FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v H C F Life Insurance Company Pty Limited [2026] FCAFC 81

Appeal from:	*Australian Securities and Investments Commission v H C F Life Insurance Company Pty Limited* [2024] FCA 1240 *Australian Securities and Investments Commission v HCF Life Insurance Company Pty Limited (Penalty)* [2025] FCA 454
File number:	NSD 1129 of 2025
Judgment of:	**DERRINGTON, HALLEY AND MCEVOY JJ**
Date of judgment:	19 June 2026
Catchwords:	**INSURANCE** – appeal from liability decision and penalty decision of the primary judge – where respondent a life insurer that offers products which contain exclusions in respect of pre-existing conditions – where respondent adopted a definition of pre-existing condition that excludes cover where a medical practitioner is of the opinion that signs or symptoms of the relevant condition existed before policy inception – where primary judge concluded contracts rendered partially unenforceable by s 47 of the *Insurance Contracts Act 1984* (Cth) – where primary judge found respondent had engaged in conduct that was liable to mislead in contravention of s 12DF(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) – where primary judge held terms were not unfair within the meaning of ss 12BF and 12BG of the ASIC Act – whether primary judge erred in finding contract terms were not unfair – no error – appeal dismissed
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BG, 12BG(1), 12BG(1)(a), 12BG(1)(b), 12BG(2)(b), 12BG(4), 12BG(3), 12BF, 12DF *Insurance Contracts Act 1984* (Cth) s 47
Cases cited:	*Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368 *Australian Competition and Consumer Commission v*

	Ashley & Martin Pty Ltd [2019] FCA 1436 *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; 239 FCR 33 *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* [2021] FCA 347; 153 ACSR 347 *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76; 309 FCR 473 *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716 *Australian Securities and Investments Commission v H C F Life Insurance Company Pty Limited* [2024] FCA 1240 *Australian Securities and Investments Commission v HCF Life Insurance Company Pty Limited (Penalty)* [2025] FCA 454 *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149; 294 FCR 524 *Comcare v Banerji* [2019] HCA 23; 267 CLR 373 *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 *Dovuro Pty Ltd v Wilkins* [2003] HCA 51; 215 CLR 317 *Farm Transparency International Ltd v New South Wales* [2022] HCA 23; 277 CLR 537 *Karpik v Carnival plc* [2023] HCA 39; 280 CLR 640 *Mulholland v Australian Electoral Commission* [2004] HCA 41; 220 CLR 181 *Ravbar v Commonwealth* [2025] HCA 25; 423 ALR 241 *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 *Whisprun Pty Ltd v Dixon* [2003] HCA 48; 200 ALR 447
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	57
Date of hearing:	11 March 2026
Counsel for the Appellant:	Mr P W Collinson KC, Mr L Hogan and Mr H Atkin

Solicitor for the Appellant:	Norton Rose Fulbright Australia
Counsel for the Respondent:	Mr D Thomas SC and Ms E Bathurst
Solicitor for the Respondent:	Herbert Smith Freehills Kramer

ORDERS

NSD 1129 of 2025

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Appellant
AND:	**H C F LIFE INSURANCE COMPANY PTY LIMITED (ACN 001 831 250)** Respondent

ORDER MADE BY: **DERRINGTON, HALLEY AND MCEVOY JJ**

DATE OF ORDER: **19 JUNE 2026**

THE COURT ORDERS THAT:

1. The appellant's interlocutory application dated 9 July 2025 be dismissed.
2. The appeal be dismissed.
3. The appellant pay the respondent's costs of and incidental to the appeal to be taxed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

DERRINGTON J:

1 I have had the advantage of reading in draft the reasons of Halley and McEvoy JJ. I agree with their Honours' reasons which demonstrate the absence of any defect in the judgment of the learned primary judge. I also agree with the orders proposed by their Honours.

2 It is a matter of great concern that a trend appears to be developing where those drafting appeals, especially in regulatory enforcement proceedings, appear to feel unconstrained by how the matter was conducted at first instance. Appeals by way of rehearing are not *de novo* proceedings. Rather, they are for the correction of error: *Allesch v Maunz* (2000) 203 CLR 172: and the demonstration of a legal, factual, or discretionary error is not shown by an assertion that, if the case had been run differently below, a different result might have occurred. That is not to say that the raising of new points or grounds on appeal is not appropriate in certain circumstances, however, where a party deliberately runs the matter at first instance on a particular basis and that founds the primary judge's determination, the occasions on which they should be permitted to alter the basis of their case on appeal must be limited. The reasons of Halley and McEvoy JJ identify the rationale for this approach.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 19 June 2026

