FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Auto & General Insurance Company Limited [2025] FCAFC 76

Appeal from:	*Australian Securities and Investments Commission v Auto & General Company Limited* [2024] FCA 272
File number:	NSD 463 of 2024
Judgment of:	**DERRINGTON, O'BRYAN AND CHEESEMAN JJ**
Date of judgment:	5 June 2025
Catchwords:	**CONSUMER LAW** – standard form home and contents insurance contract – whether contractual term requiring the insured to inform the insurer "if anything changes while you're insured with us" is an unfair term within the meaning of s 12BG(1)(a) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) – consideration of the interaction of the unfair contract terms regime with the *Insurance Contracts Act 1984* (Cth) – proper construction of the term – whether the term, properly construed, would cause a significant imbalance in the rights and obligations of the parties arising under the contract – whether the term, properly construed, was reasonably necessary to protect the insurer's legitimate interests – appeal dismissed
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12BF, 12BG, 12BH *Competition and Consumer Act 2010* (Cth) Sch 2 (Australian Consumer Law) *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth) *Insurance Contracts Act 1984* (Cth) ss 13, 54, 62, 63 *Trade Practices (Australian Consumer Law) Act (No 1) 2010* (Cth) *Trade Practices (Australian Consumer Law) Act (No 2) 2010* (Cth) *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) *Fair Trading Act 1999* (Vic)
Cases cited:	*Allianz Australia Insurance Ltd v Delor Vue Apartments*

CTS 39788 (2022) 277 CLR 445

Australian Casualty Co Ltd v Federico (1986) 160 CLR 513

Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd [2019] FCA 1436

Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd (2015) 239 FCR 33

Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377

Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3) [2021] FCA 347

Australian Securities and Investments Commission v Auto & General Insurance Company Limited [2024] FCA 272

Director General of Fair Trading v First National Bank plc [2002] 1 AC 481

Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd (1993) 176 CLR 332

Fitzgerald v Masters (1956) 95 CLR 420

Jetstar Airways Pty Ltd v Free [2008] VSC 539

Karpik v Carnival Plc [2023] HCA 39

Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd [2008] NSWCA 5

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104

QBT Pty Ltd v Wilson [2024] NSWCA 114

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

WorkPac Pty Ltd v Rossato (2021) 271 CLR 456

Division:	General Division
Registry:	New South Wales
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Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	179
Date of hearing:	28 August 2024
Counsel for the Appellant:	P W Collinson KC with L Hogan and H Atkin
Solicitors for the Appellant:	Australian Securities and Investments Commission
Counsel for the Respondent:	N C Hutley SC with N D Oreb

Solicitors for the Respondent:	Gilbert & Tobin

ORDERS

NSD 463 of 2024

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant
AND:	**AUTO & GENERAL INSURANCE COMPANY LIMITED ACN 111 856 353** Respondent

ORDER MADE BY:	**DERRINGTON, O'BRYAN AND CHEESEMAN JJ**
DATE OF ORDER:	**5 JUNE 2025**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the respondent's costs of the appeal.

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

REASONS FOR JUDGMENT

DERRINGTON J:

1 The unashamed aim of the *Insurance Contracts Act 1984* (Cth) was to tilt the insurance market in favour of the consumer. It undoubtedly succeeded in that objective: cf A Cameron and N Milne, *"Review of the Insurance Contracts Act 1984 (Cth) – Final Report on Second Stage: Provisions other than s 54*", Commonwealth of Australia, June 2004, iv: and, presently, the scope for insurers to draw the cover provided by their policies in a manner that imposes undue limits on an insured's right to recover is all but non-existent.

2 The policies of Auto & General Insurance Company Limited which are the subject of this action were drawn with a careful eye to informing insureds of their legal position vis-à-vis the insurer. No doubt, keeping in mind the broad characteristics of the market in which policies of this nature are offered, the expression of the scope of the cover provided to the insureds descended to a level of simplicity such that any person whom may be interested to know their rights, might easily and quickly understand them. Of course, in attempting to provide an easily understood articulation of the parties' respective rights in a complex legal relationship, the insurer encountered the risk of the simplified expression being viewed by those with an eye zealously attuned to the detection of error, to assert the existence of a misstatement. That is what has occurred here.

3 On the question of the construction of the notification clause, I am in entire agreement with the reasoning and conclusions of the learned primary judge, Jackman J. His Honour's construction affords the clause an appropriate commercial meaning, being one required of a policy of insurance that is a commercial agreement *par excellence*. I respectfully adopt his construction of that clause *in toto*: *Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2024] FCA 272 [41] – [63]: and have nothing further to add.

4 Otherwise, I agree with the reasons and conclusion of O'Bryan and Cheeseman JJ and with the orders they propose.

I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 5 June 2025

REASONS FOR JUDGMENT

O'BRYAN AND CHEESEMAN JJ:

A. INTRODUCTION

5 This appeal raises questions about the interaction of two forms of consumer protection legislation, being:

(a) the regulation of unfair contract terms in Subdiv BA of Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and

(b) the regulation of insurance contracts, including particularly consumer insurance contracts, by the *Insurance Contracts Act 1984* (Cth) (**IC Act**).

6 The respondent, Auto & General Insurance Company Limited (**A&G**), supplied general insurance products including home and contents insurance.

7 Between 5 April 2021 and 4 May 2023 (the **relevant period**), A&G entered into (including by way of renewal) approximately 1,377,900 home and contents insurance contracts, being consumer contracts within the meaning of s 12BF(3) of the ASIC Act, which contained the following provision (which was defined as the **Notification Term** in the concise statement of the Australian Securities and Investments Commission (**ASIC**)):

8 The Notification Term contained three clauses. The first clause contained a promise by the insured, during the term of the contract, to tell A&G "if anything changes" about the insured's home or contents. The second clause specified the consequences of a breach of that promise, which were that A&G may refuse to pay a claim, reduce the amount it pays, cancel the contract or not renew the contract. The third clause gave examples of the changes that A&G wanted to be told about.

9 ASIC commenced a proceeding seeking, amongst other forms of relief, declarations that the Notification Term is an unfair term within the meaning of s 12BG(1) of the ASIC Act and, as such, is void by operation of s 12BF(1).

10 Most of the primary facts were agreed between the parties at trial and were the subject of a statement of agreed facts tendered at the hearing. The agreed facts included that each of the relevant insurance contracts containing the Notification Term was:

(a) a standard form contract for the purposes of s 12BF(1)(b) of the ASIC Act;

(b) a financial product for the purposes of s 12BF(1)(c)(i) of the ASIC Act; and

(c) a consumer contract within the meaning of s 12BF(3) of the ASIC Act.

11 It was also an agreed fact that the Notification Term was:

(a) accompanied by symbols that were defined earlier in the contractual documentation as signifying "Something you need to tell us" and "Important information"; and

(b) presented in legible font.

12 As to the impact of the Notification Term on consumers, the primary judge found (at [30]) that only eight claims were made in the period from 5 April 2021 to 15 September 2022 which resulted in A&G relying on the Notification Term to cancel the relevant customer's policy and, of those eight claims, A&G refused to cover six of them, but paid the claims for the other two. It was an agreed fact, and found by the primary judge (at [30]), that after 15 September 2022, A&G had not cancelled any policies, or refused or reduced any claims brought by customers, for a failure to tell A&G about a change to their home or contents in reliance on the Notification Term.

13 The primary judge concluded that the Notification Term was not an unfair term within the meaning of s 12BG(1) of the ASIC Act and dismissed the proceeding. ASIC appeals from that decision.

14 ASIC's notice of appeal raises three principal grounds of appeal which are each supplemented by subsidiary grounds. The three principal grounds of appeal are that the primary judge erred:

(a) in the construction of the Notification Term;

(b) in the assessment of whether the Notification Term would cause a significant imbalance in the rights and obligations of the parties arising under the contract for the purposes of s 12BG(1)(a) of the ASIC Act, including by failing to take into account the transparency of the term in the manner required by s 12BG(2)(b); and

(c) in the assessment of whether the Notification Term was reasonably necessary to protect A&G's legitimate interests for the purposes of s 12BG(1)(b) of the ASIC Act, including by failing to take into account the transparency of the term in the manner required by s 12BG(2)(b).

15 For the reasons that follow, the first ground of appeal should be upheld, but the second and third grounds of appeal should be rejected.

16 Construed in accordance with its plain language, the Notification Term imposed an unreasonable burden on insureds because it required insureds to notify A&G of any change to their home or contents during the term of the contract. However, ASIC's case at trial, which was maintained on this appeal, did not proceed on that straightforward basis. Instead, ASIC's case proceeded on the contradictory bases that the notification obligation should be construed as being subject to a criterion of materiality, where materiality relates to the risk insured, but that a reasonable consumer reading the contract of insurance would not be aware of the materiality qualification. ASIC argued that the lack of transparency with respect to the notification obligation rendered it unfair.

17 ASIC's case involved a logical inconsistency. The process of contractual construction involves the determination of what the contractual words convey to a reasonable person in the position of the parties in the circumstances in which the contract is entered into. It is logically inconsistent to contend, on the one hand, that the notification obligation should be construed as being subject to a criterion of materiality, but on the other hand that a reasonable consumer would not understand that the notification obligation was subject to a criterion of materiality. If the former contention is correct, the latter is incorrect, and *vice versa*.

18 The Court must determine the appeal on the basis on which it was argued. Although the reasons that follow depart from the reasons of the primary judge in a number of respects, having regard to the case advanced by ASIC at trial and on this appeal, there is no error in the ultimate conclusion reached by the primary judge that the Notification Term was not an unfair term within the meaning of s 12BG(1) of the ASIC Act. It follows that the appeal must be dismissed.

B. LEGISLATIVE FRAMEWORK

Legislative history

19 The origin of Australian laws regulating unfair terms in consumer contracts can be traced to laws enacted in the European Union, which were considered by the House of Lords in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 (***First National Bank***). The first jurisdiction in Australia to regulate unfair terms in consumer contracts was Victoria. In 2003, Pt 2B of the *Fair Trading Act 1999* (Vic) was enacted, modelled closely on the European law: see the discussion in *Jetstar Airways Pty Ltd v Free* [2008] VSC 539; 30 VAR 295 (***Jetstar***). Section 32W of that Act provided as follows:

> A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant

> imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

20 The current form of Australian law regulating unfair terms in consumer contracts was enacted as part of the Australian Consumer Law by the *Trade Practices (Australian Consumer Law) Act (No 1) 2010* (Cth), with the unfair contract term provisions being renumbered by the *Trade Practices (Australian Consumer Law) Act (No 2) 2010* (Cth). Mirror provisions were also inserted into the ASIC Act in respect of contracts that are financial products or that are for the supply of financial services. At the time of enactment, the laws were confined in their operation to consumer contracts, defined as a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption. As detailed below, the unfair contract terms regime enacted in the Australian Consumer Law and the ASIC Act included, as elements of the definition of an unfair term, the requirements of causing a significant imbalance in the parties' rights and obligations under the contract and detriment to a party if the term were to be applied or relied on, but did not include the element of being contrary to good faith.

21 Although not relevant to the present appeal, the unfair contract terms provisions in both the Australian Consumer Law and the ASIC Act were extended in their reach to apply to small business contracts by the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth).

22 One of the pieces of legislation enacted in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (commonly referred to as the Hayne Royal Commission) was the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth) (**2019 Measures Act**). That Act contained provisions addressing the interaction of the IC Act and the unfair contract terms provisions in the ASIC Act, making the unfair contract terms provisions applicable to contracts of insurance regulated by the IC Act. Relevantly, the 2019 Measures Act:

(a) amended s 12BF of the ASIC Act to insert the following note:

> This section applies to Insurance Contracts Act insurance contracts in addition to the *Insurance Contracts Act 1984* (see paragraph 15(2)(d) of that Act).

