

K&L GATES

Insurance Act 2015

New Duty of Fair Presentation

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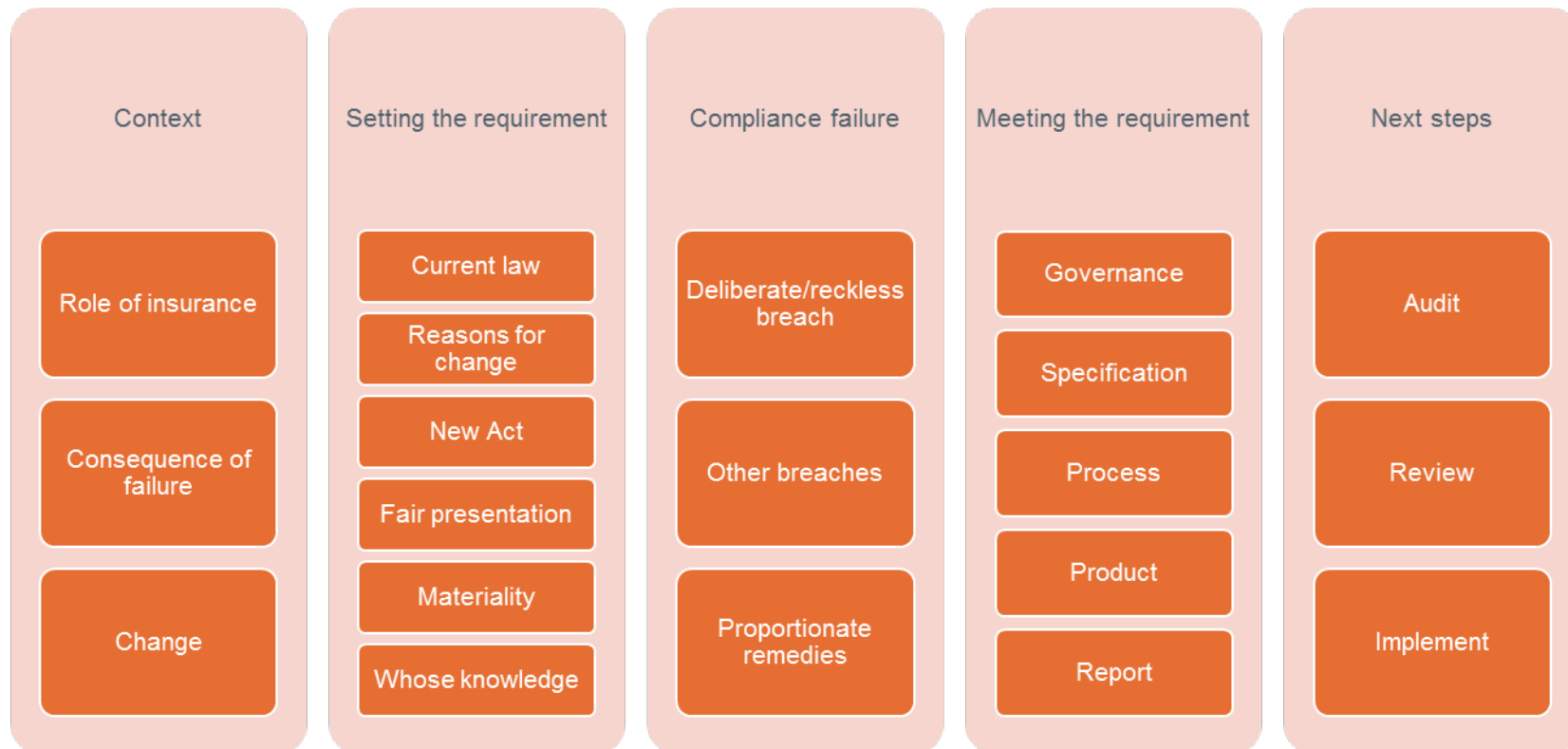


TBIAS

Introductions

- Charles van Oppen, TBIAS
 - Insurance disclosure audits and advice
 - Disclosure technical support as an extension to insured's team
- Sarah Turpin, K&L Gates
 - Provides legal advice and guidance on policy wordings, Insurance Act compliance, insurance disclosure obligations and claims disputes
 - Acts solely for insurance policyholders

Agenda





Context

Context

- Role of insurance
 - Protect balance sheet from loss
 - Comply with the law (e.g. compulsory insurance)
 - Comply with contractual obligations
- Consequence of failure
 - Premium plus limits of cover lost
 - Fines, reputational damage
 - Breach of contract
- What's changed?
 - Insurance Act 2015
- What do Insureds need to do to comply?
 - Review their insurance policies
 - Professionalise their insurance disclosure

