The AFCA Approach to motor vehicle insurance disclosure and ridesharing

We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

1 At a glance

1.1 Scope

This document focuses on AFCA's general approach to motor vehicle insurance claims made by individuals who are using their car for ridesharing without disclosing it to their insurer.

Section two of this document covers:

- failure to disclose the change of use during the policy term; and
- failure to disclose ridesharing when applying for a new policy or when a policy is renewed.

This document refers specifically to ridesharing however similar principles will be applied in cases where an individual fails to notify their insurer about a change in use – such as a person using their home (or a part of their home) for short term rental.

1.2 Who should read this document?

- Financial firms, consumers and consumer representatives who have a complaint at AFCA that includes a ridesharing issue.
- Anyone who wants to understand how AFCA applies legal principles, industry codes and good industry practice when considering complaints where the issue of motor vehicle insurance disclosure and ridesharing is raised.

The *AFCA Approach to section 54 of the Insurance Contracts Act* provides further guidance on dealing with these issues.

1.3 Summary

When we consider complaints where issues of ridesharing are raised, in particular we will ask:

- Was the complainant using the vehicle for ridesharing at the time of the collision? If so, does a policy exclusion apply?
- If not, does the policy have an exclusion for ridesharing, such that the insurer's legitimate interest in not covering commercial activity can be protected?
- Did the complainant have actual knowledge that they had to notify the insurer that the car was used for ridesharing and fail to notify anyway?
- If not, how clear were the insurer's written statements that ridesharing needed to be notified?

2 In detail

2.1 Failure to notify the change of use during a policy term

2.1.1 Jurisdiction

Section 54 of the *Insurance Contracts Act 1984* (Cth) (the Act) says that in some cases, an insurer cannot refuse to pay a claim on the basis of an act or omission which occurs after the policy started.

In *Ferrcom Pty Ltd v Commercial Union Assurance Company of Australia Ltd* (1993) 176 CLR 332, the High Court looked at a case about a crane which was unregistered when the insurance was taken out. During the term of the policy, the crane was registered. It was later damaged. The insurer said that if it had been told the crane was registered, it would not have agreed to continue to provide insurance and cancelled the policy. The policy had the following term:

> The extent of the liability of the Company is conditional upon -
>
> (a) The notification as soon as possible by the Insured to the Company of any change materially varying any of the facts or circumstances existing at the commencement of this Policy.

The High Court found that Section 54(1) operated to allow the insurer to reduce its liability to nil, because if it had been notified about the registration of the crane, it would have cancelled the policy and not been on risk when the damage occurred.

Some insurers have argued that if a person does not tell them they have started to use their car for ridesharing after the policy has started, they can refuse to pay the claim because if they had been told, they would have cancelled the policy. This argument relies on the decision in *Ferrcom*.

However, the application of Section 54 was developed further by the High Court in *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33. In referring to the purpose of section 54, the High Court stated:

> The Act is described in its long title as an Act to reform and modernise the law relating to certain contracts of insurance so that a fair balance is struck between the interests of insurers, insureds, and other members of the public and so that the provisions included in such contracts, and the practices of insurers in relation to such contracts, operate fairly.

The decision made it clear that insurers cannot refuse to pay a claim where a failure to comply with a policy term had nothing to do with the loss and did not prejudice the insurer's interests.

2.1.2 AFCA's approach

AFCA will consider what is fair in all the circumstances, ensuring each party's legitimate interests and expectations are met.

We also need to look at the purpose of the policy. In most motor vehicle policies, the purpose of the policy is to cover the insured for accidental damage. If the insurer is relying on a term in the contract that requires the insured to notify it about a change in use during the policy term, AFCA will look at the failure to notify the insurer as a post-contractual act. Failure to notify of the change of use could not reasonably be regarded as capable of causing or contributing to the loss.

If the complainant was not using the vehicle for ridesharing when the collision occurred, we would consider it fair in all the circumstances for the insurer to accept the claim. This approach is fair because there was no increase in risk to the insurer if the complainant was driving the vehicle for private use at the time of the collision.

If the complainant had failed to disclose the change of use of the vehicle when renewing the policy, then the insurer would be entitled to rely on non-disclosure subject to the provisions the Act. If the collision occurred during the first period of insurance, it is not a question of non-disclosure.

2.1.3 Why does AFCA consider this approach is fair?

A person who buys car insurance will have a legitimate interest in that insurance covering their private and non-commercial use of the car. They will reasonably expect the insurer to pay claims arising out of private and non-commercial use. They may not have a reasonable expectation that the insurance will cover commercial uses like ridesharing. On the other hand, an insurer will have a reasonable expectation and legitimate interest in not paying claims for commercial use of the car.

Difficulties arise when a person does not notify their insurer that they have started ridesharing, but then the car is damaged in circumstances which have nothing to do with ridesharing.

