

**You're on notice!**

**Developments in insurance notifications under claims made policies in Australia**



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## 1 Introduction

**"The world is full of obvious things which nobody by any chance ever observes."**

— Arthur Conan Doyle, *The Hound of the Baskervilles*

- 1.1 Claims made liability policies are a well-established feature of the financial lines insurance market. Under a claims made policy, cover is triggered by the making of a claim against the insured during the policy period,<sup>1</sup> irrespective of when the conduct or event giving rise to that claim occurred. This stands in contrast to occurrence-based policies, under which the relevant trigger is the underlying act or event, regardless of when a claim is brought against the insured.<sup>2</sup> In Australia, claims made policies operate within the statutory framework of the *Insurance Contracts Act 1984* (Cth) (the **Act**), which imposes obligations and confers rights on both insurers and insureds that significantly affect policy response.
- 1.2 Notification of facts that may give rise to a claim is critical for claims made policies and recent decisions have substantially shaped the law in this area. This paper examines the main themes that have emerged from the recent cases, including the content requirements for a valid notification of facts, the requirement for 'sufficient correspondence' between the notified facts and the claim when made, the effectiveness of 'problem' or 'hornet's nest' notifications, obligations of timeliness, and the validity of prior known circumstances exclusions in light of the Act.

## 2 Section 40

- 2.1 A notification under a claims made policy may attract the protection of section 40 of the Act.<sup>3</sup> The Act came into force on 1 January 1986 and implemented the recommendations of the Australian Law Reform Commission in its landmark Report No 20, *Insurance Contracts* (1982) (the '**ALRC Report**'). The ALRC Report was prompted by widespread concern that the existing law of insurance contracts in Australia, derived from general common law principles, was weighted in favour of insurers and inadequately protective of the reasonable expectations of insureds.
- 2.2 Section 40 was designed to address structural features of claims made policies. Under a claims made policy, cover is conditional upon a claim being made against the insured during the policy period. This temporal limitation created an obvious risk of coverage gaps: where an insured became aware during the policy period of facts that might ultimately give rise to a claim, but no formal claim was made until after expiry, the insured could find itself without cover under both the expired policy (no claim having been made) and any successor policy (the facts preceding inception and excluded by a prior known circumstances exclusion or the duty of disclosure). The ALRC identified this gap as a significant concern, particularly in long-tail liability classes, where the gap between the underlying conduct and the formal assertion of a claim could span many years.
- 2.3 Section 40(3) operates so that an insured who notifies the insurer in writing of *facts that might give rise to a claim* cannot be denied indemnity merely on the ground that the claim itself is made after the expiry of the policy period, provided that notification of facts is given as soon as reasonably practicable and before the policy expires. In recent times, the law relating to notification has entered a markedly more active phase, with a series of decisions addressing the adequacy of notifications, the attribution of awareness, and the validity of exclusions. In ways that have materially altered the practical landscape for insurers and insureds alike.

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<sup>1</sup> Kelly and Ball, 'The nature of liability insurance' in *Kelly & Ball Principles of Insurance Law* (LexisNexis) Ch 14.

<sup>2</sup> *Ibid.*

<sup>3</sup> It is not necessary that the policy refer to section 40 for the provision to apply: *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85.

2.4 Section 40 states:

**40 Certain contracts of liability insurance**

(1) This section applies in relation to a contract of liability insurance the effect of which is that the insurer's liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of the insurance cover provided by the contract.

(2) The insurer shall, before the contract is entered into:

(a) clearly inform the insured in writing of the effect of subsection (3); and

(b) if the contract does not provide insurance cover in relation to events that occurred before the contract was entered into, clearly inform the insured in writing that the contract does not provide such cover.

Penalty: 300 penalty units.

(3) Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.

2.5 Section 40(1) provides that the regime only applies where there is a 'loss suffered by some other person'. It has been held that a claim merely for an insured's own defence costs is not a 'loss suffered by some other person'.<sup>4</sup> Section 40(2) requires an insurer to provide notice to an insured; in practice this is generally achieved through the policy wording containing a notice that it is a claims made policy and explaining the effect of section 40.

2.6 Section 40(3) is the key provision governing notification. It requires:

- (1) notice to be given **in writing** by the insured;
- (2) of **facts** that might give rise to a claim; and
- (3) notice to be given **as soon as reasonably practicable** after the insured becomes aware and before the insurance cover expires.

2.7 The rationale underlying section 40(3), as articulated in the ALRC Report and confirmed by the High Court in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, is essentially protective: it mandates for the benefit of the insured cover for which premiums have been paid, in circumstances where the insured has acted reasonably by notifying the insurer of potential liability before the policy expires, even though no formal claim has been made. This policy rationale has been consistently invoked by Australian courts as a guide to the purposive construction of section 40(3) and has shaped the doctrinal development of this area of insurance law.