Insurance procurement

- Below the radar of audit
- Specialist and complex area, poorly understood by non-insurance people
- Heavy reliance on brokers
- Common disclosure failures (see benchmark survey)



Setting the requirement

BACKGROUND TO THE INSURANCE ACT 2015

- Marine Insurance Act 1906 – regarded as outdated and out of line with market practice
- Lengthy consultation by Scottish and English Law Commissions – began in 2006
- Insurance Act 2015 finally came into effect on 12 August 2016
- Applies to commercial contracts of insurance which are:
 - Governed by English law (regardless of where they are underwritten); and
 - Which are placed, amended or varied from 12 August 2016

DUTY OF DISCLOSURE – THE OLD REGIME

- Duty to disclose every material circumstance which the insured 'knows or ought to know' (s.18 MIA 1906)
- Material circumstance = 'every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk (s.18 (2) MIA 1906)
- Insured required to look into mind of hypothetical insurer
- Little or no guidance from insurer in question

DUTY OF DISCLOSURE – THE PROBLEMS IN PRACTICE

- Duty poorly understood by insureds
- Often regarded as so onerous insureds unclear how to comply (resulting in data dumping)
- Insurers permitted to play passive role (no obligation to ask questions)
- Draconian remedy for breach: avoidance of policy
- Consequences of avoidance:
 - No cover from inception
 - Premium refunded but limited value
 - Balance sheet exposed
 - Breach of contractual and/or regulatory requirements

DUTY OF FAIR PRESENTATION – KEY CHANGES UNDER INSURANCE ACT 2015

- Insureds must make a **fair presentation of the risk** before the contract of insurance is entered into, renewed or varied

- Insureds must:
 - ensure every material representation as to any matter of fact is substantially correct and as to any matter of expectation or belief is made in good faith (NO CHANGE FROM EXISTING LAW)
 - disclose every material circumstance which the Insured knows or ought to know; or
 - failing that, disclose sufficient information to put a prudent insurer on notice that it needs to make further enquiries (NEW FALL-BACK POSITION)

- In addition, Insureds must make disclosure in a manner which would be **reasonably clear and accessible** to a prudent insurer (NEW AND ADDITIONAL DUTY)

FAIR PRESENTATION: REASONABLY CLEAR AND ACCESSIBLE

- No specific guidance under the Act
- Objective test which will depend on the facts of each case and type of policy being underwritten
- Law Commission has stated that large amounts of data, per se, will not make a presentation unfair if accompanied by a fair overview or summary
- Aim is to deter:
 - at one end of the scale, "data dumps" where the insurer is provided with an overwhelming amount of undigested information; and
 - at the other end of the scale, overly brief or cryptic presentations
 - Insureds need to be more proactive regarding the manner in which disclosure is given

FAIR PRESENTATION: CIRCUMSTANCES KNOWN TO INSURED

- An insured (who is not an individual) knows only what is known to one or more individuals who are:
 - part of the insured's senior management; or
 - responsible for the insured's insurance.

Knowledge of "Senior Management"

- Defined as individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised.
- Likely to include the Board and others on Management Committees.
- May also extend beyond this depending on structure and management arrangements of the insured.

Knowledge of "Individuals Responsible For Insurance"

- Includes individuals participating in the procuring of insurance (whether as employee or agent or in any other capacity).
- Likely to include Insurance Manager, Risk Manager or any anyone else involved in buying insurance (eg Co Sec, FD, GC).
- May also include any employee involved in collection of data or negotiation of policy terms as well as agents of an organisation such as a broker.

FAIR PRESENTATION: CIRCUMSTANCES WHICH INSURED OUGHT TO KNOW

- Information which should reasonably have been revealed by a **reasonable search of information available to the Insured** whether conducted by making enquiries or by other means
- This includes information:
 - held within the insured's organisation; or
 - by any other person, such as the insured's agent or broker or other persons insured by the policy (e.g. former employees, former directors, consultants, managing agents)
- Question of what constitutes a "reasonable search" will be determined objectively
- Likely to depend on the size, type and complexity of the organisation insured
- Insureds should allow more time to identify and collect material information
- Key importance of audit trail to demonstrate 'reasonable search' undertaken



