

Chapter 3: The law relevant to the investigation

3.1 Anti-discrimination law for insurers

3.1.1 EQUAL OPPORTUNITY ACT

The *Equal Opportunity Act 2010* (Vic) is Victoria's anti-discrimination legislation. It sets out a framework of laws that seek to eliminate discrimination, sexual harassment and victimisation to the greatest possible extent. The Act aims to promote and facilitate the progressive realisation of equality.¹ It does this through the prohibition of discriminatory conduct while recognising that, in some circumstances, certain exceptions should apply.

The Equal Opportunity Act also imposes a 'positive duty' for people to take steps to eliminate discrimination, sexual harassment or victimisation. This duty requires all people who have responsibilities under the Act – such as employers, service providers, educational institutions or accommodation providers – to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.

This chapter considers the legislative framework in the Equal Opportunity Act, with a specific explanation of the positive duty and how this is relevant to the Investigation

3.1.2 WHAT IS DISCRIMINATION?

Discrimination is treating someone unfavourably or disadvantaging them because of an attribute or personal characteristic that is protected under the law.

There are 19 attributes protected by the Equal Opportunity Act including disability, sex, race, religious belief or activity, age, sexual orientation, marital status, pregnancy and gender identity. Discrimination is unlawful when it occurs in one of the areas of public

life covered by the Act, which includes the provision of services.

SECTION 44(1) OF THE ACT PROVIDES THAT A PERSON MUST NOT DISCRIMINATE AGAINST ANOTHER PERSON:

- (a) by refusing to provide goods or services to the other person;
- (b) in the terms on which goods or services are provided to the other person; or
- (c) by subjecting the other person to any other detriment in connection with the provision of goods or services to him or her.

Insurance is a service under the Equal Opportunity Act.²

Discrimination includes 'direct' and 'indirect' discrimination on the basis of 19 protected attributes (including disability).³

Direct discrimination is defined as treating, or proposing to treat, a person unfavourably because of a protected attribute. For example, refusing someone service because they are Aboriginal is direct discrimination on the basis of race. Unfavourable treatment can include being denied a service, being humiliated or harassed, or being treated unfairly.

Direct discrimination will be "on the basis" of an attribute when that attribute is a substantial reason for the treatment (section 8(2)(b)). For example, in the context of this Investigation, direct discrimination occurs when an insurer uses a 'blanket' general exclusion (See Chapter 2) against consumers with a mental health condition by expressly

noting it will not cover people because of their condition, which is considered to be a protected attribute (disability) under the Equal Opportunity Act.

Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice:

- that has, or is likely to have, the effect of disadvantaging people with an attribute; and
- that is not reasonable.

The protection against indirect discrimination recognises that, although a condition may purport to treat everyone the same, it may operate in practice to unfairly disadvantage some people or groups of people based on an attribute. Any person claiming indirect discrimination must prove that they have an attribute protected by the Equal Opportunity Act, and a condition, requirement or practice was imposed on them. They must also show how they were disadvantaged or likely to be disadvantaged by that requirement. Disadvantage occurs simply where the treatment is “adverse to the interests” of the person.⁴

When responding to claims, a service provider bears the onus of showing that the requirement was reasonable.⁵

The Equal Opportunity Act also requires service providers to make reasonable adjustments for a person with a disability, unless the adjustments are not reasonable, or the person cannot access the service or derive any substantial benefit from it even after the adjustment is made.⁶

Under the Equal Opportunity Act, it does not matter whether the person intended to discriminate or whether she or he intended to breach the law. Unlawful discrimination may be unintentional.

The Equal Opportunity Act also sets out several exceptions so that certain conduct, which would otherwise be discriminatory, is not unlawful. These exceptions seek to strike an appropriate balance between the prohibition of discrimination and other competing circumstances, interests or laws. This is relevant to insurance, as discussed below.

3.1.3 DISABILITY DISCRIMINATION

This Investigation focuses on whether the conduct of certain insurers, in providing the service of travel insurance, contravened their obligations under the Equal Opportunity Act.

The protected attribute that is relevant to this Investigation is ‘disability’.⁷ Mental health conditions are covered in the Equal Opportunity Act definition of disability, which includes “a mental or psychological disease or disorder” and also a “disability that may exist in the future”.⁸

WHAT IS DISABILITY UNDER THE EQUAL OPPORTUNITY ACT?

