



Victorian Equal Opportunity  
& Human Rights Commission

# Fair-minded cover

INVESTIGATION INTO MENTAL HEALTH  
DISCRIMINATION IN TRAVEL INSURANCE





Victorian Equal Opportunity  
& Human Rights Commission

## Fair-minded cover: Investigation into mental health discrimination in travel insurance

Published by the Victorian Equal Opportunity and Human Rights Commission,  
Level 3, 204 Lygon Street, Carlton, Victoria 3053. June 2019

### Contact us

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	enquiries@veohrc.vic.gov.au
Website	humanrightscommission.vic.gov.au

The Victorian Equal Opportunity and Human Rights Commission acknowledges and celebrates the Traditional Owners of the lands throughout Victoria and we pay our respects to their Elders, past and present.



This work, *Fair-minded cover: Investigation into mental health discrimination in travel insurance*, is licensed under a [Creative Commons Attribution 4.0 licence](https://creativecommons.org/licenses/by/4.0/). You are free to re-use the work under that licence, on the condition that you credit the Victorian Equal Opportunity and Human Rights Commission as author, indicate if changes were made and comply with the other licence terms. The licence does not apply to any branding, including the Victorian Equal Opportunity and Human Rights Commission logo.

Please give attribution to: © State of Victoria (Victorian Equal Opportunity and Human Rights Commission) 2019

### Accessible formats

This document is available to download from our website at [humanrightscommission.vic.gov.au/resources](https://humanrightscommission.vic.gov.au/resources) in PDF and RTF. Please contact the Commission if you require other accessible formats.

### Privacy

The Commission complies with Victorian privacy laws and the confidentiality provisions of the Equal Opportunity Act. Our privacy policy is available online at [humanrightscommission.vic.gov.au/privacy](https://humanrightscommission.vic.gov.au/privacy) or by contacting us.

### Disclaimer

This information is intended as a guide only. It is not a substitute for legal advice. All information was correct at time of production.

Printed on Ecostar  
ISBN 978-0-6480881-2-7

# Fair-minded cover

INVESTIGATION INTO MENTAL HEALTH  
DISCRIMINATION IN TRAVEL INSURANCE

# Acknowledgements

The Commission acknowledges the tireless work of the consumers and their advocates (including the Public Interest Advocacy Centre, Mental Health Australia, Beyond Blue and SANE) in advocating for better practices and outcomes for people with a mental health condition in the insurance industry. The work of these advocates continues to shine a light on the impact of discrimination on everyday Victorians and Australians. Giving a voice to people who have experienced discrimination can create a vehicle for change.

The Commission acknowledges the participation of insurers, peak bodies and experts and thanks them for their contribution to this investigation.

# Contents

<b>Commissioner’s foreword</b>	<b>2</b>
<b>Executive summary</b>	<b>4</b>
<b>Conclusions and outcomes of the Investigation</b>	<b>16</b>
<b>Chapter 1: Introduction</b>	<b>26</b>
<b>Chapter 2: An overview of insurance</b>	<b>42</b>
<b>Chapter 3: The law relevant to the investigation</b>	<b>51</b>
<b>Chapter 4: World Nomads Group</b>	<b>64</b>
<b>Chapter 5: Suncorp</b>	<b>80</b>
<b>Chapter 6: Allianz and AGA</b>	<b>98</b>
<b>Chapter 7: Zurich and Cover-More</b>	<b>118</b>
<b>Chapter 8: Supporting enduring change in the travel insurance industry</b>	<b>128</b>
<b>Appendix: Glossary</b>	<b>140</b>



# Commissioner's foreword



Australians are known as avid and adventurous travellers. Last year we took ten million trips overseas and eight million trips interstate. For many of us, travel insurance is regarded as a 'must have' to provide financial and other types of support if things unexpectedly go wrong. However, not all Victorians have fair access to travel insurance or indemnity if they make a claim.

The difficulties that everyday Victorians can face when they buy travel insurance and make a claim because of a mental health condition was exposed in 2015 by a Victorian Civil and Administrative Tribunal decision. Ella Ingram purchased a travel insurance policy for a school trip to New York in 2011. After experiencing symptoms of depression for the first time, Ella decided not to go on the trip. QBE Insurance denied Ella's claim for the cost of the trip, relying on a blanket mental health exclusion in the travel insurance policy. Although the Tribunal found that QBE had discriminated against Ella, the insurer refused to change its discriminatory policy.

This issue is not new. Ella's experience of discrimination added weight to many years of determined advocacy by consumer groups to improve insurance industry practices for people with a mental health condition. However, despite the Tribunal's finding, the common practice of travel insurers offering policies with blanket mental health exclusions remained widespread. As Victoria's equal opportunity regulator I knew that more had to be done. Aware of the potential for far-reaching discrimination in the industry, I launched this investigation.

We know that almost half of all Australians experience a mental health condition in their lifetime and, in 2017–18, one in five Australians had a mental or behavioural condition. That equates to around 1.2 million Victorians. With the right management and support, a mental health condition is often just a part of everyday life for many people. In any one year, around one million Australians have depression and more than two million have anxiety. That's why mental health discrimination is felt deeply across Victoria and the country.

Victoria's equal opportunity law exists to protect the right to equality for all Victorians. It also ensures that organisations take proactive steps to eliminate discrimination as far as possible. Equal opportunity means treating *all* people with the dignity and respect they deserve. If we do this across our society, we stand the greatest chance of everyone achieving their full potential for the benefit of the whole community.

Community attitudes about mental health are changing. There is increasing data available on mental health to help travel insurers more accurately identify, manage and price risk for different mental health conditions. Specific guidance to assist insurers to meet their legal obligations under anti-discrimination law has also existed for over a decade. However, my investigation showed that policies and practices in the insurance industry have been slow to catch up.

My investigation found that three major travel insurers (Allianz, Suncorp and World Nomads Group) – making up over a third of the travel insurance industry – unlawfully discriminated

against people with a mental health condition. They did this by issuing policies with a blanket mental health exclusion and failing to indemnify people under those policies. These insurers also failed to meet their positive duty to eliminate discrimination.

In short, the investigation found that discrimination in the travel insurance industry was prevalent and widespread. However, it also revealed an industry that is ready to change, and which has already taken positive steps to better understand mental health conditions and improve industry policy and practice. I am encouraged by the willingness of insurers to participate in the investigation and the positive impact that the investigation has already had across the industry.

Since launching the investigation, all insurers have now removed (or are taking immediate steps to remove) blanket mental health exclusions from their travel insurance policies – changing tens of thousands of contracts of insurance being sold to consumers for the better. All insurers have agreed to address the Commission’s practical recommendations for change. And peak bodies, including the Insurance Council of Australia and the Actuaries Institute, have acknowledged their role in supporting better compliance with the law through industry education and support.

What is needed now is practical and collaborative action to drive enduring change in the travel insurance industry. The Commission’s recommendations aim to improve awareness and understanding of anti-discrimination law in the industry, support better compliance with the law, and improve industry regulation. Alongside the formal recommendations, the lessons learned from the investigation provide a strong foundation for change.

This includes:

- the need to put consumers at the heart of insurance business
- the need for better use and analysis of data to inform business decisions
- the need for stronger regulation
- the need for better education and support.

Discrimination law provides an important line in the sand. Insurers cannot discriminate against people with a mental health condition unless there is a good reason based on fact. While the business of insurance focuses on pricing risk, insurers must treat consumers fairly and lawfully. With the prevalence of mental health conditions in Victoria and nationally, a person’s mental health condition should not stop them from accessing the same services as everyone else.

The travel insurance industry has the opportunity to ensure that Ella Ingram’s lived experience of discrimination and courage to take her story to the Tribunal was not in vain. I strongly encourage the insurance industry to take note of this investigation and to seriously consider the important obligations of insurers under anti-discrimination law. These obligations are not just about compliance but about improving the lives of many Victorians who experience mental health conditions, and reducing the stigma around seeking support.

It is also my hope that all Victorians, including those with a mental health condition, will be reassured that their right to equality is protected through our laws. And that through our laws, our community expects and demands equality for everyone. The time for committed leadership from the insurance industry is now. As shown through the positive steps taken since the investigation was launched, I have every hope that the industry will continue to transform its policies and practices in line with community expectations about mental health.



Kristen Hilton – Victorian Equal Opportunity and Human Rights Commissioner

# Executive summary

## Introduction

---

In October 2017, the Victorian Equal Opportunity and Human Rights Commission (the Commission) launched its investigation under the *Equal Opportunity Act 2010* (Vic) into potentially unlawful discrimination against people with a mental health condition in the travel insurance industry (the Investigation). The establishment of the Investigation recognised the seriousness and reach of potential discrimination in the travel insurance industry and the importance of travel insurers complying with the law.

There is an increasing understanding and acceptance of mental health conditions and their impact in the community. Yet the Commission was concerned that potential systemic discrimination in the travel insurance industry was affecting the ability of all Victorians to benefit from the safety net provided by travel insurance. With one in five Australians experiencing a mental or behavioural condition in 2017–18, the Commission knew that discrimination in the travel insurance industry had the potential to impact on the lives of many Victorians.

The Investigation found that all three of the travel insurers who were parties to the Investigation (the party insurers) had discriminated against people with a mental health condition by including a blanket mental health exclusion in their travel insurance policies and failing to indemnify people under those policies. In practice, this means that their insurance policies included terms that refuse cover for an entire category of risk. In this case, the relevant category of risk is a mental health condition. The party insurers also failed to establish that they took sufficient steps to meet their positive duty under the Equal Opportunity Act to eliminate discrimination as far as possible.

### QUICK FACTS

Australia is a nation of travellers. In 2018 Australians took more than 10 million trips overseas<sup>1</sup> and more than eight million trips interstate.<sup>2</sup>

Australians rely on travel insurance. In 2016–17 more than 5.7 million travel insurance contracts were issued in Australia.<sup>3</sup>

Many Australians experience a mental health condition. Almost half of all Australians (45 per cent) experience a mental health condition at some point in their lifetime.<sup>4</sup> In 2017–18 alone, one in five Australians had a mental or behavioural condition. That equates to around 1.2 million Victorians.<sup>5</sup>

Mental health conditions are not all the same. Mental health conditions differ in type, severity, prevalence and treatment. They range from common conditions, such as anxiety and depression, to substance use disorders and serious psychosis.<sup>6</sup>

In response, the Commission has made formal recommendations to insurers and relevant peak bodies to:

- improve awareness and understanding of anti-discrimination law in the travel insurance industry
- drive better compliance with anti-discrimination law
- improve industry regulation
- provide clear reasons to consumers for a decision to refuse travel insurance coverage or indemnity.



Despite finding widespread discrimination against people with a mental health condition in the travel insurance industry, the Investigation revealed an industry that is ready to change, and that has already taken positive steps to better understand mental health conditions and improve industry policy and practice.

#### **WHAT HAS ALREADY CHANGED AS A RESULT OF THE INVESTIGATION?**

**As a result of the Commission's Investigation:**

- all party insurers have already removed, or taken immediate steps to remove, blanket mental health exclusions from their travel insurance policies
- all party insurers have agreed to take steps to address the Commission's recommendations, including in relation to the way they offer and indemnify pre-existing mental health conditions
- the Insurance Council of Australia and the Actuaries Institute have acknowledged their role in supporting better compliance with anti-discrimination law. They have agreed to progress the Commission's recommendations, including supporting better industry education.

The Commission's Investigation draws on the lived experiences of people who have faced discrimination based on a mental health condition in the travel insurance industry. The Commission emphasises the central importance of listening to consumer experience to inform policy and practice. We acknowledge the work of consumers and their advocates in bringing to light the difficulties of people with a mental health condition in accessing and enjoying the benefits of travel insurance.

#### **WHAT DOES THE INVESTIGATION MEAN FOR CONSUMERS OF TRAVEL INSURANCE?**

**Following the Commission's Investigation, consumers can expect travel insurers to:**

- understand and comply with anti-discrimination law when they design and issue travel insurance policies and manage insurance claims
- take proactive steps to prevent discrimination against people with a mental health condition, such as developing a strategy for compliance with anti-discrimination law
- ensure that the lived experience of consumers informs policies and practices
- design and issue travel insurance policies that are based on rigorous analysis of appropriate actuarial and statistical data, which is relevant and up to date
- develop risk profiles and appropriate coverage for different mental health conditions rather than treating different conditions as a single category
- provide transparent information to consumers about travel insurance policies, coverage for people with a mental health condition and complaints processes
- provide clear reasons for a decision to refuse cover or indemnity to a person based on a mental health condition, including the data and other relevant factors relied on to support the decision.

## What is the problem?

---

For more than a decade, consumer advocacy groups have raised concerns about discrimination in the insurance industry in Australia.<sup>7</sup> These concerns include the issues that people with a past or current mental health condition can face in relation to the design of insurance policies, purchasing insurance and making an insurance claim.

Many Australian travel insurance companies have refused cover to people with a mental health condition, by including a blanket mental health exclusion in their travel insurance policies. These exclusions have prevented a person from making a claim if they experience a mental health condition during the term of their travel insurance – in many cases regardless of whether the condition is new or pre-existing. The blanket exclusions have the effect of treating all conditions the same regardless of severity, duration and required treatment.

Where a person has disclosed a pre-existing mental health condition, many insurers have refused cover if the person makes a claim because of a mental health condition – in

many cases regardless of whether the condition was the same or different to the one disclosed to the insurer, or whether the pre-existing condition was ongoing or occurred in the past, or whether the person was being treated for the condition.

Failing to provide cover or indemnity for people with a mental health condition perpetuates the stigma surrounding mental health. It sends a damaging message that seeking mental health support may result in being denied basic services that are available to the rest of the community. Blanket mental health exclusions in travel insurance policies can exclude people without formal diagnoses who have sought support during periods of normal life stress, as well as people who have no prior history of a mental health condition, from indemnity when seeking to make a claim.

The use of blanket mental health exclusions in travel insurance policies was brought to light in the Victorian Civil and Administrative Tribunal's 2015 decision in *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936.

### **CASE STUDY: INGRAM V QBE INSURANCE (AUSTRALIA) LTD**

In *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 (*Ingram v QBE*), the Victorian Civil and Administrative Tribunal (VCAT) found that QBE unlawfully discriminated against Ella Ingram on the basis of a mental health condition.

In late 2011, Ella decided to join a school trip to New York and paid costs including a travel insurance policy issued by QBE. In January 2012, Ella experienced symptoms of depression for the first time, which resulted in the decision not to go on the trip. Ella's mother lodged a claim for the cost of the trip, which was rejected by QBE.

QBE relied on a general exclusion in the policy for claims arising from a mental health condition. QBE said that its decision was based on statistical modelling and analysis of claims arising from a range of causes, which demonstrated that there is a high risk of cancellation of travel policies due to mental health conditions.

VCAT found that QBE directly discriminated against Ella when it issued a policy that included a blanket mental health exclusion and when it refused indemnity based on the exclusion. VCAT found that QBE did not provide sufficient evidence to rely on exceptions to discrimination, including proving that the discrimination was based on actuarial or statistical data or that QBE would have suffered unjustifiable hardship if it had not included the exclusion in the policy. Ella was awarded more than \$4000 for the value of the cancelled trip and \$15,000 for hurt and humiliation.

The decision in *Ingram v QBE* was an important catalyst for the Commission's Investigation. Despite VCAT's decision, the longstanding efforts of consumer advocates and existing guidance to insurers on complying with the law, the practice of travel insurers offering policies with blanket mental health exclusions remained widespread. In recognition of the potentially far-reaching impacts of discrimination in the travel insurance industry more broadly, the Commission drew inspiration from Ella Ingram's story and the many years of consumer advocacy to investigate and shine a light on discriminatory policies and practices by travel insurers.

#### **EXISTING GUIDANCE ON ANTI-DISCRIMINATION LAW FOR THE INSURANCE INDUSTRY**

In 2016, the Australian Human Rights Commission reissued its *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth) (DDA Guidelines)*. The *DDA Guidelines* support insurers to assess if they can lawfully rely on an exception to anti-discrimination law, including the factors and evidence that insurers need to take into account when making decisions.

## **What did the Commission investigate?**

---

The Commission's Investigation considered whether the practices of party insurers complied with their legal obligations under the Equal Opportunity Act, including:

- the offer of travel insurance on terms that substantially limited or excluded cover for people with a mental health condition (blanket mental health exclusions)
- the refusal of indemnity under contracts of travel insurance to people who have or have had a mental health condition.

The Investigation also considered whether all participating insurers had taken sufficient steps to comply with their 'positive duty' under the Equal Opportunity Act to eliminate discrimination as far as possible in the provision of travel insurance.

Finally, the Investigation considered the impact of travel insurance policies on people with a pre-existing mental health condition.

#### **WHICH INSURERS PARTICIPATED IN THE INVESTIGATION?**

The Commission selected five insurers to participate in the Investigation, which made up more than 70 per cent of the travel insurance market in Australia at the time. This included:

- the 'party insurers', World Nomads Group (WNG), Suncorp and Allianz, which maintained blanket mental health exclusions at the time of the investigation and were asked to provide data under the Equal Opportunity Act
- the 'non-party insurers', Zurich/Cover-More and QBE, which had removed existing mental health exclusions by the time of the Investigation and were asked to voluntarily provide information to assist the Investigation.

The Commission notes that QBE declined to participate in the Investigation.

The Investigation methodology is discussed in more detail in Chapter 1.

The Commission's Investigation powers enabled it to request information from party insurers to assess whether the data exception under the Equal Opportunity Act applied to any potential discrimination against people with a mental health condition. The focus of the Investigation was to understand the

nature and quality of data relied on by insurers to claim the data exception, and to require insurers to explain *how* they relied on this information in the design, sale and indemnity of insurance. The Commission also sought voluntary information from non-party insurers to assist the Investigation.