Compliance failure

REMEDIES FOR BREACH OF DUTY OF FAIR PRESENTATION

- Insurer only has a remedy if can demonstrate that, but for the breach, the insurer:
 - Would not have entered into the contract of insurance at all; or
 - Would have done so but on different terms
- If the breach was **deliberate** or **reckless**, the insurer can **avoid** the contract of insurance and need not return any premium paid
- If the breach was neither deliberate nor reckless, the insurer can:
 - **Avoid** the policy but must return the premium
 - Treat the policy as if it included **different terms** (e.g. exclusions, sub-limits)
 - **Reduce proportionately** the amount payable in respect of any claims (e.g. 50% higher premium, 50% reduction on claim)

PRACTICAL IMPLICATIONS OF KEY CHANGES

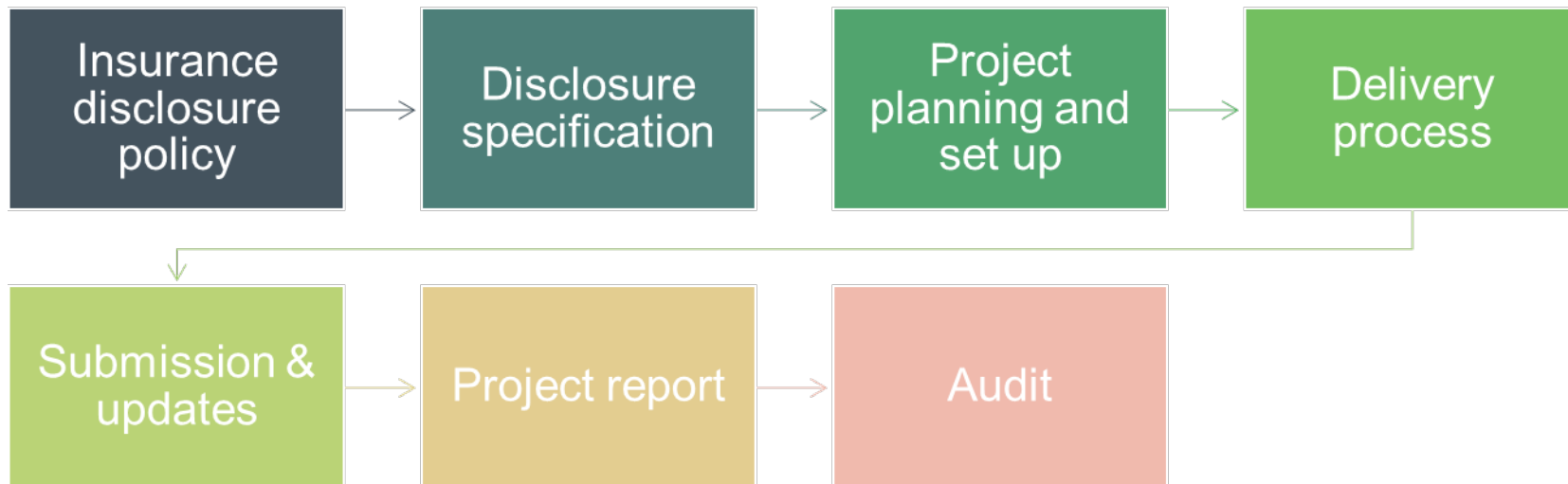
- Insureds need to take pro-active steps to ensure robust disclosure practices and procedures in order to:
 - Comply with the new requirements.
 - Avoid insurers relying on proportionate remedies (may be more willing to rely on in practice)

- Insureds should consider:
 - What changes are needed to ensure appropriate communication channels and 'reasonable search' procedures
 - What improvements can be made to disclosure presentations to ensure 'clear and accessible'
 - Whether existing policy terms provide adequate protection
 - Whether any contracting out provisions proposed by insurers are acceptable
 - Whether those within the organisation (particularly senior management) are aware what information needs to be provided



Meeting the requirement

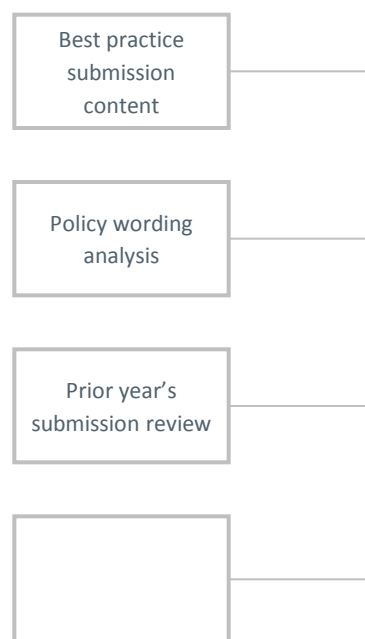
Insurance disclosure compliance framework