Section 4 of the Equal Opportunity Act says disability means:

- (a) total or partial loss of a bodily function; or
- (b) the presence in the body of organisms that may cause disease; or
- (c) total or partial loss of a part of the body; or
- (d) malfunction of a part of the body, including –
 - (i) a mental or psychological disease or disorder;
 - (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or
- (e) malformation or disfigurement of a part of the body –

and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability.

In accordance with section 44 of the Equal Opportunity Act, an insurer must not discriminate against a person with a disability, including a mental health condition, when providing insurance.

Specifically, an insurer must not discriminate by:

- refusing to provide insurance
- on the terms of the insurance – for instance, excluding cover to people on the basis of a disability, such as a mental health condition
- subjecting a person to a detriment, in connection with providing them insurance.

Some examples where conduct may be against the law include:

- not providing insurance cover to a person on the basis of them having a disability, such as a mental health condition
- offering insurance policies with unfavourable terms (such as higher premiums or excesses) to a person with a disability.

3.1.4 EXCEPTIONS TO UNLAWFUL DISCRIMINATION BY INSURERS

The Equal Opportunity Act permits insurers to take action that would otherwise be discriminatory in certain circumstances. The provisions in the Victorian laws reflect those provided in the *Age Discrimination Act 2004* (Cth).⁹ The reason for allowing an exception to discrimination for insurers is reflected in the Regulatory Impact Statement for the Age Discrimination Bill:

In relation to insurance, the development of commercially viable insurance products involves the assessment of risks for particular groups of people, an assessment that includes age where relevant. For example, there is data about the risks of driving accidents at different ages that is relevant to the assessment of risk for motor vehicle insurance, and data about the risks of various health problems at different ages that is relevant to accident insurance and travel insurance. [...] There would be costs to the providers of superannuation, insurance, and credit if these age factors could not be included in the provision of these financial services.

To address these concerns, it is proposed ... that the age discrimination legislation include an exemption for discrimination that is reasonably based

on actuarial or statistical data and other relevant factors.¹⁰

Anti-discrimination laws in Australia recognise that the process of assessing and then pricing risk is difficult, particularly when it comes to extending coverage to groups where there may be a greater propensity to make a claim because of their particular vulnerability.

SECTION 47 OF THE EQUAL OPPORTUNITY ACT PROVIDES THAT AN INSURER MAY DISCRIMINATE AGAINST ANOTHER 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 federal anti-discrimination laws;¹¹
- the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely¹² and is reasonable having regard to that data and any other relevant factors;¹³ or
- where actuarial or statistical data is not available and cannot reasonably be obtained, the discrimination is reasonable.¹⁴

This exception applies to discrimination on the basis of all attributes protected by the Equal Opportunity Act, including disability.

This exception recognises the complex nature of providing insurance, which operates on the basis of having to calculate multiple risks in order to set insurance premiums and charges. Notably, the section provides only a “limited exception, in the circumstances specified”.¹⁵

The section below outlines how the exception might apply in the provision of travel insurance.

Exception: actuarial and statistical data

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 the alleged discrimination occurs.

In 2016 the Australian Human Rights Commission updated its *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth) (DDA Guidelines)*. These provide guidance for both the application of section 47 of the Equal Opportunity Act as well as the Disability Discrimination Act (discussed below). The *DDA Guidelines* provide that an insurer must ensure that its data is accurate, complete and up to date to ensure its decisions are based on quality and relevant actuarial information.¹⁶ In particular, the *DDA Guidelines* state that “Insurers should regularly reassess exclusions which discriminate on the basis of disability to ensure that it is reasonable to maintain them.”¹⁷

The Federal Court has found that “it may not be reasonable to rely on data where that data is out of date”.¹⁸ Similarly, it may not be reasonable to discriminate based on incomplete information, or where better information could reasonably have been obtained.¹⁹

As a consequence, it is reasonable to expect an insurer to have internal procedures and policies in place to regularly consider and update policy terms to ensure compliance with all relevant laws at all times.²⁰ This includes ensuring that data is updated when necessary to take into account advances in medical knowledge, or other areas affecting the level of risk associated with a particular disability.²¹

Exception: discrimination reasonable having regard to relevant factors

Where actuarial or statistical data is available or *could have been reasonably obtained*, and the insurer wishes to raise other relevant factors, it must satisfy *both* limbs of section 47(1)(b) and prove that its “discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely” (section 47(1)(b)(i)) *and* that its discrimination is “reasonable having regard to that data and any other relevant factor” (section 47(1)(b)(ii)).

