

Chapter 4: World Nomads Group

4.1 Summary

1. From 1 July 2017 to 19 April 2018 (Investigation Period), World Nomads Group (WNG) provided travel insurance and issued travel insurance policies that excluded payment to people who have, or have had, a mental health condition (blanket exclusion term).
2. WNG unlawfully discriminated against people with a mental health condition by issuing policies with the blanket exclusion term. WNG was not able to provide the Investigation sufficient information that it relied on to offer the discriminatory policy and, in its policies and practices, it treated people with a mental health condition on a different and detrimental basis.
3. WNG claimed that it had not discriminated against people with a mental health condition because, since around 2016 it has taken a “non-prejudice” view if a mental health related claim is submitted. This means WNG may still make a payment to a person whose claim arises from a mental health condition, even though its policy terms say it will not pay. Through the Investigation Period, WNG continued to offer and provide insurance products that treated people with a mental health condition on a different and detrimental basis.
4. The Commission considers that WNG failed to comply with the positive duty to eliminate discrimination because:
 - it continued to retain the blanket exclusion term
 - it provided ex gratia payments rather than removing the blanket exclusion term
 - it did not provide transparent information about its practices.
5. WNG has agreed to the Commission’s findings and has agreed to remove the blanket exclusion terms in all its travel insurance products on an expedited basis.

4.2 About WNG

WNG is an international company that specialises in the provision of travel insurance products through its subsidiaries Cerberus Special Risks Pty Ltd and WorldNomads.com Pty Ltd.

In Australia WNG operates as Australia’s third largest distributor of insurance and is commonly sold via several well-known brands, such as Lonely Planet and STA Travel.

A more detailed summary of WNG is provided in Chapter 2.

4.3 What did we investigate?

4.3.1 WNG'S PRODUCT DISCLOSURE STATEMENT

The Commission identified a travel insurance policy offered by WNG with the following general mental health exclusion in the World Nomads Aus/NZ Product Disclosure Statement (PDS):

[WNG] won't pay for costs arising in any way from ... any mental illness as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), whether or not the condition is independently or is secondary to other medical conditions ...

[WNG] won't pay dementia, depression, anxiety, stress or other mental or nervous conditions ... behavioural diagnoses; a drug or alcohol addiction; eating disorders.

(together, the blanket exclusion terms.)¹

DSM-IV is the *Diagnostic and Statistical Manual of Mental Disorders*, a handbook published by the American Psychiatric Association. It is used by clinicians worldwide to diagnose a range of mental health disorders in both adults and children based on standardised criteria and objective testing. Mental illnesses defined in the DSM-IV include dementia, depression, anxiety, stress or other nervous conditions, behavioural diagnoses, and therapeutic or illicit drug and alcohol addictions.

It was the Commission's preliminary view that WNG's blanket exclusion terms were discriminatory because they treated people with a mental health condition less favourably than people without such a condition. This conduct is unlawful under the *Equal Opportunity Act 2010* (Vic) unless there is a basis to claim an exception under the Act.

The Investigation's Terms of Reference also consider insurance policy terms that relate to people who have had a mental health condition and therefore may be denied coverage as a 'pre-existing' condition (pre-existing condition term). WNG's travel insurance policies noted that it "will not pay for any claims arising from or exacerbated by a pre-existing medical condition" unless it is listed as an "automatically covered" pre-existing medical condition.² No mental health conditions are listed as an automatically covered condition, which means a consumer with a pre-existing mental health condition would not be offered coverage for that condition. This may lead to people being unprepared to disclose existing mental health conditions.

Both the pre-existing condition and blanket exclusion terms have the potential to significantly impact on a person who has, or has had, a mental health condition. The terms would preclude a person with a mental health condition from obtaining protection under their policy for any mental health condition. Both terms apply to the full spectrum of different mental health conditions – irrespective of differences in severity or treatment.

4.3.2 WHAT DID WE ASK WNG?

On the basis of the above blanket exclusion terms, and following initial consultations with WNG, the Commission asked it to provide the following information to the Investigation under section 130 of the Equal Opportunity Act for the period 1 July 2017 to 19 April 2018 (Investigation Period):

- all information that was considered or relied on in order to include the blanket exclusion terms within the identified PDSs
- explanations of how any such information was relied upon in formulating the terms on which the insurance would be offered
- explanations of how it assessed the statistical robustness of any data and conclusions, any analytical assumptions used to decline to provide insurance or offer alternate terms and conditions of insurance to people who have, or have had, a mental health condition.³

To assist its understanding of WNG's business, the Commission also asked WNG to:

- provide details regarding the number of contracts sold and the number of declines or additional indemnities for the policies identified, as well as to identify its most commonly sold contract of travel insurance
- provide details regarding its claims and dispute resolution processes as they relate to people that have or have had a mental health condition, such as for any consumers declined cover pursuant to the blanket exclusion or pre-existing condition terms
- describe measures it had taken in compliance with its positive duty to eliminate discrimination as far as possible against people with a mental health condition in the context of travel insurance
- explain how it understood its obligations under anti-discrimination laws.