### QUICK FACTS

#### The Commission:

- engaged with peak bodies to seek information about the systems and practices that may assist or hinder compliance with the law by travel insurers
- requested information from travel insurers about key travel insurance policies, claims made, complaints processes and steps to meet the 'positive duty'.

#### In response to the Investigation, the Commission reviewed more than:

- 100 emails and formal responses from insurers and other entities
- 470 supporting documents provided by insurers, including raw claims data, reports, internal correspondence and actuarial information.

An independent actuary assisted the Investigation by assessing and providing advice on the information provided by insurers.

## What does the law say?

In Victoria, the Equal Opportunity Act regulates the conduct of insurers by:

- prohibiting unlawful discrimination by insurers against people with a disability, including people with a mental health condition<sup>8</sup>
- including an exception for insurers if the discrimination is either:
  - lawful under federal anti-discrimination law
  - based on reasonable actuarial or statistical data and the discrimination is reasonable having regard to that data and any other relevant factors
  - where no such data is available or can be reasonably obtained, the discrimination is reasonable having regard to other relevant factors (the data exception)<sup>9</sup>
- requiring insurers to make reasonable adjustments for people with a disability to ensure that they can access and derive a benefit from their services<sup>10</sup>
- imposing a 'positive duty' on insurers to take reasonable and proportionate steps to eliminate discrimination in the provision of insurance as far as possible.<sup>11</sup>

## WHAT DOES THE POSITIVE DUTY REQUIRE FOR INSURERS?

The positive duty aims to ensure organisations take proactive steps to prevent discrimination from happening in the first place, rather than responding to complaints when things go wrong. What the positive duty requires depends on the size and nature of a particular business, the organisation's resources and priorities, and the practicability and cost of taking steps to prevent discrimination.

For insurers, the positive duty may include taking steps such as:

- assessing compliance with the Equal Opportunity Act
- developing a compliance strategy with a mechanism for regular review
- having up-to-date equal opportunity and complaints policies, and ensuring that staff are aware of and understand those policies
- organising regular equal opportunity training for executives, managers and other staff regarding anti-discrimination law and relevant guidance on the law
- ensuring that rigorous analysis of appropriate up-to-date data informs decisions about insurance coverage for people with a mental health condition.

### The party insurers



### The non-party insurers



## What did the Commission find?

Over the course of the Investigation, the Commission assessed the policies and practices of insurers that maintained blanket mental health exclusions in their travel insurance policies (the party insurers), as well as insurers that had taken steps to change their practices, including providing tailored products for people with a mental health condition (the non-party insurers). The Commission made findings related to the three party insurers, Allianz, Suncorp and World Nomads Group (WNG).

The Commission notes that the Investigation considered the policies and practices of insurers during a discrete period from 1 July 2017 to 19 April 2018 (Investigation Period). The Commission's findings are therefore made with the acknowledgment that industry practice has already and continues to improve.

### QUICK FACTS

During the Investigation Period all three party insurers committed to changing their practice of issuing travel insurance policies with a blanket mental health exclusion. The Commission commends this approach, which will now see the removal of blanket exclusion policies from some of the largest travel insurers in the Australian market.

### ALL THREE PARTY INSURERS UNLAWFULLY DISCRIMINATED

The Commission found that the three party insurers – Allianz, Suncorp and WNG – discriminated against people with a mental health condition during the Investigation Period by issuing travel insurance policies with a blanket mental health exclusion and failing to indemnify people under those policies based on a mental health condition. These insurers were unable to establish that they could rely on the data exception under the Equal Opportunity Act to lawfully discriminate.



## **SNAPSHOT SUMMARY OF THE COMMISSION'S FINDINGS**

- During the Investigation Period, Allianz, Suncorp and WNG issued travel insurance policies including a blanket mental health exclusion, and failed to indemnify people under those policies based on a mental health condition.
- During the Investigation Period, Allianz, Suncorp and WNG had a legal obligation under the Equal Opportunity Act to not discriminate against people with a mental health condition in the provision of travel insurance.
- The information provided to the Investigation by Allianz, Suncorp and WNG did not demonstrate a sufficient basis to claim the data exception for insurers.
- On that basis, Allianz, Suncorp and WNG unlawfully discriminated against people with a mental health condition during the Investigation Period.
- Allianz, Suncorp and WNG did not take sufficient steps to meet their positive duty under the Equal Opportunity Act to eliminate discrimination as far as possible.

### **ALL INSURERS FAILED TO MEET THEIR POSITIVE DUTY TO ELIMINATE DISCRIMINATION**

The Commission found that all three party insurers failed to take sufficient steps to meet their positive duty to eliminate discrimination as far as possible under the Equal Opportunity Act. Critically, these insurers were unable to demonstrate that they had adequate systems in place to consider and respond to discrimination and to educate staff about their legal obligations under anti-discrimination law.

The Commission observed that, in some of their products, insurers continue to treat mental health conditions as a single category to exclude cover in relation to pre-existing conditions. The independent actuary assisting the Commission found that there was a possibility of insurers offering some form of cover to people with pre-existing conditions. This may require differentiating between different mental health conditions, rather than treating all mental health conditions as a single category. The independent actuary considered that the spectrum of risk for different conditions could be approached in the same way that insurers already approach coverage for physical conditions.

### **WHAT DATA OR OTHER FACTORS DID THE PARTY INSURERS RELY ON TO DISCRIMINATE?**

In finding that Allianz, Suncorp and WNG had unlawfully discriminated against people with a mental health condition, the Commission considered that:

- WNG did not hold any actuarial or statistical data, or provide other relevant information or documentation, sufficient to satisfy the Commission that the use of blanket mental health exclusions was lawful. WNG argued that despite its blanket exclusion terms, it nonetheless made 'ex gratia payments'<sup>12</sup> to consumers with a mental health condition who made a claim, and therefore did not consider itself in breach of the law.
- Allianz held significant statistical and actuarial data, but this data did not support a sufficient basis for the use of blanket mental health exclusions. Allianz provided a large volume of documents to the Commission but many of these documents were created after the policy was already in place. In addition, Allianz's analysis fell short of the standard required by the *DDA Guidelines*, and Allianz's documents also indicate that it prioritised business imperatives over compliance with anti-discrimination laws.

- Suncorp held statistical and actuarial data in the form of an outdated 2008 report. The Commission considered that it was unreasonable for Suncorp to rely on this outdated data. Suncorp also claimed its 'conservative risk appetite' and small market share were relevant factors that made discrimination against people with a mental health condition reasonable.

While the Commission carefully considered all the party insurers' reasons, it ultimately concluded that all three insurers had unlawfully discriminated.

#### QUICK FACTS

Based on the data provided to the Investigation, during the Investigation Period:

- travel insurers sold more than 365,000 contracts of insurance including unlawful mental health exclusions. These contracts came from just three major travel insurers, which made up approximately 37 per cent of the Australian travel insurance market at the time, and were issued over an eight-month period
- hundreds of people had their claims relating to a mental health condition denied
- some insurers applied additional premiums to travel insurance policies or increased the excess to provide cover for mental health conditions – meaning people with a mental health condition paid more.

During the Investigation Period, it is also possible that some people decided not to purchase a travel insurance policy or to make a claim on a policy because of a blanket mental health exclusion. For this reason, the complete impact of discrimination in the travel insurance industry on consumers is unknown.

#### THE COMMISSION'S OBSERVATIONS ABOUT THE NON-PARTY INSURERS

The Commission did not make formal findings in relation to Zurich and Cover-More as non-party insurers. However, based on the information provided to the Investigation voluntarily, the Commission notes that, since June 2017, Zurich removed blanket mental health exclusions from all of its travel insurance policies offered through Cover-More. The Commission commends this change, which included consideration of multiple sources of data, such as internal claims data, population data, modelling of expected claims costs and data on the treatment of different mental health conditions.

The Investigation also heard about the use of a screening tool by Zurich and Cover-More to offer insurance cover to people with pre-existing mental health conditions. The purpose of a screening tool is to allow an insurer to better understand the risk of a particular event occurring and to set and price cover accordingly. The Commission observes that Zurich and Cover-More need to ensure that its screening tool is based on rigorous analysis of appropriate data. The Commission notes that if the use of the screening tools results in unfavourable outcomes for people with a mental health condition, such as different coverage or higher premiums, these practices may be discriminatory unless the insurer can lawfully rely on the data exception.

## The way forward: A focus on action

The Commission's Investigation established the need for the travel insurance industry to focus on practical action to drive enduring change. Along with the Commission's formal recommendations to insurers and relevant peak bodies, the lessons learned from the Investigation provide a strong foundation for change.

As set out above, during the Investigation Period the industry took encouraging steps towards eliminating discrimination for people with a mental health condition. This includes all insurers to the Investigation removing (or taking active steps to remove) blanket mental health exclusions and agreeing to address the

Commission's recommendations, as well as leading industry groups acknowledging their role in supporting industry understanding and compliance with anti-discrimination law.

In making its recommendations, the Commission acknowledges the positive steps already taken to transform policies and practice in the travel insurance industry. The Commission strongly encourages travel insurers to implement its recommendations and engage in best practice based on the lessons learned in the Investigation.

### THE COMMISSION'S RECOMMENDATIONS

#### SNAPSHOT SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

1. All insurers who participated in the Investigation should develop a strategy for compliance with the Equal Opportunity Act.
2. Allianz, Suncorp and WNG should apply rigorous actuarial analysis to the policy terms they use to offer or exclude travel insurance cover to people with a mental health condition (having regard to the *DDA Guidelines*).
3. Allianz, Suncorp and WNG should contact claimants denied indemnity or claims based on a mental health condition during the Investigation Period to notify them about the Investigation and its outcomes.
4. All insurers who participated in the Investigation should provide their staff with regular education and training on anti-discrimination law.
5. All insurers who participated in the Investigation should develop risk profiles and appropriate coverage for different mental health conditions.
6. All insurers who participated in the Investigation should provide clear reasons to travel insurance customers for refusing to offer cover or deny indemnity based on a mental health condition.
7. The Actuaries Institute and the Insurance Council of Australia should facilitate education on anti-discrimination law for actuary members and insurers respectively.
8. The Insurance Council of Australia should incorporate its Guidance on Mental Health in its revised Code of Conduct to ensure that it is mandatory and enforceable.

## **Action plans and agreements**

As well as the Commission's formal recommendations to party insurers, the Commission invited Allianz, WNG and Suncorp to consider preparing an action plan under the Equal Opportunity Act to better comply with the Act. WNG agreed to develop an action plan and to work with the Commission to expedite compliance. At the time of writing this report, Allianz and Suncorp were considering the Commission's invitation to develop an action plan. The Commission also requested that WNG enter into an agreement with the Commission to remove discriminatory terms from its travel insurance policies. The Commission commends WNG for agreeing to develop an action plan and to enter into an agreement.

### **QUICK FACTS**

The Equal Opportunity Act provides that an organisation can prepare an action plan that sets out the steps required to improve compliance with the Act.<sup>13</sup> The Commission may provide advice about preparing and implementing action plans and set minimum requirements for action plans. An action plan is not legally binding, but a court or tribunal may consider an action plan if it is relevant to a particular matter.

After conducting an investigation, the Commission may take any action it thinks fit including entering into an agreement with a person about action required to comply with the Act.<sup>14</sup> An agreement may be registered with VCAT.

## **THE LESSONS LEARNED FROM THE INVESTIGATION**

The key lessons learned from the Investigation build on the Commission's formal recommendations to insurers and peak bodies to embed a proactive and collaborative approach to eliminating discrimination in the travel insurance industry.

### **KEY LESSONS LEARNED TO DRIVE ENDURING CHANGE**

- The need to listen to consumer experience
- The need for better use and analysis of data
- The need for stronger regulation
- The need for better education and support

### **The need to listen to consumer experience**

The Commission's Investigation highlighted the importance of putting consumers at the heart of business, and ensuring that lived experience informs future policy and practice. As well as taking proactive steps to prevent discrimination, the Investigation revealed that insurers need to provide clear and transparent information to consumers about travel insurance products, complaint processes and reasons for a decision to refuse travel insurance cover or deny indemnity. The Commission also recommends that insurers contact consumers who had their claims denied during the Investigation Period to notify them about the Investigation and its outcomes.

### **The need for better use and analysis of data**

Data is at the centre of the exception under the Equal Opportunity Act that allows insurers to lawfully discriminate if the discrimination is based on actuarial or statistical data and other relevant factors in some circumstances (the data exception). The Commission's Investigation revealed concerning practices related to data, including the use of outdated or irrelevant data and the insufficient analysis of data.

In order to rely on the data exception, the Investigation highlighted that insurers must:

- use appropriate data that is up-to-date and relevant (part 8.3.1)
- undertake quality analysis of available data (part 8.3.2)
- consider alternatives to discrimination where risk is assessed as high (part 8.3.3)
- document the data relied on for a decision to discriminate (part 8.3.4).

### ***Using appropriate data***

The Commission heard about the challenges faced by the industry in sourcing appropriate data to inform coverage for mental health conditions. However, there is a significant opportunity for insurers to make better use of available data and better manage any data limitations. It is critical that available and emerging data about the prevalence, severity and treatment of mental health conditions meaningfully informs insurers' decisions and that insurers develop appropriate coverage for different mental health conditions in the same way as physical conditions.

### ***Undertaking quality analysis of data***

The Investigation highlighted the central role of actuaries in informing insurers' decisions about coverage and supporting insurers to meet their legal obligations. For this reason, it is essential that actuaries are aware of and understand insurers' anti-discrimination law obligations. The Actuaries Institute can support actuaries by facilitating education on the role of anti-discrimination law in the insurance industry.

### ***Considering alternatives to discrimination***

The Investigation emphasised the need for insurers to comply with anti-discrimination law despite commercial priorities. For this reason, insurers must consider alternatives to refusing to provide cover to people with a mental health condition when the risk associated with a mental health condition is assessed as high.

### ***Documenting the use and analysis of data***

The Investigation emphasised the need for insurers to document the reasons for a decision to discriminate, including the data relied on to discriminate.

### **The need for stronger regulation**

The Investigation found that the insurance industry requires committed leadership to ensure that travel insurers comply with their anti-discrimination law obligations and achieve best practice. Although the insurance industry is regulated by a code of practice, the code does not incorporate the Insurance Council of Australia's new Guidance on Mental Health, which reflects anti-discrimination law obligations in 'best practice principles'. The Commission considers that the Guidance on Mental Health must be incorporated into the code to ensure that it is mandatory and enforceable and that insurers understand that the best practice principles reflect the law.

### **The need for better education and support**

The Investigation found that to drive better compliance with the law, it is critical that insurers, actuaries and peak bodies, including the Insurance Council of Australia and the Actuaries Institute, understand insurers' legal obligations under anti-discrimination law. The Commission considers that this can be effectively achieved through targeted education on anti-discrimination law and relevant guidance such as the *DDA Guidelines*.

Supporting enduring change in the industry is discussed in more detail in Chapter 8.



## Notes

- 1 Australian Bureau of Statistics, January 2018, *Short-term Movement, Residents Returning and Visitors Arriving – Selected Countries of Residence: Seasonally adjusted, Table 8* (Catalogue No 3401.0), January 2018.
- 2 Tourism Research Australia, *National Visitor Survey 2018, Table 4 – Overnight Visitors and Visitor Nights by State/Territory Visited and State/Territory of Origin*, (December 2018), viewed 15 April 2019, <<https://www.tra.gov.au/Domestic/domestic-tourism-results>>.
- 3 Insurance Council of Australia, *General Insurance Code Governance Committee, General insurance in Australia 2016–17: Industry practice and Code compliance*, (March 2018), 65.
- 4 Australian Bureau of Statistics, 2008, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (Catalogue No. 4326.0), October 2008. The 2007 ABS Survey into National Mental Health and Wellbeing has not been updated. More recent results from the ABS 2017–18 National Health Survey indicate that mental health conditions among Australians increased between 2014–15 and 2017–18. Australian Bureau of Statistics, 2019, *National Health Survey: First Results, 2017–18* (Catalogue no. 4364.0.55.001), December 2018.
- 5 Australian Bureau of Statistics, 2019, *National Health Survey: First Results, 2017–18, Table 21: Victoria* (Catalogue no. 4364.0.55.001), March 2019.
- 6 Australian Institute of Health and Welfare, *Mental health services in Australia in brief 2018*, (Report, March 2019).
- 7 For example, Mental Health Council of Australia (MHCA) and Beyondblue, *Mental Health Discrimination and Insurance. A Survey of Consumer Experiences*, MHCA, Canberra, 2011. See also Chapter 1.
- 8 *Equal Opportunity Act 2010* (Vic) ss 8, 9 and 44.
- 9 *Ibid* s 47.
- 10 *Ibid* s 45.
- 11 *Ibid* s 15.
- 12 The Latin term ‘ex gratia’ is commonly understood to mean “(something granted) as a favour and not because of a legal obligation”. *Macquarie Dictionary Online*, (Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd, 2019) <<http://www.macquariedictionary.com.au>>.
- 13 *Equal Opportunity Act 2010* (Vic) s 152.
- 14 *Ibid* ss 139 and 140.

# Conclusions and outcomes of the Investigation

## Findings and recommendations

---

Following the Investigation, the Commission made number of findings regarding compliance under the *Equal Opportunity Act 2010* (Vic), which are catalogued below.

Importantly, to improve compliance moving forward, the Commission also made recommendations to the:

- three party insurers being investigated<sup>1</sup>
- key industry, insurance and related organisations that assisted the investigation and were identified by the Commission as having a role to play in ensuring enduring change in discriminatory practices within the travel insurance industry.

## Action plans and agreements

---

The Commission also specifically invited Allianz, WNG and Suncorp to prepare an action plan<sup>2</sup> to address compliance issues identified by the Commission in the Investigation and outlined in the below recommendations.