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<sup>4</sup> *Porter v GIO Australia Ltd* [2003] NSWSC 668 per McClellan J.

### 3 Recent developments in the law of notification

3.1 The notification requirements under section 40(3) of the Act have been the subject of extensive judicial consideration. Since the earliest decisions in the 1990s, courts have been repeatedly called upon to resolve disputes about what constitutes a valid notification, when it must be made, and what consequences follow from a failure to comply. Five key issues have emerged.

#### Facts that may give rise to a claim

3.2 An important threshold issue is the adequacy of the contents of a notification under section 40(3). To attract the statutory protection, a notification must identify 'facts that might give rise to a claim'. This requirement has proved unexpectedly controversial in practice. *In P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd*,<sup>5</sup> the New South Wales Court of Appeal affirmed that a broad, non-specific notification will not suffice. Rather, the notified facts must be objectively capable of giving rise to a claim and must be identified with sufficient particularity so that it is more than a potential possibility.<sup>6</sup>

3.3 The notification in *Kauter* was sent by a financial planning firm to its professional indemnity insurer and described in general terms the possibility that a small group of clients had made investments that were in difficulty. The notification stated:

*A small number of clients have invested/lent funds to property investments and/or companies that have to date been unable to repay those funds in total.*

*At the time of the investment all appropriate disclosures were made and clients invested/lent funds with full knowledge of the circumstances at the time.*

*At this stage no loss has been crystallised and no claim or complaint has been formally lodged.*

*We wish to advise the insurance company that there is a chance of a claim against Moylan Retirement Solutions in relation to any loss that may be incurred.*

3.4 The insurer argued that there was no proper notification of 'facts' within the meaning of section 40(3). At first instance, Slattery J accepted that submission and held that the notice did not identify 'facts that might give rise to a claim' as required by the section. His Honour observed that the required correspondence between the notified facts and the subsequent claim was absent because the notice exposed no underlying claim 'as distinct from bare possibilities'.

3.5 On appeal, Meagher JA upheld the insurer's position. Meagher JA made several points about a notification that attracts the protection of section 40(3). First, the notification must be of objective matters, that is, facts, rather than beliefs or opinions of the possibility of a claim.<sup>7</sup> Secondly, the characterisation of whether a fact 'might give rise to a claim' must be assessed objectively, that is, the fact must be such that a reasonable person in the insured's position would recognise a real risk of a claim.<sup>8</sup> Thirdly, the requirement of 'as soon as was reasonably practicable' is concerned to provide the insurer with knowledge of potential claims shortly after the insured acquires awareness of the relevant facts, so as to allow the insurer to evaluate, respond to, and reserve for the potential liability.<sup>9</sup> It also allows the insurer to more accurately set reserves and premiums.<sup>10</sup>

3.6 An important aspect is the requirement of 'sufficient correspondence' between the notified facts and the claim subsequently made.<sup>11</sup> Meagher JA held that the language of section 40(3),

<sup>5</sup> [2021] NSWCA 136. This decision is the appeal of *Esined No 9 Pty Ltd v Moylan Retirement Solutions Pty Ltd* [2020] NSWSC 359.

<sup>6</sup> At [43].

<sup>7</sup> At [33] citing *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103 at [63].

<sup>8</sup> At [35].

<sup>9</sup> At [32] citing *J Rothschild Assurance Plc v Collyear* [1999] 1 Lloyd's Rep IR 6 at 22 (Rix J).

<sup>10</sup> Citing *Federal Deposit Insurance Corporation v St Paul Fire & Marine Insurance Co*, 993 F.2d 155 (1993) at 158.

<sup>11</sup> At [31].

in referring to *'the claim, when made'* (emphasis in judgment), requires that the subsequent claim be identifiable as *'the'* or *'a'* claim arising or resulting from the facts as notified.<sup>12</sup> The requirement does not oblige the insured to identify the likely claimant or quantum at the time of notification: Meagher JA confirmed that a notification may take the form of a *'problem'* notification, disclosing a state of affairs that might give rise to claims by persons or entities of particular characteristics, without specifying individuals or amounts.