4.4 WNG's response to the Investigation

The Commission received information and some internal documentation from WNG and its subsidiary Cerberus Special Risks Pty Ltd (Cerberus), which appoints entities to distribute and issue WNG's policies.⁴

The relevant detail from its correspondence is outlined below.

The Commission was advised by WNG that Cerberus has appointed a number of subsidiaries and related bodies corporate (including Travel Insurance Direct Pty Ltd) and non-related entities to distribute and issue WNG's travel insurance policies.⁶ Some of these products include nib travel insurance, SureSave and Cheap Travel Insurance.

4.4.1 POLICIES SOLD

WNG estimated that during the Investigation Period approximately:⁵

- 39,710 contracts of insurance were sold under the PDS (of which 8586 were sold to Victorian consumers)
- 189,850 contracts of insurance were sold for its most common travel insurance product, Travel Insurance Direct (of which 48,269 were sold to Victorian consumers). The PDS for Travel Insurance Direct (TID PDS) also included the blanket exclusion term.

4.4.2 WNG'S VIEW REGARDING ITS COMPLIANCE WITH ANTI-DISCRIMINATION LAW

WNG's response to the Commission indicated that it did not consider it had, in practice, discriminated against people with a mental health condition. The Commission considered whether, on the basis of information provided to it, WNG could rely on the exceptions to discrimination in section 47 of the Equal Opportunity Act.

WNG argued it did not decline insurance to people with mental health conditions

WNG advised that during the Investigation Period (and from 2009), WNG and Travel Insurance Direct (TID) had "not declined to enter into a contract of insurance on the basis of the applicant having a mental health condition".⁷ WNG advised that "a customer with a mental illness is still able to purchase a [World Nomads/TID] policy which contains the exclusion", and if "a claim were made which relates to mental illness, WNG and TID would take a non-prejudice view of indemnity".⁸

WNG explained that a "non-prejudice view of indemnity" means that it would not deny a claim made because of mental illness, if all other underwriting criteria were satisfied.⁹ WNG applies a non-prejudice view of indemnity to all of its travel insurance policies with the blanket exclusion term.

In practical terms, this would mean that any person, including a person with a mental health condition, could purchase an insurance policy from WNG or TID. If a person made a claim under the policy because of a mental health condition and it was not a pre-existing condition, WNG and TID *would not deny* the payment of an indemnity.

WNG advised that all "mental illness claims" are referred to XL Catlin, a Lloyds of London approved company with which it holds a binder agreement, for final approval.¹⁰ WNG advised that it recommends that XL Catlin makes an ex gratia payment for all "first-presentation"¹¹ mental health claims. However, if a claim involves a pre-existing mental health condition, WNG recommends that XL Catlin declines the claim.¹²

WNG argued it has undertaken internal reviews into mental health conditions

In 2014, WNG "began an internal review and investigation into mental health conditions" (2014 review). The 2014 review sought to "understand these conditions by reviewing publicly available reports, assessments, white papers and data on the subject of mental health".¹³ WNG advised that the 2015 decision in *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 also prompted it to take steps to understand the servicing, product, pricing and commercial impacts of coverage to people with a mental health condition.¹⁴

In early 2016, WNG worked with its underwriting partner, XL Catlin, to collect "claims data for mental illness". It did this by collecting information as it applied its "non-prejudice view on mental health claims" across all products distributed by WNG.¹⁵ WNG worked on a number of initiatives, including "data collection and refining underwriting guidelines and claims procedures".¹⁶

During the investigation WNG did not provide the Commission with any information or documentation considered or relied on as the basis for including blanket exclusion terms within the PDS or the TID PDSs.

WNG advised that when it issued the PDS in July 2016, it was not the subject of a "full product review". This meant that the blanket exclusion term was also not subject to a review. WNG told the Commission, "there was accordingly no information which was considered or relied upon" by WNG to include the blanket exclusion term.

WNG argued it took steps to remove the blanket exclusion terms from its policies

WNG advised the Commission that:

- since August 2016, WNG released three products that did *not* contain a blanket exclusion term
- it is continuing to review its products and assess coverage related to mental health conditions
- while the review is underway, “all claims relating to mental illness are referred and reviewed on merit” and determined on a ‘non-prejudice’ basis (discussed above)
- while the blanket exclusion term had been removed from three of the 17 products offered by WNG, remaining blanket exclusion terms in other products were to be removed according to a “prioritisation process and delivery plan”.¹⁷

The Commission requested further information about the prioritisation process and delivery plan. WNG advised that the process is “not a specific process and plan directed at the removal of the mental health exclusions” but instead is part of general business processes made in accordance with its “overall general group business plan”.¹⁸ As such, the process “is not a formally documented plan, as this reflects the strategic plans of our business it is continually reviewed and updated to meet the changing needs of our business”. WNG noted potential discrimination is considered in a review at that time.