WNG confirmed it would and the Commission has agreed to work with it to establish an appropriate pathway to achieve compliance on an expedited basis. The Commission notes that Allianz and Suncorp would consider preparing an action plan and would be interested in meeting with the Commission to discuss this. The Commission confirms there remains a standing offer to assist these entities.

The Commission also separately requested that WNG enter into an agreement with the Commission to remove the identified discriminatory terms.<sup>3</sup> The Commission acknowledges WNG's cooperation and acceptance of both the Commission's recommendations and proposed agreement in this regard.

The Commission also notes that the Insurance Council of Australia and Actuaries Institute agree to progress the Commission's recommendations and indicated that the Council of the Insurance General Code would consider the Commission's proposed changes to the Code to make mental health guidelines mandatory and enforceable.

## Findings against insurers

Finding no.	Insurer	Finding
1	Allianz	<p>Within the Investigation Period (1 July 2017 – 19 April 2018), Allianz and AGA issued travel insurance policies, including the NAB Supplementary Product Disclosure Statement (SPDS) (A119163-0626) and Allianz Travel Insurance (Direct) Policy (ATID PDS):</p> <ol style="list-style-type: none"> <li>a. on terms that excluded indemnity for any claim arising from or in any way related to depression, anxiety, stress, mental or nervous conditions</li> <li>b. up until 6 November 2017, which failed to indemnify people insured under such policies whose claims arose from or were in any way related to depression, anxiety, stress, mental or nervous conditions</li> </ol> <p>(together, the Conduct).</p>
	Suncorp	<p>Within the Investigation Period (1 July 2017 – 19 April 2018), Suncorp issued travel insurance policies, including the Suncorp Holiday Travel Insurance and Annual Multi Trip Travel Insurance (PDS Issue 5 12706 and Issue 2 13579 respectively):</p> <ol style="list-style-type: none"> <li>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</li> <li>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</li> </ol> <p>(together, the Conduct).</p>
	WNG	<p>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:</p> <ol style="list-style-type: none"> <li>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</li> <li>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</li> </ol> <p>(together, the Conduct).</p>

Finding no.	Insurer	Finding
2	Allianz	During the Investigation Period, Allianz and AGA 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).
	Suncorp	During the Investigation Period, Suncorp 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).
	WNG	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	Allianz	In the Commission's opinion, the information provided to the Investigation by Allianz and AGA did not demonstrate a sufficient basis to claim the exception under section 47 of the Equal Opportunity Act with respect to the Conduct.
	Suncorp	In the Commission's opinion, the information provided to the Investigation by Suncorp did not demonstrate a sufficient basis to claim the exception under section 47 of the Equal Opportunity Act with respect to the Conduct.
	WNG	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	Allianz	In the Commission's opinion, by reason of the Conduct outlined in Finding 1, Allianz and AGA contravened section 44 of the Equal Opportunity Act.
	Suncorp	In the Commission's opinion, by reason of the Conduct outlined in Finding 1, Suncorp contravened section 44 of the Equal Opportunity Act.
	WNG	In the Commission's opinion, by reason of the Conduct outlined in Finding 1, WNG contravened section 44 of the Equal Opportunity Act.

Finding no.	Insurer	Finding
5	Allianz	In the Commission's opinion, Allianz and AGA did not take reasonable and proportionate measures to eliminate discrimination as far as possible in accordance with their duty under section 15 of the Equal Opportunity Act during the Investigation Period.
	Suncorp	In the Commission's opinion, Suncorp 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.
	WNG	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.



## Insurer recommendations

Each recommendation is made with respect to the Commission’s investigation into potential unlawful discrimination in the travel insurance industry.

Rec no.	Insurer	Recommendation
1	Allianz	<p>Allianz and AGA develop a strategy for compliance with the Equal Opportunity Act in respect of their travel insurance products and services, which:</p> <ul style="list-style-type: none"> <li>• includes creating processes and policies to ensure the regular monitoring and updating of actuarial and statistical data on which insurance terms are based</li> <li>• 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 advances in relevant medical knowledge</li> <li>• ensures any third party it uses to collect data or provide assessment for cover complies with relevant anti-discrimination laws</li> <li>• incorporates a process for the strategy’s regular review.</li> </ul>
	Suncorp	<p>Suncorp develop a strategy for compliance with the Equal Opportunity Act in respect of its travel insurance products and services, which:</p> <ul style="list-style-type: none"> <li>• includes creating processes and policies to ensure the regular monitoring and updating of actuarial and statistical data on which insurance terms are based</li> <li>• 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 advances in relevant medical knowledge</li> <li>• ensures any third party it uses to collect data or provide assessment for insurance cover complies with relevant anti-discrimination laws</li> <li>• incorporates a process for the strategy’s regular review.</li> </ul>
	WNG	<p>WNG develop a strategy for compliance with the Equal Opportunity Act in respect of its travel insurance products and services, which:</p> <ul style="list-style-type: none"> <li>• 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</li> <li>• 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</li> <li>• ensures any third party it uses to collect data or provide assessment for cover complies with relevant anti-discrimination laws</li> <li>• incorporates a process for the strategy’s regular review.</li> </ul>

Rec no.	Insurer	Recommendation
1	Zurich/ Cover-More	<p>If Zurich and Cover-More have not done so already, develop a strategy for compliance with the Equal Opportunity Act in respect of its travel insurance products and services, which:</p> <ul style="list-style-type: none"> <li>• includes creating processes and policies to ensure the regular monitoring and updating of actuarial and statistical data on which insurance terms are based</li> <li>• 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 advances in relevant medical knowledge</li> <li>• ensures any third party they use to collect data or provide assessment for cover complies with relevant anti-discrimination laws</li> <li>• incorporates a process for the strategy's regular review.</li> </ul>
2	Allianz	<p>Allianz and AGA should apply rigorous statistical and actuarial analysis to all policy terms it is using to offer or exclude travel insurance coverage to people with a mental health condition. Allianz and AGA should have regard to the Australian Human Rights Commission's <i>Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)</i>, including that:</p> <ul style="list-style-type: none"> <li>• actuarial or statistical data relied upon be up to date</li> <li>• actuarial or statistical data relied upon be relevant to the particular health condition of the prospective insured</li> <li>• if relevant data is available it must not be ignored</li> <li>• they consider whether there are less discriminatory options available in the development of policies.</li> </ul>
	Suncorp	<p>Suncorp should apply rigorous statistical and actuarial analysis to all policy terms it is using to offer or exclude travel insurance coverage to people with a mental health condition. Suncorp should have regard to the Australian Human Rights Commission's <i>Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)</i>, including that:</p> <ul style="list-style-type: none"> <li>• actuarial or statistical data relied upon be up to date</li> <li>• actuarial or statistical data relied upon be relevant to the particular health condition of the prospective insured</li> <li>• if relevant data is available it must not be ignored</li> <li>• it considers whether there are less discriminatory options available in the development of policies.</li> </ul>

Rec no.	Insurer	Recommendation
2	WNG	<p>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 <i>Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)</i>, including that:</p> <ul style="list-style-type: none"> <li>• actuarial or statistical data relied upon be up to date</li> <li>• actuarial or statistical data relied upon be relevant to the particular health condition of the prospective insured</li> <li>• if relevant data is available it must not be ignored</li> <li>• it considers whether there are less discriminatory options available in the development of policies.</li> </ul>
3	Allianz	Allianz and AGA contact travel insurance claimants denied an 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.
	Suncorp	Suncorp 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.
	WNG	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	Allianz	Allianz and AGA undertake to provide their 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.
	Suncorp	Suncorp undertake 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.
	WNG	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.
	Zurich/ Cover-More  [Note Rec 2 for Zurich/ Cover-More]	If Zurich and Cover-More have not done so already, undertake to provide their 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.

Rec no.	Insurer	Recommendation
5	Allianz	Allianz and AGA develop risk profiles and appropriate coverage for differing mental health conditions within its travel insurance policies, as it does with differing physical conditions.
	Suncorp	Suncorp develop risk profiles and appropriate coverage for differing mental health conditions within its travel insurance policies, as it does with differing physical conditions.
	WNG	WNG develops risk profiles and appropriate coverage for differing mental health conditions within its travel insurance policies, as it does with differing physical conditions.
	Zurich/ Cover-More  [Note Rec 3 for Zurich/ Cover-More]	If Zurich and Cover-More have not done so already, ensure that risk profiles and appropriate coverage are developed for differing mental health conditions (as they do with differing physical conditions).
6	Allianz	Allianz and AGA provide 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.
	Suncorp	Suncorp 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.
	WNG	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.
	Zurich/ Cover-More  [note Rec 4 for Zurich/ Cover-More]	If Zurich and Cover-More do not do so already, they should provide 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.

## Other recommendations

Rec No.	Entity	Recommendation
1	Actuaries Institute (AI)	<p>The Actuaries Institute should develop a strategy for educating members regarding anti-discrimination laws, which:</p> <ul style="list-style-type: none"> <li>• outlines insurers' obligations regarding anti-discrimination laws</li> <li>• outlines actuaries' role and obligations to comply with these laws as part of their professional obligations</li> <li>• provides guidance on the standards of actuarial analysis required, having regard to the Australian Human Rights Commission's <i>Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)</i>.</li> </ul>
1	Insurance Council of Australia (ICA)	<p>Regarding the Insurance Council of Australia Code of Practice:</p> <ul style="list-style-type: none"> <li>• The Insurance Council of Australia should incorporate the Guidance on Mental Health as mandatory matters within the Code, rather than 'best practice' standards.</li> <li>• The Insurance Council of Australia should not submit the Code to Australian Securities and Investments Commission for consumer accreditation without stronger and enforceable mental health guidelines which reflect anti-discrimination law requirements.</li> <li>• The Code Governance Committee should publish information and reasons regarding investigation outcomes of serious breaches of the Code against parties on its website as well as in Annual Reports.</li> </ul>
2	Insurance Council of Australia (ICA)	<p>The Insurance Council of Australia develop an education program to inform insurers about their legal obligations under anti-discrimination law (or arrange for appropriate training to be provided).</p>



## **Notes**

- 1 Allianz and AGA, Suncorp and World Nomads Group (WNG).
- 2 Pursuant to Pursuant to *Equal Opportunity Act 2010* (Vic) s 152.
- 3 Ibid s 139(2)(b).

# Chapter 1: Introduction

## 1.1 Travel insurance and discrimination

---

Many Victorians purchase travel insurance policies to ensure that they are covered if things unexpectedly go awry when travelling. Insurance cover is available for the potential expenses of lost bags or delays, medical assistance and hospital stays that might arise when travelling. However, in Victoria, many travel insurance policies contain 'blanket' exclusion terms that mean this cover is not available if you suffer any mental health conditions.

The Victorian Equal Opportunity and Human Rights Commission is concerned that these terms are unfair, and discriminate against people with a mental health condition. That's why we commenced this Investigation. The Commission has a mandate to ensure our anti-discrimination laws are respected and upheld, and that no person or groups of people are unfairly discriminated against. Specifically, we want to see people with a

mental health condition treated fairly and lawfully by travel insurers, and to see insurers actively fulfilling their duty to eliminate discrimination as far as possible.

The *Equal Opportunity Act 2010* (Vic) provides protection from discrimination, including provisions that prohibit discrimination by an insurer against a person on the basis of a protected attribute, such as a mental health condition.<sup>1</sup> This Investigation considered whether the conduct of insurers offering, selling and refusing cover under travel insurance policies that contained blanket exclusions directed towards people with a mental health condition was lawful.

In this chapter we set out the nature of the issue and the reasons why the Commission conducted this Investigation. We outline how an investigation works, and explain the methodology we used for this Investigation.

## 1.2 The problem

---

### 1.2.1 MENTAL HEALTH DISCRIMINATION IN THE TRAVEL INSURANCE INDUSTRY

Advocacy groups have repeatedly raised concerns about practices in the insurance industry that systemically disadvantage people with past or current mental health conditions.<sup>2</sup> These concerns include the issues that people with mental health conditions can face at three different touchpoints related to insurance products:

- product design and definitions (for example, a travel insurance policy may have a blanket exclusion for all claims due to mental health conditions)
- buying or entering the product (for example, people with past or current mental health conditions may be unable to access cover or may face higher premiums)

- making a claim and receiving benefits (for example, insurers may refuse indemnity for people with mental health conditions).<sup>3</sup>

Discriminatory practices in the insurance industry have the potential to affect a significant part of our community. One in five Australians were affected by a mental or behavioural condition in 2017–18, and 45 per cent of Australians will experience a mental health condition at some time in their life.<sup>4</sup> Millions of Australians, including people with mental health conditions, also travel every year. Discrimination can result in financial hardship, can discourage people from seeking support, and embeds a stigma about mental health issues in the broader community.

Blanket mental health exclusions in travel insurance policies are discriminatory at face value because they treat people with a mental health condition differently to people without a mental health condition. However, the Equal Opportunity Act includes an exception from unlawful discrimination if an insurer can

provide relevant data to justify discrimination. The relevant law is discussed in Chapter 3 of this report. The application of the law to travel insurance industry practices is considered throughout this report.

#### **CASE STUDY: BLANKET MENTAL HEALTH EXCLUSION DISCRIMINATORY<sup>5</sup>**

Paul (not his real name) travelled to Vancouver for a holiday between January and April in 2015. While he was in Canada, and despite having no pre-existing mental health issues, he suffered an acute manic episode which resulted in him needing to be hospitalised for a week. In addition to medical expenses, Paul incurred financial loss for the subsequent cancellation of his trip. Once back in Australia, Paul sought to recover his expenses for this unforeseen event through his travel insurance policy. The insurer denied his claim based on its general exclusion relating to claims arising from depression, anxiety, stress, mental or nervous conditions.

Paul challenged the insurer's decision and made a complaint to the Financial Ombudsman Service (FOS).<sup>6</sup> The FOS found that the exclusion in Paul's travel insurance policy amounted to unlawful discrimination under the *Disability Discrimination Act 1992* (Cth) because it sought to treat a person who developed a mental health condition differently to a person without a condition. The FOS also found that the insurer failed to establish that changing its policy would result in unjustifiable hardship and failed to provide actuarial or statistical data to otherwise justify the discrimination. In addition, the FOS found that the insurer had been aware for some time that the nature of the exclusions contained in the policy may fall short of the requirements of the Disability Discrimination Act. The FOS observed that the insurer's denial of Paul's claim, "despite the fact that it knew the applicant's mental illness was a first-presentation mental illness, was, in the circumstances, unreasonable and caused an unusual degree of inconvenience and pressure" on Paul.

Ultimately, FOS found that the insurer was not legally entitled to rely on its exclusion relating to mental illness to refuse to pay Paul's claim. FOS determined that the insurer should pay Paul's estimated \$8877 loss, plus interest, as well as pay Paul \$1500 in non-financial loss for inconvenience and delay.

Concerns have also been raised by advocacy groups about the difficulties people with mental health conditions can experience in seeking review and redress of an insurer's decision related to obtaining or claiming insurance. This includes:

- difficulties obtaining clear written reasons for a decision
- the failure of insurers to provide consumers with access to the statistical and actuarial data relied on in making decisions
- the ineffectiveness of internal dispute resolution mechanisms, including long time frames, a lack of consultation, the cost and time required to obtain medical health records that often span most or all of the applicant's life, and unsatisfactory outcomes (particularly where the applicant is not legally represented)

- the lack of clarity about complaint processes following dispute resolution.<sup>7</sup>

The difficulties that people with mental health conditions face in accessing and claiming insurance can have significant impacts. Current industry practices risk further stigmatising mental illness and send the message that seeking treatment and support should be avoided because it may result in being denied services available to the rest of the community.<sup>8</sup> An individual who is denied travel insurance must also personally accept the financial risk of a mental health condition impacting on their travel.

### **CASE STUDY: PREVIOUS UNRELATED MENTAL HEALTH CONDITION USED FOR REJECTION<sup>9</sup>**

Eleni (not her real name) booked a trip to Thailand. During the trip, she experienced a panic attack and was admitted to hospital. Eleni's husband flew to Thailand to accompany her home. She was subsequently diagnosed with bipolar disorder.

Eleni made a claim on her travel insurance for medical expenses and unexpected travel costs. The insurer refused to pay on the basis of a blanket mental health exclusion in her policy. The insurer also implied that the condition that Eleni had experienced in Thailand was a pre-existing condition, on the basis that she had experienced post-natal depression more than 16 years earlier.

The Public Interest Advocacy Centre assisted Eleni to seek an internal review of the decision to refuse to pay her claim on the basis that the blanket mental health exclusion was likely to constitute discrimination and that Eleni's single episode of post-natal depression did not fall within the definition of a "pre-existing medical condition" in the product disclosure statement. The insurer eventually paid Eleni's claim.

### **1.2.2 RECENT DEVELOPMENTS**

In recent years there has been greater community awareness and understanding of mental health, and the impact that discrimination and stigma can have on people who experience mental health conditions. However, advocates for consumers of mental health services believe that the insurance industry has not kept pace with changes in community attitudes by improving practices related to people with mental health conditions.<sup>10</sup> Building on concerns expressed by advocacy groups, the spotlight has recently turned to the difficulties that people with mental health conditions can face in accessing and claiming insurance. This includes the following recent activities:

- The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry's examination of practices in the insurance industry that impact on people with a disability (including mental health conditions).
- The Actuaries Institute's 2017 Green Paper on Mental Health and Insurance, which explores the complex balance between insurers maintaining affordable and sustainable insurance products while meeting community expectations.
- The 2017 Review of the Insurance Council of Australia's General Insurance Code of Practice, which recommended introducing best practice guidance on mental health (including a statement that insurers must, as a minimum standard, comply with anti-discrimination laws).<sup>11</sup>
- The federal Parliamentary Joint Committee on Corporations and Financial Services into the Life Insurance Industry, which made recommendations about mental health claims related to life and income protection insurance.<sup>12</sup>

## **CASE STUDY: INGRAM V QBE INSURANCE (AUSTRALIA) LTD**

In *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 (*Ingram v QBE*), the Victorian Civil and Administrative Tribunal (VCAT) found that QBE unlawfully discriminated against Ella Ingram on the basis of a mental health condition.