REASONS FOR JUDGMENT

HALLEY AND MCEVOY JJ:

3 The Australian Securities and Investments Commission (**ASIC**) brought proceedings against the respondent, H C F Life Insurance Company Pty Limited. The respondent offers insurance products which contain exclusions relating to pre-existing conditions. Historically, the respondent had adopted definitions of "pre-existing condition" that essentially reflected the language of s 47 of the *Insurance Contracts Act 1984* (Cth) (**IC Act**). Section 47 provides that an insurer may not rely upon an exclusion in respect of a pre-existing condition where, at the time the contract 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, the sickness or disability. In August 2019, however, the respondent adopted a definition of pre-existing condition that excluded cover where a medical practitioner is of the opinion that signs or symptoms of the relevant condition existed before inception of the policy (the **Pre-Existing Condition Terms**). The respondent did not advert to or explain the existence or effect of s 47 of the IC Act in the relevant product disclosure statements or in any of the standard-form welcome emails and letters sent to customers upon entering such policies of insurance.

4 ASIC contended before the primary judge that by distributing product disclosure statements and entering into policies on such terms, which ASIC maintained were rendered partially unenforceable by reason of s 47 of the IC Act, the respondent had engaged in conduct that was liable to mislead the public as to the nature, characteristics and suitability of financial services in contravention of s 12DF of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). ASIC also claimed that the terms were unfair within the meaning of s 12BF of the ASIC Act.

5 In *Australian Securities and Investments Commission v H C F Life Insurance Company Pty Limited* [2024] FCA 1240 (the **Liability Judgment**, or **LJ**) the primary judge accepted that s 47 of the IC Act prohibited the respondent from relying on pre-existing condition exclusions in specified circumstances. His Honour found that s 47 materially differs from the Pre-Existing Condition Terms and concluded that the Pre-Existing Condition Terms were partially unenforceable as a result: LJ at [97]–[99]. Because the respondent had presented the exclusion as an accurate, complete, and unqualified statement of when benefits would not be payable by reason of a pre-existing condition, when it was not, the primary judge found that the respondent

had engaged in conduct that was liable to mislead in contravention of s 12DF(1) of the ASIC Act: see LJ at [108], [119], [130].

6 Nevertheless, although the primary judge considered that the Pre-Existing Condition Terms were liable to mislead, his Honour held that they were not unfair for the purposes of s 12BG(1) of the ASIC Act. Assessing each s 12BG(1) criteria applying the effect of s 47 of the IC Act, the primary judge found that the Pre-Existing Condition Terms did not cause a significant imbalance in the parties' rights and obligations arising under the contract: see LJ at [144], [149]. His Honour also considered that the Pre-Existing Condition Terms were reasonably necessary to protect the respondent's legitimate interests in being able to offer guaranteed acceptance products and in mitigating the risk of anti-selection behaviour by prospective insureds: see LJ at [153], [160].

7 The primary judge took the view that the liability of the Pre-Existing Condition Terms to mislead could not put consumers at a substantive practical disadvantage in exercising their rights, and nor did it render the terms lacking in transparency: LJ at [146], [158]. The statutory language of s 12BG(2)(b) – "the extent to which the term is transparent" – asks only about the clarity of the term as written: LJ at [148]. Even were it to be thought that the Pre-Existing Condition Terms did lack transparency by reason of their failure to refer to or condition exclusion rights by reference to s 47 of the IC Act, his Honour considered that this would not produce a different conclusion on the issues of significant imbalance and reasonable necessity for the purposes of s 12BG(1)(a) and (b) of the ASIC Act: LJ at [149], [159].

THE APPEAL

8 By two alternative grounds of appeal (the first requiring leave to withdraw what is said to be a concession made at trial), ASIC contends that the primary judge erred in finding that the Pre-Existing Condition Terms were not unfair within the meaning of s 12BG(1) of the ASIC Act.

9 For the reasons that follow we do not consider the primary judge to have erred. We would refuse ASIC leave to raise ground 1 of the notice of appeal and dismiss ASIC's interlocutory application of 9 July 2025 seeking leave to do so. Insofar as ASIC's alternate ground of appeal is concerned, we are in substantial agreement with the analysis of the primary judge and consider that ground to be without merit. We would therefore dismiss the appeal.

Ground 1

10 In the amended form pressed at the hearing of the appeal, the first ground of appeal ASIC seeks to raise is that the primary judge erred in taking into account the ameliorative effect of s 47 of the IC Act when assessing any imbalance of party rights and obligations arising under the relevant contracts, and ought instead to have found that the Pre-Existing Condition Terms satisfied s 12BG(1)(a) and (b) of the ASIC Act.