(b) amended s 12 of the IC Act to insert the following note:

> This Part operates in addition to the unfair contract terms provisions of the *Australian Securities and Investments Commission Act 2001* (see paragraph

15(2)(d) of this Act).

(c) amended s 15(2) of the IC Act with the effect that relief under s 12BF of the ASIC Act would be available in respect of contracts of insurance.

23 The Replacement Explanatory Memorandum to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Bill 2019* explained (at p 3) that the Bill gave effect to recommendation 4.7 of the Hayne Royal Commission to extend the existing protections of the unfair contract terms regime under the ASIC Act to insurance contracts governed by the IC Act. The Replacement Explanatory Memorandum further explained that, prior to the amendments, insurance contracts covered by the IC Act were specifically excluded from the unfair contracts terms regime (at [1.3]).

Unfair contract terms regime in the ASIC Act

24 The primary provision governing unfair contract terms in the ASIC Act is s 12BF which relevantly provides as follows:

> **12BF Unfair terms of consumer contracts and small business contracts**
>
> (1) A term of a consumer contract or small business contract is void if:
>
> (a) the term is unfair; and
>
> (b) the contract is a standard form contract; and
>
> (c) the contract is:
>
> (i) a financial product; or
>
> (ii) a contract for the supply, or possible supply, of services that are financial services.
>
> (2) The contract continues to bind the parties if it is capable of operating without the unfair term.
>
> …
>
> (3) A ***consumer contract*** is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.
>
> …

25 The word "unfair" is defined in s 12BG as follows:

> **12BG Meaning of *unfair***
>
> (1) A term of a contract referred to in subsection 12BF(1) is ***unfair*** if:
>
> (a) it would cause a significant imbalance in the parties' rights and

obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(b) the extent to which the term is transparent;

(c) the contract as a whole.

(3) A term is ***transparent*** if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of paragraph (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

26 Examples of unfair terms are provided in s 12BH which relevantly provides as follows:

12BH Examples of unfair terms

(1) Without limiting section 12BG, the following are examples of the kinds of terms of a contract referred to in subsection 12BF(1) that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;

(h) a term that permits, or has the effect of permitting, one party

unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

…

27 The unfair contract terms regime in the ASIC Act, and the equivalent regime in the Australian Consumer Law, have been the subject of judicial explication in a number of decisions in this Court. In their submissions, the parties referred to statements of principle in *Australian Competition and Consumer Commission v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33 (***Chrisco***), *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377 (***CLA Trading***), *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436 (***Ashley & Martin***) and *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3)* [2021] FCA 347; 153 ACSR 347 (***Smart Corporation***). The regime was also considered by the High Court in *Karpik v Carnival Plc* [2023] HCA 39; 98 ALJR 45 (***Karpik***). There was little disagreement between the parties on this appeal about the applicable principles, which can be summarised as follows.

28 First, a contractual term is "unfair" for the purposes of the regime if it satisfies three elements or conditions: it would cause a significant imbalance in the parties' rights and obligations arising under the contract; it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on. Those conditions concern the substantive effect of the term. Thus, the regime is concerned with matters of substantive unfairness, not procedural unfairness, as recognised by the House of Lords in respect of the European unfair contract terms regime in *First National Bank* at [37] and by this Court in respect of the Australian regime: see for example *CLA Trading* at [38].

29 Second, the contractual term is to be assessed by reference to the three elements or conditions set out in s 12BG(1) as at the date of the contract: *Karpik* at [52].

30 Third, the onus is on the applicant to prove the elements of significant imbalance and detriment, but the onus is on the respondent to prove the element of legitimate interests: see s 12BG(4) and *Chrisco* at [43] and *Karpik* at [30].

31 Fourth, the requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in the supplier's favour – this may be by granting to the supplier a beneficial option or discretion or power, or by imposing on the consumer a disadvantageous burden or risk or duty: *First National Bank* at [17], followed in *Chrisco* at [47]-[49] and *CLA Trading* at [54(d)]. Significant in this context means "significant in magnitude", or "sufficiently large to be important", "being a meaning not too distant from substantial": *Jetstar* at [104]-[105], followed in *CLA Trading* at [54(e)]. The fact that there is a lack of individual negotiation of the contract between an entity and its customers is not relevant to whether a term causes a significant imbalance in the parties' rights and obligations under the contract; rather, the assessment of whether the relevant term causes a significant imbalance in the rights and obligations arising under the contract requires consideration of the relevant term together with the parties' other rights and obligations arising under the contract: *Jetstar* at [112], followed in *Chrisco* at [50]-[51].

32 Fifth, the legitimate interests of a supplier will depend upon the nature of the particular business of the relevant supplier and the context of the contract as a whole: *Ashley & Martin* at [48]. The requirement that the term be "reasonably necessary" in order to protect the legitimate interests of the party who would be advantaged by the term necessitates consideration of the proportionality of the term against the interest being protected and alternatives that were available to the party imposing the term: *Ashley & Martin* at [55] and [59]. As observed by the High Court in *Karpik* (at [30], citing para 5.28 of the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (**ACL Explanatory Memorandum**)):

> … When the provision was introduced, the Explanatory Memorandum to the Bill stated that although ultimately it is a matter for the court to determine whether a term is reasonably necessary to protect the legitimate interests of the respondent, s 24(4) requires "the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer, or a class of consumers, and that therefore the term was 'reasonably necessary'".

33 Sixth, the requirement that the term would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on does not require proof that a party has suffered detriment; it only requires proof that detriment would exist in the future as a result of the application of or reliance on the term: *Ashley & Martin* at [60], citing para 5.32 of the ACL Explanatory Memorandum.

34 Seventh, in determining whether a term of a contract is unfair, the Court may take into account such matters as it thinks relevant, but must take into account the extent to which the term is transparent and the contract as a whole: *Ashley & Martin* at [65].

35 The requirement to take into account the contract as a whole, when assessing whether a term of a contract is unfair, presents no difficulty. The elements of significant imbalance and the protection of the supplier's legitimate interests necessitate consideration of the contract as a whole. When assessing significant imbalance, the statutory direction is to consider terms that might reasonably be seen as tending to counterbalance the term in question: *Jetstar* at [128], followed in *CLA Trading* at [54(g)].

36 In adhering to the requirement to take into account the extent to which the term is transparent, it is necessary to consider how a lack of transparency may affect the three elements of the statutory definition of "unfair". The ACL Explanatory Memorandum provided the following guidance:

> 5.38 A lack of transparency in the terms of a consumer contract may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract.
>
> 5.39 Transparency, on its own account, cannot overcome underlying unfairness in a contract term. Furthermore, the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant.

37 In *Smart Corporation*, Jackson J questioned how the transparency of a term, or lack of it, can affect the question of whether the term is unfair, having regard to the three elements of the statutory definition of "unfair". His Honour observed (at [71]):

> … it is hard to see how the transparency of the provision can affect the objective question of whether the three criteria in s 24(1) are satisfied. With one qualification, whether a term would cause a significant imbalance, is reasonably necessary to protect legitimate interests of a party, or would cause detriment to another party depends on what the impugned term means, that is, on its proper construction. Those matters depend on the effect of the term, on other relevant characteristics of the contract as a whole, and on the factual question of whether the term is reasonably necessary to protect legitimate interests. They do not depend on how the impugned term is

> presented. If, for example, it is buried in fine print, that may affect its legibility, but it will make no difference to the effect it will have on the parties if it is relied on. …

38 Although there is force in the foregoing observations, the High Court confirmed in *Karpik* that the transparency of a term may affect the evaluation of the satisfaction of each of the elements of the statutory definition of "unfair". The High Court observed (at [32]):

> The requirement to consider the transparency of an impugned term is relevant to, and may affect, the analysis of the extent to which the term is unfair as assessed against each of the elements in s 24(1)(a) to (c). That is, the inquiry as to transparency is not an independent and separate inquiry from whether a term is unfair pursuant to s 24(1). The greater the imbalance or detriment inherent in the term, the greater the need for the term to be expressed and presented clearly; and conversely, where a term has been readily available to an affected party, and is clearly presented and plainly expressed, the imbalance and detriment it creates may need to be of a greater magnitude.

39 Eighth, the examples in s 25 of the Australian Consumer Law (mirrored in s 12BH of the ASIC Act) provide statutory guidance on the types of terms which may be regarded as being of concern, but the section does not prohibit the use of those terms or create a presumption that those terms are unfair: *Chrisco* at [44] citing para 5.44 of the ACL Explanatory Memorandum.

Insurance Contracts Act

40 The IC Act was enacted in 1984 and its long title is:

> 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, and for related purposes.

41 The IC Act contains many provisions which can broadly be described as having the purpose of consumer protection in the context of contracts of insurance. In that sense, the purpose of such provisions overlaps with the purpose of many provisions of the Australian Consumer Law and the cognate provisions in the ASIC Act.

42 Prior to the enactment of the 2019 Measures Act, s 15 of the IC Act stipulated that a contract of insurance is not capable of being made the subject of relief under any other enactment on the ground that the contract is harsh, oppressive, unconscionable, unjust, unfair or inequitable, or on the basis of misrepresentation, save for relief in the form of compensatory damages. As noted earlier, this had the effect that the unfair contract terms regime was not applicable to insurance contracts. Section 15 was amended by the 2019 Measures Act and now provides as follows:

> **15 Certain other laws not to apply**

(1) A contract of insurance is not capable of being made the subject of relief under:

(a) any other Act; or

(b) a State Act; or

(c) an Act or Ordinance of a Territory.

(2) Relief to which subsection (1) applies means relief in the form of:

(a) the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or

(b) relief for insureds from the consequences in law of making a misrepresentation;

but does not include:

(c) relief in the form of compensatory damages; or

(d) relief relating to the effect of section 12BF (unfair contract terms) of the *Australian Securities and Investments Commission Act 2001*.

Note: See Subdivision G (enforcement and remedies) of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* for certain remedies relating to the effect of section 12BF of that Act.

43 The expansion of the reach of the unfair contract terms regime to contracts of insurance regulated under the IC Act raises questions about the interaction of the two statutory regimes. In this proceeding, A&G placed reliance on the following aspects of the IC Act in support of its contention that the Notification Term was not an unfair term within the meaning of s 12BG of the ASIC Act.

Duty of utmost good faith

44 First, A&G placed reliance on s 13(1) which implies into every contract of insurance a provision requiring each party to act with the utmost good faith (which, for convenience, will be referred to as the **statutory good faith implied term**). Section 13(1) stipulates as follows:

> A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

45 Section 14(1) supplements s 13(1) by stipulating:

> If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.

46 By s 52, it is impermissible for an insurer to exclude, restrict or modify the statutory good faith implied term.

47 As discussed further below, A&G's contention is that its rights pursuant to the Notification Term were ameliorated by the statutory good faith implied term. As a result, A&G contends that the Notification Term would not cause a significant imbalance in the parties' rights and obligations arising under the contract.