- 3.7 However, the notified facts must be sufficiently particular that an objectively verifiable connection between them and the eventual claim can be established. In *Kauter*, the Court of Appeal found the notification failed this test because it did not state that any loss had been suffered, identified no defect in the advice or disclosures made, and positively asserted that all appropriate disclosures had been made to clients. The notification disclosed no more than a *'potential possibility'* of a claim.
- 3.8 Furthermore, *Kauter* partially departed from the English approach for determining whether notified facts might give rise to a claim. In *HLB Kidsons (a firm) v Lloyd's Underwriters*,<sup>13</sup> Toulson LJ had suggested that *'reasonable minds might differ'* as to whether notified facts give rise to a realistic possibility of a claim, and that this subjectivity was inherent in the assessment. Meagher JA declined to follow that approach and held that the objective question that section 40(3) poses *'cannot have more than one answer'*.<sup>14</sup> This adoption of a strictly objective standard, in contrast to the more flexible English approach, constitutes a divergence between Australian and English law on notification.

#### **Is it sufficient to notify a *'problem'*?**

- 3.9 In some circumstances, the insured may choose to notify a *'problem'* generally. The courts have also considered whether *'problem'* or *'hornet's nest'* notifications are acceptable.

#### ***LU Simon***

- 3.10 In *MS Amlin Corporate Member Ltd v LU Simon Builders Pty Ltd*,<sup>15</sup> the Federal Court considered the effectiveness of a *'hornet's nest'* notification and whether an expert opinion may constitute a *'fact'* for the purposes of section 40(3).<sup>16</sup> LU Simon Builders Pty Ltd (**LU Simon**) was a Melbourne construction company that had used cladding/aluminium composite panels (**ACPs**) at the Lacrosse Tower in Docklands. In November 2014, a fire at the Lacrosse Tower spread rapidly, with investigations by the Metropolitan Fire Brigade (**MFB**) and the Municipal Building Surveyor concluding that the ACPs used on that building did not comply with the Building Code of Australia and had contributed to the spread of the fire. LU Simon had also built the Atlantis Tower, a separate building in Melbourne, using ACPs.
- 3.11 Three claims were subsequently brought against LU Simon by owners of parts of the Atlantis Tower, seeking rectification costs. The insured had not given any notification to its insurers of facts relating to the Atlantis Tower itself. Rather, in May 2015, it made two notifications that related principally to the Lacrosse Tower investigation, consisting of an email attaching a newspaper article about the investigation into building practices following the Lacrosse fire, commentary from LU Simon's managing director that ACPs had been widely used in Australia for decades, and a copy of the MFB's Post Incident Analysis Report, which expressed the view that ACPs without appropriate accreditation represented an unacceptable fire safety risk and warned of the need to prevent similar incidents across both new and existing developments. The Report also included hyperlinks to four media reports.
- 3.12 Jackman J held that both notifications, assessed in combination with the insured's proposal form disclosures, constituted valid section 40(3) notifications in respect of the Atlantis Claims. His Honour's reasoning on the sufficiency of the notifications is notable for two reasons. First,

<sup>12</sup> Ibid.

<sup>13</sup> [2008] EWCA Civ 1206.

<sup>14</sup> At [35].

<sup>15</sup> [2023] FCA 581.

<sup>16</sup> See also Ray Giblett, Tim Chan and Jack MacKenzie-Wood, *'Notifications Under s 40(3) Still 'Clad' With Issues: MS Amlin Corporate Member Ltd v LU Simon Builders Pty Ltd (2023) 38(6&7) Australian Insurance Law Bulletin 93.*

the notifications were directed at the Lacrosse Tower investigation and made no specific reference to the Atlantis Tower or its ACP cladding: the notified 'problem' was the widespread use of non-compliant ACPs on high-rise buildings in Australia generally, of which the Lacrosse Tower investigation was simply the most visible manifestation. Given that LU Simon's proposal form disclosed that 100% of its work related to high-rise buildings and that the notifications conveyed a systemic risk associated with ACPs in that class of construction, there was a sufficient correspondence between the notifications and the Atlantis Claims when they subsequently arose. The fact that the Atlantis Tower was not itself mentioned in the notifications did not prevent the notified 'problem' from capturing claims arising from it.

- 3.13 Secondly, Jackman J held that the opinions expressed in the MFB Post Incident Analysis Report constituted 'facts' for the purposes of section 40(3). In making this finding, Jackman J reasoned that Lee J's approach in *Uniting Church in Australia Property Trust (NSW) v Allianz Australia Insurance Ltd*,<sup>17</sup> in which Lee J had treated opinions as incapable of constituting 'facts' for notification purposes, did not preclude the fact that an opinion had been given by someone with the relevant expertise such as the MFB.<sup>18</sup> This was a relevant 'fact'. Jackman J also accepted that documents hyperlinked within a notification form part of the notification itself, observing that clicking a hyperlink is no more demanding than turning a physical page, provided the hyperlink leads to a specific document.
- 3.14 The practical significance of *LU Simon* is that it establishes an insured may make a valid 'hornet's nest' notification, even by reference to publicly available media coverage, government or public authority reports, provided the overall communication conveys a systemic problem of a kind that might give rise to claims against the insured. This represents a broader approach to the content of notifications than some earlier authorities had suggested, and the decision has been applied in subsequent proceedings, including by the Full Federal Court in *Uniting Church*,<sup>19</sup> which confirmed that an expert report can constitute a 'fact' for the purposes of section 40(3).