In late 2011, Ella decided to join a school trip to New York and paid costs including a travel insurance policy issued by QBE. In January 2012, Ella experienced symptoms of depression for the first time, which resulted in the decision not to go on the trip. Ella's mother lodged a claim for the cost of the trip, which was rejected by QBE.

QBE relied on a general exclusion in the policy for claims arising from a mental health condition. QBE said that its decision was based on statistical modelling and analysis of claims arising from a range of causes, which demonstrated that there is a high risk of cancellation of travel policies due to mental health conditions.

VCAT found that QBE directly discriminated against Ella when it issued a policy that included a blanket mental health exclusion and when it refused indemnity based on the exclusion. VCAT found that QBE did not provide sufficient evidence to rely on exceptions to discrimination, including proving that the discrimination was based on actuarial or statistical data or that QBE would have suffered unjustifiable hardship if it had not included the exclusion in the policy. Ella was awarded more than \$4000 for the value of the cancelled trip and \$15,000 for hurt and humiliation.

A detailed analysis of the *Ingram v QBE* case is included in Chapter 3.

The insurance industry is regulated by consumer, financial and prudential laws and regulations that are designed to set standards of compliance for insurers, and protect consumers from unscrupulous corporate conduct. Importantly, the regulatory framework also includes state and federal anti-discrimination laws, which prohibit unlawful discrimination by insurers. These laws regulate discrimination through a mix of education, dispute resolution, research and enforcement. The Australian Human Rights Commission has also issued specific guidelines for providers of insurance.<sup>13</sup>

Without proper attention to anti-discrimination laws and rigorous processes to prevent discrimination, insurers can risk discriminating against the most vulnerable people in our community, including people with mental health conditions. Failure to comply with anti-discrimination laws is not only unlawful but does not meet community standards for how a person with a mental health condition should be treated.

### **1.2.3 THE NEED FOR AN INVESTIGATION**

#### **The Commission's role to enforce the law**

As Victoria's equal opportunity regulator, the Commission is tasked with enforcing the Equal Opportunity Act by exercising our statutory functions. This includes investigating systemic discrimination that has the potential to harm particular groups of people and can have flow-on effects for the broader community.

The Commission's investigation power helps to shift the burden of enforcing the law from individual complainants to the regulator. This power is critical to relieve the burden from consumers and allow the Commission to use its enforcement powers to eliminate discrimination to the greatest extent possible. The burden of enforcement can be compounded when a complainant has a mental health condition. The perceived complexity, time, costs and stigma associated with bringing a complaint can also make individuals with mental health conditions reluctant to use dispute resolution processes.

## **Limitations of individual complaints and advocacy**

The Commission is aware that individual complaints are not always sufficient to lead to a broader change in policy or practice. For example, in the case of *Ingram v QBE*, despite VCAT's finding that QBE had unlawfully discriminated against Ms Ingram, QBE initially refused to change its policies and practices, asserting that its mental health exclusions were necessary to keep travel insurance affordable and that the Tribunal's findings related "only to a specific set of circumstances".<sup>14</sup>

QBE changed its travel insurance policies in 2016. QBE's participation in the Investigation is discussed further in Chapter 2.

The Commission is also aware that consumer advocates have worked for more than a decade to influence positive change to industry practice related to people with mental health conditions. For example, Beyond Blue states that considerable effort, time and resources have been invested by consumer advocates over the years to address this issue. However, "while undoubtedly mental health is firmly on the agenda for the industry, and there are signals of change, this has not yet resulted in any large-scale, systemic improvements".<sup>15</sup>

## **The ability to access relevant data**

The Commission's investigation powers enabled us to request and assess whether insurer parties had sufficient actuarial or statistical data to satisfy the exception to discrimination under the Equal Opportunity Act. There is currently no transparency in the travel insurance industry about whether relevant data exists to justify the exception to discrimination and consumers can face difficulties obtaining relevant data (which is rarely provided outside formal complaint or court processes).

The *Ingram v QBE* case highlighted the complexity of whether and how insurers can validly claim an exception, presenting an opportunity for the Commission to clarify the application of the exception and provide guidance on best practice to insurers.

## **Investigation as catalyst for change**

The use of the Commission's investigation power also ensured that we could hold insurers to account with a broad range of investigation outcomes. The Equal Opportunity Act allows the Commission to "take any action it thinks fit" after conducting an investigation, such as entering into an agreement about actions required to comply with the Act.<sup>16</sup> Investigation outcomes have the potential to create lasting systemic change, can have a positive impact on a significant number of Victorians, and can help to maintain industry and community engagement on important issues.

The Commission commends insurers who have removed blanket mental health exclusions from their travel insurance policies prior to the Investigation. It also acknowledges the cooperation of the party and non-party insurers who participated in the investigation, including sharing data and other information with the Commission.

The timeline over provides a snapshot of the many changes that have occurred in the discrimination and travel insurance space, particularly since the Commission commenced its Investigation.



## 1.2.4 TIMELINE OF CHANGE

Date	Event
December 2015	<i>Ingram v QBE Insurance (Australia) Ltd (Human Rights)</i> [2015] VCAT 1936 judgment
March 2017	Financial Ombudsman Service Determination 428120
July 2017	QBE removes exclusion terms
October 2017	Actuaries Institute publishes Green Paper into mental health conditions and insurance
	<b>Victorian Equal Opportunity and Human Rights Commission publicly announces Investigation</b>
November 2017	Allianz considers it no longer relies on the exclusion terms but does not remove from all platforms
May 2018	Suncorp removes exclusion terms in May 2018
June 2018	Allianz completes removal of exclusion terms from all policies and platforms, begins offering limited cover for some pre-existing mental health conditions
	World Nomads Group (WNG) notes it is planning to remove exclusion terms and will do so by end of 2019
January 2019	The Commission informs insurers of proposed findings
	The Commission informs the Insurance Council of Australia of recommendation to make enforceable mental health minimum requirements in Code of Practice
	The Commission recommends all insurers consider removing of blanket pre-existing condition clauses for mental health
February 2019	WNG agrees to expedited removal of exclusion terms
	Allianz, WNG, and Suncorp acknowledge recommendations regarding future practice including changing pre-existing condition terms

## 1.3 The investigation

### 1.3.1 ABOUT THE COMMISSION

The Commission is an independent statutory body with responsibilities under the *Equal Opportunity Act 2010*, the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), and the *Racial and Religious Tolerance Act 2001*.

The Commission's role is to protect and promote human rights and eliminate discrimination, sexual harassment and victimisation to the greatest extent possible. We do this through a range of functions.

<b>Resolve complaints</b>	We resolve complaints of discrimination, sexual harassment, racial and religious vilification and victimisation by providing a free, confidential dispute resolution service.
<b>Research</b>	We undertake research to understand and find solutions to systemic causes of discrimination and human rights breaches.
<b>Educate</b>	We: <ul style="list-style-type: none"><li>• provide information to help people understand and assert their rights</li><li>• conduct voluntary reviews of programs and practices to help organisations comply with their human rights obligations</li><li>• provide education and consultancy services to drive leading practice in equality, diversity and human rights, including a collaborative approach to developing equal opportunity action plans.</li></ul>
<b>Advocate</b>	We raise awareness across the community about the importance of equality and human rights, encouraging meaningful debate, leading public discussion and challenging discriminatory views and behaviour.
<b>Monitor</b>	We monitor the operation of the Charter to track Victoria's progress in protecting fundamental rights.
<b>Enforce</b>	We intervene in court proceedings to bring an expert independent perspective to cases raising equal opportunity, discrimination and human rights issues. We also conduct investigations to identify and eliminate systemic discrimination.

## 1.3.2 PURPOSE AND SCOPE OF THE INVESTIGATION

### Purpose

The Investigation's purpose was to determine whether systemic discrimination was occurring in the travel insurance industry against people with a mental health condition. And, if so, to promote equality and best practice in the industry by attempting to eliminate discrimination to the greatest extent possible. Equality is about ensuring that everyone has the same life opportunities, including the ability to access and claim travel insurance to make travel affordable and safe for everyone.

The investigation sought to examine whether travel insurers were lawfully relying on an exception under the Equal Opportunity Act to justify discrimination.<sup>17</sup> The exception allows an insurer to discriminate by refusing to provide an insurance policy to a person, or in the terms on which a policy is provided, if the discrimination is based on reasonable actuarial or statistical data and any other relevant factors. The purpose of the investigation was to use the Commission's investigation function to:

- require the insurer parties to the Investigation to provide the Commission with the actuarial, statistical and other data they relied on to discriminate
- assess whether the data was sufficient to meet the exception to discrimination (and was therefore lawful discrimination under the Equal Opportunity Act)
- assess whether the conduct of insurers and others in the industry was compliant with the positive duty to eliminate discrimination as far as possible.

### Scope

The investigation examined the terms on which travel insurers:

- offered insurance on terms that exclude or limit cover to people who have, or have had, a mental health condition
- denied insurance cover, or the offering of insurance policies on unfavourable terms (such as extra costs being required through higher premiums or excesses), to people who disclose pre-existing mental health conditions, without adequate risks assessments being undertaken for the individuals concerns, and/or are not reasonable.

## **TERMS OF REFERENCE**

The terms of reference for the Investigation set out that the Commission:

- is aware that some providers of travel insurance products have provided contracts of insurance on terms that exclude cover to people on the basis of a mental illness, or have refused indemnity under such contracts of insurance to people on the basis of their mental illness
- is aware of recent cases, determinations and industry commentary regarding the availability and provision of travel insurance for those who have or have had a mental illness
- considers that without lawful justification, such practices may be in contravention of the Equal Opportunity Act, including its objectives
- on this basis considers that the availability of travel insurance to people who have or have had a mental illness raises a serious issue, having regard to the requirement that any limits on the availability of travel insurance to people with a disability be reasonable, by reference to actuarial or statistical data or other relevant factors
- considers that an investigation pursuant to section 127 of the Equal Opportunity Act would assist in understanding the extent to which such practices are occurring and provide an opportunity to offer to the Australian insurance industry guidance about best practice.

The Commission has determined to conduct an investigation, which will consider:

- practices involving the offer of travel insurance on terms which substantially limit or exclude cover for people with a mental illness, or where indemnity under contracts of travel insurance has been refused to people who have or have had mental illnesses
- whether such conduct is unlawful discrimination under the Equal Opportunity Act
- what steps, if any, have been taken by insurers to eliminate such discrimination pursuant to their positive duty under Part 3 of the Equal Opportunity Act
- what options there are to eliminate any unlawful discrimination, to the greatest extent possible
- any other matters that are incidental to the above.

### **Limitations of the Investigation**

The Investigation was limited to potential unlawful discrimination in the travel insurance industry only. The Commission is aware of concerns raised by consumer advocates about unfair and potentially unlawful practices in the provision of other forms of insurance, such as life insurance and income protection insurance. Other forms of insurance are regulated in the same way as travel insurance under the Equal Opportunity Act, including the application of legal exceptions. Therefore, the conclusions in this report may be applicable to the insurance industry more broadly in promoting best practice.

The Investigation focused on 'blanket' mental health exclusions in travel insurance policies.

In this way, the Commission could consider as its primary focus what data or information was held by insurers as the basis for offering the exclusion terms. The data or information is critical to be able to rely on an exception in the Equal Opportunity Act. The Commission considered the impact of the policies on people who have, or have had, a mental health condition. As part of this, it considered how travel insurers provide (or do not provide) insurance to people with a pre-existing medical condition.

Finally, the Investigation was limited to the application of the Equal Opportunity Act to travel insurance policy terms, conditions and practices. Although the Investigation did not directly invite submissions from people with mental health conditions who purchase

and claim travel insurance, the Commission did draw on the lived experiences of people with mental health conditions. We did this through case studies that have been provided through various public inquiries, as well as the Commission's complaint and enquiry data.<sup>18</sup> These case studies are an important reminder of the personal stories that underpin the formal Investigation.

### 1.3.3 POWER TO INVESTIGATE

The Commission's investigation power was introduced in 2010 to provide a framework for dealing more effectively with systemic discrimination and to "encourage more proactive compliance and alleviate the burden on individuals to address discrimination through complaints".<sup>19</sup> The investigation power enables the Commission to enforce the law in a proactive and strategic way.

#### **THE COMMISSION'S POWER TO INVESTIGATE**

The Commission has the power to conduct investigations under section 127 of the Equal Opportunity Act. The Commission's Board must decide whether the Commission should commence an investigation.

Section 127 sets out the threshold criteria that must be met before the Commission can commence an investigation including if:

- the matter:
  - raises an issue that is serious in nature
  - relates to a class or group of persons
  - cannot reasonably be expected to be resolved by dispute resolution or by making an application to VCAT
- there are reasonable grounds to suspect that one or more contraventions of this Act have occurred
- the investigation would advance the objectives of the Act.

In making a decision, the Commission's investigations policy requires the Commission's Board to consider other practical factors including:

- what is the nature and seriousness of the alleged breach of the Equal Opportunity Act?
- would the Commission within its functions be likely to obtain sufficient evidence to support a finding of a breach of the Act?
- what are the resource requirements in conducting the investigation, including how much is the investigation likely to cost, does the Commission have the required staff to undertake the investigation and can the workload involved in the investigation be managed?
- what is the likelihood of obtaining a satisfactory outcome?
- will action taken by the Commission set an example to other individuals and organisations about conduct that is not acceptable under the Equal Opportunity Act, that is, will the outcome of the investigation have a broader impact?
- are there other ways of addressing the issue raised?

Section 130 empowers the Commission to ask any party to provide information if it is reasonably necessary for the purpose of conducting an investigation.

## **Advancing the objectives of the Equal Opportunity Act**

The investigation function supports the objectives of the Equal Opportunity Act to:

- eliminate discrimination, sexual harassment and victimisation to the greatest extent possible
- further promote and protect the right to equality set out in the Charter
- encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
- promote and enable the progressive realisation of equality by recognising that discrimination can cause social and economic disadvantage, and that access to opportunities is not equitably distributed throughout society
- enable the Commission to encourage best practice and facilitate compliance (including by using its enforcement functions).

In particular, the investigation can consider whether there has been a contravention of the positive duty to eliminate discrimination, as far as possible.

## **IMPACT OF INVESTIGATION**

Over the course of the Investigation, a number of important and significant changes occurred, most notably that:

- all travel insurers party to the Investigation have either already or have now taken immediate steps to remove exclusion terms of the kind investigated by the Commission
- all travel insurers party to the Investigation agreed to take steps to address the Commission's recommendations, including in relation to the way they offer and indemnify pre-existing mental health conditions
- leading industry groups have acknowledged their role and have agreed to support the Investigation by providing improved education and enforceable provisions to ensure enduring change.



## 1.4 Methodology

### 1.4.1 SELECTING THE INSURERS

The Commission selected the insurers based on:

- the significance of their market share in the Australian travel insurance industry
- an assessment of the travel insurance products each insurer provided (determined by reference to public Product Disclosure Statements)

- the identification of travel insurance policies with general mental health exclusions that deny coverage to, and preclude any payment to, a person who makes a claim because they have experienced a mental health condition. These clauses may include words such as:

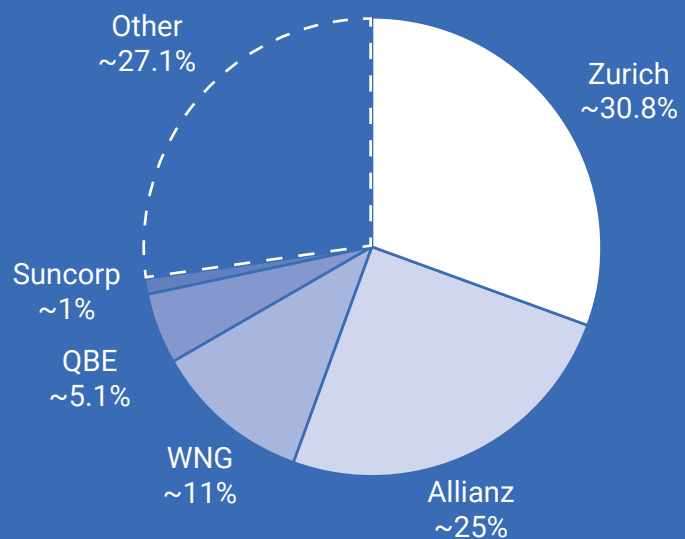
We will not pay claims arising from psychiatric, mental, nervous, emotional, personality and behavioural disorders, including but not limited to phobias, stress, anxiety and depression.

The Commission selected the following insurers which, at the time of the investigation, represented approximately 70 per cent of the travel insurance market, and included:

- three insurers that maintained general mental health exclusions at the time of the investigation and were asked to provide data under section 130 of the Equal Opportunity Act: World Nomads Group (WNG), Suncorp and Allianz (party insurers)
- two insurers that had removed existing mental health exclusions by the time of the investigation and were asked to voluntarily provide information to assist the investigation: Zurich and QBE (the non-party insurers).<sup>20</sup>

QBE declined to participate in the investigation.