Insured's duty of disclosure

48 Second, A&G placed reliance on the provisions of Div 1 of Pt IV which concern the insured's duty of disclosure. Relevantly, s 21 provides as follows:

> **21 The insured's duty of disclosure**
>
> (1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
>
> (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
>
> (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant, having regard to factors including, but not limited to:
>
> (i) the nature and extent of the insurance cover to be provided under the relevant contract of insurance; and
>
> (ii) the class of persons who would ordinarily be expected to apply for insurance cover of that kind.
>
> (2) The duty of disclosure does not require the disclosure of a matter:
>
> (a) that diminishes the risk;
>
> (b) that is of common knowledge;
>
> (c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or
>
> (d) as to which compliance with the duty of disclosure is waived by the insurer.
>
> …

49 At trial and on the appeal, A&G submitted that the Notification Term was concerned with the duty of disclosure, and only required the insured to notify A&G if, during the term of the contract, there was a change to the information previously disclosed by the insured to A&G prior to the contract.

Refusal to pay claims

50 Third, A&G placed reliance on s 54 which limits, to some extent, the exercise by the insurer of a contractual right to refuse to pay claims. Section 54 provides as follows:

54 Insurer may not refuse to pay claims in certain circumstances

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.

51 A&G's contention is that the right to refuse to pay a claim, conferred by the Notification Term, is ameliorated by s 54 which prevents the insurer from exercising a "blanket" right to refuse to pay a claim by reason of some act of the insured (here, the failure to comply with the Notification Term), but which permits a reduction in the insurer's liability in respect of the claim by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act. A&G argued that s 62(2) (referred to below) gave A&G the right to cancel the contract if it was notified of certain events. The failure by an insured to notify a change as required by the Notification Term might have the result that A&G lost the opportunity to cancel the contract, and incur a liability under the contract which it would have avoided had it cancelled the contract. A&G's interest would thereby be prejudiced by the

insured's failure to comply with the Notification Term, and A&G would be entitled to refuse to pay a claim, or reduce the amount paid, consistently with s 54.

Cancellation of the insurance contract

52 Fourth, A&G placed reliance on ss 59, 60 and 63 concerning the cancellation of an insurance contract.

53 Relevantly, s 59 stipulates that an insurer who wishes to exercise a right to cancel a contract of insurance must give notice in writing of the proposed cancellation to the insured. Stated in broad terms, the notice cannot take effect any earlier than the third business after the day on which the notice is given.

54 Section 60 relevantly stipulates as follows:

> **60 Cancellation of contracts of general insurance**
>
> (1) Where, in relation to a contract of general insurance:
>
> (a) …
>
> (b) …
>
> (d) a person who is or was at any time the insured failed to comply with a provision of the contract, including a provision with respect to payment of the premium; or
>
> (e) …
>
> the insurer may cancel the contract.
>
> (2) Where:
>
> (a) a contract of general insurance includes a provision that requires the insured to notify the insurer of a specified act or omission of the insured; or
>
> (b) the effect of the contract is to authorize the insurer to refuse to pay a claim, either in whole or in part, by reason of an act or omission of the insured or of some other person;
>
> and, after the contract was entered into, such an act or omission has occurred, the insurer may cancel the contract.
>
> (3) A reference in subsection (2) to an act or omission of the insured includes a reference to an act or omission of the insured that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter.
>
> …

55 Section 63 stipulates that an insurer must not cancel a contract of general insurance except as provided by the IC Act.

56 A&G's contention is that the right to cancel the insurance contract, conferred by the Notification Term, is ameliorated by ss 59 and 60, including by the requirement to give notice to the insured which affords the insured the opportunity to procure a new contract of insurance. As noted above, A&G placed reliance on s 62(2) as providing a basis upon which it would be entitled to refuse to pay a claim, or reduce the amount paid, pursuant to s 54 of the IC Act.

C. THE HOME AND CONTENTS INSURANCE CONTRACTS

57 The form and content of the relevant home and contents insurance contracts were the subject of agreed facts between the parties and were summarised by the primary judge.

58 The primary judge found (at [1]) that each of the contracts of insurance comprised a Product Disclosure Statement (**PDS**) dated 1 March 2021, documents titled "Cover Letter", "Insurance Certificate" and "Declarations", and applicable Supplementary Product Disclosure Statements (**SPDSs**). The PDS was issued under various brands (such as Budget Direct, ING and Virgin Insurance) but was otherwise in substantially identical terms. Consumers could elect to take insurance cover over their home or their contents or both on the terms stipulated in the PDS and SPDSs. The contracts were renewable on an annual basis.

59 The Cover Letter stated that the letter becomes the insured's insurance contract together with the most recent PDS, SPDS, Insurance Certificate and Declarations.

60 The Insurance Certificate contained insurance details specific to the insured including the policyholder's name, the insured address and the period of insurance and, for each of the applicable home cover and contents cover, the sum insured, the applicable excess and the premium payable.

61 The document titled "Declarations" commenced with the following statement:

> This is the information we have on our records, based on the questions we asked and the answers you gave us. Please check that the answers you provided still apply and contact us if anything has changed. This is an important part of your duty not to make a misrepresentation.

62 The document then set out a series of questions asked by A&G and the answers provided by the insured under the headings:

(a) "Policyholder(s)" – including matters such as whether the policyholder has a criminal conviction, has had insurance refused in the last 5 years or has made any insurance claims in the last 5 years; and

(b) "About your home" – including matters such as the construction and situation of the home, occupancy of the home, security features within the home and whether a business is being conducted from the home.

63 The primary judge found that the questions and answers contained in the Declarations document were not an exhaustive record of the information sought by A&G and provided by the insured in connection with the offer or renewal of the insurance contract (at [49]). There was no challenge to that finding on the appeal.

64 The PDS was a lengthy document. It was written in a "plain language" or "non-legal" style with the undoubted aim of being more comprehensible to consumers. As such, the document was not expressed in the form of numbered contractual clauses. Despite that, the document had a clear structural hierarchy. It was divided into the following six numbered sections:

(1) An overview of your insurance product

(2) This policy explains our agreement with you

(3) How to make a claim and what happens next

(4) Your Insurance Cover

(5) Your sum insured, premiums, renewals, and cancelling

(6) Definitions of words and phrases

65 Each section was then divided, using headings in large font, into what we will refer to as divisions. Some divisions were then further divided, using headings in a smaller font, into what we will refer to as sub-divisions. The use of the labels section, division and sub-division is only for the purpose of conveying a sense of the structural hierarchy of the document which is readily apparent from reading the document.

PDS section 1

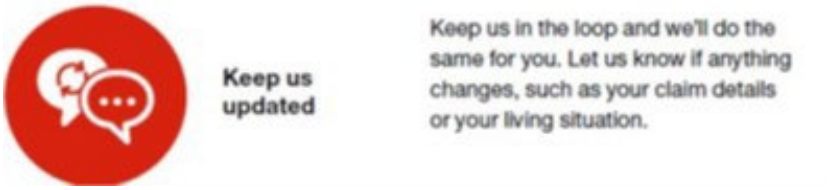
66 Section 1 of the PDS was titled "An overview of your insurance product". It commenced with the statement:

> We've written this document in plain language to help you understand your insurance cover and how to make a claim. We've included this overview to explain how your insurance cover works, and as a guide to reading and navigating this document.

67 Section 1 was then divided into four divisions. The primary judge referred (at [5]) to the second division (on page 5 of the PDS) which commenced with the heading "How we work together for an easy claims process". Under that heading, the PDS included the statement:

> We want to make the claims process straightforward for you. Here are the steps to making a claim, which you can read about in more detail on page 18.

68 There followed a series of icons and steps, related to A&G's claims process, the last of which was:

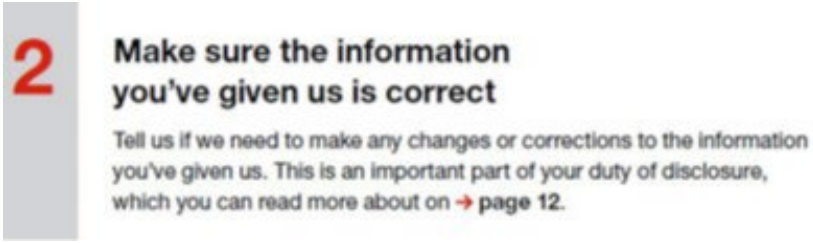


69 In context, it is clear that the phrase "anything changes" is directed to anything related to a claim that has been made.

70 The primary judge also referred (at [6]) to the fourth division (on pages 8 and 9 of the PDS) which commenced with the heading "Steps to take when you first receive this policy". Under that heading, the PDS included the statement:

> Now is a good time to make sure this product is the right one for you. Make sure the information you've provided is correct, and keep your policy documents in a safe place.

71 Following that statement were three "steps". Step 1 commenced with the heading: "Make sure this policy covers what you need it to". Step 2 commenced with the heading: "Make sure the information you've given us is correct". Step 3 commenced with the heading: "Keep your policy documents and other documents in a safe place". The information included with step 2 was as follows:



72 As can be seen, step 2 was directed to information given to A&G by the insured, and cross-referenced the terms stated on page 12 of the PDS.

PDS section 2

73 Section 2 of the PDS was titled "This policy explains our agreement with you". It was divided into six divisions.

74 The first division commenced on page 11 of the PDS and was headed: "How your policy documents work", which was followed by the following diagram:

75 Following that diagram was the first subdivision with the heading: "This PDS explains your cover that is stated on your Insurance Certificate". The PDS then explained that:

> Under this agreement, we will give you protection for events described in this document that occur during the time you are insured with us. The type of cover you have and the period of insurance are stated on your Insurance Certificate.

76 The second division commenced on page 12 of the PDS and was headed: "Your obligations and the conditions of your cover". Following that heading were the following statements:

> Here are the obligations and conditions you must meet as part of your contract with us.
>
> One of your important obligations is to give us all the information that is needed under your contract with us. Giving us this information is called your 'duty of disclosure'. To understand what we need, and when, please carefully read the section below. The text in this section is required by law.
>
> If you don't give us all the information that is required, you may lose your cover or your claim may be affected. If you have questions about your duty of disclosure, please ask your insurance advisor.

77 The second division was further divided into six subdivisions with the following headings:

(a) Your duty of disclosure;

(b) Tell us if anything changes while you're insured with us;

(c) Give us all required information at claim time;

(d) Keep security devices well maintained and activated;

(e) Tell us if your home will be unoccupied for more than 60 days; and

(f) Keep your home, contents, and personal effects in good condition.

78 The first subdivision of the second division (also commencing on page 12 of the PDS) contained the following statements (with subsidiary headings rendered in italics rather than smaller font size as in the original):

> **Your duty of disclosure**
>
> Before you enter into an insurance contract, you have a duty of disclosure under the Insurance Contracts Act 1984 (Cth). This duty applies to you until we agree to insure you and, where relevant, until we agree to renew, extend, vary or reinstate your insurance contract.
>
> *When you first take out your insurance contract*
>
> If we ask you questions that are relevant to our decision to insure you and on what terms, then you must tell us anything that you know and that a reasonable person in the circumstances would include in answering the questions.
>
> *When you renew your insurance with us*
>
> On renewal of your policy we may again ask you questions that are relevant to our decision to insure you and on what terms. Again, you must tell us anything that you know and that a reasonable person in your circumstances would include in answering the questions.
>
> Also, we may give you a copy of anything you have previously told us and ask you to tell us if it has changed. If we do this, you must tell us about any change or tell us that there is no change.
>
> If you do not tell us about a change to something you have previously told us, we are entitled to act as if you have told us that there is no change.
>
> *When you vary, extend or reinstate your insurance*
>
> When you vary, extend or reinstate your contract of insurance your duty of disclosure changes. You then have a duty to tell us anything you know, or could reasonably be expected to know, that may affect our decision to insure you and on what terms.
>
> You do not need to tell us anything that:
>
> - reduces the risk we insure you for; or
> - is common knowledge; or
> - we know or should know as an insurer; or
> - we waive your duty to tell us about.
>
> *If you do not tell us something*
>
> If you do not tell us anything you are required to tell us, we may cancel your contract or reduce the amount we will pay you if you make a claim, or both.
>
> If your failure to tell us is fraudulent, we may refuse to pay a claim and treat the contract as if it never existed.