11 The obvious difficulty with this ground, however, is the observation of the primary judge (LJ at [144]) that ASIC conceded at trial that in considering the question of unfairness for the purposes of s 12BG(1) of the ASIC Act it was also necessary to take into account the ameliorative effect of s 47 of the IC Act. It was once s 47 was taken into account that his Honour concluded that the Pre-Existing Condition Terms do not cause a significant imbalance in the parties' rights and obligations.

12 It was for this reason that ASIC sought leave to withdraw any concession it had made "that the ameliorative effect of s 47 of the [IC Act] should be taken into account in applying the three elements of s 12BG of the [ASIC Act]", and thereby be permitted to prosecute ground 1 of its notice of appeal.

13 In support of this application ASIC submits that the concession it made at trial concerned the interpretation or interaction of statutory provisions. ASIC characterises this as a legal matter and contends that there would be no prejudice to the respondent were it to be permitted to withdraw the concession. In support of its position ASIC refers to *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76; 309 FCR 473 at [148]–[153] (O'Bryan and Cheeseman JJ, Derrington J agreeing) (***A&G Insurance***). *A&G Insurance* is a decision of the Full Court delivered after the trial of the present proceeding in which, as ASIC puts it, the Court doubted the correctness of a like, but broader concession or assumption in respect of s 12BG(1)(a) of the ASIC Act. ASIC thus submits that the point sought to be raised by the first appeal ground is of importance in the context of consumer protection legislation and advances submissions as to the merits of ground 1.

14 The problem for ASIC, however, is that its case for both misleading conduct under s 12DF of the ASIC Act and unfairness under s 12BG of the ASIC Act was predicated at trial on the allegation that the Pre-Existing Condition Terms were "partially unenforceable" by reason of s 47 of the IC Act. ASIC's case was always that s 47 was to be taken into account in the

s 12BG(1) assessment of the Pre-Existing Condition Terms. In other words, properly understood there was no mere "concession" for which leave should be granted to withdraw so as to enable ASIC to run what is effectively a different case on appeal.

15 Obviously enough, it is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial: *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7 (Gibbs CJ, Wilson, Brennan and Dawson JJ); *Whisprun Pty Ltd v Dixon* [2003] HCA 48; 200 ALR 447 at [51] (Gleeson CJ, McHugh and Gummow JJ); *Dovuro Pty Ltd v Wilkins* [2003] HCA 51; 215 CLR 317 at [151] (Hayne and Callinan JJ). Proceedings at first instance cannot be reduced to little more than a preliminary skirmish. Although sometimes, when a question of law is raised for the first time, it may be expedient in the interests of justice that the question should be argued and decided in an appeal, this is not such a case.

16 The respondent advances three fundamental reasons, each of which we accept, for the dismissal of ASIC's application for leave to raise ground 1 of the notice of appeal. The first is the one to which we have adverted. It is concerned with what was said by the primary judge (LJ at [144]) to be the concession made by ASIC that the "ameliorative effect" of s 47 of the IC Act should be taken into account in applying the three elements of s 12BG(1) of the ASIC Act.

17 The truth of it is that ASIC's "concession" at trial that the ameliorative effect of s 47 of the IC Act should be taken into account in applying the three elements of s 12BG(1) of the ASIC Act is more than a concession. In this regard it is instructive to have regard to the relevant exchange between senior counsel for ASIC and the primary judge on this issue, which was as follows:

> MR HOLLO: The second category of claim brought by ASIC in this proceeding is a claim that pre-existing condition terms are unfair contract terms within the meaning of section 12BG, and I will come to that claim in due course. ASIC submits the terms are inherently unbalanced and unfair, and section 47 may at least theoretically be able to mitigate that imbalance. However, we again point to the misleading way in which the exclusions are expressed by omitting reference to section 47 as compounding, rather than alleviating the inherent balance, and I will come to that.
>
> HIS HONOUR: Again, pausing there - - -
>
> MR HOLLO: Yes.
>
> HIS HONOUR: - - - is it your submission that I should take section 47 into account in assessing whether there is a significant imbalance in the party's rights?
>
> MR HOLLO: We have, yes.
>
> HIS HONOUR: Right. Okay.