WNG advised the Commission that it expects to have removed the blanket exclusion term from all WNG products by December 2019.¹⁹

WNG argued it has an approach to offer insurance cover to people with pre-existing mental health condition

WNG advised that it uses software to assist with evaluating risk and the level of premium charged to consumers in order to offer insurance cover for pre-existing health conditions.

WNG advised the Commission that it uses a medical screening risk rating tool to assess a customer’s eligibility for cover for pre-

existing conditions, and responses are then rated as part of its overall risk assessment.²⁰ WNG considers that this process allows for a “robust evaluation” of pre-existing medical risks, by using algorithms and a point based system that takes into account a number of risk parameters, such as medical risk, travel destination, age, and duration.²¹

WNG had developed Underwriting Guidelines that form the basis of this tool. To prepare these guidelines, WNG advised that its underwriters researched mental illnesses and assessed exposure by “identifying modifiable risk factors to pre-existing mental illness and mental health symptoms to subsequent risk of morbidity and mortality”.²² Based on its research, a set of medical questions were “designed to gauge the severity and stability of each condition” in order to “determine a customer’s eligibility for cover for pre-existing medical conditions” (this research was not provided to the Investigation).²³

WNG advised that a decision on cover and terms is based on the consumer’s responses to these questions as well as other underwriting criteria. The possible underwriting decisions following this assessment are:

- agreed additional premium and/or increased excess (acceptable risk)
- limited cover (moderate risk)
- conditions excluded (doesn’t meet guidelines).²⁴

The Commission has considered the risks and efficacy of these screening tools below in further detail.

4.4.3 WNG'S RELEVANT DOCUMENTS

In response to the Commission's request for information, WNG provided supporting documents including:

- The Cerberus Special Risks Mental Illness Guide: Underwriting guidelines for mental health conditions (undated) (Underwriting Guidelines)
- System and Procedure Guide: Mental Illness Claims (18 August 2016) (Procedure Guide)
- an extract summary of medical screening outcomes for all pre-existing medical condition screening for the applicable products (undated) (Screening Summary)
- a spreadsheet with raw data of mental health claims (undated) (Claims Data).

The Commission notes that no documents were provided that record the process and plan of the 2014 and 2016 policy reviews or any subsequent reviews.

The Commission carefully considered the documents provided by WNG.

SUMMARY OF WNG PROCEDURES AND PROCESSES DOCUMENTS

Claims Data

The Claims Data provided by WNG indicates that:

- for the Investigation Period, for the PDS or the TID PDS, WNG appears to have declined 12 out of a total of 55 claims relating to mental health, one of which was declined on the sole basis of a mental health condition
- for the period 2009–August 2018 (Historical Period), for the PDS or the TID PDS, WNG declined 94 claims, three of which were on the basis of a specific mental health condition. Of these 94 claims, five were made or denied to Victorian consumers.

Procedure Guide

The Procedure Guide “outlines how mental illness claims have been recorded and addressed by WNG since August 2016”. The Guide references anti-discrimination obligations and notes that “in order to meet the law we need to collate a lot of data”.

The Procedure Guide outlines the process for WNG agents to respond to claims. The Procedure Guide asks that any new conditions are referred to XL Catlin “for potential ex gratia payments” while all pre-existing conditions are referred to XL Catlin as a recommended ‘decline’.²⁵ The Procedure Guide states that WNG should create notes to “be able to collect data on the number of claims received relating to mental illness”, as well as demonstrate “any exposure to ex gratia payments approved by XL Catlin”.

Underwriting Guidelines

The Underwriting Guidelines are used by WNG in the context of medical screening for customers with pre-existing medical conditions to determine their eligibility for cover.

The Underwriting Guidelines note:

- “for many years mental health consumers have raised difficulties in accessing insurance or making a claim ... including travel insurance”
- “depression, anxiety and related disorders account for more years of disability and lost productivity than any other illness”
- the prevalence of various forms of mental health conditions in the community, and includes instructions such as, “when there is a mixture of anxiety and depression rate the worst condition” and include a list of references (but do not include analysis or assumptions regarding those references).

The Underwriting Guidelines acknowledge that “mental health conditions have traditionally been recognised as difficult to underwrite for a number of reasons”, including that “each case is different ... and needs to be assessed on its own merit”. The Guidelines use a medical “risk rating” tool and questions for screening consumers with pre-existing conditions to identify risk factors for mental health symptoms.

However, the Guidelines do not indicate how consumer responses to questions regarding various mental health conditions would result in a different offer of insurance. WNG advised the Commission that “any response to one particular question will not in itself solely determine the outcome to a screening assessment”. No documents were provided to the Commission to explain how underwriters would approach offers of coverage, or how premiums would be determined according to responses to the questions. Further, given WNG also instructs its employees to automatically ‘decline’ when putting a recommendation,²⁶ it is unclear what role the screening questions would make to a customer being offered coverage.