79 The second subdivision commenced on page 13 of the PDS. It was reproduced at the beginning of these reasons and contains the impugned Notification Term. Leaving aside formatting features, it contained the following statements:

> **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
> - cancel your contract
> - reduce the amount we pay
> - not offer to renew your contract.

80 Following those statements were "examples of changes we want you to tell us about", which were:

(a) your insured property or address for contents changes;

(b) paying guests stay in your home, for example, Airbnb, Homestayz;

(c) you are moving out and rent your home to tenants;

(d) any construction, alteration, or renovation work will start or finish;

(e) your home will be demolished, by you or a government authority;

(f) your property will be unoccupied for more than 60 days, or is occupied by trespassers;

(g) you find out your home is heritage listed or has a heritage overlay;

(h) your home is no longer in good condition;

(i) you will start earning an income at your insured address;

(j) security devices are removed, or broken; and

(k) you find out the building materials contain asbestos.

81 The fifth subdivision also addressed the circumstances of the property being unoccupied for more than 60 days. It commenced on page 14 of the PDS and contained the following statements:

> **Tell us if your home will be unoccupied for more than 60 days**
>
> Tell us before you leave your home unoccupied for more than 60 consecutive days so we may continue to provide cover for your home and contents. You will need to agree to our conditions for the security and safekeeping of the home.

> If we agree to cover your home during this time, we will tell you in writing. Additional excesses may apply. We may provide cover while the home is unoccupied for up to a maximum of 180 days.
>
> All cover under the policy stops after 60 days of your home being unoccupied if you did not tell us it would be. This also applies if you do not comply with our conditions while the home is unoccupied.

PDS section 3

82 Section 3 of the PDS was titled "How to make a claim and what happens next". The section addressed A&G's claims process including what A&G will pay for, what it will not pay for and the payment of the applicable excess. The terms in section 3 have no direct relevance to the issues arising on the appeal.

PDS section 4

83 Section 4 of the PDS was titled "Your Insurance Cover". It described the risks covered by the policy and the risks that were not covered. It was the lengthiest section of the PDS. The terms in section 4 have no direct relevance to the issues arising on the appeal.

PDS section 5

84 Section 5 of the PDS was titled "Your sum insured, premiums, renewals, and cancelling". It was divided into four divisions which had the following titles:

(a) we will pay up to your maximum sum insured;

(b) paying your premium;

(c) renewing the policy; and

(d) cancelling the policy.

85 The primary judge referred (at [11]) to the third division, renewing the policy. That division commenced with the statement:

> We may offer to renew your policy. If we do, we will let you know in writing at least 14 days before the expiry date that is stated on your Insurance Certificate. We will tell you about any changes to the terms of your policy.
>
> If we do not offer to renew your policy, we will send you a notice in writing.

86 The second subdivision within that division was as follows:

> **Tell us if any information in our offer of renewal is incorrect**
>
> If you receive an offer of renewal, you must tell us if any information is incorrect or incomplete. If you don't tell us, we may reduce the amount we will pay, or refuse to pay a claim. This is part of your duty of disclosure.

87 On the appeal, the parties referred to the fourth division, "cancelling the policy". That division commenced with the statement that the insured may cancel the policy at any time and explained the basis on which A&G would refund part or all of the premium that had been paid. The division then addressed cancellation by A&G and included the following statements:

> **We can cancel the policy if you don't meet your conditions of cover**
>
> We can cancel your policy when permitted by law, including if you don't meet your conditions of cover. We will send you a notice of cancellation to your last known address. We may refund what is left of the premium you've paid. If we cancel your policy because you intended to deceive us, we consider this to be fraudulent and we may not refund any money to you.

PDS section 6

88 Section 6 of the PDS was titled "Definition of words and phrases". It provided a list of plain language definitions for the terms and phrases used in the PDS. The definitions in section 6 have no direct relevance to the issues arising on the appeal.

D. CONSTRUCTION OF THE NOTIFICATION TERM (APPEAL GROUND 1)

Ground of appeal

89 The first ground of appeal concerns the primary judge's construction of the Notification Term. As set out earlier, the Notification Term appears within the second division of section 2 of the PDS titled: "Your obligations and the conditions of your cover". The Notification Term comprises the second subdivision and commences with the heading "Tell us if anything changes while you're insured with us", after which the term states: "While you're insured with us, you need to tell us if anything changes about your home or contents".

90 By this ground of appeal, ASIC contends that the primary judge erred in construing the Notification Term as imposing an obligation on the insured to notify A&G if there is any change to the information about the insured's home or contents that the insured disclosed to A&G prior to entry into the contract. ASIC says that, on its proper construction, the Notification Term imposed an obligation on the insured to notify A&G if anything changes about the insured's home or contents that is relevant or material to the insured risk.

Reasons of the primary judge

91 In construing the Notification Term, the primary judge adopted principles of construction relevant to commercial contracts on the basis that such principles are applicable to contracts of insurance (at [38]-[39], citing the judgment of Allsop CJ and Gleeson J in *Todd v Alterra at*

Lloyd's Limited (2016) 239 FCR 12 (***Todd***) at [42] as support for that proposition). In that regard, the primary judge referred to the principles summarised by French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46], [47] and [51], including that:

(a) in determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean; and

(b) a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption that the parties intended to produce a commercial result, or put another way, a commercial contract should be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

92 Later in the reasons, the primary judge expressed the view that the task of construction did not involve considering what an ordinary consumer would have understood the Notification Term to mean (at [51]). The primary judge also observed (at [103]) that, although his Honour had a clear view on the proper construction of the Notification Clause, he was not able to say that "consumers generally would have reached that construction".

93 The primary judge reasoned that the word "anything" in the phrase "if anything changes about your home or contents" cannot be given a literal meaning because it would lead to absurdity (at [41]). At trial, ASIC did not resist that conclusion. Before the primary judge, the parties essentially advanced two competing constructions, although ASIC proffered a number of alternative constructions.

94 The construction advanced by A&G was that the Notification Term required the insured to notify A&G if, during the term of the policy, there is any change to the information about the insured's home or contents that the insured disclosed to A&G prior to entry into the contract (at [42]). The primary judge accepted that construction for two reasons. First, his Honour considered that that construction was supported by textual (or more accurately, contextual) considerations. In particular, his Honour reasoned that, elsewhere in the PDS, the word "changes" refers to information previously provided by the insured to A&G (at [42] and [43]). His Honour also referred to the use of the word "information" in the third division of section 5 of the PDS concerning renewal of the policy, and observed that the information being referred to is information which the insured has given A&G previously (at [44]). His Honour also considered that the construction was supported by the statement in the Declarations document asking the insured to check that the answers provided still apply and to contact A&G if

"anything has changed" (at [45]). Second, the primary judge considered that there was nothing in the purpose or the object of the transaction which would point away from that construction. His Honour reasoned that the contract was entered into necessarily on the basis of information provided by the insured, and that it is consistent with the purpose of the contract that the insurer would require the insured to disclose any changes to that information in order to preserve the balance of risk and reward inherent in the bargain (at [46]).

95 The principal construction advanced by ASIC was that the Notification Term required the insured to notify A&G of those changes to the home or contents which are relevant to the conditions of cover under the policy (at [53]). A variation to that construction proffered by ASIC was that the Notification Term required the insured to notify changes which are material or which materially increase the risk insured or which materially alter the nature of the insured risk (at [54]). The primary judge rejected those alternative constructions for similar reasons. First, his Honour considered that there was no textual or contextual support for those constructions (at [53] and [54]). Second, his Honour considered that those alternative constructions would impose an unrealistic burden on the insured, requiring the insured to assess what changes to their home and contents would be relevant or material to the insurance cover (at [53] and [54]).

96 A further alternative construction proffered by ASIC was that the Notification Term required the insured to notify A&G of those changes to the home or contents which are of the kind described in the 11 examples given in the Notification Term (at [55]). The primary judge rejected that construction as unworkable because the insureds have no means of knowing the significance which A&G attaches to matters other than those which are given by way of the 11 examples (at [53]).

Submissions of the parties

97 ASIC submitted that the primary judge's construction of the Notification Term was erroneous for the following reasons. First, it was not faithful to the contractual words used and involved rewriting the text. Second, the contextual matters taken into account by the primary judge did not, when analysed, support the primary judge's construction and indeed told against it. While the verb "change" has a single clear meaning, it is necessary to have regard to the subject of the verb in different part of the PDS and the Declarations document. In most parts of the PDS and the Declarations document, the subject is the information provided by the insured to A&G. But that is not the subject in the Notification Term.

98 On the appeal, ASIC agreed with A&G that the Notification Term could not be construed literally (because it would lead to absurd results), and argued that the term was susceptible to a number of meanings, which detracted from its transparency and supported a conclusion that the term was unfair. Nevertheless, ASIC proffered as the best construction that the Notification Term required the insured to notify any changes to the circumstances affecting the home or contents which materially increase the risk insured or which materially alter the nature of the insured risk. ASIC submitted that its preferred construction gave closer effect to the contractual words used. Further, while its preferred construction requires the Notification Term to be read subject to an implied limitation (that the insured is not required to notify changes that are immaterial to the risk insured), ASIC submitted that implied limitations of that kind are frequently found in insurance policies. ASIC further submitted that the fact that its construction may require some evaluative judgment to be exercised by the insured does not tell against it. That is a common feature of disclosure obligations in connection with insurance contracts, including the insured's duty of disclosure prior to contract. The PDS itself described an evaluative duty of this kind in the immediately preceding subdivision of the PDS headed "Your duty of disclosure". Under the subheading "When you vary, extend or reinstate your insurance", the PDS stated:

> When you vary, extend or reinstate your contract of insurance your duty of disclosure changes. You then have a duty to tell us anything you know, or could reasonably be expected to know, that may affect our decision to insure you and on what terms.

99 ASIC submitted that, here, the word "anything" is being used (as in the Notification Term) to describe a disclosure obligation that is not limited to information previously disclosed by the insured.

100 On the appeal, A&G supported the primary judge's construction of the Notification Term for the reasons given by his Honour, which are summarised above. A&G further submitted that, even if ASIC's preferred construction is correct, that would not change the assessment of whether the Notification Term is unfair within the meaning of s 12BG.

Consideration

Applicable principles of construction

101 It is uncontroversial that Australian law applies an objective approach to the construction of contracts. The law does not seek to ascertain the parties' subjective understanding of a contractual obligation, but what the contractual words convey to a reasonable person in the

position of the parties in the circumstances in which the contract is entered into. Evidence of the parties' subjective intention is usually inadmissible on the question of construction. In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, the High Court stated the applicable principle as follows (at [40], citations omitted):

> This Court, in *Pacific Carriers Ltd v BNP Paribas*, has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

102 As is apparent from the above statement, construction is undertaken by reference to what the words used would convey to a reasonable person in the position of the contracting parties, taking account of the surrounding circumstances.

