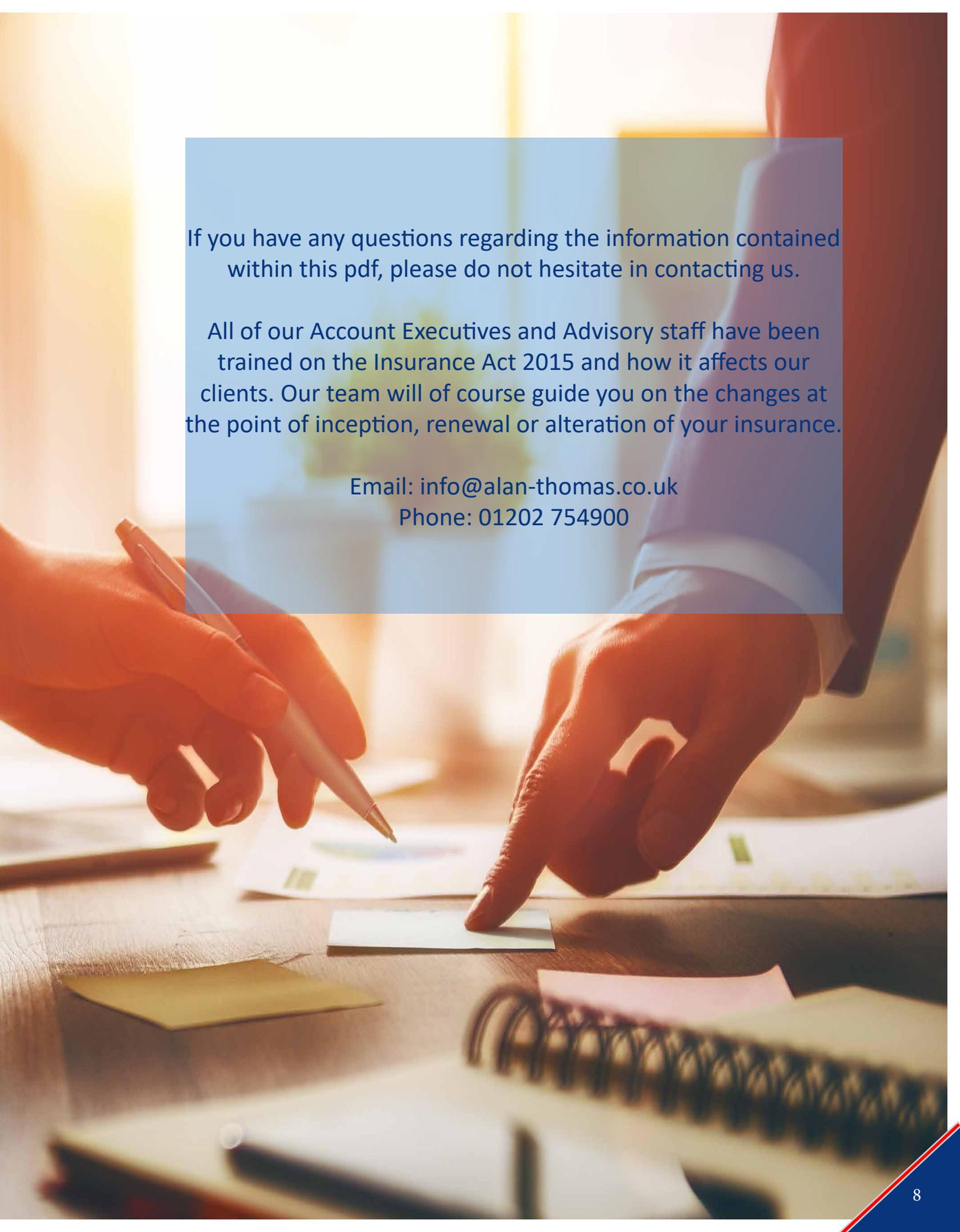
	Current Law	Insurance Act 2015	In Practice
Warranties.	Non-compliance with a warranty terminates the policy.	Warranties become 'suspensive conditions'.	The insurer's liability is suspended while the insured is in breach of a warranty, but can be restored if the breach of warranty is subsequently remedied by the insured.
Non-compliance of a warranty or a policy term that is not relevant to the claim.	Any breach even if not relevant to the loss can affect the validity of the policy and claim. In severe cases, the policy could terminate.	Insurers cannot limit or avoid a claim where the insured can demonstrate that the breach could not have increased the risk of the loss.	This does not include terms that define the risk as a whole.
Basis of contract clause.	Basis of contract clauses are allowed and the insurer can avoid the policy for any misstatement in the information provided.	Basis of contract clauses are prohibited.	All information given to insurers (including details provided on a proposal form) can no longer be treated as a warranty, whereby any incorrect information automatically terminates the policy.
F r a u d u l e n t Claims.	Coexisting remedies of forfeiture under common law and avoidance under statute.	The new remedy removes the option of avoidance.	In the event of fraud, an insurer remains 'on cover' for claims made before the fraud occurs, but has the option to cancel the policy with effect from the date of the fraudulent act.

Implications of the Disclosure Requirements of the Insurance Act 2015

Some Practical Considerations:

The new regulations place an increased burden on policyholders to ensure details of all material circumstances known to them are disclosed and also to conduct a wide ranging search for further relevant information. Below we list some guidance (although this is by no means an exhausted list, or set in order of priority).

- The renewal process is likely to take longer due to the information gathering requirements.
- We may need to start the renewal or placement process earlier than usual so that we can assist with identifying what information you will need to search for in the disclosure process and allow sufficient time for data gathering.
- You will need to identify who your 'Senior Management' are (under the definition of the Act).
- We recommend that you raise awareness of the Act internally, with those who will be asked for information in the future as well as your Board (if applicable).
- You will need to identify who has information that you 'ought to know'. You are obliged to make enquiries not only within your organisation, but also of 'any other person' who may hold relevant information. This could include, not only your broker but any entities such as subsidiaries or outsourcers.
- For policies you buy as a business which provide cover to individuals (for example, directors and officers liability), you should consider how you can check those individuals have no material information that needs to be disclosed.
- You should consider how you will carry out this search, for example by visits, discussions with key staff, or questionnaires.
- Insurers will no longer accept brief information or the deluge of electronic information such as website direction, to provide material information. Key information and sign posting must be used to highlight the key information.
- When directing insurers to your website they should be directed to relevant pages. Where particular information is held on web pages, you should ensure you keep a record of its content for future reference.
- Consider how you will record that you have carried out a reasonable search.
- Consider how details of new or changing material circumstances will be maintained throughout the policy year, as most policies have an explicit ongoing disclosure requirement e.g. information relating to acquisitions, product changes or process changes.
- In order to provide evidence that you have carried out a 'reasonable search', consider your internal record keeping procedures and how you can verify that you can carry out a 'reasonable search'.
- You should keep a permanent copy of the presentation made to insurers.

A close-up photograph of a person's hand in a light blue suit sleeve pointing at a document on a wooden desk. Another hand is holding a pen over the document. The scene is lit with warm, golden light from a window in the background. A semi-transparent blue box is overlaid on the image, containing text.

If you have any questions regarding the information contained within this pdf, please do not hesitate in contacting us.

All of our Account Executives and Advisory staff have been trained on the Insurance Act 2015 and how it affects our clients. Our team will of course guide you on the changes at the point of inception, renewal or alteration of your insurance.

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