

## NOTICE OF FILING

### Details of Filing

|                           |  |
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| Document Lodged:          | Concise Statement  |
| Court of Filing           | FEDERAL COURT OF AUSTRALIA (FCA)   |
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| File Title:               | AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v H C F<br>LIFE INSURANCE COMPANY PTY LIMITED ACN 001 831 250 |
| 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 H C F LIFE INSURANCE COMPANY PTY LIMITED (ACN 001 831 250)

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

**H C F LIFE INSURANCE COMPANY PTY LIMITED (ACN 001 831 250)**

Defendant

1. These proceedings concern three types of insurance policy issued by the defendant, H C F Life Insurance Company Pty Limited (**HCF Life**). The policies are known as “Smart Term”, “Cash Back”, and “Income Assist” or “Income Protect” and each is branded as a form of “Recover Cover”.
2. Each of the policies contains an exclusion in respect of “Pre-Existing Conditions”. Each of those exclusions is drafted in such a manner that, by reason of s 47 of the *Insurance Contracts Act 1984* (Cth) (**ICA**), it is partially unenforceable. This is because “Pre-Existing Condition” is defined in each policy in a manner which may include a sickness or disability that, at the time each policy was entered into, the insured was not aware of and a reasonable person in the circumstances could not be expected to have been aware of.
3. ASIC contends that the inclusion of the partially unenforceable exclusions in the policy terms (in circumstances where HCF Life fails to advert to, or explain, the existence or effect of s 47 of the ICA or the extent to which the term is unenforceable):
  - a. is liable to mislead the public in contravention of s 12DF of the *Australian Securities and Investments Commissions Act 2001* (**ASIC Act**); and
  - b. renders the exclusion terms unfair within the meaning of s 12BG of the ASIC Act and void by reason of s12BF of the ASIC Act.

|   |   |     |     |
|---|---|-----|-----|
| 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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## A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

### The Recover Cover Contracts

4. HCF Life published combined Product Disclosure Statement, Policy Document and Financial Services Guides (together **Recover Cover PDSs**) entitled:
  - a. “Smart Term Insurance” on 1 April 2021 (applicable to policies purchased between 1 April 2021 and 30 September 2021) and 1 October 2021 (applicable to policies purchased between 1 October 2021 and 24 March 2023);
  - b. “Cash Back Cover” on 1 April 2021 (applicable to policies purchased between 1 April 2021 and 30 September 2021), 1 October 2021 (applicable to policies purchased between 1 October 2021 and 30 August 2022), 1 September 2022 (applicable to policies purchased between 1 September 2022 and 24 March 2023) and 25 March 2023 (applicable to policies purchased on or after 25 March 2023);
  - c. “Income Assist Insurance” on 1 April 2021 (applicable to policies purchased between 1 April 2021 and 30 September 2021); and
  - d. “Income Protect Insurance” on 1 October 2021 (applicable to policies purchased between 1 October 2021 and 24 March 2023) and 25 March 2023 (applicable to policies purchased on or after 25 March 2023).
5. The policies to which each Recover Cover PDS is applicable were (and, in some cases, are) available for purchase by members of the public.
6. HCF Life has published each Recover Cover PDS on HCF’s website at [www.hcf.com.au](http://www.hcf.com.au) while policies to which that Recover Cover PDS applies have been available for purchase.
7. From on or about 1 April 2021, HCF Life entered into consumer contracts (within the meaning of s 12BF(3) of the ASIC Act) with non-party consumers (within the meaning of s 12BA of the ASIC Act) (**consumers**), the terms of which were recorded in a Recover Cover PDS and each consumer’s policy schedule (together **Recover Cover Contracts**).
8. Upon entering into a Recover Cover Contract, HCF Life provided to each consumer, who was the counterparty to the relevant Recover Cover Contract, a copy of the applicable Recover Cover PDS by email or post.
9. From 5 April 2021 to 27 April 2023, HCF Life entered into approximately 12,265 Recover Cover Contracts.
10. As at 27 April 2023, there were approximately 9,370 Recover Cover Contracts remaining on foot, in that HCF Life continued to provide insurance cover under the contract.
11. The Recover Cover Contracts include the contracts which are identified at Annexure A to the Originating Process.