> MR HOLLO: And we have to deal - - -
>
> HIS HONOUR: So consistently with the stance you took in Auto & General?
>
> MR HOLLO: Yes.
>
> HIS HONOUR: That is that I assess the elements of section 12BG in the overall context – legal context facing the parties, not confined simply to a contractual analysis?
>
> MR HOLLO: Sorry, my – yes. There are two points, yes, your Honour needs to assess the practical context, and also what we're talking about here is section 47 – when you say the legal context, that includes section 47 at least.
>
> HIS HONOUR: Yes, but I have to take the effect of section 47 into account in applying the three elements of section 12BG, is that right?
>
> MR HOLLO: Yes.
>
> HIS HONOUR: Right. Thank you. Yes.

18 It is apparent from the exchange which is said to constitute the concession that ASIC is actually now seeking to withdraw its acceptance at trial that the assessment of whether the Pre-Existing Condition Terms were unfair was to be undertaken having regard to the overall legal context, *including* s 47 of the IC Act. In our view it would be contrary to the dictates of fairness and principle for ASIC to be permitted to reformulate its case in this way on appeal.

19 The second and closely related reason the respondent submits that ASIC's application for leave to withdraw the so-called concession should be refused is that, as will be apparent, ASIC did more than merely "concede" (that is to say, admit or agree to something being correct after first denying or resisting it) that s 47 of the IC Act had to be considered in the s 12BG(1) assessment. The effect of s 47 on the parties' rights and obligations under the relevant contracts was central to ASIC's case on unfairness. As may be seen in ASIC's concise statement at [27], ASIC had alleged that the Pre-Existing Condition Terms would cause a significant imbalance in the parties' rights and obligations arising under the relevant contracts within the meaning of s 12BG(1)(a) of the ASIC Act because:

(a) the Pre-Existing Condition Terms would enable the respondent to deny a claim in circumstances where a consumer would otherwise have the benefit of s 47 of the IC Act; and

(b) of the misleading effect generated from the disconformity between the Pre-Existing Condition Terms and s 47 of the IC Act.

20 In this sense, to use the respondent's language, s 47 of the IC Act formed part of each plank of ASIC's case on unfairness and there was a common assumption by the parties that this was

how the case was being run. To seek now to divorce s 47 of the IC Act entirely from the analysis is a material departure from the case advanced and run before the primary judge.

21 The third reason the respondent submits that ASIC's application should be refused is that ASIC is not correct when it asserts that "there appears to be no prejudice to HCF Life". ASIC's submission in this regard should be rejected. We accept the respondent's submission that the position is otherwise. The reality is that the respondent ran its case at trial on the basis that the Pre-Existing Condition Terms were reasonably necessary to protect its legitimate interests. The respondent bore the onus in this regard: ASIC Act s 12BG(4). The respondent satisfied that onus on the basis of detailed evidence led below on the common assumption at that time that s 47 of the IC Act was relevant to the s 12BG(1)(b) assessment.

22 There is force in the further point the respondent makes as to the manner in which it ran its case at trial. Leaving to one side the effect of s 47 of the IC Act, the Pre-Existing Condition Terms permit the refusal of a benefit with respect to a condition, illness or ailment the signs or symptoms of which, "in the opinion of a registered medical practitioner", existed at the time before the relevant contracts were entered into, even if a diagnosis had not been made. The respondent submits that if ASIC had run the case that s 47 has no role to play in assessing unfairness, it may well have led different evidence, including expert medical evidence as to the meaning attributed by a registered medical practitioner to "signs and symptoms".

23 Although ASIC submits that it is inherently improbable that the respondent may have led different evidence, and that the suggestion it may have done so should be rejected, we consider that it is open to the respondent to submit that had ASIC advanced the case it now puts, different considerations would have informed the evidence that the respondent decided to lead. In our view this is enough to demonstrate the requisite prejudice in the present circumstances.

24 An aspect of the prejudice which the respondent may now be thought to suffer is that ASIC succeeded on its misleading conduct case in a context in which the ameliorative effect of s 47 of the IC Act *was* being taken into account. Had s 47 not been taken into account, it is at least conceivable that ASIC's prospects of succeeding in the misleading conduct case may have been diminished. All of this reflects the reality that were ASIC to have leave effectively to run its case on a different basis, it would be advancing a case on appeal that the primary judge was never given an opportunity to consider. In those circumstances, this Court would have been deprived of the benefit of his Honour's consideration of that different case. A further prejudicial effect of this for the respondent would be the effective denial of the as of right entitlement to

appeal an adverse decision. These matters are significant considerations sounding against the grant of leave.