### ***Uniting Church***

- 3.15 The Full Federal Court in *Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust (NSW)*<sup>20</sup> affirmed the effectiveness of a 'hornet's nest' notification and that an expert's opinion in a report can constitute a 'fact'. The proceedings arose from a series of claims for abuse at Knox Grammar School, a school of the Uniting Church. The Uniting Church in Australia Property Trust (NSW) (**UCPT**) sought indemnity from Allianz under a series of professional indemnity policies written on a 'claims made and notified' basis over a period of approximately twelve years.
- 3.16 The central factual issue in the proceedings was the significance of a report commissioned by Knox Grammar School in 2004, referred to in both the first instance and appeal proceedings as 'LKA2'. The report was the product of an investigation carried out on behalf of the School following receipt of allegations concerning a particular teacher, Mr Nisbett, and it documented an escalating pattern of inappropriate conduct by that teacher, identified that a number of other teachers and former teachers may have engaged in similar conduct, and revealed a school culture in which such behaviour had been permitted to occur and management responses that had failed to address it.
- 3.17 The Full Court overturned Lee J's finding at first instance that the investigation report (called 'LKA2'), which had documented a persistent pattern of sexual abuse by teachers at Knox Grammar School and identified a culture in which such conduct had been tolerated, gave rise to no more than a 'bare possibility' of a claim. Derrington J characterised LKA2 as disclosing a 'problem', 'hornets' nest', or 'can of worms', and Colvin and McEvoy JJ, in a joint judgment, held that a reasonable person in possession of LKA2 would have recognised a real possibility that claims might be made. The report identified the risk to the school as 'extreme' and warned

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<sup>17</sup> [2023] FCA 190.

<sup>18</sup> This point was ultimately overturned on appeal: *Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust (NSW)* (2025) 308 FCR 308; [2025] FCAFC 8.

<sup>19</sup> *Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust (NSW)* (2025) 308 FCR 308; [2025] FCAFC 8.

<sup>20</sup> (2025) 308 FCR 308; [2025] FCAFC 8.

of the prospect of further claims relating to a pattern of alleged conduct from the 1980s and early 1990s. Neither LKA2 nor the earlier LKA1 report was provided to Allianz at the time.

- 3.18 The Full Court affirmed that the test for notifiable facts is 'deliberately undemanding'.<sup>21</sup> It is sufficient for an insured to notify of a problem described in general terms, even without identifying individual claimants or their quantum, provided the notified circumstances identify the characteristics of the class of persons likely to make claims (i.e. students from the 1980s onwards). The Full Court also endorsed Jackman J's approach in *LU Simon* that the reasoned opinion of an expert, such as a professional investigator, can itself constitute a 'fact' capable of notification under section 40(3), departing from Lee J's narrower approach at first instance. These findings are, in principle, favourable to insureds: they indicate that broad 'bulk notifications' capturing a class of potential claimants defined by shared characteristics may be valid under section 40(3), even where specific claimants or precise quantum are unknown. However, the Full Court's ruling ultimately turned against the insured on the timeliness requirement. As the relevant insured first became aware of the LKA2 facts in 2004, the failure to provide notification as soon as reasonably practicable meant that the statutory protection was permanently lost, and the 2009 bulk notifications were held to be too late.<sup>22</sup>