12. Further information as to the number of Recover Cover Contracts entered into in respect of each of the Recover Cover PDSs is set out in Annexure A to this Concise Statement.

The Pre-Existing Condition Terms are partially unenforceable

13. Each of the Recover Cover Contracts contains an exclusion in respect of “Pre-Existing Conditions”.
14. In the Recover Cover Contracts entered into between 1 April 2021 and 24 March 2023, “Pre-Existing Condition” is defined to mean (or in substantially similar terms to):

any condition, illness or ailment where the signs or symptoms of which in the opinion of a registered medical practitioner, existed at any time before the Cover Commencement Date, even if a diagnosis had not been made.
15. In the Recover Cover Contracts entered into on or after 25 March 2023, “Pre-Existing Condition” is defined to mean:

any condition, illness or ailment where the signs, symptoms or treatment of which, in the opinion of a registered medical practitioner, existed within 5 years immediately prior to the Cover Commencement Date, even if a diagnosis had not been made.
16. The Recover Cover Contracts entered into on or after 25 March 2023 also include statements purporting to describe “How a Pre-Existing Condition Works” and “Examples of How a Pre-Existing Condition Works” to demonstrate “the impact a Pre-existing Condition can have on a claim”.
17. The exclusions, definitions and statements in respect of “Pre-Existing Conditions” in each of the Recover Cover Contracts are set out in Annexure B to the Originating Process and are collectively described as the “**Pre-Existing Condition Terms**”.
18. At all relevant times, the effect of s 47 of the ICA has been that, where a claim is made in respect of a loss that occurs as a result, in whole or in part, of a sickness or disability to which a consumer was subject or had at any time been subject, HCF Life may not lawfully rely upon the Pre-Existing Condition Term in a Recover Cover Contract where, at the time when the Recover Cover Contract was entered into, the consumer was not aware of, and a reasonable person in the circumstances could not be expected to have been aware of, the sickness or disability.
19. Each of the Pre-Existing Condition Terms in each of the Recover Cover Contracts is, to the extent described in paragraph 18 above, unenforceable by HCF Life.
20. This is because, as drafted by HCF Life, the existence of a “Pre-Existing Condition” turns on whether “*a registered medical practitioner*” holds an opinion that “*signs or symptoms*” (or, in some cases, “*treatment*”) of a condition, illness or ailment existed prior to entering into the contract “*even if a diagnosis had not been made*”, whereas s 47 only permits such an exclusion to be relied upon if the “*insured*” was aware of a “*sickness or disability*” or a reasonable person in the circumstances could be expected to have been so aware.

21. None of the Recover Cover Contracts advert to or explain the existence or effect of s 47 of the ICA or the extent to which each Pre-Existing Condition Term is unenforceable.
22. Ordinary and reasonable readers of each of the Recover Cover Contracts are, or are likely to be, unaware of the existence or effect of s 47 of the ICA and are therefore liable to:
  - a. believe (incorrectly) that the Pre-Existing Condition Term is enforceable in accordance with its terms;
  - b. be misled as to the circumstances in which a consumer may make a claim under a Recover Cover Contract notwithstanding that a loss was caused as a result, in whole or in part, of a "Pre-Existing Condition"; and
  - c. be misled as to the extent to which HCF Life can rely upon the Pre-Existing Condition Term to deny a claim under a Recover Cover Contract.

**B. RELIEF SOUGHT FROM THE COURT**

23. ASIC seeks declarations, injunctions, a pecuniary penalty and costs as set out in the accompanying Originating Process.

**C. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

Nature of the Recover Cover Contracts

24. Each of the Recover Cover Contracts is:
  - a. a financial product within the meaning of s 12BAA of the ASIC Act;
  - b. a financial service within the meaning of s 12BAB of the ASIC Act;
  - c. 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;
  - d. a contract for the supply, or possible supply, of services that are financial services within the meaning of s 12BF(1)(c)(ii) of the ASIC Act; and
  - e. a consumer contract within the meaning of s 12BF(3) of the ASIC Act.