25 Once all of this is appreciated, ASIC's contention that the so-called "concession" concerned merely "interpretation or interaction of statutory provisions – a legal matter" cannot be maintained, and we reject it. The prejudice to the respondent would be considerable were ASIC to be permitted to run what is effectively a new case on appeal. It follows that it cannot be said to be expedient or in the interests of justice to grant leave for ASIC to withdraw the "concession" and pursue the proposed ground 1 on appeal. ASIC's interlocutory application should therefore be dismissed and it is only necessary to consider ground 2 of the notice of appeal.

Ground 2

26 ASIC puts ground 2 on the alternative basis that the primary judge *correctly* had regard to s 47 of the IC Act when making his s 12BG(1)(a) and (b) assessments.

Ground 2(a) – s 12BG(1)(a)

27 Section 12BG(2) of the ASIC Act provides that the evaluative s 12BG(1) assessment of "unfairness" may take into account such matters as the court thinks relevant, but it requires the court to take into account "the extent to which the term is transparent" and the contract as a whole.

28 ASIC submits that the primary judge erred:

(a) first, by finding the liability of the Pre-Existing Condition Terms to mislead and its misdescription of actual rights could not put consumers at a practical, substantive disadvantage or otherwise affect a s 12BG(1)(a) assessment of balance as a matter relevant to s 12BG(2) of the ASIC Act: LJ at [146]–[149], [158]; and

(b) secondly, by finding that the Pre-Existing Condition Terms were transparent because s 12BG(3) of the ASIC Act focuses only on the textual meaning of a term and, alternatively, even if not transparent, that lack of transparency could have no effect on the balance of substantive rights and obligations: LJ at [148]–[149].

29 Insofar as "imbalance" and liability to mislead are concerned, ASIC submits that notions of "significant imbalance" and the "legitimate interests" of the benefitting party are to be assessed by reference to clarity and availability of understanding, referring (in respect of the

transparency of a term) to *Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149; 294 FCR 524 at [3] (Allsop CJ). ASIC contends that the example given by the primary judge at LJ [146] encapsulates his Honour's first error as set out above, as well as the latter part of the second error. ASIC maintains that a misleading term can substantively impact the equilibrium of party rights and obligations, and effect or exacerbate imbalance.

30 Dealing then with the example the primary judge uses at LJ [146], ASIC contends that Party A, the standard form proponent, knows to transfer $100 despite the convoluted terms. ASIC suggests that Party B, the consumer, may not; Party B being less likely to have the resources to understand contract terms and less capacity to manage risk: see Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) (**2015 Explanatory Memorandum**) at [1.2]–[1.4], [1.6]. Party B, ASIC contends, faces the higher, disadvantageous risk of breaching its otherwise identical (in form) obligation and also the risk of the consequences of doing so, including through the effect of other terms: see, for example, *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224 at [61], [63] (Moshinsky J) (***ACCC v JJ Richards & Sons***).

31 ASIC submits that how the consumer may approach the operation of a clause is a practical, substantive matter, and a matter to balance. ASIC refers in this regard to the Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) which states at [5.32] in respect of the equivalent to s 12BG(1)(c) of the ASIC Act that "a term does not need to be enforced in order to be unfair, although the possibility of such enforcement may impact on the decisions made by the party that would be disadvantaged by the term's practical effect, to that party's detriment".

32 ASIC points to *Karpik v Carnival plc* [2023] HCA 39; 280 CLR 640 (***Karpik***), where the effect of a class action waiver clause of preventing or discouraging passengers from vindicating their legal rights was imbalanced, even though the clause did not impede or affect the *existence* of the individual's right to sue Carnival, or the individual's *capacity* to exercise that right: at [54] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).

33 ASIC maintains that here, the liability of the Pre-Existing Condition Terms to mislead emphasised insurer-favourable, unenforceable express exclusion rights to those persons who might not have known otherwise: see, equivalently, the 2015 Explanatory Memorandum at [1.2]–[1.4], [1.6]. The practical effect of this, ASIC submits, is to impose risk that insureds would not vindicate their contractual coverage rights (for example by making a claim), despite

the term not affecting their existence (having regard to s 47 of the IC Act). ASIC refers also to various principles of the law of the European Union which it appears to contend support this part of ground 2 of the appeal.

34 As to the matter of transparency, ASIC submits that the Pre-Existing Condition Terms were not transparent because they were liable to mislead. This is said to be the second error made by the primary judge. ASIC submits that by inaccurately stating actual party rights and obligations and being liable to mislead those who read it, the Pre-Existing Condition Terms were not "presented clearly" or "expressed in reasonably plain language" for the purposes of a provision intended to support assessment of unfairness through clarity of counterparty understanding. It is said that for the same reasons identified in the above paragraph, that lack of transparency is relevant to, and supports a finding of, significant imbalance.