### Awareness of the facts

- 3.19 It is also important that the insured has the requisite awareness to enable it to notify facts that could give rise to a claim.
- 3.20 In *DIF III Global Co-Investment Fund LP v DIF Capital Partners Ltd*,<sup>23</sup> a claim arose from a US\$25 million investment made in 2007 by DIF III Global Co-Investment Fund L.P., a limited partnership within the Babcock & Brown group, in Coinmach Services Corporation (**Coinmach**), a United States provider of outsourced laundry equipment services, on the advice of DIF Capital Partners Ltd, formerly known as Babcock & Brown Direct Investment Fund Limited (the **Manager**). The Manager was contractually obliged to exercise due diligence and vigilance in carrying out its investment management functions.<sup>24</sup> The investment performed catastrophically in the wake of the Global Financial Crisis; DIF III ultimately recovered only approximately US\$1.4 million against an initial outlay of US\$25 million, and in 2018 commenced proceedings against the Manager and its professional indemnity (**PI**) insurers, alleging that the Manager had failed to conduct proper due diligence prior to recommending the Coinmach transaction and had failed to disclose material concerns raised by a co-financier at the time of the acquisition.
- 3.21 The significance of *DIF III* in the context of section 40 of the Act is in the Court of Appeal's treatment of the awareness requirement that is central to both contractual deeming mechanisms (see paragraph 3.31 onwards of this paper) and section 40(3). The PI policy covered claims 'first made' during the period 1 September 2008 to 1 September 2009 and contained a deeming provision under which a claim would be treated as made at the time management became '*aware of any fact, circumstance or event which could reasonably be anticipated to give rise to a Claim at any future time*'.
- 3.22 The Court of Appeal (Bathurst CJ, Meagher JA, and Bell P) upheld the primary judge's finding that no member of the Manager's senior management had become aware of any such fact, circumstance or event during the relevant policy period. Internal correspondence relied upon by DIF III disclosed, in substance, the distressed financial position of the Coinmach investment and concerns expressed by co-investors. These were held insufficient for a notification of facts that could give rise to a claim: they pointed to investment underperformance, not to any conduct of the Manager that could reasonably be anticipated to give rise to a claim against it.
- 3.23 The case illustrated an important principle for claims made policies: an insured can only notify what it knows. Where the requisite awareness does not exist at the level of senior management, neither a contractual deeming mechanism nor the analogous protection

<sup>21</sup> At [161] citing *DIF III — Global Co-Investment Fund L.P v DIF Capital Partners Limited* [2020] NSWCA 124 at [171].

<sup>22</sup> See paragraph 3.24 ff of this paper.

<sup>23</sup> [2020] NSWCA 124.

<sup>24</sup> At [18].

afforded by section 40(3) of the Act can be engaged. Furthermore, a lack of awareness itself is not an 'omission' that section 54 can remedy. The result is a stringent one, and it highlights the critical importance of insureds being alive to potential claims at the time events are unfolding, rather than after losses have crystallised.

#### **'As soon as reasonably practicable'**

- 3.24 Another issue concerns the timeliness of notification. Section 40(3) requires that notice be given 'as soon as was reasonably practicable' after the insured became aware of the relevant facts. What constitutes reasonable practicability is a question of fact and degree, and the case law reveals there can be a spectrum of outcomes depending on the circumstances in which the insured became aware of potential liability and the steps taken thereafter. The decision of the Federal Court in *Uniting Church*<sup>25</sup> illustrates how the courts approach the timeliness requirement. The facts of this case are set out at paragraphs 3.15 and 3.16 above.
- 3.25 The requirement in section 40(3) that the insurers are notified 'as soon as was reasonably practicable' was central to the outcome of the appeal. The Full Court held that, as LKA2 constituted facts that might give rise to claims, the window within which UCPT was required to notify Allianz opened when the relevant insured first became aware of those facts. That question required the Court to determine, as a matter of attribution, whose knowledge was relevantly the knowledge of UCPT for the purposes of the notification obligation. Colvin and McEvoy JJ held that, in circumstances where UCPT was liable as a nominal defendant for the conduct of Knox, it was Knox's awareness, as the institution whose conduct gave rise to the insured liability, that governed the extent of the notification obligation. Knox's headmaster had read LKA2 in full in 2004. The consequence was that UCPT was burdened with the consequences of Knox's failure to communicate those facts to the General Secretary of the Synod (through whom notifications to Allianz were required to be channelled), and UCPT's 2009 bulk notification was therefore not made 'as soon as was reasonably practicable' as required by section 40(3): the relevant period of awareness had commenced five years earlier.
- 3.26 Accordingly, the opportunity to notify Allianz for the purposes of section 40(3) had expired. Therefore, there was no valid notification of the LKA2 facts that could anchor the statutory extension of cover under section 40(3), and Allianz was entitled to deny indemnity for the claims subsequently made by former students. The Full Court's analysis of the timeliness requirement makes plain that the obligation to notify is not one that can be deferred pending clarification of the precise scope of a potential problem. Rather, once the insured (through any relevant insured person or entity) is aware of facts constituting a 'problem' of a kind that might give rise to claims, the clock can begin to run, and any delay in notification beyond what is objectively reasonable will be fatal to the section 40(3) protection.
- 3.27 The failure to give a timely and adequate notification had a direct consequence for the availability of cover under the policies. As no valid section 40(3) notification of the LKA2 facts was made during the relevant policy period, section 40(3) could not extend cover to claims subsequently made after Allianz went off risk. UCPT's argument that this failure could be remedied by section 54 of the Act was rejected, consistent with the established principle in *Gosford City Council*.<sup>26</sup>
- 3.28 A further question that is likely to be raised in future is when/what may constitute *new* facts capable of a fresh notification and the extent to which a failure to notify as soon as reasonably practicable precludes notification of new or related facts. For example, the circumstances (if any) where facts that are related to previously known (but unnotified) facts can qualify as genuinely new facts, or whether they are characterised as elaborations or continuations of earlier facts that were not notified in time.