**Market share of travel insurers in Australia**



### 1.4.2 INFORMATION SOURCES

The Commission has the power to collect information for the purposes of an investigation by using a broad range of methods, including asking a party to provide information on a voluntary basis, seeking stakeholder input, or any other means it considers appropriate in the circumstances and within its powers.<sup>21</sup>

The Commission used the following information sources to inform the investigation:

- information provided voluntarily by non-party insurers on request
- data provided by parties under section 130 of the Equal Opportunity Act
- research on potential discrimination in the insurance industry<sup>22</sup>
- consultation with consumer advocates and industry bodies<sup>23</sup>
- expert reports from an independent actuary
- relevant case law<sup>24</sup>
- the Australian Human Rights Commission's 2016 *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)*.

### 1.4.3 OUR PROCESS

The Commission has the power to conduct an investigation “in the manner it thinks fit” but is bound by the principles of natural justice.<sup>25</sup> In practice, this means that the Commission will act fairly and ensure that it will:

- give a person whose interests may be adversely affected by an investigation an opportunity to present their view
- act without bias
- base any conclusions arising from the investigation on logically probative evidence.<sup>26</sup>

The Commission understands the importance of natural justice and therefore determined that the Investigation would be consultative. Organisations that participated in the Investigation had an opportunity to comment on the Commission's findings and recommendations prior to the Investigation being finalised.

The Commission used the following process to conduct the Investigation:

<b>Research</b>	The Commission undertook preliminary research on potential unlawful discrimination in the travel insurance industry to inform its decision to commence an Investigation.
<b>Consultation</b>	<p>The Commission consulted with bodies including:</p> <ul style="list-style-type: none"> <li>• consumer advocates such as Mental Health Australia, Beyond Blue, Victoria Legal Aid, the Public Interest Advocacy Centre and SANE Australia</li> <li>• industry bodies such as the Insurance Council of Australia and the Actuaries Institute</li> <li>• the Australian Human Rights Commission.</li> </ul>
<b>Notification</b>	The Commission notified party insurers and non-party insurers about the commencement of the Investigation and requested their participation.
<b>Request for data and information</b>	<p>The Commission requested:</p> <ul style="list-style-type: none"> <li>• information from the party insurers to the Investigation under section 130 of the Equal Opportunity Act including, for example: <ul style="list-style-type: none"> <li>– data considered or relied on to include relevant policy terms</li> <li>– an explanation for how that data is used to decline insurance or to offer alternate terms and conditions of insurance for people with a mental health condition</li> <li>– data regarding the number of times the insurer declined to enter into a contract of insurance on the basis of the applicant having a mental health condition</li> <li>– data regarding the number of times the insurer declined to indemnify an insured on the basis of a relevant policy term or the person’s past or present mental health condition</li> </ul> </li> <li>• information from the non-party insurers including, for example: <ul style="list-style-type: none"> <li>– the reasons and evidentiary basis for removing blanket mental health exclusions from their policies</li> <li>– any subsequent claims related to mental health conditions</li> </ul> </li> <li>• information from industry bodies, for example the Insurance Council of Australia and the Actuaries Institute about best practice and conduct across the industry, including new initiatives and challenges.</li> </ul> <p>The Commission also asked all five insurers to provide information on the steps they have taken to implement the positive duty to eliminate discrimination against people with a mental health condition in the provision of travel insurance.<sup>27</sup></p>
<b>Data analysis</b>	The Commission engaged an independent actuary to analyse the data provided by the party insurers to support our determination of whether the party insurers had sufficient actuarial or statistical data to rely on the exception to discrimination under section 47 of the Equal Opportunity Act.
<b>Consideration</b>	The Commission provided participants in the Investigation the opportunity to understand and respond to the Commission’s preliminary views and findings about compliance with the Equal Opportunity Act, and our recommendations.
<b>Outcomes</b>	All five insurers were notified about the Commission’s intention to publish a report including Investigation findings and recommendations. The insurers were given an opportunity to provide feedback about the Commission’s findings and recommendations that were relevant to a particular insurer.

## 1.5 About this report

---

### 1.5.1 PURPOSE

The purpose of this report is to provide a public and transparent record of the Investigation, including why the Commission decided to commence the investigation, how the Commission undertook the investigation, what the Commission found and the Commission's recommended way forward.

The purpose of the report is not to penalise individual insurers. Rather, the report reflects the process and outcome of the Investigation, which was undertaken with the cooperation and participation of the insurers. The Commission recognises that tackling systemic discrimination is not just about enforcement. It is about working in partnership with organisations and industries to reflect on current practice and find practical ways to prevent further discrimination.

The report seeks to identify systemic discrimination embedded in current industry practice. It makes recommendations to support insurers to implement the positive duty by eliminating discrimination against people with mental health conditions as far as possible. The Commission has approached this task acknowledging the complexities of the law, including the application of legal exceptions.

## Notes

- 1 *Equal Opportunity Act 2010* (Vic) s 44.
- 2 For example, the Public Interest Advocacy Centre, Mental Health Australia, Beyond Blue and SANE.
- 3 Actuaries Institute, *Mental Health and Insurance* (Green Paper, October 2017).
- 4 Australian Bureau of Statistics, 2008, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (Catalogue No. 4326.0), October 2008.
- 5 Based on Financial Ombudsman Service Australia (Determination, Case number: 428120, 31 March 2017) (*'Determination 428120'*).
- 6 From 1 November 2018, the Australian Financial Complaint Authority.
- 7 See Public Interest Advocacy Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (26 April 2018), and Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018). See also Beyond Blue, Submission to the Australian Government Treasury regarding the 'Review of the financial system external dispute resolution framework' (October 2016).
- 8 Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).
- 9 Based on a consumer experience outlined in Public Interest Advocacy Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (26 April 2018).
- 10 Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).
- 11 Insurance Council of Australia, *Review of the General Insurance Code of Practice* (Final Report, June 2018).
- 12 Parliamentary Joint Committee on Corporations and Financial Services, Life Insurance Industry (Report, 27 March 2018).
- 13 Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (Guidelines, November 2016) (*'DDA Guidelines'*).
- 14 'QBE firm on mental illness exclusion, despite tribunal loss', *Insurance News* (online, 8 February 2016) <<http://www.insurancenews.com.au/corporate/qbe-firm-on-mental-illness-exclusion-despite-tribunal-loss>>.
- 15 Beyond Blue, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).
- 16 *Equal Opportunity Act 2010* (Vic) s 139.
- 17 *Ibid* s 47.
- 18 Primarily by reviewing submissions to and transcripts of hearings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and publicly available determinations of the Financial Ombudsman Service (from 1 November 2018, the Australian Financial Complaints Authority).
- 19 Second Reading Speech, Equal Opportunity Bill 2010. Victorian Parliament, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, (Rob Hulls, Attorney-General).
- 20 See Chapter 2 for QBE's contribution to the investigation.
- 21 *Equal Opportunity Act 2010* (Vic), Part 9.
- 22 This includes research undertaken by leading advocacy organisations such as Mental Health Australia, Public Interest Advocacy Centre, Beyond Blue and Choice. In addition, the Commission considered the following research: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws* (Issues Paper 44, 15 November 2013); Anti-Discrimination Commissioner of Tasmania, *Volunteers, Age and Insurance* (Investigative Report, 2013); South Australian Commissioner for Equal Opportunity, 'Disability Discrimination and Insurance' (March 2014) *Law Society of South Australia Bulletin*; Actuaries Institute, *Discrimination: what do actuaries need to be aware of?* (Review, November 2013); Actuaries Institute, *Mental Health and Insurance* (Green Paper, October 2017); Beyond Blue, Submission to the Development of the Consular Strategy 2017–2019 Mental Health (November 2016); *DDA Guidelines* (n 13).
- 23 The Commission consulted with Mental Health Australia, Beyond Blue, Victoria Legal Aid, the Public Interest Advocacy Centre, SANE Australia, the Insurance Council of Australia, the Actuaries Institute and the Australian Human Rights Commission.
- 24 For example, *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 and *Determination 428120* (n 5).
- 25 *Equal Opportunity Act 2010* (Vic) s 129.
- 26 Victorian Equal Opportunity and Human Rights Commission, Investigations Policy (30 August 2011).
- 27 See discussion on the positive duty in Chapter 3 of this report.

# Chapter 2: An overview of insurance

## 2.1 What is insurance?

Most people hold different insurance products throughout their life for a range of reasons. In general, insurance is bought by consumers to provide them with protection in the event things might go wrong in the future.

Broadly, contracts for insurance are either a policy of:

- general insurance, which covers short-term risks of an individual (such as car and vehicle insurance, home and contents, travel and credit card)
- life insurance, which covers the long-term life risk of the insured (such as income protection and health insurance).

### General insurance

For example:

- car and vehicle insurance
- home and contents
- travel and credit card



### Life insurance

For example:

- income protection
- health insurance



Icons made by Smashicons from [www.flaticon.com](http://www.flaticon.com)

In either insurance product, an insurer estimates the liability of a consumer for a particular loss. The insurer then sets an amount or range of cover it is prepared to indemnify, considers what premium to apply to provide the indemnity and, finally, offers a consumer an insurance contract or policy based on these variables.

At its core, insurance pools the resources of a large number of people with similar risks to make sure that the few who experience loss are protected. In general insurance, pooling resources through the payment of a premium may allow a consumer to avoid paying the full cost of replacing, repairing, rebuilding or restoring valuable things if they are lost, stolen, damaged or destroyed.

In order to assess risk, an insurer or underwriter evaluates what likelihood there is of a risk occurring, which often considers actuarial and statistical data. Insurers also use this information to inform the premium price they are willing to charge when selling a policy. This can be a complex process that involves synthesising a range of information, particularly if the range of possible variables is wide, such as if someone is being insured for a long period of time.

When someone buys an insurance policy the insurer promises it will pay for the type of loss stipulated in the policy, by funding things like repairs or treatment, up to the limit specified in a policy. A consumer will only have access to the pool of money if they claim a loss that is covered by an insurance policy.



In Australia insurance has developed into a complex industry, characterised by:

- major insurers holding complex corporate structures with multiple subsidiaries
- insurers using commercial and contractual arrangements with third-party operators to promote and distribute their product across different platforms and industries
- 'white labelling' between brands, where an insurer re-packages the same product under a different brand profile.

Under the *Equal Opportunity Act 2010* (Vic), an 'insurer' is defined as a "person who is in the business of providing insurance policies".<sup>1</sup> Consistent with the beneficial purpose of the legislation, the Commission considers that each entity that issues, underwrites, or offers products of insurance is an 'insurer' under the Equal Opportunity Act.

## 2.1.1 EXCLUSIONS

In order for an insurer to manage risk, an insurer's policies may have different rules about what they will and won't cover, which is expressed as an 'exclusion'. The exclusions eliminate the insurer's responsibility to pay any claims relating to or arising from the exclusion that they are unwilling to insure. These might include accidents caused by an illegal activity, or risky activities such as skydiving.

These exclusions narrow the scope of coverage offered by the insurer.

These factors may make it difficult for consumers to understand what they are buying, what protections they have in place if something goes wrong and which company is ultimately their insurer.<sup>2</sup>

### GENERAL EXCLUSION OR 'BLANKET' EXCLUSIONS

Many insurance policies now contain lengthy and complicated sections of general exclusions, including terms that refuse any cover for an entire category of risk (often referred to as 'blanket' exclusion conditions).

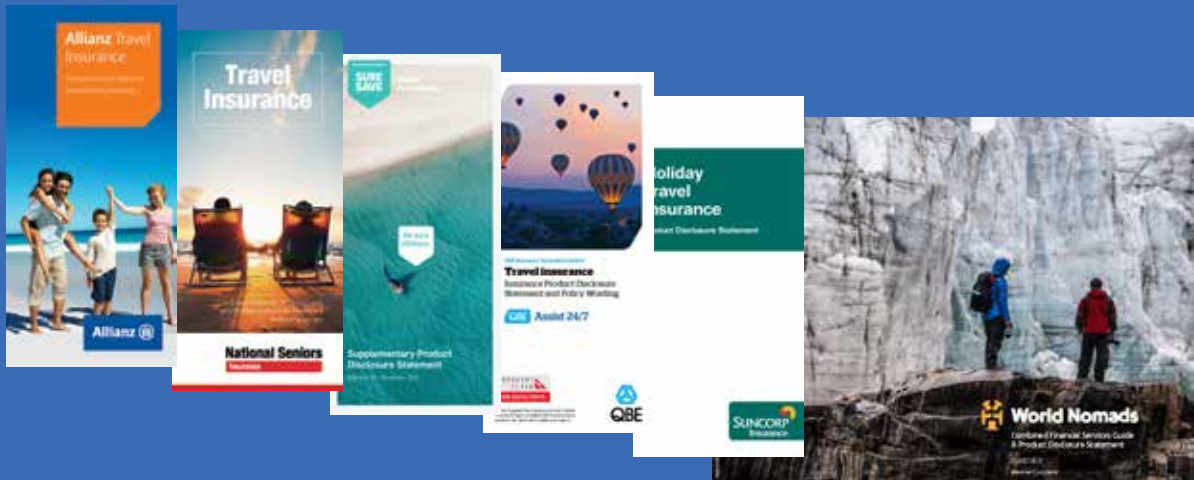
A typical blanket exclusion in relation to mental health may say: "we won't pay under any circumstances if ... your claim arises from or is any way related to a mental health condition".

### PRE-EXISTING CONDITION EXCLUSIONS

Depending on the insurer and the insurance policy selected, a consumer may find that, if they have experienced a mental health condition before, they will also be separately excluded under another clause from any claim relating to their mental health as it would be considered a 'pre-existing condition'.

### OTHER EXCLUSIONS

Exclusions may also be 'partially insurable', which accepts a limited indemnity for a risk, or 'insurable for a price', which requires the consumer to pay an additional premium to add specific coverage for a risk.



Examples of product disclosure statements

## 2.1.2 THE PRODUCT DISCLOSURE STATEMENT

Under Australian law, a financial services licensee (such as an insurer) must provide a consumer with a product disclosure statement (PDS), when it recommends or offers a financial product.<sup>3</sup> The PDS document must include information about the product’s key features, such as its fees, commissions, benefits, risks and complaints handling processes.<sup>4</sup>

Many insurance contracts require a consumer to enter details about the length of time they need insurance for, what they need covered

# \$110.6 million

profit for the Australian travel industry in 2017–18



25% of the travelling population were Victorian

specifically and, depending on the form of insurance, may require some information about their health. These details often help determine the scope and cost of the insurance. While these details form important specific terms of the contract between the consumer and the insurer, the finer points

of the contract of insurance's coverage are contained in the policy's PDS.

Accordingly, the PDS is the bedrock document for consumers to use when determining the quality, exclusions and coverage of their insurance policy.

## 2.2 Travel insurance in Australia

Travel insurance is a form of general insurance that offers an indemnity or coverage for travellers. Travel insurance policies often include terms that provide luggage insurance, travel delay and cancellation, and overseas medical insurance. Central terms of policies offered by travel insurers relate to a policy holder's health and medical coverage.

Travel insurers charge premiums for a range of insurance options, which are designed to provide coverage for unforeseeable and unfortunate circumstances that may happen during travel. Cancellation insurance and emergency medical insurance account for a significant portion of travel insurance industry revenue.<sup>5</sup>

Many industry operators sell their products through third-party agents, which are then retailed directly to consumers. Unlike other general insurance products, a large portion of travel insurance is sold through distributors and partner companies – such as Cover-More.<sup>6</sup>

### 2.2.1 TRAVEL INSURANCE BY THE NUMBERS

In the financial year ending 30 June 2018, the travel insurance industry in Australia recorded a \$110.6 million-dollar profit,<sup>7</sup> and has experienced strong growth in the last five years due to the number of Australians travelling overseas.<sup>8</sup>

Victorians accounted for approximately 25 per cent of Australia's overall travelling population in the financial year ending June 2018.<sup>9</sup>

## 2.3 Travel insurers selected for Investigation

### 2.3.1 SCOPE OF INVESTIGATION

The Investigation sought participation in the Investigation from five different insurers, covering approximately 70 per cent of the total travel insurance market in Australia. Three insurers maintained clauses in policies that expressly ruled out cover for mental health conditions (blanket exclusion), and were asked to provide the information they relied on to offer insurance on these terms to the Investigation. The remaining two insurers had already removed the blanket exclusion terms and assisted the Commission with our inquiries.

#### Insurers that maintained clauses relating to mental health conditions

In accordance with its Terms of Reference, the Commission approached Allianz Australia Insurance Limited<sup>10</sup> (Allianz), Suncorp Group Limited<sup>11</sup> (Suncorp) and World Nomads Group Pty Ltd<sup>12</sup> (WNG) three of Australia's leading insurers in the travel insurance industry.

The Commission requested that Suncorp, Allianz and WNG's participate in the Investigation based on each company's market share in the Australian travel insurance industry. The request was also informed by our assessment of the travel insurance products offered, with specific regard to the insurers' publicly available PDSs.

The Commission identified policies being sold by each of the three insurers between the period of 1 July 2017 to 19 April 2018 (the Investigation Period) that included apparently discriminatory terms. We asked these three insurers to provide the Commission with information they each relied on in order to lawfully discriminate under the Equal Opportunity Act.

#### MARKET SHARE OF TRAVEL INSURANCE IN AUSTRALIA

**Zurich** = ~30.8 per cent (including insurance sold via major distributor Cover-More)<sup>13</sup>

**Allianz** = ~25 per cent (including Allianz Global Assistance)<sup>14</sup>

**WNG** = ~11 per cent (market share of parent company nib will, from April 2019, include acquisition of former travel insurance business from QBE worth approximately 5.1 per cent of overall market share)

**Suncorp** = ~1 per cent<sup>15</sup>

**QBE** = ~5.1 per cent<sup>16</sup> (Subsequently sold to nib, now part of WNG)<sup>17</sup>

**Other** = 27.1 per cent

#### Insurers that had removed the exclusion terms

The Commission also approached insurers QBE and Zurich, which had recently changed policies regarding mental health exclusions. We asked these insurers to assist the Investigation by explaining the reasons for the relevant changes to remove exclusions for mental illnesses from their PDSs.

