

ASIC issues first unfair contract term proceeding against an insurer

APR23

At a glance

- ASIC has commenced its first proceeding against an insurer under the unfair contract terms regime. The term in question is contained in a home and contents insurance contract and concerns an obligation on the insured to notify the insurer if “*anything changes about your home or contents*”.
- The allegedly unfair contract term is contained in approximately 1,377,900 insurance contracts issued by the insurer since the regime came into effect. Among other things, ASIC seeks orders directing the insurer to reassess any claim made by a consumer that it reduced or refused to pay by relying on the term in question.
- ASIC has also taken this opportunity to remind insurers that the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) will introduce civil penalties under the ASIC Act for breaches of the unfair contract term prohibition from 10 November 2023.

Overview

On 4 April 2023, ASIC commenced its first proceeding alleging unfair contract terms (UCT) in an insurance contract. The proceeding is issued against Auto & General Insurance Company Limited (Insurer) with the allegedly unfair contract term contained in the insurance materials (comprising the PDS and renewal letters among other things) for several of its home and contents products.

ASIC’s proceeding is centred around one contract term, which outlines the insured’s obligation to notify the Insurer if “anything changes about your home or contents” (the Term). The Term features in approximately 1,377,900 insurance contracts issued between 5 April 2021, when the UCT regime¹ came into effect, and 21 March 2023.²

According to the Concise Statement, the Term is in breach of the UCT regime because it would cause a significant imbalance in the parties’ rights and obligations³ as:

- 1) The Term imposes an onerous obligation on the consumer to notify the Insurer if “anything” changes about their home or contents. ASIC stated this obligation is one “customers cannot practically meet”⁴. Even if the obligation is not read literally, it imposes an unclear obligation on the consumer about what needs to be disclosed.

¹ Being the extension of the Australian Consumer Law prohibitions to the *Australian Securities and Investments Commission Act 2001* (Cth)

² That date range is the relevant period for the purposes of the claim. The Concise Statement also alleges that approximately 670,390 of the contracts were still active as at 28 February 2023.

³ See s 12BG of the *Australian Securities and Investments Commission Act 2001* (Cth).

⁴ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-088mr-asic-sues-auto-general-insurance-company-for-alleged-unfair-contract-terms-in-insurance/>

Takeaways for insurers

There are three key takeaways for insurers based on this regulatory development:

- 1) ASIC is clearly focused on terms that seem to limit the operation of (or misrepresent the position regarding) the Insurance Contracts Act.
- 2) Vague and broadly drafted obligations contained within contract or disclosure materials will be considered unfair unless it is clear that the term is reasonable and necessary to protect the insurer's legitimate interests.
- 3) This proceeding serves as a timely warning to insurers ahead of the strengthened penalties that come into effect in November 2023.

- 2) The contract does not reference the effect of s 54 of the *Insurance Contracts Act 1984* (Cth), so may mislead or confuse the consumer about the Insurer's rights to refuse to pay a claim for failure to comply with the Term.
- 3) The Term is not reasonably required to protect the interests of the Insurer⁵ because, among other things, it could have been expressed in a way that explained the effect of s 54 of the Insurance Contracts Act.

In addition to the relief for declaratory and injunctive type relief ordinarily sought by ASIC, the regulator is also seeking orders directing the Insurer, at its own expense (and within 30 days), to reassess any claim made by a consumer that it reduced or refused to pay by relying on the Term.

Importantly, the [ASIC press release](#) reminds us that a breach of the UCT prohibitions will be a civil penalty provision from 10 November 2023.⁶



While insurers have undertaken a significant amount of work in preparing for the UCT regime, they will also need to plan for their ongoing compliance obligations.

Insurers can manage their risk by undertaking regular reviews of their policy wordings to ensure that they don't contain any prohibited contract terms and to ensure that those terms do not seem to limit, or misrepresent, the position about the operation of the Insurance Contracts Act.

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⁵ The presumption contained in s 12GB(4).

⁶ By operation of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*



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Need to know more?

If you would like further information about, or assistance with, the UCT regime, contact a member of our team.



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