Otherwise, other relevant factors may only be considered where no actuarial or statistical data is available and cannot reasonably be obtained, pursuant to section 47(1)(c) of the Equal Opportunity Act.

The Federal Court has provided that a ‘relevant factor’ is any “matter which is rationally capable of bearing upon whether the discrimination is reasonable”.²²

The *DDA Guidelines* provide that relevant factors may include “factors that increase the risk to the insurer as well as those that may reduce it”.²³ Such factors include:

- practical and business considerations
- whether less discriminatory options were available
- the individual’s particular circumstances
- the objects of the Disability Discrimination Act, especially eliminating disability discrimination as far as possible
- all other relevant factors of a particular case, such as medical opinions, opinions from other professional groups, the practice of others in the insurance industry and commercial judgment.²⁴

However, while an insurer is entitled to consider those other relevant factors, they must always be balanced against the “nature and extent of the discriminatory effect”.²⁵

Exception: discrimination under federal anti-discrimination laws

Under section 47 of the Equal Opportunity Act, if discrimination is permitted under federal anti-discrimination legislation it will not be unlawful discrimination for the purposes of the Equal Opportunity Act.²⁶ An insurer may therefore lawfully rely on a relevant defence or exception in the Disability Discrimination Act.

The federal Disability Discrimination Act includes a prohibition on discrimination in respect of goods and services similar to section 44 of the Equal Opportunity Act.²⁷ The Disability Discrimination Act also provides similar exception to unlawful discrimination to section 47 of the Equal Opportunity Act.

Section 46 of the Disability Discrimination Act provides that it is not unlawful for a person to discriminate against another person, on the grounds of the other person's disability, by refusing to offer the other person a policy of insurance or in respect of the terms or conditions on which a policy of insurance is offered, if:

- (f) the discrimination:
 - (i) is based upon actuarial or statistical data on which it is reasonable for the first-mentioned person to rely; and
 - (ii) is reasonable having regard to the matter of the data and other relevant factors
- (g) in a case where no such actuarial or statistical data is available and cannot be reasonably obtained, the discrimination is reasonable having regard to any other relevant factors.

Unjustifiable hardship

In addition, the Disability Discrimination Act provides that it is not unlawful to discriminate against another person on the ground of a disability, if avoiding the discrimination would impose an 'unjustifiable hardship' on the discriminator.²⁸ The burden of proving that something would impose unjustifiable hardship rests on the person claiming the unjustifiable hardship.²⁹

In the context of travel insurance, a question may arise as to whether offering coverage for claims relating to mental health conditions would cause 'unjustifiable hardship' because of the anticipated extra cost to the travel insurer in extending indemnity to people within this category.

In determining whether a hardship would be 'unjustifiable', all relevant circumstances of the particular case must be taken into account, including:³⁰

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;
- (d) the availability of financial or other assistance to the first person; and
- (e) any relevant action plans given to the Commission under section 64.

Applying the Disability Discrimination Act's unjustifiable hardship test (and also section 46 in the context of other relevant factors) requires consideration of competing factors, similar to the application of section 47 of the Equal Opportunity Act discussed above. For example, assessing any potential financial loss to the insurer (such as a reduction in profit) as well as the potential benefits to a consumer or a class of consumers, such as people with a mental health condition, by having their claims met for any loss associated with a mental health condition. A financial burden may be justified, given the objectives of the Disability Discrimination Act in respect to the elimination of discrimination as far as possible.³¹

The *DDA Guidelines* explain that the factors set out in the Act are not exhaustive, and note that it is relevant to consider if there are alternatives available that provide some benefit to a consumer. For instance, it may be possible to offer insurance at an increased premium, or with a limited exclusion. In addition, factors such as other laws and regulatory standards may be relevant.³²

3.1.5 THE POSITIVE DUTY

Section 15 of the Equal Opportunity Act states that:

- (2) A person must take reasonable and proportionate measures to eliminate ... discrimination, sexual harassment or victimisation as far as possible.

This duty applies to any person who has an obligation to not engage in discrimination, such as employers, schools, services providers, and insurers.