Screening Summary

The Screening Summary set out medical screening outcomes for all pre-existing medical condition screening for WNG products for the period August 2016 to May 2018. The Commission observes that the screening outcomes do not appear to distinguish between ‘first-presentation’ or ‘pre-existing’ conditions.

The Screening Summary indicates that of the thousands of applications made over this period:

- 46 per cent had a mental health condition fully excluded from cover
- 47 per cent had ‘limited cover’ offered
- two per cent had an additional premium and increased excess added to their policy (however, it is not clear from the data how much the additional premium of excess was). Of these applicants, the most prevalent mental health conditions were autism, intellectual disability, and depression.

The Screening Summary also includes a brief “screening outcome description”, suggesting each screening decision made by WNG. The spreadsheet records that ‘limited cover’ was offered in hundreds of applications, of which almost half related to depression, with smaller proportions related to conditions such as anxiety or anxiety attacks, bi-polar affective disorder, and post-traumatic stress disorder.²⁷

4.5 WNG's compliance with anti-discrimination law

4.5.1 DID WNG DISCRIMINATE AGAINST PEOPLE WITH A MENTAL HEALTH CONDITION?

WNG has an obligation under section 44 of the Equal Opportunity Act not to discriminate in the provision of travel insurance against people with a mental health condition.

Based on its assessment of the information provided by WNG to the Investigation, the Commission considers that WNG discriminated unlawfully against people with a mental health condition for the reasons set out below.

WNG treated people with a mental health condition differently and detrimentally

During the Investigation Period, WNG and its related entities provided travel insurance and issued travel insurance policies with blanket exclusion terms.

WNG advised the Commission that, in its view, it had not declined to enter into a contract of insurance on the basis of an applicant having a mental health condition because it “would take a non-prejudice view of indemnity”.²⁸ The Commission takes this to mean that WNG would make a payment for claims arising because of a mental health condition, if all other underwriting criteria were satisfied.

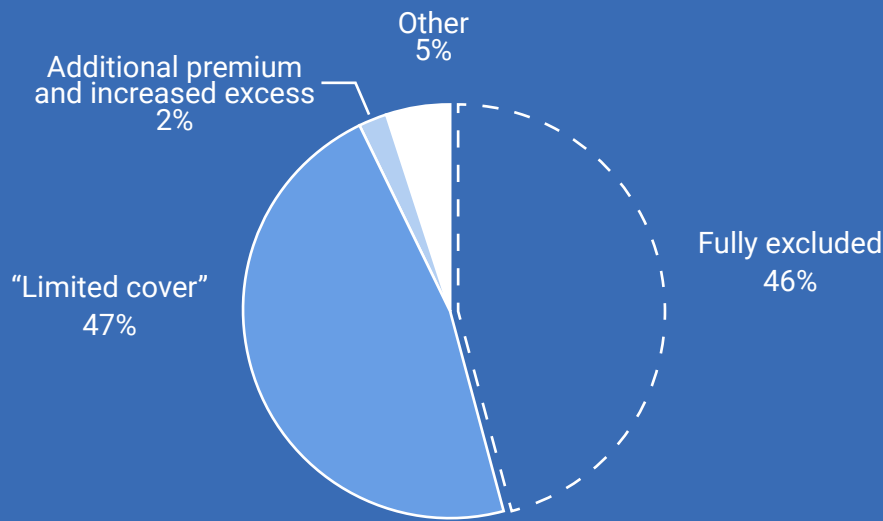
However, in the Commission's view, the information and data provided by WNG to the Investigation *does* show that it has offered, sold or refused policies to people with a mental health condition on a different and detrimental basis.

For example, WNG advised that there were 14 mental health claims (related to the TID PDS) recorded during the Investigation Period.²⁹ In two cases, TID declined indemnity either in reliance on an blanket exclusion term or for reasons related to the person's mental health.³⁰ WNG also advised that during the period 2009 – May 2018, there were 221 mental health claims (related to the PDS and the TID PDS), of which 94 policy holders were declined indemnity in reliance on an exclusion term for reasons related to the person's mental health.³¹ Of these, five claims were made by and declined to Victorian consumers.

The Commission observes the apparent inconsistencies in WNG's internal documents, which indicate pre-existing mental health conditions were, on the one hand, automatically recommended for decline,³² and yet the Screening Summary shows that WNG provided limited or partial insurance. Information contained in WNG's Screening Summary indicates that, for claims made for coverage of a pre-existing condition in the Investigation Period under either the PDS and TID PDS:

- 46 per cent of claims had a mental health condition fully excluded from cover
- 47 per cent had “limited cover” offered
- two per cent had an additional premium and increased excess added to their policy
- people with specific mental health conditions as defined in the DSM-IV and identified in WNG's documents (such as depression, autism or intellectual disability) were required to pay additional premiums to be provided cover.

