

**Senate Standing Committee on Economics**

**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Supplementary Budget Estimates

20-21 November 2013

**Question: SBT 914-919**

**Topic: Unfair contract terms in consumer credit contracts**

**Written: 28 November 2013**

**Senator WONG asked:**

914. Can ASIC please outline what sorts of complaints it has been receiving, if any at all, from consumers about alleged unfair terms in consumer credit contracts, and in what forms of credit contracts?
915. Are there any stand-outs in terms of key consumer concerns about certain types of unfair contract terms? [e.g. penalty fees on standard savings accounts or over-limit fees on credit cards or early exit fees from mortgages]
916. What if any enforcement actions have ASIC undertaken in regard to identifying and seeking to void unfair terms in consumer credit contracts?
917. What industry guidance has ASIC provided to the financial services sector? Targeting what sort of terms/contracts?
918. Has ASIC received consumer complaints about unfair contract terms in insurance contracts? If so, how many?
919. Is it ASIC's view that the UCT provision has worked as it was designed? Are you seeing improvements in the way standard-form credit contracts are being designed, to the benefit of the consumer?

**Answer:**

914. ASIC does receive complaints about consumer credit contracts that may involve unfair contract terms, although consumers usually do not directly refer to 'unfair terms'. Rather, consumers usually describe a general concern about the loan they have been given but are unlikely to identify particular contract provisions as being unfair when making their complaint. These complaints come from the consumers themselves and through intermediaries such as financial counsellors and legal aid bodies.

It is evident from our analysis of complaints about consumer credit contracts that some of those complaints relate to particular terms in the contracts, however, whether or not those terms might be considered unlawful is a different question. For example, some contract terms are not open to challenge under the UCT provisions because they involve some aspect of the upfront cost, and other terms may be defensible as serving a legitimate purpose.

We have set out in the table below some examples of the contract terms that have been the subject of these sorts of complaints to ASIC and the different forms of credit contracts which contained these terms.

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Type of credit contract	Contract term complained about
Small amount/payday loans	High fees and charges for such things as - direct debit fees, default fees, payment dishonour fees and enforcement expenses.  Multiple fees for the one default event such as – a missed payment fee, a direct debit dishonor fee and a direct debit stopped payment fee.
Consumer leases	High early termination fees  Terms that convert a lease with a fixed term to an indefinite rental agreement.  Terms requiring the consumer in remote areas to return faulty goods to the lessor for repair or to return goods when the agreement is terminated.
Rent to own rental agreements	High early termination fees
Car loans	Terms stating that the offer of credit is conditional on acquiring other services such as extended warranty, servicing agreements and roadside assistance.
Credit card contract and home loans	Unilateral right to vary terms and conditions <sup>1</sup>

915. The 'stand-outs' in terms of key consumer concerns about unfair contract terms generally involve those credit products aimed at financially vulnerable consumers.

For example, providers of short term/small amount credit contracts engage with a consumer market that is typically low income earning, in urgent need of funds, and may fall outside of credit standards required by banks and other more mainstream sources of funding.

Complaints made by or on behalf of those consumers regularly raise concerns in relation to high fees and charges, and multiple fees and charges that may apply particularly when a consumer falls into hardship or defaults on the loan.

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<sup>1</sup> We note that the National Credit Code allows for consumer credit contracts to have unilateral variations terms. Changes to the contract under these terms generally take effect after a period of notice.

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Another area of concern including financially vulnerable consumers relates to the termination of lease agreements, including provisions in lease agreements that seek to impose on consumers a requirement to return goods in circumstances where the goods were delivered to the consumer and the consumer has no means to transport the goods. In remote areas, an additional term is sometimes added to the lease requiring the consumer to return faulty goods to the lessor.

ASIC has not received regular complaints about penalty fees on standard savings accounts or over-limit fees on credit cards. In relation to early exit fees from mortgages, home loan early termination fees have been banned since 2011.

916. When undertaking surveillances in relation to concerns raised in complaints from consumers which highlight potential unfair contract terms, ASIC has generally sought to work with credit providers in the first instance to ensure these terms are removed from their standard form contracts. As an example, in January 2011, ASIC identified concerns with terms in My Budget Pty Ltd's terms of service agreement around post-termination administration fees, disclosure of priority payments and retention of interest and direct debit penalty fees. As a result of ASIC's intervention, the service agreements were updated and the offending terms removed/amended.

<http://www.asic.gov.au/asic/asic.nsf/byheadline/11-12AD+ASIC+obtains+changes+to+contract+terms+under+new+consumer+law?openDocument>.

In cases where ASIC has identified systemic consumer detriment as a result of unfair contract terms, action has been taken to ensure consumer redress is made. For example, an ASIC investigation into Mr Rental's standard form rental agreement gave rise to concerns that the inclusion of a term allowing Mr Rental to charge a 'calculation period adjustment' (that is, an additional fee charged to consumers who terminated their rental agreements early), was an unfair contract term under the *Australian Securities and Investments Commission Act 2001*. As a result, ASIC accepted an Enforceable Undertaking from Mr Rental which resulted in consumers being repaid in excess of \$300,000 and Mr Rental removing the calculation period adjustment from its contracts.