While a breach of the positive duty cannot be the subject of an individual complaint under the Equal Opportunity Act, it may be the subject of an investigation under Part 9 of the Equal Opportunity Act.³³

Duty to eliminate discrimination

The positive duty aims to meet the objectives of the Equal Opportunity Act, which are:

- eliminating discrimination, sexual harassment and victimisation to the greatest possible extent
- promoting and protecting the right to equality
- tackling systemic causes of discrimination
- working towards the progressive realisation of equality.³⁴

Importantly, the positive duty seeks to address systemic causes of discrimination and overcome the limitations of a complaint-based system by providing broader change.³⁵ As was observed in the 2008 review of Victoria's then *Equal Opportunity Act 1995*:

The complaints based system cannot adequately address systemic discrimination. It puts the onus on the individual victim to complain and not on the organisation to comply.³⁶

Instead, the positive duty requires organisations to be proactive: "in other words, prevention is better than cure".³⁷

Reasonable and proportionate measures

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.³⁸

The steps to comply with the positive duty vary for every organisation, taking into account the above mandatory factors.

At a minimum, the positive duty requires organisations to identify potential areas of non-compliance with the Act; to develop strategies for meeting and maintaining compliance, and for eliminating any discrimination.

The examples provided in the Equal Opportunity Act are instructive of the types of measures that may be required:

A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.

A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

The measures required to meet the positive duty are similar to those that must be taken to avoid being found vicariously liable for discrimination and sexual harassment.³⁹

Examples of entities failing to provide reasonable precautions to prevent discriminatory conduct include:

- no conscious effort being made to ensure employees were aware that discrimination was prohibited⁴⁰
- having a policy that was too general or lacked detail about acceptable and unacceptable behaviour or examples or explain how discrimination is prohibited⁴¹
- having no practices in place to ensure that the types of behaviour which occurred were either monitored or governed⁴²
- doing little to instil in its leaders and senior members a sense of commitment to a culture and management standards with an expectation for all members to conform to non-discriminatory standards in their work, professional behaviour and attitude⁴³
- knowingly permitting discrimination and taking no reasonable action to prevent it or to prevent it continuing⁴⁴
- providing no reference to the legislative foundation in Australia for the prohibition on discrimination or harassment.⁴⁵

However, unlike the vicarious liability provisions, the positive duty requires measures taken to *eliminate* discrimination, and it operates regardless of whether there is a discrimination dispute. The positive duty therefore requires a higher standard of conduct.

HOW CAN INSURERS COMPLY WITH THE POSITIVE DUTY

The Commission considers that, as a minimum to comply with the positive duty, insurers should:

- have robust systems in place for monitoring, identifying and eliminating discrimination that may arise in the course of their business
- constrain the application of any lawful exception to discrimination as much as possible.

This is in order to fulfil the insurer's obligation to take reasonable and proportionate steps to eliminate discrimination as far as possible.

Providing services that proactively identify and address the potential for discrimination may not only make an insurer more efficient, it may also make the insurer more appealing to consumers.

The Equal Opportunity Act provides that where an investigation reveals a breach of the positive duty, the Commission may take any action it thinks fit. This can include making a report (for example to Parliament or the Attorney-General) or referring the matter to the Victorian Civil and Administrative Tribunal. The Commission can also enable compliance through agreements with parties, or by providing educational materials and advice.⁴⁶

3.2 Other regulatory and industry frameworks

In addition to anti-discrimination laws, insurers are subject to a number of different regulatory regimes that affect their conduct in issuing policies, assessing claims and dealing with consumers. These laws include the *Insurance Act 1973* (Cth), the *Insurance Contracts Act 1984* (Cth) and the *Corporations Act 2001* (Cth). Each of these regulatory regimes sit alongside, and interact with, the anti-discrimination law obligations in Victoria.

3.2.1 INSURANCE REGULATION

APRA and ASIC

The Australian Prudential Regulation Authority (APRA) and the Australian Securities and

Investments Commission (ASIC) are the two principal regulators of the insurance industry in Australia. General insurers (such as travel insurers) are subject to the *Insurance Act*, which sets out the prudential regulation of insurance businesses. APRA monitors insurer compliance under prudential and reporting standards and practice guides.

The *Insurance Act* requires insurers to have formally appointed actuaries (Appointed Actuaries). The *Insurance Act* provides that an Appointed Actuary is subject to APRA Prudential Standards⁴⁷ and must prepare two annual reports to APRA.⁴⁸ The roles and responsibilities of Appointed Actuaries are further set out in Prudential Standards.⁴⁹

These require that a general insurer has access to appropriate actuarial advice to assist in the sound and prudent operation of its business. The Standard requires a board-approved “actuarial advice framework”.

