

Australian Securities and Investments Commission

Answers to Questions On Notice

Public hearing: Parliamentary Joint Committee on Corporations and Financial Services

19 March 2021

Division/Agency: Australian Securities and Investments Commission

Question No: QoN 009

Committee Member: Mr Bert Van Manen MP

Question:

Mr VAN MANEN: One of the areas where we're going to see some change over the next little while is the application of unfair contract terms to life insurance policies; I think that starts in early April. What discussions have ASIC had with the life insurance industry in relation to the application of those unfair contract terms? It appears there's potentially some issues in that space around changes to ownership of policies and changes to other bits of policies where, because of their existing policies and with the application of the unfair contract terms, those things can't occur. They'd have to go to a new contract, which may then put the cover that those people have at risk. They may not be able to get cover, because of changes in their health circumstances, or they may lose benefits and conditions on new policies that they currently have with existing policies. What work is ASIC doing with the industry to deal with those potential issues?

Ms Chester: In terms of the work that ASIC has been doing: you're right, the new regime following the Hayne royal commission on unfair contract terms as it relates to insurance policies comes into effect from 1 April this year.

Thus, the insurers have been working on that since June last year when the legislation looked like it was going to secure passage. We've been working with Treasury on the legislation and then on information sheets to the insurance industry to help them get ready.

I would say that, from September last year, all of the insurers have been doing a complete review of all of their contract terms by their in-house and external legal counsel to make sure all of those contract terms that could be construed as unfair under the new legislation have been identified and replaced for the start of 1 April 2021. We've had many meetings with the FSC, the Insurance Council of Australia and all of the large insurers. Myself and two of our executives, led by Emma Curtis who runs our insurance team, have met on the unfair contract terms with all the major insurers over the last three to four months.

The issue you raised is one that has not been raised with us. I will take the question on notice and come back to you quickly, but replacing an unfair contract term with a non-unfair contract term should not trigger the ending or a changeover of the policy. It's just a replacement of that term. This has not been raised in any of the meetings that I have had.

Mr VAN MANEN: Maybe I phrased it poorly. I'll give you a practical example. Sometimes it would be the exception rather than the rule, but, if you have an insurance policy and you failed to pay the premium, normally you'd have a period after which the premium is due to pay that premium and reinstate the policy. If you go past that date, you also have the option to approach the insurance company and say, 'Can that policy be reinstated with payment of the applicable premium?' and they have the option as to whether they can do that. It's been put to me that now, with the introduction of the unfair contract terms, that is now effectively, for existing policies, no longer possible, because it's a reinstatement of an old policy that doesn't comply with the unfair contract terms. Another example has been put to me where somebody wishes to change the nature of their existing policy from

'any occupation' to an 'own occupation' definition or from level premiums to stepped premiums. They're practical things that happen in the course of dealing with your clients on a regular basis. Those things, particularly the second two—changing occupation from any to own or from level to stepped premiums—now may necessitate the writing of a completely new policy, which, by its nature, would have different terms and conditions from the current policy. If the client's health had changed, there's a risk they won't get that new policy, so they can't pursue that course of action, which may not be in the client's best interest. There's a heap of follow on potential consequences that arise.

Ms Chester: I think there are two streams you're identifying here. The first is replacing unfair contract terms with fair contract terms. As I understand it, that doesn't trigger a rewrite of a policy in terms of, if they need to have a look through to the risk of the individual policy holder—

Mr VAN MANEN: I agree with that.

Ms Chester: I thought that was what your original question was about. The other stream you're identifying is what triggers are in the existing policy such that if the policy holder wants to change an element of the policy, be it a step payment versus them saying, 'I want to change my industry occupation', whether or not that triggers a rewrite is a matter for the individual policy. But, now that we have in place unfair contract terms, they couldn't have in place a contract term that opens them up to a retrigger of a policy and thus a complete underwrite review if that was unfair. So, in a perverse way, that shouldn't happen after 1 April, but if you have particular examples in mind, we'd be happy to look at them to see if there is any misconduct there.

Mr VAN MANEN: I haven't got particular examples in mind, but it's been put to me that this is a potential consequence. The existing policies contain potentially unfair contract terms, because they don't need to comply with the law. It's only new policies issued after that date that have to comply with the removal of those unfair contract terms. Or are the insurance companies going through all existing policies and updating them to remove unfair contract terms?

Ms Chester: That's what we're going to be looking for from 1 April. If there are any policies in place after 1 April that have unfair contract terms in them, it's a breach of the law.

Mr VAN MANEN: My understanding was that, if there were existing contracts, they were exempt from that and only new contracts after that date had to be updated, but I stand to be corrected.

Ms Chester: I'll take that question on notice, and we'll find out who is right.

Answer:

ASIC has undertaken targeted supervisory work in preparation for the unfair contract terms (UCT) reform, which included reviewing the product disclosure statements of a sample of general and life insurance products. We have been working closely with industry in preparation for the commencement of the reform. Our work has involved industry roundtables, direct engagement with some insurers and engagement with the Financial Services Council (FSC) and the Insurance Council of Australia.

Insurers are conducting their own proactive reviews of their policies and obtaining legal advice in preparation for the UCT reform.

To assist with compliance with the reform, ASIC has published updates to our existing information sheets on unfair contract term protections ([INFO210](#) and [INFO211](#)). We have also shared information with industry about concerning terms and published examples of some of the changes made by insurers on our website.

The UCT laws will apply to standard form consumer and small business insurance contracts entered into or renewed from 5 April 2021. Where a term in an existing contract is varied on or after 5 April 2021, the UCT laws will generally apply to the term that is varied but not to the rest of the contract.

The issue of changes to existing policies which has been raised by Mr Van Manen has been brought to our attention by the FSC. The way that the law has been drafted means that insurers can make some changes to an existing policy without creating a new policy which would be subject to UCT laws. Whether changes made to an existing policy would mean that the whole policy would be subject to UCT laws will depend on the terms of each policy and the nature of the change. If an insurer makes changes to a policy from 5 April 2021 which results in the issue of a new policy, the whole policy would generally be subject to the UCT laws.

ASIC does not have relief powers in relation to the UCT provisions but will continue to engage with the FSC and APRA on this issue to understand insurers' concerns and insurers' proposed responses to this issue. Any proposal to amend the legislative settings is a matter for the Government. ASIC encourages insurers to continue to work towards good consumer outcomes, while appropriately managing any sustainability issues, within the bounds of the law.