103 Respectfully, the starting point for the primary judge's construction of the Notification Term involved two interrelated errors. First, the primary judge was wrong to characterise the insurance contract as a "commercial contract" and apply principles of contractual construction relevant to commercial contracts, including that it is necessary to ask what a reasonable business person would have understood the Notification Term to mean and that the question of construction should be approached on the assumption that the parties intended to produce a "commercial result". The reasons of Allsop CJ and Gleeson J in *Todd* do not support a conclusion that all insurance contracts are to be construed as commercial contracts. Rather, their Honours applied principles of contractual construction relevant to commercial contracts to the insurance contract in issue in that proceeding because it was a commercial contract (being a contract for insurance of a financial advisor in respect of advice given in the course of the advisor's business). Second, the primary judge was wrong to conclude that the task of construction did not involve considering what an ordinary consumer would have understood the Notification Term to mean.

104 The present case concerns a standard form home and contents insurance contract. It was an agreed fact that the insurance contract was a consumer contract within the meaning of s 12BF(3), which means that the insureds to whom the contract was offered were individuals

who acquired the insurance wholly or predominantly for personal, domestic or household use or consumption. The insurance contract was a standard form contract, drafted by A&G, and offered to consumers. In that context, the proper approach to construction is to consider what the Notification Term would mean to a reasonable individual, as a matter of ordinary language, reading the contractual documentation as a whole: *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513 at 525 (Wilson, Deane and Dawson JJ).

105 In resolving ambiguity, a court will seek to adopt a common sense approach that is in accordance with the apparent purpose of the contract. However, such an approach has no place where there is no ambiguity, and the court will not rewrite the terms of a contract to relieve against harsh or unreasonable terms. As the High Court recently observed in *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456 (at [63] per Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ, citations omitted):

> … It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain. It has rightly been said that it is not a legitimate role for a court to force upon the words of the parties' bargain "a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made". Even the recognised doctrines of unconscionability or undue influence do not support such a course …

106 It is pertinent to observe that the unwillingness of the common law to rewrite a contract in order to relieve a party from an unfair term has been addressed by Parliament, in the context of consumer and small business contracts, in the unfair contract terms regime in the Australian Consumer Law and the cognate provisions of the ASIC Act, with which this proceeding is concerned.

107 Orthodox principles of contractual construction will permit a court to add, omit or correct words in an otherwise unambiguous contract where it is clearly necessary in order to avoid absurdity: *Fitzgerald v Masters* (1956) 95 CLR 420 at 426 (Dixon CJ and Fitzgerald J). However, the fact that a contractual term is unreasonable or unfair does not mean that it is absurd, and the fact that the plain meaning of a contractual term might appear to be contrary to common sense is not a sufficient basis for the court to depart from the plain meaning: *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd* [2008] NSWCA 5 at [27]-[38] (Basten JA, Giles and Tobias JJA agreeing). Further, a court will only add, omit or correct words in an otherwise unambiguous contract where it can discern the intended meaning of the contractual term – the court cannot speculate as to the intended meaning and thereby engage in

a process of rewriting the contract. As stated by Leeming JA (with whom Bell CJ and Ward P agreed) in *QBT Pty Ltd v Wilson* [2024] NSWCA 114 at [74]:

> If it is unclear how the absurdity is to be resolved, then the principles of construction where there is an obvious error are not available to authorise a departure from the ordinary literal meaning.

Construction of the Notification Term

108 There is no ambiguity or patent error in the Notification Term. However, the primary judge found that the literal meaning of the Notification Term resulted in absurdity (at [41]). The term required an insured to tell A&G "if anything changes about your home and contents". Applied literally, the term would require an insured to update A&G continuously about minor changes to the condition of the insured's home and its contents.

109 At trial, ASIC agreed that the Notification Term, if read literally, would produce an absurd result. ASIC maintained that agreement on the appeal. But for ASIC's agreement, the conclusion of absurdity would have been open to question on this appeal. No doubt, the effect of the Notification Term, applying its plain meaning, would impose an unreasonable burden on the insured. But unreasonableness does not equate to absurdity, and does not give the court license to rewrite the parties' contract. An orthodox approach to this proceeding would have been to accept that the Notification Term, applying its plain meaning, imposed an unreasonable burden on the insured and apply the statutory unfair contract terms regime to the Notification Term accordingly. However, in circumstances where ASIC agreed at trial that the Notification Term should not be construed in accordance with its plain meaning, and that agreement was maintained on this appeal, it would be procedurally unfair for the Court to decide this appeal on a different basis. Accordingly, these reasons proceed on the basis that the Notification Term should not be construed in accordance with the ordinary meaning of the words used in order to avoid so-called absurd results, and the Court must construe the term to ascertain, objectively, the intended meaning of the term.

110 The primary judge accepted A&G's submission that the Notification Term should be construed as imposing an obligation on the insured, during the term of the policy, to disclose to A&G any change to the information about the insured's home or contents that the insured had disclosed to A&G prior to entry into the contract (which will be referred to as the **A&G construction**). Respectfully, the primary judge erred in accepting that construction. It cannot be supported on any basis, having regard to the words used, the terms of the contract as a whole, and the apparent contractual purpose.

111 The text of the Notification Term provides no support for the A&G construction, and there are textual indications that negative the A&G construction. First and foremost, the Notification Term makes no reference to information about the insured's home or contents previously disclosed by the insured to A&G. That can be contrasted with other sections of the insurance contract which address that subject matter. For example, the opening statement in the Declarations document refers to answers given by the insured to A&G and asks the insured whether anything has changed. Similarly, in the subdivision titled "Your duty of disclosure" (being the subdivision immediately preceding the Notification Term), the contract stipulates that, when the contract is renewed, A&G may give the insured a copy of information previously disclosed to A&G and ask the insured to tell A&G if anything has changed. Second, the Notification Term seeks to illustrate or explain the obligation imposed on the insured by the use of examples. The use of examples is inconsistent with the A&G construction, because the A&G construction does not require examples. The A&G construction is self-defining by reference to information previously disclosed by the insured to A&G. In contrast, the use of examples indicates that the Notification Term is a more broadly based and non-specific obligation, the scope of which is illustrated by the examples.

112 The other terms of the contract also provide no contextual support for the A&G construction, and indeed negative the A&G construction. With respect, the focus of the primary judge on the frequent use of the verb "change" in the contract is misdirected. As submitted by ASIC, it is necessary to have regard to the subject of the verb in different parts of the contract. In many parts of the contract, the insured is expressly required to inform A&G if there is any change to the information provided by the insured to A&G. Two examples are given in the preceding paragraph. Another example is in step 2 of the fourth division of section 1 of the PDS (headed "Steps to take when you first receive this policy"), which states: "Tell us if we need to make any changes or corrections to the information you've given us". In other parts of the PDS, the subject of the verb "change" is another category of information. For example, in the second division of section 1 of the PDS (headed "How we work together for an easy claims process"), the statement "Let us know if anything changes, such as your claim details or your living situation" refers to changes relating to a claim which is addressed more fully in section 3 of the PDS. The conclusion that can be drawn is that, when the contract requires the insured to inform A&G of changes to information previously provided to A&G, the contract states that requirement in clear terms. The Notification Term is drafted in a different manner, providing a strong indication that it serves a different purpose in the contract.

113 As noted earlier, the primary judge reasoned that the contract was entered into on the basis of information provided by the insured, and that it is consistent with the purpose of the contract that A&G would require the insured to disclose any changes to that information in order to preserve the balance of risk and reward inherent in the bargain. That reasoning may be accepted, but it rises no higher than providing a reason why A&G may have chosen to impose an obligation on insureds to inform A&G of any changes to information previously disclosed. Equally, there are rational reasons why A&G might have chosen not to impose such an obligation on insureds. In particular, such an obligation would require the insured to retain a copy of all information previously disclosed to A&G. That might not be feasible or reasonable. Ultimately, the primary judge's reasoning provided no substantive support for the A&G construction.

114 Contrary to the conclusion of the primary judge, the preferable construction of the Notification Term, with the ostensible aim of avoiding absurdity, is to qualify the clause "if anything changes about your home or contents" with a criterion of materiality, where materiality relates to the risk insured (which will be referred to as **ASIC's construction**). ASIC's construction is supported by textual, contextual and purposive considerations.

115 As to the text, ASIC's construction is consistent with the open manner in which the notification obligation is framed ("if anything changes about your home and contents"), and merely qualifies the obligation with a materiality criterion. Further, the implied materiality criterion is illustrated, and thereby given meaning, by the 11 examples provided in the term. Each of the 11 examples is clearly directed to the risk insured and would be expected to have a material impact on the risk insured.

116 As to context, ASIC's construction is consistent with the structure of the document in which the subdivisions of the second division of section 2 of the PDS address different matters. Those subdivisions have been detailed earlier in these reasons, and the terms will not be repeated here. It is sufficient to observe that the first subdivision is directed to the insured's duty of disclosure prior to entering into the contract and at the time of renewal, variation, extension or reinstatement of the contract. The second subdivision, containing the Notification Term, imposes an obligation during the term of the contract. The third subdivision addresses the claims process. The fourth and sixth subdivisions impose positive obligations concerning certain aspects of the insured's home rather than disclosure obligations. The fifth subdivision

imposes a disclosure obligation which arguably overlaps with the Notification Term, but that does not undermine ASIC's construction.

117 As to purpose, ASIC's construction is consistent with the apparent purpose of the Notification Term to require the insured to notify A&G of any change in circumstances that alters the risk insured, as illustrated by the 11 examples given in the term. The learned authors of Kelly D and Ball M, *Principles of Insurance Law* (2nd ed, Butterworths, 2001) discussed the prevalence and interpretation of such clauses at [12.0080.1], observing:

> Many policies contain terms that are aimed at controlling the risk covered by the policy. Terms requiring the insured to notify the insurer of any alteration in the risk are a prime example, as are terms that exclude liability in the case of an alteration in the risk unless the alteration has been notified and an additional premium paid.
>
> …
>
> Apart from terms requiring notification generally of a change in the risk, some policies contain terms requiring notification of specified changes in the risk, such as an alteration to the premises, a loss of a licence for the use of the premises, or a change in use of adjoining premises.
>
> In some cases, a clause requiring the insured to notify the insurer of alterations in the risk provides for suspension or avoidance of the contract if such an alteration occurs. Such a clause is unlikely to be read literally.

118 It follows, in our view, that the primary judge erred in the construction of the Notification Term and appeal ground 1 should be upheld. That does not, however, lead to the conclusion that the Notification Term is unfair within the meaning of s 12BG(1). It does mean, though, that the application of the statutory definition to the Notification Term must be re-evaluated having regard to its proper construction. Those matters will be considered in the context of appeal grounds 2 and 3.

E. SIGNIFICANT IMBALANCE IN THE RIGHTS AND OBLIGATIONS OF THE PARTIES (APPEAL GROUND 2)

Ground of appeal

119 The second ground of appeal concerns the primary judge's conclusion that the Notification Term would not cause a significant imbalance in the parties' rights and obligations arising under the insurance contract within the meaning of s 12BG(1)(a) of the ASIC Act. On this ground of appeal, ASIC contends that the primary judge erred in two ways:

(a) first, by adopting an erroneous construction of the Notification Term; and

(b) second, by failing to take into account the lack of transparency of the Notification Term either at all or in the manner required by the statutory regime.

Reasons of the primary judge

120 In construing the Notification Term, the primary judge considered both the contractual obligation imposed on the insured by the Notification Term and A&G's rights upon breach of the contractual obligation. The first ground of appeal concerned only the contractual obligation imposed on the insured by the Notification Term. It is now necessary to refer to the primary judge's reasons with respect to A&G's rights upon breach.