Most insurers have exclusions for ridesharing in their policies. Those exclusions will protect their legitimate interest in not paying claims arising out of commercial use. Strictly applying Ferrcom to allow an insurer to avoid paying a claim arising out of private use may mean the insurer obtains a result better than required to meet its legitimate interests and reasonable expectation. By contrast, the insured's reasonable expectations and legitimate interests would not be met.

2.1.4 What information does AFCA need?

Information generally required in these cases are:

- Call recordings of any conversations about ridesharing either before the policy started or during its term
- Copies of policy documents, schedules, PDSs and marketing materials

- Copies of logs showing when and where the car was used for ridesharing.

2.2 Failure to disclose at inception or renewal

2.2.1 The Act sets out obligations on insurer and insured at inception and renewal

Under section 22 of the Act, an insurer must clearly inform an insured, prior to entering a contract of insurance, of the duty of disclosure.

Section 21 of the Act states an insured is required to disclose every matter the insured knows (or a reasonable person in the circumstances could be expected to know) is relevant to the insurer's decision whether to offer insurance.

Section 21A of the Act modifies the duty of disclosure when eligible contracts are first entered into and section 21B modifies the duty of disclosure on renewal of those eligible contracts.

At inception, section 21A requires the insurer to request the insured to answer one or more specific questions that are relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.

At renewal, section 21B of the Act requires the insurer to either:

- Ask the insured specific questions relevant to the insurer's decision whether to accept the risk and, if so, on what terms; or
- Give the insured a copy of any matter previously disclosed in relation to the contract and request the insured to disclose any change to that matter or inform the insurer there is no change to that matter.

2.2.2 AFCA's approach

AFCA's approach differs when the insured fails to disclose the ridesharing use of their vehicle at inception or renewal of the policy.

The insurer would need to show it:

- asked the insured a specific question regarding whether the vehicle is used for ridesharing; or
- provided a copy of this question, and answer, at renewal.

The insurer must establish the insured failed to disclose the fact the vehicle was used for ridesharing. AFCA will look at whether the insured (or a reasonable person in their position) could be expected to disclose this fact.

If AFCA considers the insured (or a reasonable person in their position) should have disclosed this fact, and this failure was not fraudulent, section 28(3) of the Act allows the insurer to reduce its liability for a claim under a policy. The insurer can reduce its

liability to the amount for which it would have been liable, had the insured complied with the duty of disclosure.

The insurer must show the extent of prejudice. The insurer is entitled to reduce its liability to nil by showing it would not have offered insurance (at inception or renewal) for ridesharing use, subject to refunding the relevant premium paid.

A different outcome may apply if the insurer says it would still have offered insurance, but on different terms.

Section 54 of the Act will not apply in this circumstance, because the failure to disclose was pre-contractual.

2.2.3 Why does AFCA consider this approach fair?

AFCA considers this approach is fair as it aligns with our current approach regarding non-disclosure.

2.2.4 What information does AFCA need?

An insurer responding to a complaint about insurance disclosure and ridesharing should provide:

- Underwriting guidelines
- A statutory declaration from a relevant employee regarding the application of the guidelines to the circumstances, and whether any discretion applied
- Policy documents.

3 Context

3.1 Case studies

Case study 1 (691706)

The complainants incepted a motor vehicle insurance policy in April 2019. Later the same year, the complainants lodged a claim the following a collision that damaged the vehicle.

During its investigation, the complainants advised the insurer they had started using the vehicle for ridesharing a month before the accident. The insurer subsequently declined the claim, saying had it been informed of the ridesharing, it would have cancelled the insurance policy.

AFCA found that as the complainants were not using the vehicle for ridesharing when the collision occurred, it was fair in all the circumstances for the insurer to accept the claim. This was because there was no increase in risk to the insurer by the complainants driving the vehicle for private use at the time of the collision.

Case study 2 (644749)

The complainant registered their vehicle with Uber one day after taking out a motor vehicle insurance policy. The complainant was using the vehicle for ridesharing with Uber when they renewed the policy a year later.

A month after renewing the policy, the complainant lodged a claim for damage to his vehicle following a collision, which the insurer declined.

Had the complainant disclosed the change in usage of the vehicle (to include ridesharing) when renewing the policy, the insurer was able to show they would not have continued to provide cover. AFCA found the insurer was therefore entitled to decline the claim due to non-disclosure.

Section 54 of the Act did not apply because the failure to disclose the change in usage occurred before the renewal of the contract, therefore it was a pre-contractual act. Section 28(3) of the Act applied in these circumstances.

3.2 References

Term	Definition
Complainant	a person who has lodged a complaint with AFCA
Financial firm	a financial firm such as an insurer, who is a member of AFCA
Ridesharing	an arrangement in which a passenger travels in a private vehicle driven by its owner, for free or for a fee, especially as arranged by means of a website or App.

Useful links

Document type	Title / Link
Insurance Contracts Act	This Commonwealth statute can be found here: legislation.gov.au/Details/C2019C00115
Austlii	Austlii is a free resource that contains a full extract of most of the judgments issued in Australia austlii.edu.au