Claims made for WNG coverage of a pre-existing condition in the Investigation Period under either the PDS and TID PDS:



WNG advised that referrals to XL Catlin are appropriate because the travel insurance issued by WNG is issued on behalf of XL Catlin, under binding authority from XL Catlin.³³ The Commission notes, and WNG accepts, that this does not remove WNG's obligation to comply with anti-discrimination law.³⁴

Finally, in the Commission's view the process of ex gratia payments is also treating people with a mental health condition differently. This is a different and less transparent process for indemnifying people with a mental health condition who wish to make a claim under their travel insurance policy. There appears to be no information at point of sale provided to consumers to advise them they may be entitled to an ex gratia payment. Similarly, there appears no clear information regarding rights of redress if consumers disagree with an ex gratia decision.

In conclusion, the Commission notes that during the Investigation Period (and in the five years prior to the Investigation Period), WNG and its related entities:

- excluded from cover people with a mental health condition
- failed to indemnify people with a mental health condition
- indemnified people with a mental health condition only on a different, and detrimental, basis.

The Commission considers that this conduct constitutes discrimination in the provision of travel insurance against people with a mental health condition, unless there is a lawful basis for the discrimination.

4.5.2 WAS THE CONDUCT LAWFUL?

As set out in Chapter 3, under section 47 of the Equal Opportunity Act, an insurer may discriminate lawfully against a person by refusing to provide an insurance policy or in the terms on which an insurance policy is provided if:

- the discrimination is permitted under the equivalent federal legislation Acts, in this instance, the *Disability Discrimination Act* Cth (section 47(1)(a))
- the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely and is reasonable having regard to that data any other relevant factors (section 47(1)(b))
- in a case where no such actuarial or statistical data is available and cannot reasonably be obtained, the discrimination is reasonable having regard to any other relevant factors (section 47(1)(c)).

In the Commission's view, there was no lawful basis for the discrimination. That is, WNG did not provide sufficient information or documentation to demonstrate a lawful reliance on the exception to discrimination

for insurers in the Equal Opportunity Act. The Commission's analysis is detailed below.

The discrimination was not based on relevant actuarial or statistical data

The Commission considers that the information provided by WNG does not satisfy the requirements of section 47(1)(b) of the Equal Opportunity Act. Its offer of insurance on terms that discriminated against people with a mental health condition was not based on actuarial or statistical data on which it was reasonable to rely.

In its response to the Commission's request for information, WNG noted that:

- in 2014, it began an internal review and considered "publicly available reports, assessments, white papers and data" on mental health
- in 2016, WNG began work to "collect claims data for mental illness", "reviewing our products and assessing the coverage provided in relation to mental illness"
- there was not a "full product review" of the PDS so "there was accordingly no information which was considered or relied upon by WNG to include the exclusion term".

Although WNG's Underwriting Guidelines contain statistics and a reference list, the guidelines do not analyse the effect of those statistics on WNG's insurance offering.

The exception in section 47 of the Equal Opportunity Act requires the discrimination to be 'based' on data. In the Commission's view, this requires insurers to take steps to establish and document what and how they can justify offering a product which has a discriminatory impact. This is also the recommended approach in the Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth) (DDA Guidelines)*.

WHAT DO THE DDA GUIDELINES SAY?

The *DDA Guidelines* note that data should be current, complete, credible, based on a sufficient sample size and applicable to the situation.³⁵ The data must also have been available at the time of the discrimination and the insurer must be able to show that they actually considered and relied on the data.³⁶

Compliance with anti-discrimination laws is a standing, and ongoing, obligation. The exception in section 47(1)(b) of the Equal Opportunity Act requires regular consideration of whether any actuarial or statistical data is reasonable for the insurer to rely upon at the time that alleged discrimination occurs.

Consequently, an insurer must ensure its data is accurate, complete and up to date to ensure its decisions are based on quality and relevant actuarial information.

WHAT DO THE DDA GUIDELINES SAY?

The *DDA Guidelines* also reiterate that it is not reasonable to discriminate on the basis of incomplete information, or if better information could reasonably have been obtained.³⁷ The *DDA Guidelines* note that:

[A]ny disability discrimination in relation to superannuation or insurance should be based on relevant actuarial or statistical data where it is available or could reasonably be obtained.³⁸

and

Insurers should regularly reassess exclusions which discriminate on the basis of disability to ensure that it is reasonable to maintain them.³⁹

The discrimination was not reasonable having regard to other relevant factors

Similarly, the information provided by WNG to the Investigation does not disclose that the “discrimination is reasonable having regard to any other factors”, as required by section 47(1)(c) of the Equal Opportunity Act.

Although WNG provided information about the steps it took to understand the servicing, product, pricing and commercial impacts of coverage, and referenced reports, assessments and data, the Commission does not consider this information is

sufficient to maintain that any discrimination was reasonable.