The insurers were also asked to outline the measures they have taken to eliminate discrimination against people on the basis of a mental health condition, as required by the positive duty under section 15(2) of the Equal Opportunity Act.

## 2.4 Insurer profiles

### 2.4.1 ALLIANZ

#### Allianz's business

Allianz Australia Limited<sup>18</sup> and Allianz Australia Insurance Limited<sup>19</sup> (Allianz) are the Australian subsidiaries of the multinational company Allianz SE,<sup>20</sup> a European financial services company headquartered in Munich, Germany. In 2017 Forbes ranked Allianz SE as one of the world's largest insurance companies.<sup>21</sup>

In Australia and New Zealand, Allianz employs approximately 4300 staff and is headquartered in Sydney. Allianz's core operations include a mix of both general and life insurance products, such as car insurance, home and contents, small business and life insurance.

#### Allianz as a travel insurer

Allianz is one of Australia's largest providers of travel insurance in Australia.<sup>22</sup> Public reports indicate that Allianz Australia's revenue from travel insurance operations has risen over the last five years and is expected to continue growing.<sup>23</sup>

While Allianz does not issue and distribute travel insurance directly to consumers, Allianz underwrites travel insurance policies that are issued and distributed by its related body corporate, AWP Australia Pty Ltd, trading as Allianz Global Assistance (AGA).<sup>24</sup>

The Commission notes that responses to the Investigation were prepared and provided by Allianz and AGA jointly.

Allianz holds partnerships with several well-known brands and institutions, including National Australia Bank (NAB), Citibank and HSBC. Allianz underwrites products sold through these institutions as either the institution's branded insurance, or sold as an Allianz branded product. Over the Investigation Period, Allianz sold a number of travel insurance products through its subsidiaries or third-party relationships.

#### ALLIANZ'S ASSOCIATED BRANDS

- Allianz Travel Insurance (Direct) (ATID)
- Zuji
- Wotif.com
- Webjet
- UniHealth
- STA
- Lastminute.com.au
- NAB
- Bank West

Allianz and AGA's participation in the Investigation is discussed in Chapter 6.

## 2.4.2 SUNCORP

### Suncorp's business

Suncorp Group Limited (Suncorp) is an Australian company and a top 20 ASX-listed corporation, with 13,500 employees across Australia and New Zealand. It holds approximately 9 million customers on its books and approximately \$96 billion in assets.<sup>25</sup> Suncorp is one of the largest general insurance groups in Australia.

It offers a range of different financial products and services, including travel insurance. Many of these services and products are offered across several well-known brands.

### Suncorp as a travel insurer

Suncorp offers several travel insurance products, most prominently through Vero Insurance, its flagship travel insurer, as well as through its other owned brands such as AAMI, GIO and Apia. AAI Limited underwrites these products.<sup>26</sup>

### SUNCORP'S ASSOCIATED BRANDS

- Suncorp
- AAMI
- GIO
- Apia
- Shannons
- Vero

Several products and services are also offered through Suncorp's third-party partners, such as Citibank.<sup>27</sup>

Suncorp's participation in the Investigation is discussed in Chapter 5.

## 2.4.3 WORLD NOMADS GROUP

### World Nomads Group's business

World Nomads Group Pty Ltd (WNG) was established in 2000 and provides services across over 130 countries and several international offices, including headquarter offices in Sydney, Australia. In 2015, WNG (and its subsidiaries including Cerberus Special Risks Pty Ltd (Cerberus)<sup>28</sup> and WorldNomads.com Pty Ltd) was acquired by nib holdings Limited (nib).

WNG provides ancillary insurance services, such as claims management and emergency assistance for insurance policies written in Australia and New Zealand. WNG travel insurance products are issued by Cerberus, which acts as an agent of certain underwriters at Lloyds. In 2018, nib acquired QBE's travel insurance business, QBE Travel, for \$25 million.<sup>29</sup>

### WNG and Cerberus as travel insurers

WNG is considered to be Australia's third largest travel insurance distributor<sup>30</sup> and is the insurance trusted by several travel brands including Lonely Planet and STA Travel.<sup>31</sup>

Cerberus travel insurance products are also issued by other entities.<sup>32</sup>

### CERBERUS'S ASSOCIATED BRANDS

- Travel Insurance Direct Pty Ltd (TID)
- World Nomads.com Pty Ltd (World Nomads)
- SureSave Pty Ltd (SureSave)
- Cheap Travel Insurance Pty Ltd (CTI)
- nib Travel Insurance Distribution (nib)

World Nomads Group's participation in the Investigation is discussed in Chapter 4.



## 2.4.4 ZURICH AND COVER-MORE

### Zurich and Cover-More's business

Zurich Insurance Group is a multinational insurance group, which owns Australian based subsidiary Zurich Australia Insurance Limited (Zurich). In April 2017, Zurich purchased insurance distribution platform Cover-More for approximately \$741 million.<sup>33</sup> Zurich has underwritten Cover-More products since 1 June 2017.

Cover-More acts as an agent of Zurich under a binder contractual arrangement, which authorises Cover-More to provide a range of services including issuing policies, product design and claims management services.<sup>34</sup> In Australia, Cover-More operates its travel insurance business through two separate Australian Financial Services Licensees, Cover-More Insurance Service Pty Ltd and Travel Insurance Partners Pty Ltd (collectively, Cover-More).

### Zurich and Cover-More as travel insurers

Zurich, through Cover-More, offers a wide range of travel insurance products.

#### ZURICH'S ASSOCIATED BRANDS

- Australia Post
- Cover-More Travel Insurance
- Medibank
- Flight centre

In June 2017, prior to Zurich's purchase, Cover-More publicly announced that it would begin to offer mental health coverage by removing general exclusions for mental health conditions in travel insurance policies it issued.

Zurich and Cover-More's participation in the Investigation is discussed in Chapter 7.

## 2.4.5 QBE

### QBE's business

QBE Insurance Group Limited is one of the world's top 20 general insurance and reinsurance companies. QBE Insurance Group Limited's locally-based subsidiary is QBE Australia (QBE), a leading ASX-listed company and Australia's largest global insurer. It has more than 14,000 employees and provides a range of insurance products including lenders' mortgage insurance, car, travel and home insurance, as well as tailored industry cover for industries such as aviation and farming.<sup>35</sup>

### QBE as a travel insurer

In 2018, QBE held approximately 5.1 per cent of the overall travel insurance market share in Australia.<sup>36</sup> As noted above, the Commission understands that QBE was purchased by nib in late 2018 for \$25 million.

In April 2018, the Commission wrote to QBE requesting its voluntary participation in the investigation as a non-party insurer.

QBE chose not to participate in this Investigation. It advised the Commission it had determined to sell its travel insurance business and, on that basis, decided to not provide information to the Investigation.

While disappointed with QBE's lack of participation, the Commission acknowledges that its reason for choosing not to take part was reasonable.

The Commission will provide QBE with a copy of this report. We recommend that QBE considers whether there are any improvements it can make to its compliance with the Equal Opportunity Act. For example, by preparing an action plan that outlines the steps necessary to improve compliance with the Act in response to relevant information in this report.

## Notes

- 1 *Equal Opportunity Act 2010* (Vic) s 47(2).
- 2 Senate Economic References Committee, Commonwealth of Australia, 'Australia's general insurance industry: sapping consumers of the will to compare' (2017).
- 3 See *Corporations Act 2001* (Vic) s 1012B, and Australian Securities and Investments Commission (ASIC), *Disclosure: Product Disclosure Statements (and other disclosure obligations)* (Regulatory Guide 168, October 2011).
- 4 ASIC Moneysmart, 'Product Disclosure Statement', *Glossary* (Web page, 10 May 2018) <<https://www.moneysmart.gov.au/glossary/p/product-disclosure-statement-pds>>.
- 5 IBISWorld, *Travel Insurance – Australia* (Market research report, June 2018) 11 ('*Travel Insurance – Australia*').
- 6 *Ibid* 8.
- 7 *Ibid* 3.
- 8 *Ibid* 4.
- 9 *Ibid* 16.
- 10 Australian Business Number 15 000 122 850.
- 11 Australian Business Number 66 145 290 124.
- 12 Australian Business Number 48 132 902 713.
- 13 *Travel Insurance – Australia* (n 5) 21.
- 14 Advised to be between approximately 22–25 per cent. Email from Allianz and AGA to the Victorian Equal Opportunity and Human Rights Commission, 28 February 2019.
- 15 Email from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, 28 February 2019.
- 16 As at 30 June 2018.
- 17 Sale publicly announced 3 August 2018. Nicola Middlemiss, 'QBE sells travel insurance arm for \$25M' (3 August 2018) *Insurance Business Australia* <<https://www.insurancebusinessmag.com/au/news/breaking-news/qbe-sells-travel-insurance-arm-for-25m-107837.aspx>>.
- 18 Australian Business Number 21 000 006 226.
- 19 Australian Business Number 15 000 122 850.
- 20 Allianz, *About Us* (Web Page) <<https://www.allianz.com.au/about-us/>>.
- 21 Forbes, *The World's Largest Public Companies* (Web Page) <<https://www.forbes.com/global2000/list/>>. In 2017, Allianz SE was ranked number two of global diversified insurers in the Forbes Global 2000 list.
- 22 Advised to be between approximately 22–25 per cent. Email from Allianz and AGA to the Victorian Equal Opportunity and Human Rights Commission, 28 February 2019. Zurich, Australia's largest provider of travel insurance, currently holds approximately 30.8 per cent. On its website, Allianz notes that considers itself to be Australia's fourth largest providers of general insurance: Allianz, *About Us* (Web Page) <<https://www.allianz.com.au/about-us/>>.
- 23 *Travel Insurance – Australia* (n 5) 22.
- 24 Australian Business Number 52 097 227 177. Australian Financial Services License 24563.
- 25 Suncorp, *About us* (Web Page) <<https://www.suncorp.com.au/about-us.html>>.
- 26 Australian Business Number: 48 005 297 807. Australian Financial Services Licence 23230859. Letter from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, 1 June 2018.
- 27 Suncorp, *Strategic Partners* (Web Page, 2019) <<https://www.suncorpgroup.com.au/about/partners>>.
- 28 Australian Business Number 81 115 932 173. Australian Financial Services Licence 308461.
- 29 Alice Uribe, 'Nib Holdings taps into travel "megatrend", acquires QBE's travel arm for \$25 million' (3 August 2018) *Australian Financial Review* <<https://www.afr.com/business/banking-and-finance/nib-holdings-taps-into-travel-megatrend-acquires-qbes-travel-arm-for-25-million-20180803-h13ia1>>.
- 30 nib, '2015' *Company History* (Web Page) <<https://www.nib.com.au/shareholders/company-profile/company-history>>.
- 31 World Nomads, *We are World Nomads* (Web Page) <<https://www.worldnomads.com/about>>.
- 32 Letter from WNG to the Victorian Equal Opportunity and Human Rights Commission, 24 May 2018, Appendix A.
- 33 Jordan Lynn, 'Zurich announces \$741 million acquisition' (12 December 2016) *Insurance Business Australia* <<https://www.insurancebusinessmag.com/au/news/breaking-news/zurich-announces-741-million-acquisition-58330.aspx>>.
- 34 Letter from Cover-More to the Victorian Equal Opportunity and Human Rights Commission, 17 May 2018.
- 35 QBE, *About QBE* (Web Page, 2018) <<https://www.qbe.com/au/about>>.
- 36 *Travel Insurance – Australia* (n 5) 22.

# 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.<sup>1</sup> 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.<sup>2</sup>

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

**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.<sup>4</sup>

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

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.<sup>6</sup>

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’.<sup>7</sup> 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”.<sup>8</sup>

#### **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).<sup>9</sup> 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.<sup>10</sup>

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;<sup>11</sup>
- the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely<sup>12</sup> and is reasonable having regard to that data and any other relevant factors;<sup>13</sup> or
- where actuarial or statistical data is not available and cannot reasonably be obtained, the discrimination is reasonable.<sup>14</sup>

**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”.<sup>15</sup>

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.<sup>16</sup> 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.”<sup>17</sup>

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

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.<sup>20</sup> 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.<sup>21</sup>

## 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”.<sup>22</sup>

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”.<sup>23</sup> 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.<sup>24</sup>

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”.<sup>25</sup>



## **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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> The burden of proving that something would impose unjustifiable hardship rests on the person claiming the unjustifiable hardship.<sup>29</sup>

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:<sup>30</sup>

- (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.<sup>31</sup>

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.<sup>32</sup>

### 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.<sup>33</sup>

#### 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.<sup>34</sup>

Importantly, the positive duty seeks to address systemic causes of discrimination and overcome the limitations of a complaint-based system by providing broader change.<sup>35</sup> 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.<sup>36</sup>

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

#### 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.<sup>38</sup>

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.<sup>39</sup>

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 prohibited<sup>40</sup>
- having a policy that was too general or lacked detail about acceptable and unacceptable behaviour or examples or explain how discrimination is prohibited<sup>41</sup>
- having no practices in place to ensure that the types of behaviour which occurred were either monitored or governed<sup>42</sup>
- 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 attitude<sup>43</sup>
- knowingly permitting discrimination and taking no reasonable action to prevent it or to prevent it continuing<sup>44</sup>
- providing no reference to the legislative foundation in Australia for the prohibition on discrimination or harassment.<sup>45</sup>

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.<sup>46</sup>

## **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 Standards<sup>47</sup> and must prepare two annual reports to APRA.<sup>48</sup> The roles and responsibilities of Appointed Actuaries are further set out in Prudential Standards.<sup>49</sup>

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).<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup>

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,<sup>53</sup> 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.<sup>54</sup> The President may also conduct an inquiry into a complaint and may obtain information relevant to such an inquiry.<sup>55</sup>

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.<sup>56</sup>

## **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)<sup>57</sup> 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)<sup>58</sup> 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).

# 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.)<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>6</sup> 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:<sup>5</sup>

- 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".<sup>7</sup> 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".<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> WNG advised that it recommends that XL Catlin makes an ex gratia payment for all "first-presentation"<sup>11</sup> mental health claims. However, if a claim involves a pre-existing mental health condition, WNG recommends that XL Catlin declines the claim.<sup>12</sup>

#### 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".<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> WNG worked on a number of initiatives, including "data collection and refining underwriting guidelines and claims procedures".<sup>16</sup>

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”.<sup>17</sup>

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”.<sup>18</sup> 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.<sup>19</sup>

## **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.<sup>20</sup> 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.<sup>21</sup>

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”.<sup>22</sup> 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).<sup>23</sup>

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).<sup>24</sup>

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’.<sup>25</sup> 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,<sup>26</sup> 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.<sup>27</sup>

## 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".<sup>28</sup> 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.

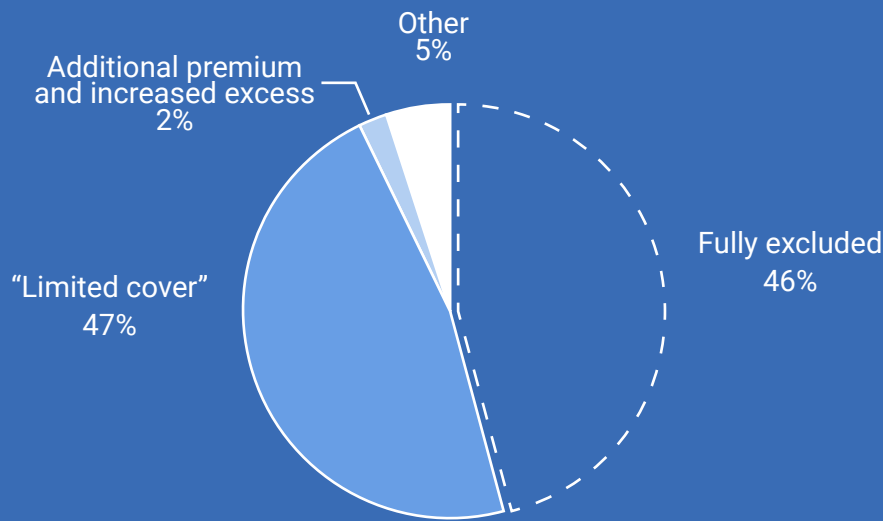
For example, WNG advised that there were 14 mental health claims (related to the TID PDS) recorded during the Investigation Period.<sup>29</sup> In two cases, TID declined indemnity either in reliance on an blanket exclusion term or for reasons related to the person's mental health.<sup>30</sup> WNG 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.<sup>31</sup> 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,<sup>32</sup> 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.<sup>33</sup> The Commission notes, and WNG accepts, that this does not remove WNG's obligation to comply with anti-discrimination law.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup>

and

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

### **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).<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup>

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”.<sup>43</sup>

### 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.<sup>44</sup>

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.<sup>45</sup> While there are challenges with data collection and analysis for mental health conditions<sup>46</sup> 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.<sup>47</sup>

WNG acknowledged the proposed outcomes of the Investigation and welcomed the opportunity to enhance and improve its compliance with the Equal Opportunity Act.<sup>48</sup> 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".<sup>49</sup> 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.<sup>50</sup>

WNG agreed to the Commission's proposal to enter into an agreement<sup>51</sup> 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.<sup>52</sup> 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).