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<sup>25</sup> Special leave to appeal to the High Court was sought but was denied: *Uniting Church in Australia Property Trust (NSW) v Allianz Australia Insurance Limited* [2025] HCATrans 46.

<sup>26</sup> [2003] NSWCA 34.

### Who can give notice?

- 3.29 In *Avant Insurance Ltd v Darshn*,<sup>27</sup> the Full Federal Court (Jagot, Derrington and Colvin JJ) commented on the capacity of the person who may give notice for the purposes of section 40(3). The Full Court held that the condition in section 40(3) that 'the insured gave notice' did not preclude a solicitor retained by the insurer from giving notice on behalf of the insured, provided the scope of the retainer extended to that task.
- 3.30 This recognition that an agent may satisfy the notification requirement is practically significant and potentially concerning in the context of managed liability claims, where solicitors commonly act with dual references to both the insured and the insurer.<sup>28</sup> The Full Court also affirmed Kirby P's observation from *Antico* that intention is not an element of section 40(3): the subsection requires only that notice in fact be given, not that it be given with the specific purpose of invoking the statutory benefit.<sup>29</sup>

### Deeming clauses

- 3.31 In addition to the statutory protection afforded by section 40(3) of the Act, the obligation to notify may also be governed by express contractual terms in the policy. A deeming clause is a contractual provision in a claims-made insurance policy that allows an insured to notify the insurer of facts, circumstances, or events that might give rise to a claim in the future, even though no formal claim has yet been made against the insured. Upon such notification being given in accordance with the clause, the policy deems any subsequent claim arising out of those notified facts or circumstances to have been made at the time of the original notification (i.e. within the policy period in which the notification was given).
- 3.32 Where the policy contains a deeming clause, section 54 of the Act permits an insured to make a 'late' notification to the insurer of facts that may give rise to a claim, even after the policy has expired. Section 54 is a remedial provision that may prevent an insurer from refusing to pay a claim by reason only of some act or omission of the insured, except to the extent the insurer is prejudiced.
- 3.33 In *Australian Hospital Care*,<sup>30</sup> a hospital sought indemnity under a professional indemnity policy containing a deeming clause. The insured had failed to notify the insurer, during the policy period, of an occurrence which might give rise to a subsequent claim. The plurality of the High Court (McHugh, Gummow and Hayne JJ) held that section 54(1) of the Act applied to excuse the insured's failure to give the notification, a significant development in the law of notification. Their Honours reasoned that the omission to give notice was an act occurring after the contract was entered into, and that it did not fall within the category of restrictions 'inherent in the claim', being restrictions that define the very scope of cover rather than conditions or limitations on that cover. The failure to notify was characterised as an omission which could be remedied by section 54(1).
- 3.34 *Australian Hospital Care* is frequently cited as authority for the expansive interpretation of section 54 in the context of claims made policies containing a deeming clause. By holding that section 54 could remedy the consequences of a failure to give a notification in a policy containing a deeming clause, the plurality effectively expanded the scope of cover available to insureds. The decision prompted insurers to omit deeming provisions from some policies altogether.

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<sup>27</sup> [2022] FCAFC 48.

<sup>28</sup> See also Daniel Lorbeer, 'Darshn v Avant; Notification of Facts by an Insured in a Class Action Context' (2021) 37(3) *Australian Insurance Law Bulletin* 56.

<sup>29</sup> At first instance, it was held that defence counsel could also act as the insurer's agent for receiving notification of facts under section 40(3) of the Act. This point was not challenged on appeal although Derrington J noted there was 'some tension' with this view (at [34]). Also see [372] and [549].

<sup>30</sup> *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641.

3.35 However, a critical distinction is that where a policy does not contain a deeming clause, section 54 cannot cure a failure to comply with section 40(3).<sup>31</sup> In that situation, the insurer's entitlement to refuse indemnity derives from the statute itself rather than from a contractual provision that section 54 can override. The practical consequence is that where an insurer has removed deeming provisions from its policy form, in part in response to *Australian Hospital Care*,<sup>32</sup> an insured who fails to give a timely and adequate facts notification under section 40(3) is left without any statutory protection.