ICA and the Code

Insurance industry participants are also subject to the voluntary General Insurance Code of Practice (Code), which is administered by the Insurance Council of Australia (ICA).⁵⁰ The ICA is the general insurance representative body in Australia. The ICA also promotes the industry by raising awareness on the role and benefits of insurance.⁵¹

Importantly for consumers, the Code outlines a number of standards, including those in relation to appropriate product documentation, selection and training, claims handling and dispute resolution.⁵²

At the time of writing this report, the ICA was conducting a review of the Code.

3.2.2 COMPLAINT BODIES

In addition to bringing a complaint to the Commission,⁵³ the conduct of each of the insurers considered in this report can also be considered by a range of complaint bodies. These include:

Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) receives complaints made under federal anti-discrimination statutes,

including the Disability Discrimination Act. The AHRC provides conciliation for written complaints relating to instances of alleged unlawful discrimination, as well as for representative complaints.⁵⁴ The President may also conduct an inquiry into a complaint and may obtain information relevant to such an inquiry.⁵⁵

As noted above, the AHRC has issued useful *DDA Guidelines*.

Australian Financial Complaints Authority

Consumers who consider they have been treated unfairly by a general insurer (such as a travel insurer) can make a complaint directly to that insurer. They may also make a complaint directly to the ICA, which considers complaints through its Code Governance Committee.

A consumer can appeal the decision of the Code Governance Committee to the Australian Financial Complaints Authority (AFCA). AFCA is a not-for-profit company that provides a dispute resolution scheme for financial service. AFCA considers complaints which were, prior to 1 November 2018, formerly under the remit of the Financial Ombudsman Service (FOS).

Insurers are required to ensure their customers are aware that they can bring a complaint to AFCA.⁵⁶

3.3 Application of the law in practice

Before we began this Investigation, the conduct of insurers and the lawfulness of blanket exclusions was considered by a range of complaint bodies, courts and tribunals. The case studies below summarise the key decisions in these forums. In summary, the courts and tribunals found that insurers have

unlawfully discriminated against people with both mental and physical health conditions in circumstances where they refuse policies, or exclude liability, by applying a blanket exclusion clause, rather than relying on a reasonable evidence base for their decision.

Case studies

INGRAM V QBE INSURANCE (AUSTRALIA) LIMITED (HUMAN RIGHTS) [2015] VCAT 1936

Ella was a high school student who took out travel insurance with QBE in 2011 ahead of an overseas school trip. In the months leading up to the trip, Ella experienced a first episode of depression and, upon receiving treatment and advice from treating doctors, Ella needed to cancel the trip. Ella sought to claim the expenses for the cancelled flights and bookings against the travel insurance policy with QBE. QBE rejected Ella's claim and pointed to a blanket exclusion for any mental health condition that was contained in the insurance policy that had been purchased.

QBE claimed the blanket exclusion was based on detailed statistical modelling and analysis of claims arising from a range of causes including mental illness, which showed that there is a high risk of cancellation by reason of mental illness. QBE claimed that, even if it had discriminated against Ella (which it denied), the discrimination was lawful because of statutory exceptions under the Equal Opportunity Act.

The Victorian Civil and Administrative Tribunal (VCAT) disagreed. It held that QBE had directly discriminated against Ella and was in breach of section 44(1)(b) of the Equal Opportunity Act when it had issued a policy that included the blanket mental health exclusion, and was also in breach of section 44(1)(a) when it refused to indemnify when Ella lodged a claim.

Importantly, QBE provided insufficient evidence to show its conduct was based on actuarial or statistical data. In fact, QBE had *no* actuarial data to rely on in respect of the mental health exclusion clause in the policy. In relation to the statistical data QBE produced, it was not clear whether QBE used the mental health exclusion in policies prior to March 2010, so VCAT was unable to infer that the reports relied on by QBE were in existence or relied on when the exclusion was introduced. Furthermore, most of the reports post-dated the commencement of the policy, so could not have formed the basis for the exclusion clause. Nor was there evidence as to whether QBE has separately turned its mind to statistical data at the time it refused to indemnify Ms Ingram.

In addition, VCAT found that QBE was unable to rely on the unjustifiable hardship exception in section 29A of the Disability Discrimination Act, as there was no proof that QBE would have to increase the price of travel insurance or bear losses for offering insurance at the current premium rates if the exclusion clause was removed.