WNG provided information about its approach to determining mental health condition claims on a ‘non-prejudice’ basis. It also provided its Underwriting Guidelines, which include screening questions about particular mental health conditions. However, it did not provide any relevant information that demonstrates it had a reasonable basis for retaining the exclusion terms in its policies, or for why certain screening criteria could be lawfully applied to different mental health conditions or have different premiums applied.

4.6 Did WNG comply with its positive duty to eliminate discrimination?

4.6.1 THE POSITIVE DUTY OBLIGATION

As service providers, insurers also have a legal obligation to “take reasonable and proportionate measure to eliminate discrimination, sexual harassment or victimisation as far as possible” (positive duty).⁴⁰ The positive duty requires organisations to be proactive and to take steps to monitor, identify and eliminate discrimination that may arise in the course of their business. The positive duty is discussed in detail in Chapter 3.

The Equal Opportunity Act sets out mandatory factors to be considered when determining if a measure is reasonable and proportionate, including:

- the size of the person’s business or operations
- the nature and circumstances of the person’s business or operations
- the person’s resources
- the person’s business and operational priorities
- the practicability and the cost of the measures.⁴¹

The Commission asked WNG what steps it had taken in compliance with the positive duty.

4.6.2 WNG’S POSITION REGARDING THE POSITIVE DUTY

In response to the Commission’s request for information on WNG’s compliance with the positive duty as it relates to people with a mental health condition in the provision of travel insurance, WNG advised that it is taking the following steps:

- continually researching mental health issues
- reviewing and updating processes and procedures for how it manages mental health issues, including WNG’s interactions with customers:
 - at the time of policy purchase (and the terms on which the policies are offered to them and how they are assessed for cover)
 - when they require emergency medical assistance overseas
 - when they are making a claim for indemnity under the policy
- reviewing practices in relation to all areas of potential discrimination, including on the basis of disability, age and sex, which includes assessment by the WNG Risk and Compliance Committee for compliance with anti-discrimination law
- developing a compliance strategy to improve data collection and how it uses data, to refine underwriting guidelines and claims procedures, and to amend its policy wordings to reflect the positive duty.⁴²

WNG noted that it “is committed to the advocacy of our travellers, and ensuring that our products and services are relevant, personalised and provided in a fair, lawful manner in accordance with our positive duty” and that it “recognises the increasing awareness of discrimination ... [and] the role we play in the design of products and services to support awareness, treatment and acceptance of such conditions and the prevention of discrimination”.⁴³

4.6.3 COMMISSION’S ASSESSMENT

An insurer’s obligation under the positive duty requires more than a ‘business as usual’ approach. In the context of this Investigation, the positive duty reflects the community’s expectation that each insurer will demonstrate leadership by taking seriously their responsibility to offer the most inclusive travel insurance products possible.

Based on an assessment of the information provided by WNG to the Investigation, the Commission considers that WNG was not discharging its positive duty in its provision of travel insurance to people with a mental health condition.

While the measures set out in part 4.6.2 are encouraging, the Commission does not consider that they demonstrate WNG was taking reasonable and proportionate steps to eliminate discrimination as far as possible against people with a mental health condition in the provision of travel insurance. The Commission would expect that an insurer the size of WNG, with 16 per cent of the travel market, would be doing more.

The Commission’s analysis of WNG’s response to its positive duty obligations is outlined below.

WNG provides discriminatory travel insurance products

Over the course of the Investigation, WNG was still offering policies to consumers with the blanket exclusion term via WNG’s website.⁴⁴

Further, during the Investigation Period, while WNG had begun the process of removing blanket exclusion terms from some of its policies, it remained the case – in the Commission’s view – that during and after the

Investigation Period WNG was still providing discriminatory travel insurance products, without sufficiently demonstrating that an exception to unlawful discrimination applies. At face value, these products treat people with a mental health condition unfavourably, perpetuate a damaging stigma, and may prevent people with a mental health condition from enjoying the benefits of travel.

The Commission also observes that, separately to the blanket exclusion term, WNG continues to sell policies that exclude cover for pre-existing mental health conditions.

WNG did not consider or rely on relevant data

WNG did not provide information that demonstrated it had considered or relied on relevant actuarial or statistical data to justify its conduct.

The Commission expects that an insurer the size of WNG would be able to demonstrate that it has considered and relied on relevant data, including in accordance with the *DDA Guidelines* (which require an insurer to show that the data was actually considered and relied on). The Commission notes that there is now significant, relevant, publicly available data on insurance coverage and mental health that WNG could consider in addition to the development of its own claims data.⁴⁵ While there are challenges with data collection and analysis for mental health conditions⁴⁶ insurers should have sufficient data to distinguish between the risk profiles of different conditions should ensure that any mental health related exclusions can be justified by relevant data.