35 In this regard ASIC submits that although close attendance to statutory language is necessary, s 12BG of the ASIC Act should not be read in an unduly narrow way because it sits within a broad-based consumer protective statutory regime in respect of contract terms. ASIC notes that in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; 239 FCR 33 at [39]–[40] (***Chrisco Hampers***), Edelman J, considering unfairness in the Australian Consumer Law cognate – s 24(1) of Sch 2 the *Competition and Consumer Act 2010* (Cth) – recognised that s 12BG of the ASIC Act is an example of an open-ended provision that attracts a more purposive and less minutely textual mode of construction; see also *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436 at [44] (Banks-Smith J) (***Ashley & Martin***) and Leeming M, "Equity: Ageless in the 'Age of Statutes'" (2015) 9 *Journal of Equity* 108 at 116.

36 ASIC submits that contrary to LJ at [148], s 12BG(2)(b) of the ASIC Act, informed by s 12BG(3), does not ask only about the clarity of the meaning of a term as written in a narrow sense. ASIC contends that in each of *Chrisco Hampers* at [79]–[94], and in particular [85], *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716 at [55]–[56] (Gleeson J) and *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368 at [953] (North J), the impugned term lacked s 12BG(3) (or cognate) transparency by reference to what it did not express to the consumer about its content or operation. That, ASIC maintains, is consistent with a legislative intent that transparency attends to consumer understanding and awareness of burden and risk afforded by a term. ASIC

contends that European Court of Justice jurisprudence (based on similar but not identical legislation) is to like effect.

37 We do not accept that there is substance in this first error ASIC alleges. In our assessment the primary judge was correct to reject ASIC's submission that there was a significant imbalance in the parties' rights and obligations because the liability of the Pre-Existing Condition Terms to mislead "puts the consumer at a real practical disadvantage in exercising their right to claim under the policy and in challenging any denial of their claim by HCF Life": LJ at [146].

38 Critically, ASIC bore the onus on s 12BG(1)(a), and we accept the respondent's submission that there was little evidence, if any, to indicate the extent to which the possibility that some consumers may have been dissuaded by the Pre-Existing Condition Terms from making or persisting with claims that the respondent would have been obliged to pay was a realistic one. The primary judge accepted as much: *Australian Securities and Investments Commission v HCF Life Insurance Company Pty Limited (Penalty)* [2025] FCA 454 at [62] (the penalty judgment in this proceeding). Although the primary judge found (LJ at [123]) that the probability of a mismatch between s 47 of the IC Act and the Pre-Existing Condition Terms was real and not speculative, we accept the respondent's submission that that objective likelihood does not bear on whether the Pre-Existing Condition Terms would in fact put consumers at a "practical, substantive disadvantage" in their potential decisions as to whether to make or persist with a claim.

39 Relatedly, it is also the case that while s 12BF of the ASIC Act applies at the time of contracting, and the criteria applied by s 12BG(1) of the ASIC Act are prospective, ASIC was still required to establish on the balance of probabilities that the terms "would cause a significant imbalance" and it failed to do so. The primary judge was not assisted by ASIC with evidence which would have enabled his Honour to assess whether the relevant possibility was realistic. The direct evidence on this issue from Mr David Goodsall, the actuary called by the respondent, was that while he could not entirely eliminate the theoretical possibility of the disadvantage posited by ASIC arising, such a possibility was speculative and remote because policy holders tend to claim on policies even when they are aware of policy conditions which say they are not eligible to claim benefits and even when they are unaware of their eligibility to claim benefits because they are ignorant of the policy conditions. Noting ASIC's criticisms of Mr Goodsall's evidence, and its limitations recorded by the primary judge (LJ at [71]), ASIC nonetheless bore the burden of proof. And in any event, as the respondent notes, the reality was

that the primary judge found that the Pre-Existing Condition Terms were at all times administered by the respondent consistently with s 47 of the IC Act: LJ at [68].

40 It follows that while it may be accepted that a misleading term can, at a theoretical level, substantively impact the equilibrium of party rights and obligations and effect or exacerbate imbalance, this is not such a case. In this regard the observations in *Karpik* at [54] relied on by ASIC are not analogous. There, as the respondent submits, a real practical effect of the relevant clause was to discourage passengers from vindicating their legal rights where, compared to the cost of the cruise, commencing an individual prosecution would obviously be uneconomical. By contrast, in this case, while there was a theoretical possibility that the Pre-Existing Condition Terms might have dissuaded some consumers from making or persisting with claims that the respondent would have been obliged to pay, on the evidence that possibility did not rise so high as to tilt the parties' rights and obligations under the contract significantly in favour of the respondent.