## 4 Prior known circumstances exclusion

4.1 The importance of timely claims notification is partly due to the existence of prior known circumstances exclusions. It is usual for claims made policies to contain exclusions that deny cover for claims arising from facts or circumstances of which the insured was aware, or ought reasonably to have been aware, prior to the inception of the policy. Such exclusions serve an obvious underwriting purpose, but their validity is now in doubt following the decision of the Full Federal Court in *Uniting Church*.<sup>33</sup> The majority (Colvin and McEvoy JJ), in obiter, held that a typical prior known circumstances exclusion was void by operation of section 52 of the Act (the 'contracting out' prohibition) on the basis that the exclusion had the effect of excluding or restricting the disclosure provisions of the Act to the prejudice of the insured.

4.2 A continuity clause overrides a prior known circumstances exclusion.<sup>34</sup> However, the Full Federal Court has cast doubt over whether a prior known circumstances exclusion is effective in the first place. This could render continuity clauses of limited utility.<sup>35</sup>

4.3 The relevant exclusion in *Uniting Church* (Exclusion 7(c)) stated:

This Policy does not cover any Claim for any liability for or arising directly or indirectly from:

...

### 7. Prior Claims & Circumstances

any Claim, fact, circumstance or occurrence;

a. in respect of which notice has been given to the Company or any other insurer under a previous insurance policy, or

b. disclosed or communicated to the Company in the proposal or declaration or otherwise before the commencement of the Period of Insurance, or

c. of which the Insured is aware before the commencement of the Period of Insurance, which may give rise to a claim.

This exclusion is independent of and shall not affect the Company's other rights regarding misrepresentation and non-disclosure.

4.4 The insured (**UCPT**) challenged the exclusion on two grounds. Firstly, section 33 of the Act, which confines insurers to the statutory remedies for non-disclosure under section 28, precluded reliance on the exclusion as an alternative means of declining indemnity. Secondly, that section 52, the 'contracting out' prohibition, rendered the exclusion void because its effect

<sup>31</sup> *Gosford City Council v GIO General Ltd* [2003] NSWCA 34. Also see *East End Real Estate Pty Ltd v CE Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400. Cf *FAI General Insurance Co Ltd v Pery* (1993) 30 NSWLR 89 which was disapproved in *Antico v Health Fielding* (1997) 188 CLR 652.

<sup>32</sup> *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641.

<sup>33</sup> See also Fred Hawke, 'Some observations on *Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust (NSW)*' (2026) 34 *Insurance Law Journal* 135.

<sup>34</sup> See, eg. *Zurich Australian Insurance Limited v CIMIC Group Limited* [2024] NSWCA 229 for an example of the issues that may arise in the context of continuity clauses.

<sup>35</sup> See Ray Giblett and Tim Chan, 'Can we still have faith in prior known circumstances exclusions? Lessons from the *Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust* dispute' (2025) 33(3) *Insurance Law Journal*.

was to exclude, restrict or modify the operation of the Act to the prejudice of the insured. All three members of the Full Court rejected the section 33 argument, agreeing that the exclusion was a scope-of-cover provision unrelated to the duty of disclosure and that section 33 was accordingly not engaged. Disagreement arose on section 52.<sup>36</sup>