The Commission also notes that WNG does not distinguish between mental health conditions when it screens potential customers for pre-existing medical conditions (and did not provide any information or data to justify doing so). The Commission considers that WNG should be able to distinguish between the different risk profiles of mental health conditions in the same way that it distinguishes between the different risk profiles of physical conditions.

WNG does not provide transparent information about its practices

WNG does not inform consumers about its practices related to mental health claims so that they can make informed decisions about travel insurance cover. For example:

- the PDS requires a consumer to apply online or call WNG to discuss a possible premium. The PDS states that coverage for a mental health condition will be denied. However, potential consumers are not advised to contact WNG to discuss an appropriate indemnity.
- from testing the Commission has conducted, the online quote process does not provide information about what premium might be available for a consumer to seek cover for a pre-existing mental illness.
- there is no information provided to consumers at the point of sale about WNG's practice of making ex gratia payments

for claims relating to new mental health conditions. The Commission does not consider that offering discretionary ex gratia payments to people who seek to claim insurance for a mental health condition satisfies WNG's positive duty to eliminate discrimination as far as possible.

The Commission also notes that information about WNG's internal claims and dispute resolution processes is not publicly available, which may make it difficult for a person to raise a concern with WNG.

The Commission would expect WNG to have systems in place for monitoring, identifying and eliminating discrimination that may arise in the course of its business. This would include ensuring that relevant parts of its business are aware of, and apply, the guidance provided in the *DDA Guidelines*. Insurers must also ensure that employees are aware that discrimination is prohibited, and their obligations to not discriminate.

4.7 Findings

The Commission makes the following findings about WNG's compliance with the Equal Opportunity Act:

1. Within the Investigation Period (1 July 2017 – 19 April 2018), WNG issued or provided travel insurance policies, including the World Nomads Aus/NZ PDS (WNAUS-FSG-02-01JUL2016) policy and Travel Insurance Direct policy:
 - a. on terms that excluded indemnity for claims arising from all psychiatric, mental, nervous, emotional, personality, and behavioural disorders, including but not limited to phobias, stress, anxiety and depression ... physical, mental or emotional exhaustion, including but not limited to jet lag
 - b. which failed to indemnify people insured under such policies whose claims arose from all psychiatric, mental, nervous, emotional, personality, and behavioural disorders, including but not limited to phobias, stress, anxiety and depression ... physical, mental or emotional exhaustion, including but not limited to jet lag(together, the Conduct).
2. During the Investigation Period, WNG had obligations under section 44 of the Equal Opportunity Act to not discriminate in the provision of travel insurance against people with a mental health condition (being a disability under the Equal Opportunity Act).
3. In the Commission's opinion, the information provided to the Investigation by WNG did not demonstrate a sufficient basis to claim the exception under section 47 of the Equal Opportunity Act with respect to the Conduct.
4. In the Commission's opinion, by reason of the Conduct outlined in Finding 1, WNG contravened section 44 of the Equal Opportunity Act.
5. In the Commission's opinion, WNG did not take reasonable and proportionate measures to eliminate discrimination as far as possible in accordance with its duty under section 15 of the Equal Opportunity Act during the Investigation Period.

4.8 Recommendations

The Commission makes the following recommendations to WNG to comply with the Equal Opportunity Act:

1. WNG develop a strategy for compliance with the Equal Opportunity Act in respect of its travel insurance products and services, which:
 - includes creating and documenting processes and policies to ensure the regular monitoring and updating of actuarial and statistical data on which insurance terms are based
 - provides for continuous improvement and regular review of policy terms to ensure it is compliant with anti-discrimination law and that it considers the continual advancements in relevant medical knowledge
 - ensures any third party it uses to collect data or provide assessment for cover complies with relevant anti-discrimination laws
 - incorporates a process for the strategy's regular review.
2. WNG should apply rigorous statistical and actuarial analysis to all policy terms it is using to offer or exclude travel insurance to people with a mental health condition. WNG should have regard to the Australian Human Rights Commission's *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)*, including that:
 - actuarial or statistical data relied upon be up to date
 - actuarial or statistical data relied upon be relevant to the particular health condition of the prospective insured
 - if relevant data is available it must not be ignored
 - it considers whether there are less discriminatory options available in the development of policies.
3. WNG contact travel insurance claimants denied indemnity or claims based on a mental health condition during the Investigation Period and provide a copy of the Investigation Report and Outcome Notice for their consideration.
4. WNG undertakes to provide its staff, including senior managers, underwriters, executive teams and any person involved in the drafting of policy terms and conditions, with regular education and training regarding applicable anti-discrimination laws.
5. WNG develops risk profiles and appropriate coverage for differing mental health conditions within its travel insurance policies, as it does with differing physical conditions.
6. WNG provides clear reasons to travel insurance consumers regarding any refusal to offer cover or denial of an indemnity based on or relating to a mental health condition.