Given the absence of sufficient evidence produced by QBE, VCAT found that "the scales weigh in favour of people like Ms Ingram being able to be properly assessed on their policy claims in the same way people with physical disabilities are assessed". VCAT awarded Ella payment for economic loss, together with compensation of \$15,000.

Case studies

BASSANELLI V QBE INSURANCE [2003] FMCA 412 AND QBE TRAVEL INSURANCE V BASSANELLI [2004] FCA 396

In 2002, QBE refused to provide travel insurance to Ms Bassanelli after she disclosed that she had metastatic breast cancer. Ms Bassanelli had sought cover for potential losses in the course of travel that were not related to her pre-existing cancer condition and subsequently obtained travel insurance from another company. She brought proceedings against QBE in the Federal Magistrates Court, claiming the refusal to provide insurance was unlawful discrimination.

QBE argued its decision was based on the 'other relevant factors' component of the Disability Discrimination Act (s.46(1)(g)) exception and said it would not be economically viable to issue a non-standard policy excluding Ms Bassanelli's medical condition. QBE submitted that it had been subject to a number of high-cost claims in the past where it had been difficult to differentiate between the claimant's pre-existing medical conditions and medical conditions suffered by them while travelling. The Court found QBE had discriminated by refusing any insurance policy because:

- QBE had issued similar policies in the past
- it was unreasonable for QBE to refuse to provide any policy at all
- no unjustifiable hardship would have been involved in providing one.

QBE decided to appeal the Magistrate's decision to the Federal Court, arguing again

that its underwriting decision was reasonable having regard to any 'other relevant factors'.

The Federal Court dismissed the appeal. The Federal Court said that QBE should have sought further medical information and not assessed Ms Bassanelli's situation based solely on its general experience regarding pre-existing medical conditions. Further, the Court found QBE could not rely on the defence that the discrimination was reasonable (s 46(1)(g)) without first seeking out relevant actuarial and statistical data (as required in s 46(1)(f)). Nor could QBE choose what material should be used for the purpose of determining the reasonableness of the discrimination. Instead, it must consider "any matter which is rationally capable of bearing upon whether the discrimination is reasonable", and should not stereotype individuals by reference to their disability.

FINANCIAL OMBUDSMAN SERVICE (FOS) AUSTRALIA, DETERMINATION 428120, 31 MARCH 2017

Paul (not his real name)⁵⁷ purchased a travel insurance policy that included a general blanket exclusion clause for claims arising from depression, anxiety, stress, mental or nervous conditions. Paul did not have any history of mental illness. While travelling, Paul experienced an acute psychotic episode, which required hospitalisation, and was forced to cancel the remainder of his trip and return home.

Paul then lodged a claim with the insurer for costs incurred in relation to the overseas medical expenses, additional accommodation and travel expenses, cancellation fees and lost deposits and the costs incurred by his parents travelling to and from Canada as his non-medical escorts.

The insurer denied the Paul's claim, relying on the general exclusion for mental health conditions in the policy. The applicant lodged a discrimination complaint with the Financial Ombudsman Service Australia (FOS)⁵⁸ on the basis that the general exclusion and denial of the claim was unlawful under the Disability Discrimination Act.

FOS found in favour of Paul and found that the insurer did not provide sufficient evidence to establish that removing the general exclusion clause would cause it an unjustifiable hardship. FOS also noted that the exception for relying on data (s 46(2)(f)) did not apply, as the only data provided by the insurer related to all mental illness rather than just first-presentation mental illness. The insurer also failed to provide an assessment of the insurance risk. As such, FOS considered that it was not reasonable for the insurer to rely on the data and ordered the insurer to pay Paul's expenses of \$8877.37 plus interest, and \$1500 compensation.