121 It will be recalled that the Notification Term contains the following stipulation in the event of a breach of the notification obligation:

> If you don't tell us about changes, we may:
>
> - refuse to pay a claim
> - cancel your contract
> - reduce the amount we pay
> - not offer to renew your contract.

122 There was no dispute between the parties with respect to the meaning of that stipulation. The primary judge observed (at [56]) that the use of the word "may" confers a discretionary right upon A&G. The primary judge further observed (at [57]) that the rights exercisable by A&G under the Notification Term are subject to the statutory good faith implied term, which requires each party to act towards the other party, in respect of any matter arising under or in relation to the contract, with the utmost good faith.

123 There was also no material dispute between the parties with respect to the content of the statutory good faith implied term. The primary judge referred (at [58] and [59]) to the principles stated by Kiefel CJ, Edelman, Steward and Gleeson JJ in *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* (2022) 277 CLR 445 with respect to that obligation, including that:

(a) the duty requires each party to have regard to more than its own interests when exercising its rights and powers under the contract of insurance, although this condition upon the exercise of rights and powers and the performance of obligations is not fiduciary;

(b) the duty does not require a party to an insurance contract to exercise rights or powers or to perform obligations only in the interests of the other party, but nor is the condition limited to honest performance;

(c) rights and powers must be exercised, and duties must be performed, consistently with commercial standards of decency and fairness, as distinct from standards of decency and fairness more generally; and

(d) the obligation to act decently and with fairness is a condition on how existing rights, powers and duties are to be exercised or performed in the commercial world.

124 The primary judge expressed his conclusions with respect to the construction of the Notification Term in the following manner (at [62]-[63]):

> 62 Accordingly, upon the proper construction of the Notification Clause, the contracts of insurance in the present case contained a term that:
>
> (a) the insured must notify the defendant if, during the term of the policy, there was any change to the information about the insured's home or contents that the insured had disclosed to the defendant prior to entry into the contract; and
>
> (b) if the insured failed to notify the defendant of such changes, the defendant had the right to refuse to pay a claim, reduce the amount it paid, cancel the contract or not offer to renew the contract if and to the extent that it would be consistent with commercial standards of decency and fairness for the defendant to do so.
>
> 63 To the extent that it may be relevant to the issue of "transparency", which I deal with below, I do not regard this question of construction as finely balanced. On the contrary, I regard the construction of the Notification Clause which I have adopted to be the proper construction by a very substantial and comfortable margin.

125 The conclusion expressed in [62(a)] was the subject of the first ground of appeal and has been found to be erroneous. The conclusion expressed in [62(b)] assumed considerable significance in his Honour's reasons. The conclusion is to the effect that the process of construction of the Notification Term includes the incorporation of the statutory good faith implied term. Adopting that approach to the construction of the Notification Term, at [63] his Honour expressed the view that the construction of the Notification Term was clear, which had implications for the issue of transparency under the unfair contract terms regime. Then, at [66], his Honour reasoned that the term, which was required to be considered under s 12BG(1), was the Notification Term as so construed (in other words, incorporating the statutory good faith implied term).

126 The primary judge's conclusions, expressed at [62(b)] and [66], raise questions concerning the interaction of the unfair contract terms regime and the consumer protection provisions of the IC Act. It is uncontroversial that, in seeking to exercise its rights under the Notification Term, A&G is required to act toward the insured with the utmost good faith by virtue of the statutory good faith implied term. However, that conclusion does not require the Notification Term to be construed as if it included the statutory good faith implied term, far less that the Notification Term as so construed is the relevant term to be considered under s 12BG(1) of the ASIC Act.

127 The primary judge recorded (at [67]) that both parties proceeded on the basis that s 12BG(1) is concerned with an assessment of the relevant contractual term in the context of the legal environment in which the term operates, comprising both statutory and non-statutory law. The parameters and implications of that statement are unclear. It is apparent from the reasons that there was considerable debate before his Honour as to how the significant imbalance element of the statutory definition in s 12BG(1) of the ASIC Act should be applied in light of ss 13 and 54 of the IC Act. Indeed, his Honour recorded (at [77]) a submission by ASIC that the proceeding raises a novel question about the interaction of the unfair contract terms provisions of the ASIC Act and the effect of s 54 of the IC Act, and how s 54 is to be taken into account in determining whether the criteria in s 12BG(1) of the ASIC Act are satisfied.

128 To a large extent, the primary judge avoided the issue of interaction of the unfair contract terms regime and the IC Act by construing the Notification Term as qualified by the statutory good faith implied term, and applying the test of significant imbalance to the term as so construed (see at [80]). His Honour then reasoned (at [81] and [82]):

> 81 In s 13, the requirement that insurers act with the utmost good faith means that they must act consistently with commercial decency and fairness. Commercial decency and fairness require that the defendant not exercise its rights in a way which is opportunistic, such as by seizing upon a breach by the insured which has not caused the defendant any loss, or by refusing to pay a claim or reducing the amount of a claim beyond the extent to which the defendant would be prejudiced by the breach. The ability of an insurer to rely upon a breach of warranty to refuse an insured's claim even if the breach did not cause or contribute to the relevant loss or prejudice the interests of the insurer in some other way (such as increasing the risk) is what led to the recommendation and enactment of ss 54 and 55 of the ICA (see the Australian Law Reform Commission's Report No 20 (1982) on *Insurance Contracts* at [219]–[220]). This feature of the common law was described, with appropriate restraint, by Lord Templeman as "one of the less attractive features of English insurance law": *Forsikringsaktieselkapet Vesta v Butcher* [1989] AC 852 at 893–4.
>
> 82 Now that the duty of utmost good faith has been given statutory recognition in ss 13 and 14 of the ICA, and undoubtedly applies beyond the formation of the

> contract of insurance to the way in which the contract is performed by the insurer, the question arises as to what the standards of commercial decency and fairness would require of the defendant when considering whether to refuse to pay or reduce the amount of a claim by the insured by reason of a breach of the Notification Clause. In my view, commercial decency and fairness would prevent the defendant from any opportunistic reliance on the Notification Clause. It would be contrary to commercial standards of decency and fairness for the defendant to exercise the rights referred to in the Notification Clause to the prejudice of an insured unless and to the extent that the insured's failure to notify a change in information had prejudiced the defendant's interests. Further, as the defendant submits, and I accept, in exercising its powers, the defendant must carry out its assessment of such prejudice in a bona fide way. In other words, the substantive effect of s 54 of the ICA is consistent with the Notification Clause on its proper construction. Accordingly, it is not necessary to consider how the analysis required by s 12BG(1) relates to s 54 per se.

129 With respect to the issue of transparency, the primary judge noted (at [65]), with respect correctly, that the extent to which the term is transparent is not one of the three criteria set out in s 12BG(1), but is a matter which the court must take into account pursuant to s 12BG(2)(b). His Honour indicated that he would address the issue of transparency in "the order which was adopted by the High Court" in *Karpik*; that is, to take each of the three elements in s 12BG(1) in turn, and then deal with the issue of transparency under ss 12BG(2)(b) and 12BG(3). Accordingly, his Honour considered the issue of transparency after his Honour had separately considered the three elements of the definition of unfair in s 12BG(1).

130 The primary judge accepted (at [103]) ASIC's submission that the question whether a term is expressed in a manner which allows consumers readily to know and understand the parties' rights and obligations is an aspect of the concept of "transparent", and that the Notification Term lacked transparency to a significant degree in that sense. As noted earlier in these reasons, his Honour doubted that consumers generally would have understood the Notification Term in the manner in which it was construed by his Honour. His Honour also accepted that few consumers would be aware of ss 13 and 54 of the ICA, and few consumers would have considered the impact of those statutory provisions on the Notification Term.

131 The primary judge noted (at [104]) that ASIC placed the lack of transparency at the forefront of its argument and had submitted that the fundamental vice in the Notification Term (in terms of unfairness) is that it was not expressed in a manner which allowed the insured readily to know and understand their rights and obligations. But his Honour did not find that submission persuasive, reiterating that a lack of transparency is not an independent element of unfairness as defined in s 12BG(1) and noting that ASIC had not brought a case based on any of the statutory prohibitions of misleading or deceptive conduct. More fundamentally, his Honour

considered that ASIC's argument concerning transparency was answered by his Honour's construction of the Notification Term. Ultimately, his Honour reasoned that, as the Notification Term (as construed by his Honour) did not cause a significant imbalance in the parties rights and obligations, the lack of transparency in the term could not lead to a different conclusion. His Honour expressed his conclusion as follows (at [107]):

> The difficulty with those submissions is that, as I have said above, s 12BG(1)(a) requires that the "term" of the contract be identified along with "the parties' rights and obligations arising under the contract", and, in my view, those concepts are primarily directed to the meaning of the term on its proper construction. An erroneous but arguable construction of the term, or an erroneous but plausible view as to how the term operates in its overall legal (including statutory) context, is not picked up directly by the statutory language. In the present case, I cannot see how the lack of transparency could be deployed in considering the criterion in s 12BG(1)(a), other than the way identified by the High Court in *Karpik* at [32], namely that the greater the imbalance inherent in the term, the greater the need for the term to be expressed and presented clearly. I have concluded above, while putting the question of transparency aside, that there is no "significant imbalance in the parties' rights and obligations arising under the contract" on the proper construction of the Notification Clause. In all the circumstances, I do not regard the lack of transparency in the present case as leading to any different conclusion as to the criterion in para (a).

Submissions of the parties

132 As noted earlier, ASIC contends that the primary judge erred by adopting an erroneous construction of the Notification Term and by failing to take into account the lack of transparency of the Notification Term either at all or in the manner required by the statutory regime.

133 ASIC's submissions with respect to the construction of the Notification Term were addressed in the context of the first ground of appeal, and accepted. ASIC's submissions did not expressly challenge the primary judge's reasoning that, properly construed, the Notification Term incorporated the statutory good faith implied term. Nevertheless, a challenge on that basis was implicit in ASIC's submissions.

134 ASIC's argument had two principal foundations:

(a) first, the Notification Term imposed a disadvantageous burden or risk on the insured, being a risk of the potential cancellation of the policy, or a claim being refused, by reason of the insured failing to inform A&G of a change to the home or contents insured; and

(b) second, the Notification Term did not make plain or clear the scope of the notification obligation or that its effect was subject to the statutory good faith implied term.

135 It is implicit in ASIC's submission that the Notification Term lacked transparency that the "term" that is the subject of assessment under s 12BG(1) is the Notification Term in the form in which it appeared in the contract. While ASIC accepted that the required assessment is to be based on the Notification Term as properly construed, the burden of ASIC's submission was that the statutory good faith implied term was a separate contractual duty. As a matter of law, the statutory good faith implied term modified A&G's rights under the contract, but the implied term was not part of the Notification Term and would have been unknown to most persons who entered into the insurance contracts.

136 ASIC submitted that the Notification Term, properly construed, engaged several of the examples of potentially unfair terms contained in s 12BH(1), specifically:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract (as per para (b) of s 12BH(1));

(b) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract (as per para (c) of s 12BH(1));

(c) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract (as per para (e) of s 12BH(1)); and

(d) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract (as per para (g) of s 12BH(1)).

137 With respect to transparency, ASIC submitted that the Notification Term was drafted in unclear terms and was capable of bearing a number of interpretations. As such, the Notification Term lacked transparency which increased the imbalance in the parties rights and obligations under the contract. ASIC submitted that, if the statutory good faith implied term is to be taken into account in the assessment of significant imbalance under s 12BG(1) as a counterbalancing factor, the weight of that factor is reduced by reason of the fact that insureds are unlikely to know of the implied term.