Misleading conduct in relation to financial services

25. By reason of the matters stated in paragraphs 4 to 22 and 24 above, each Recover Cover PDS was liable to mislead the public as to the nature, the characteristics, or the suitability for their purpose of a Recover Cover Contract.
26. By publishing each Recover Cover PDS, giving the Recover Cover PDSs to members of the public and entering into the Recover Cover Contracts with members of the public, HCF Life engaged in conduct, in trade or commerce, which was liable to mislead the public as to the nature, the characteristics, or the suitability for their purpose of a Recover Cover Contract in contravention of s 12DF of the ASIC Act.

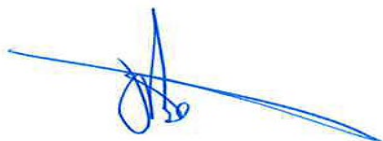
## Unfair contract terms

27. Each Pre-Existing Condition Term would cause a significant imbalance in the parties' rights and obligations arising under each Recover Cover Contract within the meaning of s 12BG(1)(a) of the ASIC Act because:
  - a. it permits, or purports to permit, HCF Life to deny a claim in respect of a "Pre-Existing Condition" even where the consumer was not (and a reasonable person in the circumstances could not be expected to have been) aware of the sickness or disability at the time of contracting; and
  - b. by reason of the matters referred to above in paragraphs 18 to 22, it is liable to mislead, or leave the consumer ignorant, in a significant respect as to the consumer's rights and HCF Life's obligations arising under each Recover Cover Contract, and therefore impedes the consumer's ability to understand and to avail themselves of their rights.
28. ASIC relies on the presumption in s 12BG(4) that the Pre-Existing Condition Term in each Recover Cover Contract is not reasonably necessary to protect HCF Life's legitimate interests. Further, the Pre-Existing Condition Term is not reasonably necessary in order to protect HCF Life's legitimate interests because:
  - a. it is partially unenforceable; and
  - b. it could have been expressed in narrower terms while having the same legal effect and while not being liable to mislead.
29. If the Pre-Existing Condition Term were to be relied on by HCF Life, it would cause detriment to the consumer because of the matters stated in paragraph 27 above and because the Pre-Existing Condition Term can be relied on by HCF Life to refuse a claim.
30. The Pre-Existing Condition Term in each of the Recover Cover Contracts is not transparent within the meaning of s 12BG(3) of the ASIC Act because it is misleading and partially unenforceable and its legal effect is therefore not presented clearly or expressed in reasonably plain language.
31. By reason of the matters in paragraphs 24 and 27 to 30 above, the Pre-Existing Condition Term in each of the Recover Cover Contracts entered into on or after 5 April 2021 is unfair within the meaning of s 12BG of the ASIC Act and void by reason of s 12BF of the ASIC Act.

## Certificate of lawyer

I Tina Beltrame certify to the Court that the factual and legal material available to me at present provides a proper basis for each allegation made in this concise statement.

Date: 11 May 2023

A handwritten signature in blue ink, appearing to be 'Tina Beltrame', with a long horizontal stroke extending to the right.

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Signed by Tina Beltrame  
Lawyer for the plaintiff

## ANNEXURE A

### NUMBER OF RECOVER CONTRACTS ENTERED INTO IN RESPECT OF EACH OF THE RECOVER COVER PDSs

| <b>Product</b>         | <b>Time Period</b>                | <b>Number of policies issued by HCF Life</b> | <b>Number of policies issued in the Time Period which remain on foot as at 27 April 2023</b> |
|------------------------|-----------------------------------|--|--|
| <b>Cash Back Cover</b> | 5 April 2021 to 30 September 2021 | 4,097  | 2,787  |
|                        | 1 October 2021 to 31 August 2022  | 3,481  | 2,636  |
|                        | 1 September 2022 to 24 March 2023 | 1,665  | 1,507  |
|                        | 25 March 2023 to 27 April 2023    | 275  | 271  |
| <b>Income Assist</b>   | 5 April 2021 to 30 September 2021 | 289  | 208  |
| <b>Income Protect</b>  | 1 October 2021 to 24 March 2023   | 1,157  | 941  |
|                        | 25 March 2023 to 27 April 2023    | 82   | 82   |
| <b>Smart Term</b>      | 5 April 2021 to 30 September 2021 | 383  | 271  |
|                        | 1 October 2021 to 27 April 2023   | 836  | 667  |
| <b>Total:</b>          |                                   | <b>12,265</b>                                | <b>9,370</b>   |