

NOTICE OF FILING

Details of Filing

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File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
AUTO & GENERAL INSURANCE COMPANY LIMITED (ACN 111 586
353)
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Concise Statement

No. of 2023

Federal Court of Australia
District Registry: New South Wales
Division: General

IN THE MATTER OF AUTO & GENERAL INSURANCE COMPANY LIMITED ACN 111 586 353

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

AUTO & GENERAL INSURANCE COMPANY LIMITED (ACN 111 586 353)

Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. These proceedings concern contracts of insurance, comprising home and contents insurance policies, entered into by the defendant, Auto & General Insurance Company Limited (**Auto & General**).
2. The plaintiff, the Australian Securities and Investments Commission (**ASIC**), contends that:
 - a. a term of these contracts requiring the insured to notify Auto & General “if anything changes about your home or contents” is unfair;
 - b. the contracts are standard form contracts;
 - c. the contracts are financial products; and
 - d. the contracts are consumer contracts,within the meaning of s 12BF of the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), with the consequence that the term is void.
3. On 1 March 2021, Auto & General issued the following product disclosure statements (**PDS**):
 - a. Auto & General Your Home and Contents Insurance Policy PDS (issued under the following brands: 1st For Women, Best Buy, Ozicare, Retirease, and Maxxia);

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
Prepared by (name of person/lawyer)	Tina Beltrame, Litigation Counsel		
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- b. Budget Direct Your Home and Contents Insurance Policy PDS;
- c. Australia Post Your Home and Contents Insurance Policy PDS;
- d. ING Home and Contents Insurance Policy PDS;
- e. Catch Insurance Your Home and Contents Insurance Policy PDS;
- f. Virgin Insurance Your Home and Contents Insurance Policy PDS; and
- g. Qantas Home and Contents Insurance PDS,

together, the **Home and Contents Insurance PDSs**.

4. The Home and Contents Insurance PDSs are in substantially identical terms.
5. From about 1 March 2021, Auto & General published the Home and Contents Insurance PDSs on its website at www.autogeneral.com.au.
6. From at least 5 April 2021, Auto & General entered into, including by renewal, consumer contracts (within the meaning of s 12BF(3) of the ASIC Act) with Non-Party Consumers as defined in s 12BA of the ASIC Act, the terms of which were recorded in a Home and Contents Insurance PDS, an insurance certificate, a cover letter, declarations, and any applicable supplementary product disclosure statement (**Class Insurance Contracts**). In this concise statement, Auto & General's counterparties to the Class Insurance Contracts are described as "consumers".
7. From 5 April 2021 to 21 March 2023, Auto & General entered into, including by renewal, approximately 1,377,900 Class Insurance Contracts.
8. As at 28 February 2023, there were about 670,390 Class Insurance Contracts for which the period of insurance had not expired.
9. The Class Insurance Contracts includes the contracts which are identified at Annexure A to the Originating Process (**Individual Insurance Contracts**).
10. The Class Insurance Contracts contain a term (set out in the Home and Contents Insurance PDSs) which provides:

Tell us if anything changes while you're insured with us

While you're insured with us, you need to tell us if anything changes about your home or contents.

If you don't tell us about changes, we may:

- refuse to pay a claim
- reduce the amount we pay
- cancel your contract
- not offer to renew your contract.

Examples of changes we want you to tell us about, are:

Your insured property or address for contents changes

You find out your home is heritage listed or has a heritage overlay

Paying guests stay in your home, for example, Airbnb, Homestayz

Your home is no longer in good condition

You are moving out and rent your home to tenants	You will start earning an income at your insured address
Any construction, alteration, or renovation work will start or finish	Security devices are removed, or broken
Your home will be demolished, by you or a government agency	You find out the building materials contain asbestos.
Your property will be unoccupied for more than 60 days, or is occupied by trespassers	

(the Notification Term)

B. RELIEF SOUGHT FROM THE COURT

11. ASIC seeks the relief set out in the accompanying Originating Process comprising declarations pursuant to ss 12GND and 12GNB of the ASIC Act, and/or s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), injunctions pursuant to s 12GD of the ASIC Act and/or s 23 of the FCA Act and corrective orders pursuant to pursuant to s 12GNB of the ASIC Act and/or s 23 of the FCA Act.

C. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

12. The Notification Term would cause a significant imbalance in the parties' rights and obligations arising under each Class Insurance Contract because:
- a. it imposes an onerous obligation on the consumer to notify Auto & General of "anything" that changes about the consumer's home or contents;
 - b. further or alternatively (if the Notification Term is not to be construed literally), it imposes an ambiguous and unclear obligation on the consumer as to what the consumer needs to disclose to Auto & General;
 - c. by reason of the Notification Term, the effect of each Class Insurance Contract is that, if the consumer does not comply with the Notification Term, then:
 - i. but for s 54 of the *Insurance Contracts Act 1984* (Cth) (**ICA**), Auto & General may refuse to pay a claim by the consumer in whole or in part; and
 - ii. Auto & General may cancel the Class Insurance Contract;
 - d. the Class Insurance Contract does not advert to, or explain, the existence or effect of s 54 of the ICA and is therefore liable to mislead, confuse or leave the consumer ignorant as to the circumstances in which Auto & General may in fact refuse to pay a claim in whole or in part by reason of an omission of the consumer to comply with the Notification Term.

13. ASIC relies on the presumption in s 12BG(4) that the Notification Term is not reasonably necessary to protect Auto & General's legitimate interests. The Notification Term is not reasonably necessary in order to protect the legitimate interests of Auto & General, being the party who would be advantaged by the term, because:

- a. Auto & General does not have a reasonable need in order to protect its legitimate interests to be notified if "anything" changes about the consumer's home or contents;
- b. further or alternatively (if the Notification Term is not to be construed literally), Auto & General could have included a term with the same legal effect which was not ambiguous and unclear; and
- c. the Notification Term could have been expressed in a manner which adverted to or explained the existence or effect of s 54 of the ICA and which was not liable to mislead, confuse or leave the consumer ignorant as to the circumstances in which Auto & General may refuse to pay a claim in whole or in part by reason of an omission of the consumer to comply with the Notification Term.

Particulars

- a) Prior to 1 March 2021, the PDSs issued by Auto & General in respect of home and contents insurance did not contain the Notification Term but rather stated "*You must tell us if any details on your insurance certificate are incorrect or have changed, if the occupancy or use of your home changes from a residence to include any income earning activity, or if the home is in a state of disrepair. If you do not tell us, we may reduce or refuse to pay a claim*".
- b) On 6 March 2023, Auto & General informed ASIC that:
 - i. since 15 September 2022, it has not been refusing or reducing claims brought by consumers for a failure to tell Auto & General about a change to their home or contents, pursuant to the Notification Term; and
 - ii. it currently intends not to refuse or reduce a claim brought by any consumer on the basis that a consumer failed to tell Auto & General about a change to their home or contents.

14. If the Notification Term were to be relied on by Auto & General, it would cause detriment to the consumer because of the matters stated in sub-paragraphs 12(a)-(d) above.

15. The Notification Term is not transparent within the meaning of s 12BG(3) because its legal effect is not expressed in reasonably plain language by reason of the matters stated in sub-paragraphs 12(b)-(d) above.

16. By reason of the matters stated in paragraphs 12 to 15, the Notification Term is unfair within the meaning of s 12BG of the ASIC Act.
17. ASIC alleges that each of the Class Insurance Contracts:
- a. is a consumer contract within the meaning of s 12BF(3) of the ASIC Act;
 - b. is a standard form contract for the purposes of s 12BF(1)(b) of the ASIC Act and ASIC relies on the presumption which applies by reason of s 12BK(1) of the ASIC Act that each of these contracts is a standard form contract; and
 - c. is a financial product by reason of s 12BAA(7)(d) of the ASIC Act.
18. ASIC alleges for the purposes of s 12GNB(1) that:
- a. Auto & General is a party to each of the Class Insurance Contracts who is advantaged by the Notification Term;
 - b. the Notification Term caused or is likely to cause a class of persons, being each of the consumers who are party to the Class Insurance Contracts, to suffer loss or damage by reason of the matters stated in paragraph 12(a)-(d) above; and
 - c. the class of persons includes persons who are not or have not been party to an enforcement proceeding, as defined in s 12BA of the ASIC Act, in relation to the Notification Term.
19. By reason of the matters stated in paragraphs 12 to 18, ASIC contends that the Notification Term in each of the Class Insurance Contracts is void pursuant to s 12BF(1) of the ASIC Act and the relief sought in the Originating Process ought be granted.

Certificate of lawyer

I Tina Beltrame certify to the Court that, in relation to the concise statement filed on behalf of the plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the statement.

Date: 4 April 2023



Signed by Tina Beltrame
Lawyer for the plaintiff