- 4.5 The majority (Colvin and McEvoy JJ) held that Exclusion 7(c) was void by reason of section 52.<sup>37</sup> Their Honours reasoned that the effect of the exclusion was to transform what is, in substance, a matter for disclosure under section 21 of the Act, namely, facts known to the insured that might give rise to a claim and that would be material to the insurer's underwriting decision, into a general exclusion from cover operating regardless of whether the duty of disclosure was engaged or breached. In their Honours' view, this had the effect of excluding or restricting the operation of the disclosure provisions of the Act. Without the exclusion, a failure to disclose such facts would engage section 28 of the Act, which imposes conditions on the insurer's ability to reduce or deny liability and requires the insurer to demonstrate the prejudice it has suffered. Accordingly, the exclusion in substance modified the operation of the Act to the prejudice of the insured, and it was therefore void by virtue of section 52.
- 4.6 Derrington J dissented on the section 52 point. His Honour held that Exclusion 7(c) was concerned only with the scope of cover and did not, in any legally relevant sense, affect the operation of the Act.<sup>38</sup> In his Honour's view, the exclusion operated regardless of whether the relevant facts had been disclosed or were required to be disclosed; it was concerned with the insured's awareness, not with any breach of the duty of disclosure. The majority's approach, in Derrington J's analysis, conflated the concept of 'facts which might give rise to a claim' (relevant for the purposes of the prior known circumstances exclusion) with 'facts material to the insurer's decision to accept the risk' (relevant for the purposes of the duty of disclosure under section 21), and these were conceptually distinct categories that would not always overlap. His Honour also observed that the majority's reasoning was contrary to the historically accepted understanding that claims made insurance is designed to cover fortuitous, unknown risks, and that prior known circumstances exclusions were a legitimate and well-understood mechanism for giving effect to that principle.
- 4.7 Several observations may be made about the significance and limits of the majority's findings. First, the finding was in obiter. The Full Court had already determined in Allianz's favour on the section 40(3) timeliness ground, and the prior known circumstances exclusion issue did not need to be resolved. Nonetheless, because the question was fully argued and addressed in both the majority and dissenting judgments, it is likely to be treated as persuasive by courts at first instance in future disputes. Secondly, the majority's reasoning may be limited to exclusions that require the insured to have been aware that the relevant facts 'might give rise to a claim', a formulation that mirrors the disclosure threshold under section 21. An exclusion drafted more narrowly, requiring only bare awareness of the fact or circumstance itself (without any requirement of awareness that a claim might follow), may fall outside the scope of the majority's reasoning, as it would not so clearly transform a disclosure obligation into a blanket denial of cover. Thirdly, the practical implications for the insurance market are significant: prior known circumstances exclusions are a ubiquitous feature of claims made liability policies, and if the majority's approach is affirmed, insurers will be left to rely solely on non-disclosure remedies under section 28. Special leave to appeal to the High Court was sought but was denied.<sup>39</sup>

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<sup>36</sup> The potential effect of sections 33 and 52 on prior known circumstances exclusions have previously been considered in *Pech v Tigals* (1994) 28 ATR 197 (per Dunford J), *Porter v GIO Australia Ltd* [2003] NSWSC 668, *Permanent Custodians Ltd v Arma Pty Ltd* [2006] FCA 640 and *Macquarie Underwriting Pty Ltd v Permanent Custodians Ltd* [2007] FCAFC 60.

<sup>37</sup> The possibility of section 52 having this effect was foreshadowed in P Mann and S Drummond, *Mann's Annotated Insurance Contracts Act* (9th ed, Thomson Reuters, 2024) at [52.40].

<sup>38</sup> At [453] – [455].

<sup>39</sup> *Uniting Church in Australia Property Trust (NSW) v Allianz Australia Insurance Limited* [2025] HCA Trans 46.

## 5 Where to from here?

- 5.1 The law of notification under claims made insurance policies in Australia has been shaped by a significant body of jurisprudence over the past three decades, focusing primarily on section 40(3) of the Act. Some key principles that have emerged in recent decisions are that a valid notification under section 40(3) must be of objective facts, not opinions or speculation, that a reasonable person in the insured's position would regard as indicative of a real risk of a claim. The notification must be made as soon as reasonably practicable after the insured becomes aware of those facts, and there must be sufficient correspondence between the notified facts and the subsequent claim. A notice may also be given by an agent of the insured, such as defence counsel appointed by the insurer, and matters of expert opinion can also constitute a 'fact'.
- 5.2 However, the case law also reveals persistent tensions that have not been fully resolved. The boundary between a compliant 'problem' notification and an impermissibly vague or speculative communication remains a contentious area. The 'sufficient correspondence' requirement raises complex questions about the extent to which a general notification can capture claims that emerge from later but more substantially developed facts.
- 5.3 Furthermore, the interplay between continuity clauses, prior circumstances exclusions, and the insurer's statutory rights under sections 21 and 28 of the Act continues to generate some uncertainty. The High Court has, to date, refused to weigh in on the significant issue of whether prior known circumstances exclusions are void by s 52 of the Act. Due to the potential invalidity of prior known circumstances exclusions, insurers may adopt a narrower form of exclusions that have a similar effect.<sup>40</sup> It also remains to be seen whether insurers relying solely on the duty of disclosure will have the same practical outcome.
- 5.4 With these issues in mind, insurers and insureds are certainly 'on notice'. In practice, we have observed insurers handle claims notifications more carefully, considering whether notifications are acceptable or not. Insureds are also taking more care when notifying circumstances to ensure they are adequate to capture future claims that may arise. The significance of notification law extends beyond the technical domain of insurance law. For professionals, including medical practitioners, lawyers, accountants, architects, financial advisers, and directors, the law of notification under claims made policies determines, in a very real sense, whether they have cover at all. For insurers, the notification framework governs their ability to reserve accurately, manage their exposure across policy periods, and price risk appropriately. The stakes are therefore high for all participants in the market. This fascinating area of insurance law will no doubt receive further judicial attention as it continues to evolve.

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<sup>40</sup> Hawke, above n 33.