Insurance Disclosure Policy

- To set the governance framework
- To set the standard of compliance (meeting the requirements of the law)
- To empower the insurance manager
- To impose duties on the business to cooperate
- To make non compliance / failure of the business to cooperate the problem of the board / risk committee
- To identify who within the organisation falls within the definition of the “insured” to identify whose actual knowledge is relevant
- To ensure appropriate resources are made available
- To set out roles and responsibilities of the broker as per the Service Level Agreement
- To identify the insurance manager as the point of contact for the insurer, eg. to discuss/agree whose actual knowledge is relevant (definition of “insured”) and what searches they are proposing to undertake
- To identify sign-off procedure for submission

Disclosure Specification



Output consolidated into a series of categories:

- General (*lists general information about the insured's activities, governance, etc.*)
- Then identify disclosure content requirements for each policy / class, e.g.

PDBI

Terrorism

General Liability (Public & Products)

Employers Liability

Workers Compensation

EPL UK

EPL USA

Employee benefits UK

Motor third party

Marine

PA Travel

Death in Service

Healthcare

Financial Lines (PI and D&O)

The list of contents in each category is broken down into:

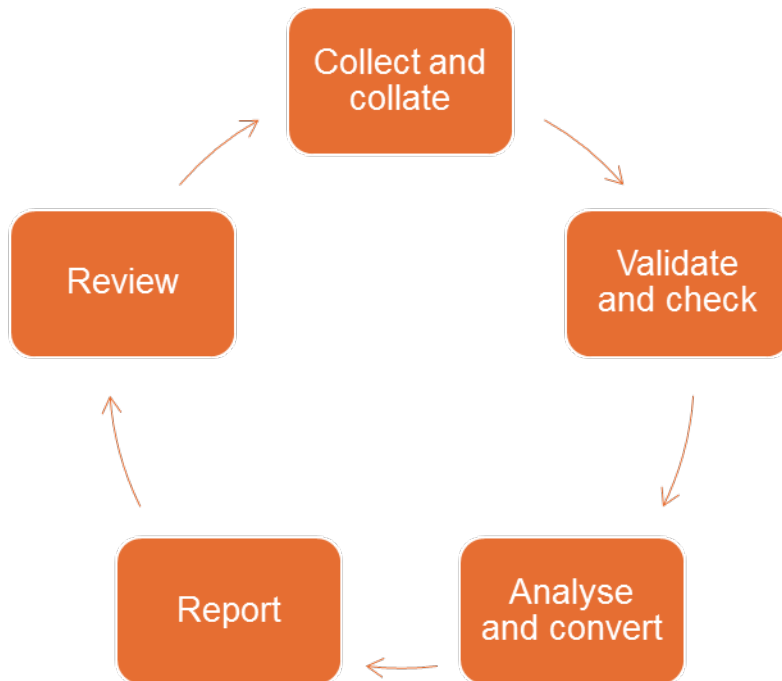
- Cover
- Risk exposures
- Risk management
- Losses

RD = Content specification +
Project Plans

Start nine months before
insurance policy inception

This usually takes 3-6 months of elapsed time

Delivery process



- Project management
 - Report progress against the plan
 - Maintain a log of issues that impact time, cost or quality
 - Maintain a correspondence log
 - File management protocols
 - System activity reports
 - Status reports

Report / Submission

- Assemble exhibits, charts and tables, narrative, images and diagrams into report templates
- Edit, proof and publish reports into standard English (avoid jargon)
- Format files into design styles
- Organise files into agreed structure
- Upload files onto website or file share portal
- Ensure all files are named and ordered correctly
- Quality control content and presentation
- Make updates and amendments as required
- Administer user access to website / file share portal
- Check confidentiality / disclaimers
- Get sign-off internally as per Insurance Disclosure Policy

Project report

- Review disclosure against specification
 - Report issues incurred and resolution recommendations if still outstanding
 - Report on resource adequacy / costs against budget
 - Combined with the submission pack this report tells the full disclosure story
- Append
 - Specification
 - Project plan
 - Data map (identifying name of data supplier and date data was received)
 - Issues log
 - Correspondence log
 - User access reports
 - etc