Notes

- 1 *Equal Opportunity Act 2010* (Vic) s 3.
- 2 *Ibid* s 4.
- 3 *Ibid* s 7(1).
- 4 *Firestone and Australian National University* [2009] ACTDT 1 [45]; Also see *Prezzi v Discrimination Commissioner* [1996] ACTAAT 132 [24].
- 5 *Equal Opportunity Act 2010* (Vic) s 9(2).
- 6 *Ibid* ss 45–46.
- 7 *Ibid* s 6.
- 8 *Ibid* s 4.
- 9 See *Equal Opportunity Bill 2010*, Explanatory Memorandum, cl 47: “Paragraphs (b) and (c) are similar to sections 43(1)(b) and (c) of the *Equal Opportunity Act 1995* but have been amended to bring the circumstances in which discrimination in insurance is allowed into line with those in the *Commonwealth Age Discrimination Act 2004*”.
- 10 *Age Discrimination Bill 2003*, Explanatory Memorandum and Regulation Impact Statement.
- 11 Specifically, the *Equal Opportunity Act 2010* (Vic) s 47(1)(a) refers to the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.
- 12 *Equal Opportunity Act 2010* (Vic) s 47(1)(b)(i).
- 13 *Ibid* s 47(1)(b)(ii).
- 14 *Ibid* s 47(1)(c).
- 15 *Equal Opportunity Bill 2010*, Explanatory Memorandum, cl 47.
- 16 Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (Guidelines, November 2016) 8–10 (*‘DDA Guidelines’*).
- 17 *Ibid* 16.
- 18 *Ibid* 9.
- 19 *Ibid* 7.
- 20 *Ibid* 9–10.
- 21 *Ibid* 9–10.
- 22 *QBE Travel Insurance v Bassanelli* [2004] 137 FCR 88 [53].
- 23 *DDA Guidelines* (n 16) 11.
- 24 *Ibid* 7–14.
- 25 *Ibid* 14.
- 26 The *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004* or the *Disability Discrimination Act 1992*.
- 27 *Disability Discrimination Act 1992* (Cth), s 24.
- 28 *Ibid* s 29A.
- 29 *Ibid* s 11(2).
- 30 *Ibid* s 11(1).
- 31 *Ingram v QBE Insurance (Australia) Limited (Human Rights)* [2015] VCAT 1936, 26.
- 32 *DDA Guidelines* (n 16) 21–22.
- 33 *Equal Opportunity Act 2010* (Vic) s 15(3)–(4).
- 34 *Ibid* s 3.
- 35 Explanatory memorandum for the *Equal Opportunity Bill 2010*, 17.
- 36 Julian Gardner, ‘An Equality Act for a Fairer Victoria: Equal Opportunity Review’ (Final report, State of Victoria, Department of Justice, June 2008), 39.
- 37 Second Reading Speech, *Equal Opportunity Bill 2010*. Victorian Parliament, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 785 (Rob Hulls, Attorney-General).
- 38 *Equal Opportunity Act 2010* (Vic) s 15(6).
- 39 *Ibid* s 109.
- 40 *McKenna v State of Victoria* [1998] VADT 83 (*‘McKenna’*).
- 41 *Styles v Murray Meats Pty Ltd* [2005] VCAT 914.
- 42 *Blenner-Hassett v Murray Goulburn Co-operative Ltd & Ors* [1999] VCC 6.
- 43 *McKenna* (n. 40) 83.
- 44 *Ibid*.
- 45 *Richardson v Oracle Corporation Pty Ltd* [2014] FCAFC 82.
- 46 See *Equal Opportunity Act 2010* (Vic) s 139.
- 47 *Insurance Act 1973* (Cth), s 41.
- 48 These reports are: (a) the ‘Financial Condition Report’ (FCR); and (b) the ‘Insurance Liability Valuation Report’ (ILVR) (which may form part of the FCR).
- 49 Prudential Standard CPS 320. In June 2018, APRA took steps to clarify and strengthen the role of Appointed Actuaries. Australian Prudential Regulation Authority, ‘APRA releases new prudential standards to strengthen the role of the Appointed Actuary within insurers’ (Media release, 6 June 2018).
- 50 IBISWorld, *Travel Insurance – Australia* (Market research report, June 2018) 28.
- 51 *Ibid* 28.
- 52 *Ibid* 27.
- 53 *Equal Opportunity Act 2010* (Vic) Part 8, s 122. A person may also make an application about a contravention of the *Equal Opportunity* directly to the Victorian Civil and Administrative Tribunal.
- 54 *Australian Human Rights Commission Act 1986* (Cth), s 46PB.
- 55 *Ibid* s 46PI.
- 56 Australian Securities and Investment Commission, *Licensing: Internal and external dispute resolution* (Regulatory Guide 165, May 2018).

- 57 Financial Ombudsman Service determinations are issued with the applicant and respondent as anonymous. Financial Ombudsman Service Australia (Determination, Case number: 428120, 31 March 2017).
- 58 From 1 November 2018, the Australian Financial Complaints Authority (AFCA).