41 We do not accept that there is substance in the second error ASIC alleges on the part of the primary judge. We agree that there was no error in his Honour's rejection of ASIC's submission that the Pre-Existing Condition Terms were not transparent because they were liable to mislead the consumer as to the actual circumstances in which the consumer is entitled to be indemnified under their policy.

42 A term is transparent if it is expressed in reasonably plain language, if it is legible, presented clearly, and readily available to any party affected by the term: ASIC Act s 12BG(3). An absence of transparency is not an independent element of unfairness defined under s 12BG(1) of the ASIC Act. Rather, as the respondent submits, the ASIC Act requires the court to consider transparency only when determining whether the term is unfair under s 12BG(1): see *Karpik* at [32]; *A&G Insurance* at [38], [157], [160]–[161]. If a term is not transparent, that does not mean it is unfair, and if a term is transparent, that does not mean that it is not unfair: see *Chrisco Hampers* at [43(3)], [43(5)].

43 It follows that the primary judge was correct in his conclusion that any lack of transparency arising from the misleading nature of the Pre-Existing Condition Terms can only be deployed in considering the criteria in s 12BG(1) in the manner identified by the High Court in *Karpik* at [32]: LJ at [149]; see also *A&G Insurance* at [38], [157], [160]–[161]. As to the criterion identified in s 12BG(1)(a) of the ASIC Act, as we have explained, there is no "significant imbalance in the parties' rights and obligations arising under the contract" because the alleged

"practical disadvantage" identified by ASIC rose no higher than a theoretical possibility. Any lack of transparency would not lead to any different conclusion as to the criterion in s 12BG(1)(a), and the primary judge was correct to so conclude. We reject ASIC's submission to the contrary.

44 It follows that ground 2(a) fails.

Ground 2(b) - s 12BG(1)(b)

45 As has been mentioned, the primary judge found that the Pre-Existing Condition Terms were liable to mislead, but that they were reasonably necessary in order to protect the respondent's legitimate interests. ASIC submits that his Honour did so despite finding that alternative (non-misleading) terms equally protective of the respondent's legitimate interests were available: see LJ at [157]. This result, ASIC submits, bespeaks error in and of itself (referring to *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; 261 FCR 301 at [49] (Perram J, Allsop CJ and Markovic J agreeing)). ASIC contends that the primary judge came to this conclusion by relying on an erroneous s 12BG(1)(b) assessment that "derivatively applied" s 12BG(1)(a).

46 ASIC points to the fact that the primary judge assessed the proportionality of the Pre-Existing Condition Terms by reference to alternatives being "less restrictive to the other party to the contract" and by posing a "central question", namely "whether the alternative contractual term would cause a [significantly] lesser imbalance in the parties' rights and obligations": LJ at [156].

47 ASIC submits that there was no warrant for such a narrow question, nor for relying solely on it, referring to *Ashley & Martin* at [59]. Indeed, it is ASIC's position that to the extent that the primary judge relied upon *Ashley & Martin*, *ACCC v JJ Richards & Sons* and *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* [2021] FCA 347; 153 ACSR 347 (Jackson J) for the form of test posed, those cases provide no support for it. ASIC contends that proportionality and alternative assessment, in aid of consideration for the purposes of s 12BG(1)(b) of the ASIC Act, is not solely a question of impact on the balance of rights and obligations. It is ASIC's position that any analysis of alternative provisions in the assessment of the s 12BG(1)(b) criterion, informed by the consideration made mandatory by s 12BG(2)(b), properly considers available alternatives of expression that can impact practical exercise of party rights and obligations, and consumer detriment.

48 ASIC submits that the central question framed and analysed by the primary judge ignored the possibility that a liability to mislead, or a lack of transparency, could have any effect either on the counterparty or on what is reasonably necessary to protect a legitimate interest, alone and relative to alternatives. "Necessary" in this context, ASIC submits, means appropriate and adapted, rather than essential, lest "reasonably" have no qualifying effect: see, for example, *Mulholland v Australian Electoral Commission* [2004] HCA 41; 220 CLR 181 at [39] (Gleeson CJ). ASIC submits that in the same way the Court in *A&G Insurance* (at [175]) recognised that a lack of transparency could alone give rise to a lack of reasonable necessity, so too, even if not a matter of transparency, could the liability of the Pre-Existing Condition Terms to mislead do so.