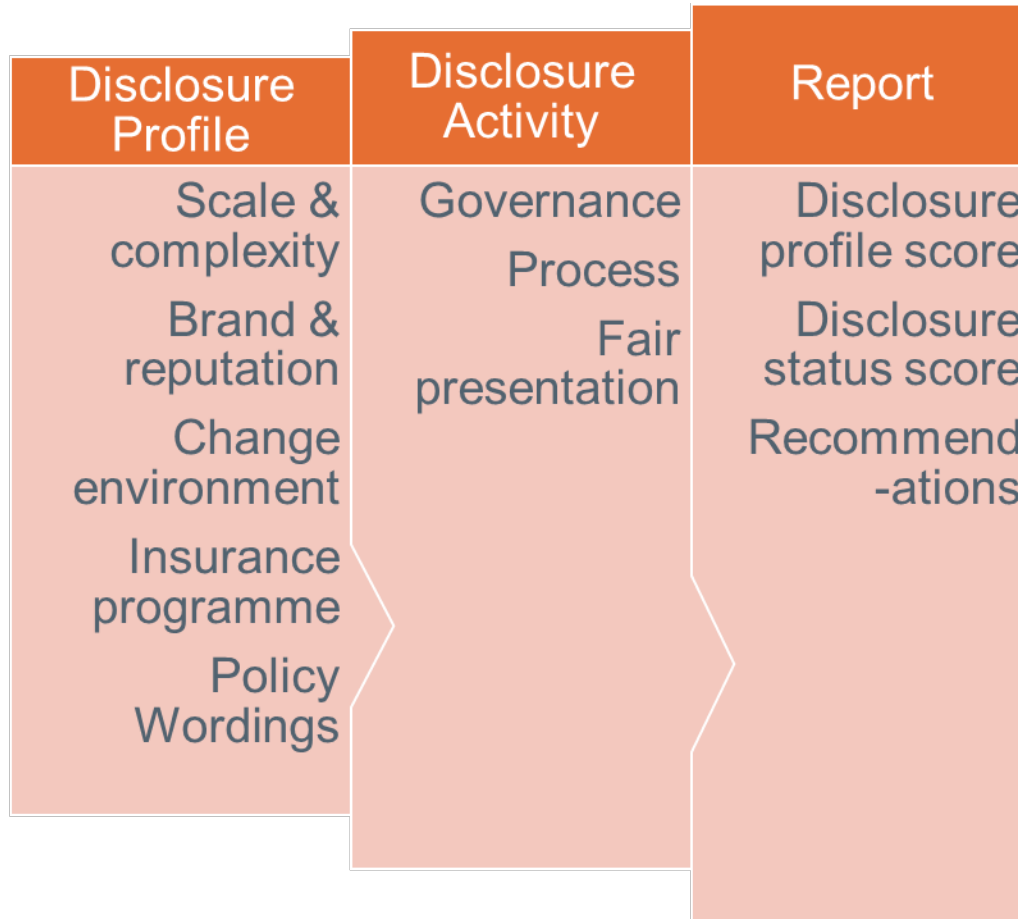
Insurance Act Compliance Audit

Audit objective

- Benchmark your Company disclosure against standards of best practice
- Identify gaps and areas for improvement
- Develop an action plan to comply with the Insurance Act



Preliminary Disclosure Compliance Assessment





Compliance requirement

Key	Score
Complex	5
Difficult	4
Normal	3

Question #	Business Risk Profile			Insurance Programme			Policy Wording		
	Scale and complexity	Brand and reputation	Change environment	Limits purchased	Risk Retention	Programme complexity	Wording coverage/complexity	Policy obligations	Policy validation
1	6	6	6	6	3	6	6	4	4
2	5	3	3	3	3	3	3		3
3	3	3	3	3		3	3		4
4	5	3	3			4	3		
5	3	3	3			3	5		
6	4	3	3			3			
7	5		3			3			
8	3								

Score	34	21	24	12	6	25	20	4	11
Max	40	30	35	15	10	35	25	5	15
% Scored	85.00%	70.00%	68.57%	80.00%	60.00%	71.43%	80.00%	80.00%	73.33%