# Chapter 5: Suncorp

## 5.1 Summary

---

1. From 1 July 2017 to 19 April 2018 (Investigation Period), Suncorp provided travel insurance and issued travel insurance policies that excluded payment for claims to people who have, or have had, a mental health condition (blanket exclusion term).
2. Suncorp unlawfully discriminated against people with a mental health condition because it was not able to demonstrate a sufficient basis to offer the blanket exclusion term under the *Equal Opportunity Act 2010* (Vic).
3. Suncorp provided the Commission with a single report from 2008, which it relied on to offer the blanket exclusion term. The report concluded there was insufficient data to offer cover to people with a mental health condition, and recommended Suncorp maintain and even strengthen policy exclusions. Suncorp continued to rely on the 2008 report for its policies in 2017 and 2018. Suncorp told the Commission that its small market size was also a “relevant factor” for the discriminatory terms, arguing it was unable to offer such changes without the rest of the travel insurance industry leading change.
4. The Commission considers the age of the 2008 report, its limited scope and its failure to consider alternatives other than simply excluding cover for people with a mental health condition mean that it was not reasonable for Suncorp to rely upon it. The Commission also considers that the size of an insurer alone is not a valid basis to discriminate.
5. Suncorp began removing the blanket exclusion term from its policies at the beginning of 2018. However, some of Suncorp’s revised policies still prevent cover for claims relating to any pre-existing mental health condition.

## 5.2 About Suncorp

---

Suncorp Group Limited (Suncorp) is an Australian company and a top 20 ASX-listed corporation, with 13,500 employees across Australia and New Zealand.

Suncorp is one of the largest general insurance groups in Australia. It provides services to approximately nine million customers and holds approximately \$96 billion dollars in assets. At the end of the 2017 financial year, Suncorp’s travel insurance portfolio had sold 52,933 policies, and gathered more than \$11 million in premiums.<sup>1</sup>

Suncorp offers several travel insurance products, most prominently through Vero Insurance, its flagship travel insurer, as well as through its other owned brands such as AAMI, GIO and Apia. AAI Limited<sup>2</sup> underwrites these products.<sup>3</sup>

The Commission investigated Suncorp on the basis of its volume of sales, market share and the insurance products it offered, as discussed below.

## 5.3 What did we investigate?

### 5.3.1 SUNCORP'S PRODUCT DISCLOSURE STATEMENT

The Commission identified travel insurance policies sold by Suncorp, which included contracts of insurance sold to Australian consumers under a publicly available Product Disclosure Statement (PDS).

In particular, the Commission identified policies called the 'Suncorp Holiday Travel' and the 'Annual Multi-Trip Travel Insurance', which were sold under a Suncorp PDS.<sup>4</sup>

The Commission identified that both these policies had a PDS that included the following clauses:

[Suncorp] will not pay claims arising from:

6. all psychiatric, mental, nervous, emotional, personality, and behavioural disorders including but not limited to phobias, stress, anxiety and depression
  7. physical, mental or emotional exhaustion, including but not limited to jet lag<sup>5</sup>
- (together, the blanket exclusion terms)

The blanket exclusion terms can have a detrimental impact on a person seeking travel insurance at multiple points, including both when a person purchases insurance, and whether and how a claim may be accepted by Suncorp.

It was the Commission's preliminary view that blanket exclusion terms such as the above were discriminatory, in that 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 unless there is a basis to claim an exception under the Act. One such exception is found in section 47, which outlines limited circumstances where discriminatory conduct of insurers will be lawful. The Commission asked Suncorp to provide information to the Investigation explaining the legal basis for including both the blanket exclusion terms.

The Commission also determined in the Investigation's Terms of Reference to consider insurance policy terms that related to people who have had a mental health condition, and therefore may be denied coverage as a 'pre-existing' condition (pre-existing condition term). Both the pre-existing 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 any mental health condition from obtaining protection under their policy on the basis of any mental health condition. Both terms apply to the full spectrum of mental health conditions – irrespective of differences in their severity or treatment.

### 5.3.2 WHAT DID WE ASK SUNCORP?

The Commission requested Suncorp provide the following information to assist in assessing its compliance with the Equal Opportunity Act:

- all information that was considered or relied upon to include the blanket exclusion terms within the identified PDSs
- its explanation of how any such information was relied upon in formulating the terms on which the insurance would be offered
- its explanation 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
- the number of contracts sold and the number of declines or additional indemnities for both the policies identified, as well as its most commonly sold contract of travel insurance within the Investigation Period
- the measures taken in compliance with section 15(2) of the Equal Opportunity Act (positive duty)
- details regarding its claims and dispute resolution processes in relation to people that have or have had a mental health condition.

## 5.4 Suncorp's response to the Investigation

Suncorp participated in the Investigation and assisted the Commission by providing written responses and key documents to the Investigation.<sup>6</sup> The Commission acknowledges Suncorp's open and cooperative engagement. Relevant information provided by Suncorp is discussed below.

### 5.4.1 POLICIES SOLD

During the Investigation Period, Suncorp advised that it and its affiliated brands offered and sold a total of 41,696 policies of travel insurance. This number included:

- 19,001 policies under AAMI
- 17,055 under Vero
- 5640 under APIA.

Suncorp advised that during the Investigation Period it received 274 applications declaring a mental health condition and declined cover for that condition in each of them.<sup>7</sup>

### 5.4.2 SUNCORP'S POSITION REGARDING ITS COMPLIANCE WITH ANTI-DISCRIMINATION LAW

While the Investigation was ongoing, Suncorp took steps to remove the blanket exclusion terms that were the focus of this Investigation.<sup>8</sup>

Suncorp confirmed that, as at 24 December 2018, its "travel insurance products (across all brands) commenced providing coverage for pre-existing mental health conditions".<sup>9</sup> This is a positive step. However, the Commission notes that, at the time of writing, the AAMI policies being sold by Suncorp still do not offer any coverage for claims arising from a mental health condition to people with a pre-existing mental health condition.<sup>10</sup> This is detailed further below.

In Suncorp's view, regardless of the other policy changes, it believed it had a lawful basis for discriminating against people with a mental health condition in the provision of travel insurance for the reasons outlined below.

### Discrimination lawful as it poses an 'unjustifiable hardship'

Suncorp argued that it was entitled to offer policies with discriminatory terms (that is, the blanket exclusion terms that deny cover to people with mental health conditions) because section 47(1)(a)(ii) of the Equal Opportunity Act permits discrimination that is allowed under the federal *Disability Discrimination Act* 1992 (Cth). In particular, Suncorp noted that under the Disability Discrimination Act it is lawful to discriminate if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.<sup>11</sup>

Suncorp argued that removing the blanket exclusion terms and offering travel insurance to consumers with a mental health condition would "impose unjustifiable hardship"<sup>12</sup> given its small market size and the perceived commercial risks for a relatively small operator.

Finally, in relation to pre-existing condition terms, the Commission identified that its AAMI product would direct consumers wishing to add coverage for a pre-existing mental health condition to contact Suncorp "to discuss product options". Upon doing so, a consumer would be directed to purchase another product, because the AAMI brand product "is a budget product that is provided at a lower price point and does not provide coverage for pre-existing mental health conditions".<sup>13</sup>

### Discrimination lawful having regard to 'relevant factors'

In addition, Suncorp argued that its blanket exclusion terms were lawful because they were reasonable having regard to other 'relevant factors' under sections 47(1)(b) and 47(1)(c) of the Equal Opportunity Act. Other 'relevant factors' refers to factors other than a statistical and actuarial basis justifying the discrimination as necessary for the insurer's financial viability.

Suncorp argued that its limited market share in the travel insurance industry reduced its ability to make "industry leading product change",<sup>14</sup> such as introducing cover to people with a mental health condition.

During the Investigation Period, Suncorp advised that it and its affiliated brands offered and sold a total of

# 41,696

policies of travel insurance

This number included:

## 19,001

policies under **AAMI**

## 17,055

policies under **Vero**

## 5640

policies under **APIA**

During the Investigation Period  
Suncorp received

# 274

applications declaring a mental health condition and declined cover for that condition in each of them

As a small participant in the travel insurance market, Suncorp considered that if it was to “be the first Australian travel insurer to provide coverage for mental health conditions” it would have resulted in “significant risk and would have potentially impacted on the ongoing viability” of its travel insurance portfolio.<sup>15</sup>

Suncorp considered larger travel insurers would have the benefit of claims data to enable more reliable actuarial decisions regarding claims frequency and costs.<sup>16</sup> As a relatively small travel insurer, Suncorp noted it “does not hold sufficient actuarial or statistical data” upon which it can “make decisions regarding mental health coverage”.<sup>17</sup>

Suncorp also considered that its “conservative risk appetite” was a ‘relevant factor’.<sup>18</sup> By this, Suncorp said its willingness to take on risk in a specific portfolio is “influenced by its degree of certainty that it will have a forecast level of claims for each specific segment of customers”.<sup>19</sup>

Finally, Suncorp considered that “there was no statistical and actuarial data upon which Suncorp could reasonably rely” in setting its policy terms.<sup>20</sup> Instead, Suncorp argued that the absence of sufficient actuarial data was itself a ‘relevant factor’ in providing a policy with discriminatory terms. In this regard, it sought to rely on section 47(1)(b)(ii) of the Equal Opportunity Act.<sup>21</sup>

### 5.4.3 SUNCORP'S SUPPORTING DOCUMENTS – THE 2008 VERO REPORT

To support its contention that there was insufficient actuarial data to rely on to offer more inclusive travel policies, Suncorp provided the Commission with a report, *A Statistical Review of Mental Health-Related Disorders in Australia and Relevance to Travel Insurance Claims Risk (Vero Report)*.<sup>22</sup> The Vero Report was drafted in 2008 by Vero, a brand of insurance now owned by Suncorp. The *Vero Report* was provided as “a detailed review of the available literature and data regarding mental health conditions, specifically in relation to travel insurance”.<sup>23</sup> Suncorp advised it commissioned the Report in order “to provide strategic analysis for Suncorp’s travel insurance”.<sup>24</sup>

No other actuarial data or information was provided to the Investigation by Suncorp to substantiate its reliance on the insurer exception to unlawful discrimination in the Equal Opportunity Act.

The *Vero Report* concluded that there was no means to calculate incidence rates for any mental health-related disorders, considered across levels of population, sub-population (for example state, region or residence) or group (age, sex) in Australia.<sup>25</sup> The *Vero Report* ultimately recommended that Suncorp’s

exclusion clauses for claims associated with anxiety, depression and other mental health related disorders should not be removed.

In reaching this conclusion, the *Vero Report* considered there were several issues with the data it reviewed, including inconsistencies of diagnosis and classification of mental health conditions, and a short history of historical data available, with an absence of data in the two years prior to publication (in 2008).<sup>26</sup> Given the data was inadequate to assess the claims frequency and claims intensity of mental health disorders, the *Vero Report* considered that exclusion clauses in travel insurance policies for mental health conditions (including pre-existing mental health conditions) should, if possible, in fact be strengthened or broadened to remove ambiguity.<sup>27</sup> The *Vero Report* did not distinguish between pre-existing or first-presentation mental health conditions.

In Suncorp’s view, the *Vero Report* identified an absence of satisfactory information, which resulted in a high level of uncertainty for Suncorp and an inability to properly price the risk of cover for mental health conditions.<sup>28</sup> Suncorp advised that it relied on the *Vero Report*’s recommendation in deciding that coverage should not be introduced for mental health conditions.<sup>29</sup>

## 5.5 Opinion of an independent actuary

### 5.5.1 EXPERT ACTUARY ENGAGED BY COMMISSION

The Commission engaged an independent actuary, Actuarial Edge (the Actuary), to assist it to consider insurer compliance under the Equal Opportunity Act.

The Commission asked the Actuary for an expert opinion on whether the conclusions drawn by Suncorp in the 2008 *Vero Report* were actuarially sound, and what options for better practice compliance were available to an insurer in circumstances such as Suncorp, where data may be limited. The Actuary produced a report to the Commission on this basis, outlining her actuarial analysis of the information and providing her view on what options for compliance were reasonably open to Suncorp during the Investigation Period.<sup>30</sup>

### 5.5.2 THE ACTUARY'S ANALYSIS OF SUNCORP'S SUPPORTING DOCUMENT

#### Positive aspects of actuarial information

The Actuary noted the *Vero Report* had sourced “considerable statistical information to understand the risk statistics”,<sup>31</sup> including the relevance of mental health conditions in the general population, historical trends over a four-year period, the likelihood of people with a mental health condition seeking treatment and the average number of days’ care in hospital.<sup>32</sup> The Actuary noted that the different demographic characteristics examined in the *Vero Report*, (such as sex, age and state) constituted data and analysis that was reasonable to consider in understanding the relevant risks of mental health conditions



as a cohort. The Actuary also observed that, in circumstances where there is an absence of internal claims data available, it is a reasonable actuarial approach to consider industry or broader population data to assess risk, as Suncorp had done.

### **Shortcomings of the Vero Report**

Despite the above, the Actuary considered that there were a number of deficiencies in the *Vero Report's* analysis. As a result, the Actuary considered the *Vero Report* did not provide an adequate analysis to assess the claims frequency and claims intensity for mental illness.<sup>33</sup> The Actuary identified the following deficiencies within the *Vero Report*:

- It did not adjust population data to reflect characteristics of people purchasing travel insurance. The Actuary explained that “the demographic and socioeconomic characteristics of people taking out travel insurance policies differ from that of the general population”.<sup>34</sup>
- It did not examine the ‘relative riskiness’ of mental health conditions by comparing the population risk statistics of other illnesses or injuries that were covered by the policy such as, for example, heart attacks or limb fractures. The Actuary noted that “ignoring this context may lead to unfair conclusions about whether mental health conditions are significantly higher than risks of claims from other sources”.<sup>35</sup>
- It did not consider how the large spectrum of different types of mental health conditions could be treated differently. The Actuary noted that “the risks of a claim in the travel insurance context ... would differ markedly for people at different points along this mental illness spectrum”,<sup>36</sup> and that the “use of a blanket mental illness exclusion ignores this risk variation”.<sup>37</sup> The Actuary noted that differential treatment is, for instance, already used by Suncorp for other physical conditions, such as distinguishing between different levels of breast and prostate cancer.<sup>38</sup>
- Its risk assessment was not sufficiently precise. The Actuary noted, for instance, the relative prevalence and average length of a mental health condition could have been

compared to physical injuries to understand “the relative risk and whether an adjustment to either the risk statistics and/or policy terms and conditions was required”.<sup>39</sup>

- It provided a superficial analysis of the data. The Actuary considered that a more rigorous and granular analysis “could have assisted in making appropriate judgments about plausible adjustments to the risk statistics and/or policy terms and conditions for the travel insurance policy to limit the exposure to excessive risk”.<sup>40</sup>

The Actuary considered that if Suncorp had taken steps to address these deficiencies it may have helped it to better assess the nature and scale of likely travel insurance claims and the risks arising from mental health conditions. This would have led Suncorp to a more accurate assessment of whether it was justifiable to exclude mental health conditions from the policy.

### **Other options available to Suncorp**

In addition to the above analysis, the Actuary advised that Suncorp could have considered alternatives to the blanket exclusion terms for mental health conditions within its policies, such as:

- offering cover for mental health conditions at a higher premium
- offering cover to a subset of mental health conditions considered less of a risk (for example, if people had not experienced recent hospitalisations)
- limiting the amount paid per claim to ensure forecasted costs were contained.<sup>41</sup>

Finally, if Suncorp was unable to assess the level of risk for offering mental health coverage due to limitations in the data, the Actuary noted that Suncorp could alternatively have:

- undertaken scenario testing to understand the impact to profitability and viability
- undertaken stress testing to analyse how much the risk statistics can change
- undertaken to sell policies to people with pre-existing mental health conditions, while monitoring the evolving claim experience.<sup>42</sup>

## 5.6 Did Suncorp unlawfully discriminate?

Suncorp has an obligation under section 44 of the Equal Opportunity Act to not discriminate in the provision of travel insurance against people with a disability, including a mental health condition. Section 47 of the Equal Opportunity Act provides limited circumstances where discrimination will not be unlawful. The exceptions to discrimination are discussed in detail in Chapter 3.

While acknowledging the complexities inherent in insurance coverage, the Commission considers that Suncorp's policies in the Investigation Period discriminated unlawfully against people with a mental health condition for the reasons set out below. The Commission considers that Suncorp did not provide sufficient evidence to demonstrate that the exception in section 47 of the Equal Opportunity Act applied in the circumstances. The Commission's view is outlined in detail below.

### 5.6.1 AVOIDING THE DISCRIMINATION WOULD NOT CAUSE AN 'UNJUSTIFIABLE HARDSHIP'

#### The law

Under section 47(1)(a) of the Equal Opportunity Act, where conduct of insurers is lawful under federal anti-discrimination laws, that conduct will also be lawful under the Equal Opportunity Act.<sup>43</sup>

Section 29A of the Commonwealth Disability Discrimination Act provides that it is lawful for an insurer to discriminate if avoiding the discrimination would impose an 'unjustifiable hardship' on the discriminator.

Suncorp relied on the defence of 'unjustifiable hardship' to argue that the use of the blanket exclusion terms was lawful.

There is no definition of what counts as a 'relevant factor' in the Equal Opportunity Act. However, in determining whether avoiding discrimination would impose an unjustifiable hardship, the Disability Discrimination Act requires that all relevant circumstances must be taken into account.<sup>44</sup>

These circumstances include:

- benefits or detriments that might accrue to a customer if insurance cover was provided, or is not provided
- the effect of the disability on the person concerned
- financial circumstances, including costs of providing cover
- any financial or other assistance to the insurer
- the terms of any action plan developed under the Disability Discrimination Act.<sup>45</sup>

#### Commission's analysis

In the Commission's view, the information and documentation provided by Suncorp does not demonstrate that providing travel insurance cover to people with a mental health condition would impose an unjustifiable hardship on Suncorp.