49 It is ASIC's position that the primary judge's analysis of s 12BG(1)(b) of the ASIC Act did not otherwise address the proportionality of the Pre-Existing Condition Terms in protecting the legitimate interest of being able to offer guaranteed acceptance products or minimising the risk of anti-selection behaviour. ASIC submits that the basic question is left unanswered – namely, why is it (ever) proportionate or reasonably necessary to use a term that misleads as a means of protecting against consumer behaviour or to advance commercial interests?

50 Notwithstanding ASIC's submissions, we agree with the respondent that there was no error in the approach taken by the primary judge to concluding that the Pre-Existing Condition Terms were reasonably necessary to protect the respondent's legitimate interests. In particular, we accept that his Honour's assessment of whether the alternative terms he identified resulted in a "significantly" lesser burden on the consumer than the Pre-Existing Condition Terms was consistent with authority that in undertaking the assessment required by s 12BG(1)(b) of the ASIC Act it was appropriate to have regard to matters such as available alternatives and proportionality.

51 To begin with, in assessing what is "reasonably necessary", the court is required to consider the particular circumstances of the respondent's business: *Ashley & Martin* at [51]. Other options or alternatives which might be available to that business are also relevant and the court might also engage in an analysis of the proportionality of the term against the potential loss sufferable: see *Ashley & Martin* at [53]–[59].

52 We agree that in this case, in the context of the application of the proportionality principle to the s 12BG(1)(b) question, what the primary judge was referring to at LJ [156] (consistently with the observations of the plurality in *Comcare v Banerji* [2019] HCA 23; 267 CLR 373 at

[35] (Kiefel CJ, Bell, Keane and Nettle JJ)) was what the authorities have said concerning the test of "reasonable necessity" in the context of whether a law infringes the implied freedom of political communication. See also *Farm Transparency International Ltd v New South Wales* [2022] HCA 23; 277 CLR 537 at [46] (Kiefel CJ and Keane J), [253] (Edelman J); and *Ravbar v Commonwealth* [2025] HCA 25; 423 ALR 241 at [240] (Edelman J), [312] (Gleeson J). On a fair reading of the approach adopted by the primary judge, his Honour was not seeking to import in globo the constitutional principles governing the implied freedom of political communication in determining unfairness. The primary judge was simply dealing with the issue his Honour had identified at LJ [151(b)]. There was nothing illogical in his Honour aligning his s 12BG(1)(b) assessment (which also calls for an assessment of whether the impugned contractual term is "reasonably necessary" to protect a respondent's legitimate interests) with previous consideration given to that question: see also *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at [103] (Gummow and Crennan JJ). We agree that once it is accepted that it is appropriate to have regard to proportionality in the s 12BG(1)(b) assessment, it is appropriate that the proportionality lens be applied consistently with how it has been applied in other legal contexts.

53 Consistent application of the proportionality lens means that where an impugned contractual term in this context has a purpose aligned with the protection of the legitimate interests of the party advantaged by the term, and is suitable for the achievement of that purpose as described, such a term is not ordinarily to be regarded as lacking in necessity unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the consumer. We agree that in applying that framework to analyse the s 12BG(1)(b) question, there is no conflation of the s 12BG(1)(b) assessment with the assessment undertaken pursuant to s 12BG(1)(a) of the ASIC Act. It is no more than an application of the proportionality lens, consistently with existing authority.

54 In the present case the Pre-Existing Condition Terms had a purpose consistent with the protection of the respondent's legitimate interest in mitigating the risk of anti-selection behaviour by prospective insureds. ASIC accepted as much: see LJ at [154]; and also LJ at [10], [38], [153]. While there were equally practicable alternatives to the Pre-Existing Condition Terms, those alternatives would not result in any significantly lesser burden on the consumer. This must be particularly so in circumstances where the evidence was to the effect that insureds generally (albeit not invariably) tend to claim on policies irrespective of whether they were aware or unaware of the terms of a pre-existing clause in whatever terms. We accept

that in those circumstances the primary judge was correct to conclude that the Pre-Existing Condition Terms were reasonably necessary in order to protect the respondent's legitimate interests, and we reject ASIC's submissions to the contrary.

55 It follows that ground 2(b) fails also, and that the appeal must be dismissed.

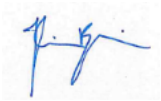
NOTICE OF CONTENTION

56 ASIC having been refused leave to raise ground 1, and ground 2 having failed, the respondent's notice of contention dated 24 July 2025 need not be considered.

COSTS

57 ASIC having been wholly unsuccessful, the respondent should have its costs of and incidental to the appeal to be taxed if not agreed.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Halley and McEvoy.

Associate: 

Dated: 19 June 2026