Compliance response

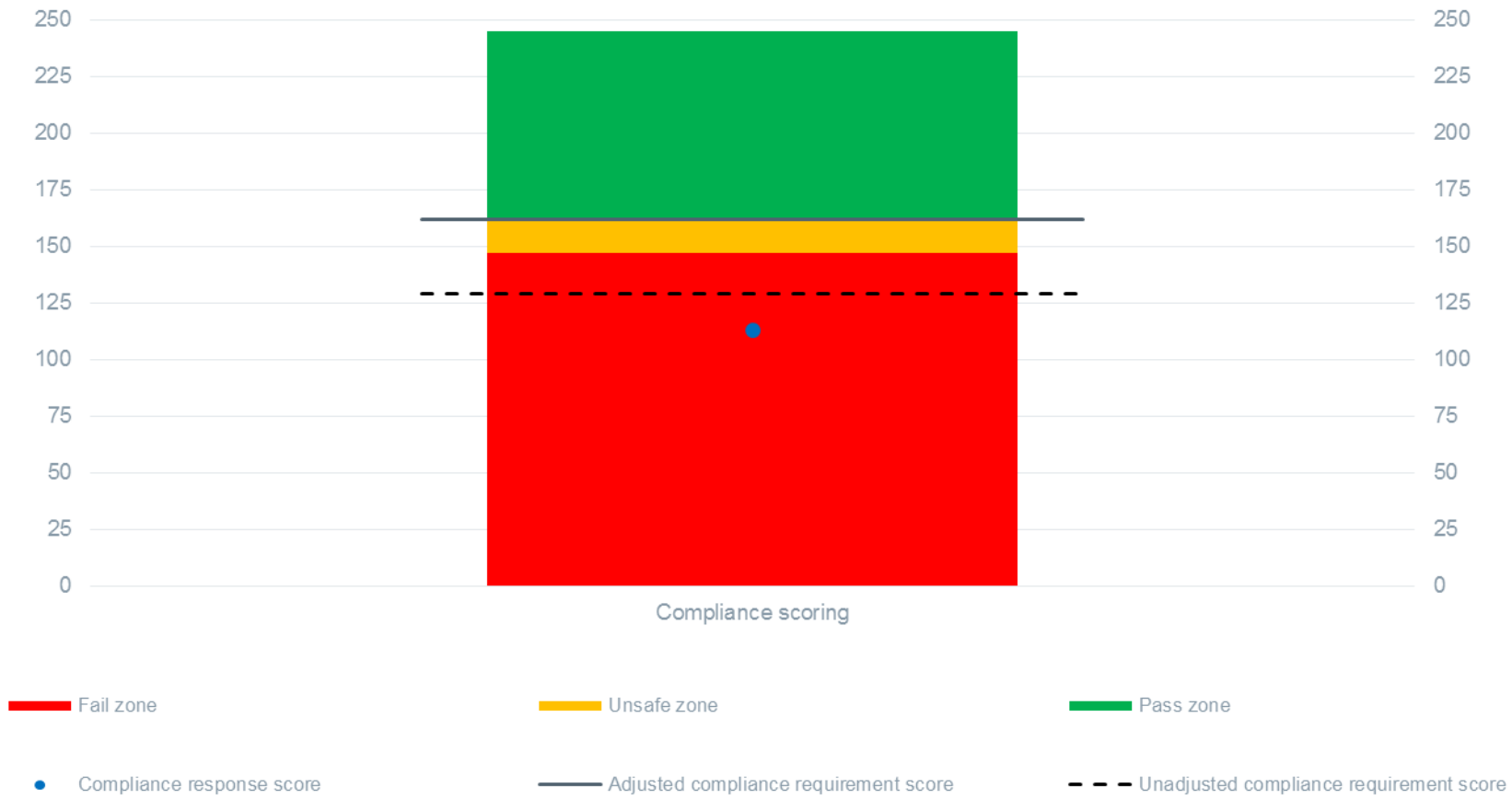
Key	Min	Max
Pass	4	5
Unsafe	3	3
Fail	1	2

Question #	Disclosure Governance	Disclosure Process		Fair Presentation			
	Accountability framework	Evidence of formal processes and procedures	Post fair presentation actions	Accuracy	Clear and accessible	Materiality	Consistency of approach
1	1	2	1	4	2	4	5
2	1	2	1	2	3	5	
3	1	2	1	4	3	3	
4	1	3	3	5	2	3	
5	1	2	2	3		1	
6	2	3	1			1	
7	2	3					
8	1	2					
9		2					
10		2					
11		2					
12		2					
13		3					
14		3					
15		2					
16		3					
17		2					
18		2					
19		2					

Score	10	44	9	18	10	17	5
Max	40	95	30	25	20	30	5
% Scored	25.00%	46.32%	30.00%	72.00%	50.00%	56.67%	100.00%



Summary compliance score





Next steps

Insurance disclosure compliance plan