<http://asic.gov.au/asic/asic.nsf/byheadline/13-022MR+ASIC+accepts+enforceable+undertaking+from+Mr+Rental?openDocument>.

In some cases where the ASIC has identified terms in credit contracts which may be unfair contract terms, the consumer credit laws have provided more efficient tools for ASIC to tackle the conduct and address the consumer detriment. For example, there may be potential unfair contract terms in some lease agreements for household goods, however, where there are also breaches of the responsible lending obligations and unconscionable conduct, we have taken action to ban individuals from the credit industry, cancel licenses and prevented entities from enforcing these contracts rather than taking action under the UCT provisions in the ASIC Act.

<http://asic.gov.au/asic/asic.nsf/byheadline/13-021MR+ASIC+takes+action+against+Zaam+rentals%2C+cancelling+its+licence+and+banning+its+directors?openDocument>.

<http://asic.gov.au/asic/asic.nsf/byheadline/13-235MR+ASIC+takes+action+against+rental+companys+franchisees?openDocument>

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We note that the unfair contract term provisions apply to consumers but not to small businesses.

917. ASIC, the ACCC and State and Territory consumer protection agencies have jointly published<sup>2</sup> guidance on key aspects of the Australian Consumer Law including the unfair contract terms provisions. The purpose of this guidance is to help businesses, legal practitioners and consumer advocates to understand the new laws in simple language, but it is not a substitute for the legislation.

ASIC has also published Regulatory Guide 220 *Early termination fees for residential loans: Unconscionable fees and unfair contract terms* and Report 300 *Review of early termination fees for residential loans entered into before 1 July 2011* (these documents primarily focused on unconscionable fee provisions of the National Credit Code and they also dealt with unfair contract terms provisions).

918. As the *Insurance Contracts Act 1984* currently operates to exclude the application of the unfair contract terms provisions in the *ASIC Act* from applying to insurance contracts, ASIC is not able to take action in relation to unfair contract terms in insurance contracts.

However, ASIC has received several complaints from a consumer representative group about the practice of some insurance companies to automatically renew customers' policies. This process of automatic renewal requires the customer to actively opt out, otherwise their policy is automatically renewed and their bank account debited. It has been alleged that ineffective disclosure of the automatic nature of renewal may amount to an unfair contract term if the provisions applied to insurance contracts.

ASIC has also considered the operation of other clauses in general insurance policies which may be unfair contract terms (if the provisions applied). Some examples might include:

- For travel insurance - Insurance companies refusing to pay monies stolen from a secure place (eg hotel or luggage)
- For motor vehicle insurance - the requirement to provide full details (eg name, address and phone numbers) of the other party at fault in an accident before a claim will be paid, and
- For funeral insurance – automatic cancellation of policy after four missed payments.

ASIC is unable to provide the number of complaints about insurance contracts that may involve potential unfair contract terms because, as the unfair contract terms provisions do not apply to insurance contracts, ASIC does not currently assess the application of those provisions to the circumstances of complaints received. However, as noted above, we are aware of consumer group concerns about contractual provisions that may amount to unfair contract terms if the provisions applied.

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<sup>2</sup> <http://www.asic.gov.au/asic/asic.nsf/byheadline/Unfair-contract-terms-law?openDocument>

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919. The unfair contract terms law that applies to financial products and services under the *Australian Securities and Investments Act 2001* is part of the broader national Australian consumer law which was fully implemented as of 1 January 2011. Since that date there have been numerous legislative changes in consumer credit, privacy legislation and consumer law (some of these reforms are ongoing). Industry is also still adapting to these changes and undertaking contract reviews to better inform themselves of their compliance.

Disentangling the effects of the UCT legislation from the other legislation relevant to consumer credit contracts is difficult. However, based on our surveillances, research and enforcement action it is clear that, as a package, these reforms have had a significant positive influence on conduct in the credit sector.

ASIC has found the UCT provisions in conjunction with the other consumer credit legislation to be an effective tool for negotiating with credit providers and lessors on their standard form contracts if we have concerns over the impact of a particular term on consumers. ASIC's early experience is that most credit providers and lessors are keen to address any potential unfair contract terms when approached by ASIC.

ASIC has used this broader package of legislation to obtain significant results based on a review of the contracts involved. For example, in the RHG Mortgage Corporation Ltd (formerly known as RAMS Mortgage Corporation Ltd) matter, more than 6000 consumers were refunded in excess of \$3.3M following ASIC concerns about contract terms for discharge and early termination fees charged on home loans. This type of action has helped improve industry practice around mortgage exit fees.

[http://www.asic.gov.au/asic/asic.nsf/byheadline/12-169MR+RHG+customers+refunded+over+\\$3.3+million?openDocument](http://www.asic.gov.au/asic/asic.nsf/byheadline/12-169MR+RHG+customers+refunded+over+$3.3+million?openDocument).

There are limitations to using the UCT provisions, including that it is difficult to impose penalties for breaches of the provisions (in contrast with the National Credit Act and Credit Code). When considering how best to address particular conduct and consumer detriment, we will assess the various tools available to us (credit legislation, ASIC Act and UCT provisions) to determine the most appropriate approach in the circumstances.