138 ASIC further submitted that the primary judge erred by undertaking, in both form and effect, an independent and separate transparency inquiry, thereby failing to undertake a proper assessment of s 12BG(1)(a). ASIC argued that the primary judge was wrong to consider the unfairness criteria without regard to the question of transparency, and then to undertake a separate transparency assessment.

139 A&G submitted that there was no error in the primary judge's assessment of the significant imbalance element of the definition of "unfair", and no error in the manner in which, or method by which, his Honour had regard to the transparency consideration.

140 In respect of the significant imbalance element, A&G submitted that the primary judge was correct to conclude that there was a meaningful relationship between the notification obligation and the protection of the insurer's interests, and that the insurer's rights upon breach were qualified by the operation of ss 13 and 54 of the IC Act.

141 In respect of the transparency consideration, A&G submitted that the primary judge did not err in first assessing each of the elements of the definition of "unfair", and then re-assessing those elements by taking transparency into account, and that such an approach was consistent with the High Court's observations in *Karpik*. A&G argued that the observations in *Karpik* demonstrate that a lack of transparency may have some bearing on the court's evaluation of the extent to which the term is unfair as assessed against each of the elements in s 12BG(1). In other words, the extent to which a term is transparent bears upon the degree of seriousness of the imbalance and detriment the term creates. However, if the impugned term does not create imbalance in the parties rights and obligations, a lack of transparency cannot result in significant imbalance.

Consideration

142 The primary judge's reasons, and the parties' arguments on the appeal, raise a number of questions about the interaction of the regulation of unfair contract terms by the ASIC Act and the regulation of insurance contracts by the IC Act, and how that interaction affects the assessment required to be undertaken by s 12BG.

143 There can be no doubt that the assessment of a contractual term required by s 12BG is of the term on its proper construction. The proper construction is the meaning that the contractual language conveys to a reasonable person in all the circumstances. As explained in the context of the first appeal ground, in the case of consumer contracts, it is necessary to consider what would be conveyed to a reasonable person in the position of a consumer acquiring the relevant goods or services on the terms of the contract.

144 Respectfully, the primary judge's approach to the construction of the Notification Term, and the identification of the contractual term to be assessed under s 12BG, involved error. His Honour reasoned that, as properly construed, the Notification Term incorporated the statutory

good faith implied term, and that the contractual term that was required to be assessed under s 12BG(1) was the Notification Term as so construed (in other words, incorporating the statutory good faith implied term). The effect of s 13(1) of the IC Act is to imply into the contract a provision requiring each party to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith. The statutory implied term does not alter the proper construction of the Notification Term (just as it does not alter the construction of any other term of the contract). It imposes an obligation on, relevantly, A&G with respect to the exercise of its rights under the Notification Term (and other terms). Contrary to the view expressed by the primary judge, the contractual term to be assessed under s 12BG is the Notification Term as expressed in the contract.

145 As explained in the context of the first appeal ground, there is no ambiguity or patent error in the Notification Term. However, the primary judge found that the literal meaning of the Notification Term resulted in absurdity and there was no challenge to that conclusion on the appeal. Having regard to the manner in which the appeal was conducted, the Notification Term has been construed in accordance with the ordinary meaning of the words used in order to avoid so-called absurd results. The preferable construction of the Notification Term, with the ostensible aim of avoiding absurdity, is to qualify the words "if anything changes about your home or contents" with a criterion of materiality, where materiality relates to the risk insured.

146 Having regard to the foregoing, ASIC's submission that the Notification Term lacked transparency because it is capable of differing interpretations cannot be accepted. The term is not ambiguous, but it has been construed as being qualified by a materiality criterion to avoid absurdity. ASIC supports that construction. The process of construction involves an assessment of what the term conveys to a reasonable person acquiring home and contents insurance in a consumer context. By definition, alternative constructions propounded by ASIC are not what the term conveys to a reasonable person. The mere fact that alternative constructions of a contractual term can be formulated does not lead to a conclusion that the term lacks transparency. Indeed, but for ASIC's concession that the ordinary meaning of the Notification Term produces absurd results, the term would have been construed in accordance with its plain and clear language.

147 ASIC's concession with respect to the proper construction of the Notification Term presents a significant obstacle to its second ground of appeal. ASIC's construction, which has been accepted, is that the Notification Term is qualified by a materiality criterion – an insured is

only obliged to notify A&G of changes to the insured's home or contents in so far as the change is material to the insured risk. ASIC did not contend that the substantive effect of such a term would cause a significant imbalance in the parties' rights and obligations. ASIC effectively acknowledged that an insurance contract involves the pricing of the risk of the insured events. If circumstances occur during the term of the contract that materially change the insured risk, that involves a change to the main subject matter of the contract. To require an insured to notify the insurer of such circumstances, and to confer on the insurer the right to cancel the contract if they are not notified of such circumstances, does not cause a significant imbalance in the parties' rights and obligations arising under the contract.

148 As noted earlier, A&G placed reliance on the effect of certain provisions of the IC Act on the exercise of the parties' rights and obligations arising under the Notification Term. Both at trial and on the appeal, the parties proceeded on the assumption that the provisions of the IC Act, particularly ss 13 and 54, are relevant to the significant imbalance assessment required by s 12BG(1)(a) of the ASIC Act. In other words, the parties proceeded on the assumption that the phrase "the parties' rights and obligations arising under the contract" in s 12BG(1)(a) should be construed as meaning the parties' rights and obligations arising under the contract as moderated or affected by the IC Act.

149 In circumstances where no argument was directed to the correctness of that assumption, and the parties argued the appeal on the basis of that assumption, the appeal should also be decided assuming the correctness of the assumption. Nevertheless, it is appropriate to express some caution about the limits of the assumption in the context of this case.

150 The phrase "the parties' rights and obligations arising under the contract" in s 12BG(1)(a) directs attention to contractual rights and obligations. The phrase does not contemplate, or require the balancing, of the parties' rights and obligations arising under statutory enactments generally. For example, a party's rights under a contract may be affected by the statutory obligation not to engage in unconscionable conduct. However, none of the parties suggested that the evaluation required by s 12BG(1)(a) would require that such statutory obligations, impacting on the exercise of a party's contractual rights, be brought into consideration.

151 Some requirements of the IC Act specifically alter the parties' rights and obligations arising under an insurance contract. In particular, s 13 has the effect of implying into all contracts of insurance a provision requiring each party to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith. Thus, s 13 alters the

contractual rights and obligations of the parties by including, in insurance contracts, the statutory good faith implied term. Without expressing a concluded view on the issue (which was not argued on the appeal), it is not difficult to accept that the statutory good faith implied term is an aspect of the parties' rights and obligations arising under an insurance contract which is required to be assessed under s 12BG(1)(a) (and which must be taken into account under s 12BG(2)(c) as part of the contract as a whole).

152 Subject to considerations of transparency (which are discussed further below), it may be that s 13 of the IC Act reduces the circumstances in which an insurance contract will be found to contain an unfair term, because the insurer will always be subject to an implied contractual obligation to act with the utmost good faith. Nevertheless, Parliament contemplated that s 13 would not immunise insurance contracts from the unfair contract terms regime. The Replacement Explanatory Memorandum accompanying the enactment of the 2019 Measures Act stated:

> 1.47 The *Insurance Contracts Act 1984* provides that parties to an insurance contract have a duty to act with the *utmost good faith* (see Part 2 of the *Insurance Contracts Act 1984*). The duty covers any matters in relation to the insurance contract including negotiation before the contract is signed and claims handling after a contract has been formed. The amendments in the Bill do not impact the existing operation of the duty of utmost good faith.
>
> 1.48 The *Insurance Contracts Act 1984* and *Australian Securities and Investments Commission Act 2001* have been amended to include notes to make it clear that the unfair contract terms regime and the duty of utmost good faith operate independently of one another.
>
> 1.49 A breach of the duty of the utmost good faith will not necessarily equate to a breach of the unfair contract terms regime. A breach of the unfair contract terms regime will not necessarily equate to a breach of the duty of the utmost good faith. Each regime operates independently of the other. However, it is possible that some scenarios may give rise to relief under both sets of provisions. In such scenarios, a party may bring actions before the court under either or both regimes, and the court will be able to take into account the concurrent operation of the two regimes when considering what orders to make.

153 Many provisions of the IC Act directly affect the exercise of parties' rights and obligations arising under an insurance contract. Relevantly in the present case, s 54 affects the exercise of contractual rights to refuse to pay claims, and s 63 affects the exercise of contractual rights to cancel the insurance contract. Unlike s 13, neither ss 54 nor 63 create contractual rights or obligations. Rather, they are statutory enactments which, in certain circumstances, may prevent the exercise of contractual rights or affect the manner of exercise of contractual rights.

154 In the present case, A&G submitted that the Notification Term (properly construed) did not cause a significant imbalance in the parties' rights and obligations arising under the contract when regard is had to the provisions of the IC Act. It relied upon the following provisions. First, the exercise of the contractual rights under the Notification Term is subject to the statutory good faith implied term. Second, the exercise of the right to cancel the contract is subject to the notification requirements in s 59, which provides the insured with an opportunity to obtain replacement insurance. Third, the exercise of the right to refuse to pay a claim is subject to the restrictions imposed by s 54(1). The effect of s 54(1) is that A&G does not have the right to refuse to pay a claim merely because an insured failed to comply with the Notification Term. A&G may only reduce a payment by the amount that fairly represents the extent to which its interests were prejudiced as a result of that failure. A&G's interests may be prejudiced if the insured's failure to comply with the Notification Term denied A&G the opportunity to cancel the contract, as permitted by s 62(2), and thereby "go off risk" (as explained by the High Court in *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd* (1993) 176 CLR 332).

155 On the appeal, ASIC did not contest A&G's summary of the effect of the IC Act on the parties' rights and obligations arising under the contract. Rather, ASIC argued that those effects would not have been known to most insureds and that lack of transparency added to or caused a significant imbalance in the parties' rights and obligations arising under the contract.

156 There is force in ASIC's submission. There was no challenge to the primary judge's findings (at [103]) that:

(a) the question whether a term is expressed in a manner which allows consumers readily to know and understand the parties' rights and obligations is an aspect of the concept of "transparent"; and

(b) few consumers would be aware of ss 13 and 54 of the IC Act, and few consumers would have considered the impact of those provisions on the Notification Term.

157 As was made clear by the High Court in *Karpik*, a lack of transparency may affect the analysis of the extent to which the term is unfair as assessed against each of the elements in s 12BG(1) of the ASIC Act (as the cognate to s 24(1) of the ACL). A lack of transparency may compound any imbalance in the parties rights and obligations and, conversely, transparency may alleviate any imbalance in the parties' rights and obligations.

158 The difficulty with ASIC's ground of appeal, however, lies in the fact that the Notification Term, on ASIC's construction (which has been accepted), does not give rise to any significant imbalance in the parties' rights and obligations even before consideration is given to the provisions of the IC Act. On ASIC's construction, an insured is only obliged to notify A&G of changes to the insured's home or contents in so far as the change is material to the insured risk. So construed, the term is not unreasonable and cannot be said to cause imbalance in the parties' rights and obligations. Even accepting ASIC's argument that the modifying effect of the IC Act on the exercise of A&G's rights under the contract lacked transparency and should be disregarded, the Notification Term, on ASIC's construction, did not satisfy the significant imbalance element of s 12BG(1)(a).