4.9 WNG's response to findings and recommendations

If the Commission anticipates making adverse findings about an organisation in an investigation report, it must provide the organisation with a reasonable opportunity to respond to the grounds for making adverse findings prior to publishing the report.⁴⁷

WNG acknowledged the proposed outcomes of the Investigation and welcomed the opportunity to enhance and improve its compliance with the Equal Opportunity Act.⁴⁸ WNG advised the Commission that it is taking the matters raised by the Commission seriously and is "currently working to implement the Commission's proposed recommendations and review its product offerings".⁴⁹ This includes taking

steps to remove the blanket exclusion terms, developing a strategy for compliance with the Act and undertaking a product review of its travel insurance products.⁵⁰

WNG agreed to the Commission's proposal to enter into an agreement⁵¹ about the expedited removal of the blanket exclusion terms from all of its products, as well as prepare an action plan to address the recommendations outlined above.⁵² The Commission commends WNG's preparedness to address the issues the Commission has identified and welcomes its engagement in future. The Commission and WNG have resolved to draft an agreement.

4.10 Lessons learned from WNG's conduct

Based on the Commission's analysis above, insurers should be aware that:

- a policy that denies cover to people with a mental health condition may be a breach of anti-discrimination laws, even if internal practices allow for claims to be accepted
- complying with anti-discrimination laws is an active and ongoing obligation
- claims arising from a mental health condition should not be automatically recommended for a 'decline', unless there is a sound and lawful reason for the policy in the first place, having regard to sound actuarial and statistical information
- terms and policies must be based on fact and relevant, current information, rather than adopting a 'business as usual approach'
- making processes fair means that a consumer should understand how a policy applies to them, including whether or not they will be paid on their claim.

Notes

- 1 World Nomads Product Disclosure Statement (No Aus/NZ PDS WNAUS-FSG-02-01JUL2016) 1 July 2016, 45.
- 2 Ibid, 44.
- 3 Letter from the Victorian Equal Opportunity and Human Rights Commission to WNG, 19 April 2018.
- 4 Letter from WNG to the Victorian Equal Opportunity and Human Rights Commission, 24 May 2018 ('May letter'); Letter from WNG to the Victorian Equal Opportunity and Human Rights Commission, 22 June 2018 ('June letter'); Letter from WNG to the Victorian Equal Opportunity and Human Rights Commission, 4 February 2019 ('February letter').
- 5 WNG noted that it provided data for the period from August 2017 to May 2018 due to the inability of its systems to produce data for the exact Investigation Period. For the purposes of this chapter, the 'Investigation Period' refers to August 2017–May 2018.
- 6 May letter (n 4).
- 7 Ibid.
- 8 Ibid.
- 9 June letter (n 4).
- 10 Ibid.
- 11 See Appendix: Glossary, which notes 'first-presentation' is a term frequently used to describe the status of a person who experiences symptoms or is diagnosed with a health condition for the first time.
- 12 June letter (n 4).
- 13 May letter (n 4).
- 14 Ibid.
- 15 Ibid.
- 16 Ibid.
- 17 Ibid; June letter (n 4).
- 18 June letter (n 4).
- 19 Ibid.
- 20 Ibid.
- 21 Ibid.
- 22 Ibid.
- 23 Ibid.
- 24 Ibid.
- 25 The Commission observes that this Procedure Guide directive is at odds with WNG's position that it assessed mental health claims on a "case by case basis", and with WNG's own claims data, which suggests that partial coverage was offered in some instances. This is discussed further in the chapter.
- 26 See above n 25, comments regarding the Procedure Guide.
- 27 WNG advised that it is unable to identify how many Victorian consumers were included in the screening outcomes data.
- 28 May letter (n 4).
- 29 Ibid.
- 30 Ibid.
- 31 Ibid.
- 32 See above n 25, analysis of the Procedure Guide, which directs WNG employees to automatically recommend a 'decline' to XL Catlin for a person with a mental health condition.
- 33 February letter (n 4).
- 34 Ibid.
- 35 Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (Guidelines, November 2016) 6.
- 36 Ibid, 9.
- 37 Ibid, 7.
- 38 Ibid, 16.
- 39 Ibid.
- 40 *Equal Opportunity Act 2010* (Vic) s 15(2).
- 41 Ibid s 15(6).
- 42 May letter (n 4).
- 43 Ibid.
- 44 World Nomads, *Travel Insurance* (Web Page) <<https://www.worldnomads.com/travel-insurance>>. The Commission notes that, at the time of writing, WNG has now committed to removing these on an expedited basis. See February letter (n 4).
- 45 See discussion of actuarial information and sourcing of data in chapters 5–7.
- 46 Actuaries Institute, *Mental Health and Insurance* (Green Paper, October 2017) 25.
- 47 *Equal Opportunity Act 2010* (Vic) s 143(1).
- 48 February letter (n 4).
- 49 Ibid.
- 50 Ibid.
- 51 Pursuant to the *Equal Opportunity Act 2010* (Vic) s 139(2)(b).
- 52 February letter (n 4).