159 It remains to address ASIC's contention that the primary judge erred in the manner in which his Honour addressed the transparency factor. As noted earlier, his Honour indicated that he would address the issue of transparency in "the order which was adopted by the High Court" in *Karpik* – that is, to take each of the three elements in s 12BG(1) in turn, and then deal with the issue of transparency under ss 12BG(2)(b) and 12BG(3).

160 The statutory definition of "unfair" in s 12BG(1) has three elements or conditions and each must be separately satisfied. It follows that the injunction in s 12BG(2), to take into account the extent to which the term is transparent and the contract as a whole, is an injunction that is applicable to each of the three elements of the statutory definition and must be applied to each of them in order to reach a finding whether each is satisfied. Logically, no final conclusion can be reached about each of the elements of the statutory definition until the transparency of the term and the contract as a whole have been taken into account. The High Court's reasons in *Karpik* do not suggest otherwise.

161 Nevertheless, it does not involve error for a court to make factual and evaluative findings in a different order, provided the court returns to the ultimate assessment required by the statutory provisions. The High Court's reasons in *Karpik* should not be understood as mandating a particular order in which issues should be considered and addressed, but nor did the primary judge suggest that was the case. While the primary judge initially made factual and evaluative findings without regard to the factor of transparency, his Honour ultimately considered that factor and addressed the relevant statutory criteria. The contention that his Honour erred in approaching the matter in that way cannot be accepted.

162 Ultimately, ASIC has not demonstrated that the Notification Term, properly construed and taking into account its transparency, caused a significant imbalance in the parties' rights and obligations arising under the contract. It follows that appeal ground two must be rejected. In those circumstances, it is not strictly necessary to consider appeal ground three. Nevertheless, as the matter was fully argued and in case the matter goes further, the ground will be considered in the next section of these reasons.

F. REASONABLY NECESSARY TO PROTECT A&G'S LEGITIMATE INTERESTS (APPEAL GROUND 3)

Ground of appeal

163 The third ground of appeal concerns the primary judge's conclusion that the Notification Term is reasonably necessary to protect A&G's legitimate interests for the purposes of s 12BG(1)(b) of the ASIC Act. On this ground of appeal, ASIC contends that the primary judge erred in three ways:

(a) first, by adopting an erroneous construction of the Notification Term;

(b) second, by failing to take into account the lack of transparency of the Notification Term either at all or in the manner required by the statutory regime; and

(c) third, by failing to find that there were other terms which A&G could have employed to protect its legitimate interests to the same extent, but which were not significantly lacking in transparency.

Reasons of the primary judge

164 As summarised by the primary judge, ASIC advanced two main arguments at trial. Both arguments were to the effect that the Notification Term was not reasonably necessary to protect A&G's legitimate interests because those interests could have been protected by a less onerous contractual term. In that regard, the primary judge accepted (at [86]) that the phrase "reasonably necessary" in s 12BG(1)(b) usually involves an analysis of the proportionality of the term against the potential loss sufferable, and may take into account other options that might be available to the party in terms of protecting its business and which are less restrictive to the other party to the contract.

165 ASIC's first argument focussed on the breadth of the notification obligation. ASIC contrasted the Notification Term with the equivalent term in A&G's standard form home and contents insurance contracts before and after the relevant period. Before 12 September 2019, the

relevant term stated that the insured must tell A&G "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 repair". In the SPDS issued on 4 May 2023, the relevant term required the insured to tell A&G, during the period of insurance, about any of an exhaustive list of occurrences which were set out in the SPDS.

166 In respect of ASIC's first argument, the primary judge reasoned (at [89]) that the phrase "reasonably necessary" contemplates a range of permissible terms, not a uniquely acceptable term, and there is no requirement of absolute necessity. The primary judge framed the relevant question as whether it was reasonably necessary in order to protect the legitimate interests of A&G for the Notification Term to require notification of any change to the information previously provided by the insured to A&G (applying the A&G construction of the Notification Term) (at [90]). His Honour found that A&G's legitimate interests included its ability to choose which risks it will insure against, and the information-gathering process ensured that it was not covering risks which it was not willing to insure against (at [91]). His Honour concluded (at [92]):

> Accordingly, the defendant submits, and I accept, that it is reasonably necessary to protect the defendant's legitimate interests for it to have powers under the contract to put itself in the position it would have been in had the insured disclosed information revealing the risk, and the defendant had declined to grant cover, or limited the cover which it agreed to provide, for that reason. The obligation in the Notification Clause for the insured to disclose changes to any of the information previously provided to the defendant is therefore proportionate to the defendant's legitimate interests, and in my view reasonably necessary for the protection of those legitimate interests.

167 ASIC's second argument focussed on the rights conferred on A&G by the Notification Term in the event the insured failed to give notice of changes. ASIC argued that the rights conferred by the Notification Term were expressed in broader terms than could ever be enforced by A&G, having regard to the effect of ss 54 and 55 of the IC Act. In response to that argument, the primary judge concluded as follows (at [94]):

> That submission faces the difficulty which I have discussed above in relation to significant imbalance under para (a), that the Notification Clause on its proper construction constrains the defendant to exercise its powers consistently with commercial standards of decency and fairness, with the practical effect that those powers can only be used by the defendant in circumstances where, and to the extent that, the insured's failure to notify a change in information has prejudiced the defendant's interests. In so far as the submission is directed to the absence of explanation of s 54 in the Notification Clause, I will deal with that matter when considering the issue of transparency below.

168 The primary judge addressed the question of transparency later in the reasons. His Honour concluded (at [109]) that, as the Notification Clause was reasonably necessary to protect A&G's legitimate interests, the lack of transparency in the term does not yield any different result.

Submissions of the parties

169 As noted above, ASIC contends that the primary judge erred in three ways: by adopting an erroneous construction of the Notification Term; by failing to take into account the lack of transparency of the Notification Term either at all or in the manner required by the statutory regime; and by failing to find that there were other terms which A&G could have employed to protect its legitimate interests to the same extent, but which were not significantly lacking in transparency.

170 ASIC's contentions with respect to construction and transparency have been summarised earlier in these reasons and need not be repeated. With respect to the third alleged error, ASIC did not contest the primary judge's findings that an insurer has a legitimate interest in choosing which risks it would insure against and those it would not, and that a provision requiring the disclosure of information relevant to the risk insured can be protective of that interest. ASIC challenged the finding that the Notification Term was reasonably necessary to protect A&G's interests, principally on the basis that the term lacked transparency. ASIC argued that the alternative notification terms used by A&G in its standard form contracts before and after the relevant period demonstrated that A&G's legitimate interests could be protected by provisions that were in plain terms and had clear effect. In contrast, the lack of transparency in the form of the Notification Term supported a conclusion that a provision in that form was not reasonably necessary to protect the legitimate interests of A&G.

171 A&G's contentions with respect to construction and transparency have been summarised earlier in these reasons and need not be repeated. With respect to the question whether the Notification Term was reasonably necessary to protect A&G's interests, A&G's submissions largely reflected the reasoning of the primary judge.

Consideration

172 Many of the conclusions reached with respect to the second ground of appeal are also relevant to the third ground of appeal.

173 First, the primary judge's approach to the construction of the Notification Term, and the identification of the contractual term to be assessed under s 12BG, involved error. The contractual term to be assessed under s 12BG is the Notification Term as expressed in the contract, properly construed. Having regard to the manner in which the appeal was conducted, the preferable construction of the Notification Term, with the ostensible aim of avoiding absurdity, is to qualify the words "if anything changes about your home or contents" with a criterion of materiality, where materiality relates to the risk insured.

174 Second, ASIC's concession with respect to the proper construction of the Notification Term presents a significant obstacle to its third ground of appeal. ASIC's construction, which has been accepted, is that the Notification Term is qualified by a materiality criterion – an insured is only obliged to notify A&G of changes to the insured's home or contents in so far as the change is material to the insured risk. ASIC did not contend that the substantive effect of such a term was not reasonably necessary to protect A&G's legitimate interests. Rather, ASIC argued that the meaning and effect of the term was not transparent, and the lack of transparency supported a conclusion that the term was not reasonably necessary. As explained earlier, ASIC's argument involves an inherent contradiction. By accepting that the Notification Term should be construed as being qualified by a materiality criterion, ASIC must be taken to have accepted that a reasonable consumer would understand the Notification Term in that manner. As a result, ASIC's argument based on a lack of transparency is undermined by its own concession.

175 Third, there is considerable force in ASIC's submission that the effect of the IC Act on the exercise of the parties' rights and obligations under the Notification Term would not have been known to most insureds, and that lack of transparency is relevant to the assessment of whether the Notification Term was reasonably necessary to protect A&G's legitimate interests. It should be accepted that a lack of transparency of a contractual term may, on its own, support a finding that the term is not reasonably necessary to protect a party's legitimate interests. That conclusion follows from the accepted principle that the phrase "reasonably necessary" requires consideration of the proportionality of the term against the interest being protected and alternatives that were available to the party imposing the term. It would rarely, if ever, be reasonably necessary to protect a party's legitimate interests by a contractual term that was strongly lacking in transparency (having regard to the factors listed in s 12BG(3)). A finding that the impugned term was not expressed in reasonably plain language, or was illegible, or was not presented clearly, or was not readily available to the party affected by the term, may

support a conclusion that the term was not reasonably necessary to protect a party's legitimate interests, in circumstances where there were transparent alternatives available to the party.

176 The difficulty with ASIC's ground of appeal again lies in the fact that the Notification Term, on ASIC's construction (which has been accepted), does not suffer from a fatal lack of transparency. On ASIC's construction, an insured is only obliged to notify A&G of changes to the insured's home or contents in so far as the change is material to the insured risk. By definition, a reasonable insured must be taken to understand that that was the effect of the Notification Term. An obligation of that kind imposed on the insured is proportionate to the interest being protected. True it is that an insured may not be aware of the further effects of the IC Act on the exercise of A&G's rights under the Notification Term, and to that extent the term lacked transparency. Overall, however, that lack of transparency does not undermine a conclusion that the Notification Term (on ASIC's construction) was reasonably necessary to protect A&G's legitimate interests. No doubt it would have been possible to frame the notification obligation in a more transparent manner, expressly reflecting the requirements of the IC Act such as the statutory good faith implied term. That, however, is not the statutory criterion. As the primary judge observed, the question raised by s 12BG(1)(b) is whether the impugned term fell within the range of permissible terms having regard to the statutory test.

177 Ultimately, ASIC has not demonstrated that the Notification Term, properly construed and taking into account its transparency, was not reasonably necessary in order to protect A&G's legitimate interests. It follows that appeal ground three must be rejected.

G. CONCLUSION

178 In conclusion, while ground one of the appeal is upheld, grounds two and three are rejected. It follows that the appeal must be dismissed.

179 With respect to costs, the discretion to award costs is usually exercised in favour of a successful party. A successful party may be deprived of a proportion of its costs, or even required to pay costs to the other party, if the successful party succeeded only upon a portion of its claim, or failed on issues that were not reasonably pursued, or where the result of the litigation might be described as mixed. However, the mere fact that a court does not accept all of a successful party's arguments does not make it appropriate to apportion costs on an issue by issue basis. A&G was successful on the appeal. Although not all of A&G's contentions on the appeal were accepted, the outcome of the appeal cannot be described as mixed and there is no proper basis

on which A&G should be deprived of a proportion of its costs. Accordingly, the appropriate order is that ASIC pay A&G's costs of the appeal.

I certify that the preceding one hundred and seventy-five (175) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices O'Bryan and Cheeseman.

Associate: 

Dated: 5 June 2025