Section 11 of the Disability Discrimination Act sets out multiple factors that must all be considered when assessing the defence of unjustifiable hardship. Consideration of these factors is critical as it prompts an insurer to weigh up competing factors, rather than simply relying on one factor. For example, it prompts a balance between considering potential financial loss to the insurer (such as a reduction in profit) against the potential benefits to a consumer or a class of consumers, such as people with a mental health condition, having their travel claims met for any loss associated with a mental health condition. Similarly, it requires companies to consider a potential reduction in profit against the promotion of more inclusive travel policies, and the fact that "the community would benefit from an action which would lessen the stigmatising effect of negative attitudes towards mental illness".<sup>46</sup>

As the Australian Human Rights Commission *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (DDA Guidelines) note, "even if providing insurance or superannuation to a person with a disability might involve some costs and effort, it will not necessarily amount to unjustifiable hardship".<sup>47</sup>

## 5.6.2 THE DISCRIMINATION WAS NOT REASONABLE HAVING REGARD TO 'RELEVANT FACTORS'

In the VCAT case of *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936, VCAT considered the defence of unjustifiable hardship in s 29A of the Disability Discrimination Act. In that case, Member Dea explained that:

It is apparent from the terms of section 29A that some hardship is justifiable ... 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. While the financial burden which may be imposed will be relevant, it is not the only factor to consider.<sup>48</sup>

In addition, in the Commission's view, Suncorp did not provide the investigation with sufficient information and documentation to substantiate its claim that offering travel insurance coverage for mental health conditions would in fact create a financial burden.

If a company considers that the risk or financial cost is too severe to provide cover to people with a disability, the Commission would expect to see rigorous and contemporaneous documentation in support of this analysis. This ought to include an analysis of possible alternatives to the more extreme measures such as blanket exclusion terms. While Suncorp outlined the projected costs of offering cover based on its size,<sup>49</sup> the Commission notes that reduced profitability is not, of itself, a valid exception to unlawful discrimination.<sup>50</sup> Similarly, while market share may have some relevance to questions of unjustifiable hardship, Suncorp has not provided information to show that any hardship would be *unjustifiable*.

In the Commission's view, during the Investigation, Suncorp did not provide sufficient evidence to justify excluding cover to people who have a mental health condition and notes the *Vero Report* did not distinguish between pre-existing or first-presentation mental health conditions.

### The law

Under section 47(1) of the Equal Opportunity Act, an insurer may discriminate in the provision of insurance, if:

- 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 and any other relevant factors (section 41(1)(b)); or
- where actuarial or statistical data is not available and cannot reasonably be obtained, the discrimination is reasonable having regard to relevant factors (section 47(1)(c)).

Importantly, an insurer can only claim an exception to unlawful discrimination based on 'relevant factors' if it can show:

- there is actuarial or statistical data on which it is reasonable to rely; or
- there is no actuarial or statistical data available and it cannot reasonably be obtained.

There is no definition of 'relevant factors' in the Equal Opportunity Act. However, there is relevant case law and guidance on its meaning within the Act.

The Federal Court has stated that a relevant factor is any "matter which is rationally capable of bearing upon whether the discrimination is reasonable".<sup>51</sup>

The *DDA Guidelines* state the 'relevant factors' include:

- practical and business considerations
- whether less discriminatory options are available
- the individual's particular circumstances<sup>52</sup>
- the objects of the Disability Discrimination Act, especially eliminating disability discrimination as far as possible<sup>53</sup>
- all other relevant factors<sup>54</sup> including medical opinions, opinions from other professional groups, the practice of others in the insurance industry and commercial judgment.<sup>55</sup>

Further, the *DDA Guidelines* note that relevant factors may include “factors that increase the risk to the insurer as well as those that may reduce it”.<sup>56</sup>

### **Commission’s analysis**

In the Commission’s view, Suncorp did not provide sufficient information or documentation to demonstrate that any discrimination was lawful through relying on the exception of ‘other relevant factors’ in 47(1) of the Equal Opportunity Act.

#### ***Statistical and actuarial data could have reasonably been obtained***

The Commission considers that Suncorp cannot rely on section 47(1)(c) to maintain policies with the blanket exclusion terms. Section 47(1)(c) only applies if actuarial or statistical data is not available “and cannot reasonably be obtained” [emphasis added].

Suncorp claimed that according to the *Vero Report*, there was no statistical or actuarial data upon which it could reasonably rely to determine whether it could afford to offer travel insurance to people with a mental health condition. The Commission disagrees with this assessment. In the Commission’s view, over the course of the last 10 years, since the production of the *Vero Report*, Suncorp could have reasonably obtained further actuarial or statistical data. This view was supported by the Actuary, who found there were deficiencies in the approach to the data taken in the *Vero Report*, and that there were other options available for analysis.

Even if it were open to conclude that the *Vero Report* was a sufficient basis to claim that no actuarial or statistical data was available and could not reasonably have been obtained, the Commission considers that Suncorp has not provided sufficient information or documentation to show that it could reasonably rely on ‘other relevant factors’ for the reasons outlined below.

#### ***The suggested ‘other relevant factors’ do not make the discrimination reasonable***

Under to Equal Opportunity Act, an insurer is unable to exclude the requirements of section 47(1)(b)(i) and rely only on section 47(1)(b)(ii). This means that in order for Suncorp to rely

on the exception in section 47(1)(b), it must establish that its “discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely”, and that the discrimination “is reasonable having regard to that data and any other relevant factors”. Both elements are required to claim the exception.

In the Commission’s view, Suncorp has not satisfied either element required to rely on the exception outlined at section 47(1)(b) of the Equal Opportunity Act.

Suncorp asserted that its discriminatory conduct in issuing the blanket exclusion terms was “reasonable having regard to other relevant factors”. Suncorp identified the ‘other relevant factors’ as its relatively small market size, the commercial risks for a smaller operator, and the absence of satisfactory actuarial or statistical data itself. To support its view, Suncorp highlights the “practical and business considerations” included as a ‘relevant factor’ in the *DDA Guidelines* for assessing whether discrimination is “objectively reasonable”.

The Commission accepts that an insurer is entitled to consider “practical and business considerations” as part of its analysis as to whether its policies are compliant with its anti-discrimination law obligations. However, a practical business consideration is only one factor for an insurer’s consideration in the exercise of assessing what is reasonable. Relevant case law clarifies that a decision-maker needs to consider “the nature and extent of the discriminatory effect on the one hand against the reasons advanced in favour of the requirement or condition on the other”.<sup>57</sup>

As outlined above, the ‘relevant factors’ to assess what is reasonable are not limited, and the *DDA Guidelines* provide a number of factors relevant to assessing what is reasonable. These include:

- practical and business considerations
- whether less discriminatory options are available
- the individual’s particular circumstances
- the objects of the legislation
- all other relevant factors, such as medical opinions, opinions from other professional groups, the practice of others in the insurance industry and commercial judgment.



The Commission also observes that Suncorp's current PDS,<sup>58</sup> and other offered policies, provide different models for coverage of pre-existing physical illnesses and conditions compared to mental illnesses or conditions. If an insurer can distinguish between particular types of physical condition that can be disclosed when a consumer purchases cover, then it should be possible to distinguish between mental health conditions. Where insurers have enough data to be able to distinguish and determine different risk profiles of different health conditions, they should use that data to ensure that their disclosure obligations and exclusions in relation to illness or disability are no more than is reasonably justified by the data.

Taking into account these factors, the Commission considers that use of the blanket exclusion terms was not reasonable.

In the Commission's view, compliance with anti-discrimination laws is a standing 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 make sure its data is accurate, complete and up to date to ensure its decisions are based on quality and relevant actuarial information.<sup>59</sup> The *DDA Guidelines* also state "Insurers should regularly reassess exclusions which discriminate on the basis of disability to ensure that it is reasonable to maintain them".<sup>60</sup>

In the Commission's view, it was not reasonable for Suncorp to rely on a report that is 10 years old and, for reasons identified by the Actuary, contains shortcomings in analysis. Furthermore, it is clear that it may not be reasonable to rely on data where that data may be "out-of-date, or discredited, and the decision-maker ought, in the circumstances, to have known that".<sup>61</sup>

Suncorp's approach did not appear to have relevant regard to the circumstances of individuals who may have been affected by policy exclusions for people with a mental health condition. The *Vero Report* was a review of all mental health disorders and did not distinguish between first-presentation and pre-existing conditions. Accordingly, the analysis in the *Vero Report* focused on the prevalence of mental health conditions in general and did not make any conclusions based on a specific presentation or severity of mental health condition. The Actuary observed that given the broad risk spectrum of mental health conditions, more specific analysis could have been conducted, including considering the risk of particular mental health conditions.

There were less discriminatory options available to Suncorp than the use of exclusion terms. In particular, the Commission notes that the Actuary considered that there were other options available to provide coverage to people with mental health conditions, such as offering cover at increased premiums, or by offering coverage to limited types of mental health conditions, depending on their discrete risk.

The Commission further observes that some Australian insurers have been offering travel insurance to people with a mental health condition since 2014.<sup>62</sup> This fact arguably lessens the weight of Suncorp's perceived commercial risks associated with offering coverage for mental health conditions.

For the above reasons, in the Commission's view, Suncorp's discriminatory travel insurance policies are unreasonable considering the full spectrum of possible 'other relevant factors' in the circumstances.

## 5.7 Did Suncorp comply with its positive duty to eliminate discrimination?

### 5.7.1 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).<sup>63</sup> The positive duty requires organisations to be proactive and 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.<sup>64</sup>

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

### 5.7.2 SUNCORP’S POSITION REGARDING THE POSITIVE DUTY

Suncorp identified measures it had undertaken to eliminate mental health discrimination in travel insurance, in compliance with the positive duty, including:

- exploring how coverage could be introduced to people with a mental health condition – but notes it was only able to do so once larger insurers had begun offering coverage for claims relating to mental health conditions<sup>64</sup>
- progressing plans to offer coverage for pre-existing mental health conditions, which were to be offered across all its products by the fourth quarter of 2018<sup>65</sup>

- asking its claims management provider to escalate all claims relating to mental health for Suncorp’s review (after the announcement of the Investigation)
- making ex gratia payments for claims made relating to mental health without legal obligation to do so or admissibility of liability<sup>66</sup>
- providing awareness capability and specialist training with Uniting Kildonan<sup>67</sup> on the issues of elder abuse, mental health conditions, emotional vulnerability and other modules.<sup>68</sup>

However, Suncorp acknowledged that neither it, nor its external claims management provider, previously had a specific field for recording whether claims relate to a mental health condition. Further, prior to the Commission’s announcement of the Investigation, “there was no formal, documented process in place for the external claims management provider to escalate claims related to mental health conditions to Suncorp to review” and instead, noted that this instruction was “verbally communicated”.<sup>69</sup>

In addition, the Commission notes that, by June 2018, Suncorp had removed any blanket exclusion terms from travel insurance policies it offered.

### 5.7.3 COMMISSION’S ASSESSMENT

The Commission commends Suncorp for its recent efforts to remove discrimination on the basis of mental health conditions across a number of its product offerings.

This is a positive step that demonstrates Suncorp is improving its approach to compliance and is changing its policies and practices to make a meaningful difference to the lives of consumers with a mental health condition.

Despite these efforts, in the Commission’s view, Suncorp was not eliminating discrimination to the greatest extent possible in accordance with its duty under section 15 of the Equal Opportunity



Act during the Investigation Period. The Commission's reasons for this assessment are outlined below.

### **Suncorp's continued use of blanket exclusion terms**

While Suncorp outlined that it had explored how coverage could be introduced to people with mental health conditions, in the Commission's view, Suncorp could have done more to proactively eliminate discrimination *as far as possible*.

The Commission notes that, at the time of the Investigation commencing, Suncorp was relying on a report and data that was close to a decade old to justify its use of the blanket exclusion terms. Further, material produced by Suncorp to the Investigation did not demonstrate that it had taken a rigorous approach to determine how it could offer coverage to people with a mental health condition. Such steps could include appropriately limited exclusion clauses, or charging higher premiums for higher risks or where risks are unusually difficult to determine.<sup>70</sup>

The Equal Opportunity Act provides a specific example of what can be expected of a 'large company' discharging its obligations under the positive duty. It states:

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.<sup>71</sup>

Suncorp, as a top 20 ASX listed company, holding approximately \$96 billion dollars in assets, can be considered as a large company. It is reasonable to expect that it has a compliance strategy in place.

During the Investigation, Suncorp provided just one report from 2008 as evidence of a process undertaken to assess its compliance with anti-discrimination laws. In the Commission's view, this does not represent a sufficient effort on Suncorp's part to eliminate discrimination against people with a mental health condition in the context of travel insurance. It does not demonstrate a

compliance strategy, nor does it demonstrate a process for regularly monitoring such a strategy for continuous improvement.

The Commission does not consider Suncorp's basis of waiting for other companies to take the lead to make changes to policy offerings, or its comparatively small market size, as sufficient reasons to either reduce or discharge its obligations under the positive duty. That it continued to offer policies with the blanket exclusion terms during the Investigation Period indicates it was not discharging its duty under section 15 of the Equal Opportunity Act.

Finally, the Commission notes Suncorp's position that it will continue to offer a product<sup>72</sup> that refuses any cover in relation to a pre-existing mental health condition. The Commission considers that, through the sale of this product, Suncorp still erroneously treats mental health conditions as a single category, despite having both the means and data to offer better coverage, as it now does through its other products. The Commission does not consider that directing a consumer to purchase another of its products, on its own, is a lawful basis to discriminate in the first product, or that offering a 'budget' product is a lawful basis to discriminate.<sup>73</sup> The policy reasons for this are also clear – to allow cheaper products to discriminate only serves to reinforce stigma and detriment where anti-discrimination laws have clearly required minimum guarantees for the provision of insurance.

### **Suncorp's handling of travel insurance claims**

During the Investigation Period Suncorp sold 41,696 policies of travel insurance.<sup>74</sup>

Suncorp did not advise how many of the sold policies resulted in claims being made, but the Commission notes that the 274 consumers who declared they had a pre-existing mental health condition when purchasing a policy during the Investigation Period were denied insurance coverage for events arising from that mental health condition. This figure, coupled with the lack of guidance on claims handling provided to the Investigation, indicates that there may be inadequate processes in place to provide proper consideration of validity of claims.

The above suggests that either claims or cover were denied without lawful justification required by the Equal Opportunity Act. In addition, there was no indication that Suncorp had a process to provide reasonable adjustments for people with a disability, as required by section 45 of the Equal Opportunity Act.

Further, the Commission has also carefully considered Suncorp's practice of making ex gratia payments to consumers who make claims arising from a mental health condition. Suncorp described this practice:

An ex gratia payment is made where an insurer determines that the terms and conditions of the relevant policy enable the insurer to decline the claim (for example, where the claim is not covered by the terms of the policy), but the insurer decides to make a payment despite their entitlement to decline the claim. In effect, the claim is formally declined but a payment is made 'outside' of the policy wording, without any legal obligation to do so or admission of liability related to the policy of insurance.<sup>75</sup>

Suncorp stated that it took this approach to "ensure consumers did receive payment for claims",<sup>76</sup> in circumstances where Suncorp had not yet made amendments to its policy wordings in line with its intended changes. Suncorp considered that ex gratia payments acted to remove discrimination "that those consumers would have experienced if those claims had not been paid at all".<sup>77</sup> Suncorp noted that it:

[W]ould not be standard practice for the policy wording, or other documents provided to a customer at the time they purchased an insurance policy to state that payments may be made outside the terms and conditions of the policy.<sup>78</sup>

The Commission observes that individual ex gratia payments and other ad hoc methods of dealing with mental health condition claims indicate a practice that lacks transparency, particularly for consumers who would not be informed of this practice at the time of purchasing a policy.

The Commission does not consider that an internal, ad hoc ex gratia payment practice can cure the discrimination occasioned on people with a mental health condition where the PDS maintains a discriminatory clause, which an insurer knows it is required to change. This action does not discharge an insurer's obligation under the positive duty. Suncorp could and should have taken steps to immediately remove a clause that it considered it did not have a lawful basis to offer.

Suncorp informed the Commission that it has entered into an arrangement with a third party to handle its data aggregation and reporting. For clarity, the Commission notes that this arrangement does not remove Suncorp's obligation to comply with the range of anti-discrimination laws applicable to it.<sup>79</sup>

### Suncorp's training

The Commission is pleased to learn of Suncorp's recent decision to introduce targeted training for its employees, including on mental health and related issues. However, it is not clear to the Commission whether these modules are specifically related to principles or obligations of anti-discrimination laws, nor whether they are compulsory. To ensure that Suncorp's employees (including subsidiaries) understand and apply the law consistently, the Commission considers that specific education regarding anti-discrimination laws needs to be provided to all levels of Suncorp's business in travel insurance and, in particular, in relation to its policy drafting and underwriting.

Further, the Commission observes that neither Suncorp nor its external claims management provider had a specific field for recording whether claims relate to mental health. Suncorp also advised that, prior to the Commission's announcement of the Investigation, "there was no formal, documented process in place for the external claims management provider to escalate claims related to mental health conditions to Suncorp to review"<sup>80</sup> and instead Suncorp noted that this instruction was "verbally communicated".<sup>81</sup> This is an unsatisfactory business practice in circumstances where an insurer needs to ensure it is taking active steps to eliminate discrimination as far as possible.

The Commission notes that understanding the impact of these policies and practices is an important first step towards eliminating discrimination. It's also important to ensure consumers can understand the basis of the

decisions made. Providing consumers with information about the reasons for any refusal of their claim assists in ensuring that there is a valid basis for the decision, including under anti-discrimination laws.

## 5.8 Findings

---

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

- 1. Within the Investigation Period (1 July 2017 – 19 April 2018), Suncorp issued travel insurance policies, including the Suncorp Holiday Travel Insurance and Annual Multi Trip Travel Insurance (PDS Issue 5 12706 and Issue 2 13579 respectively):**
  - 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, Suncorp 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 Suncorp 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, Suncorp contravened section 44 of the Equal Opportunity Act.**
- 5. In the Commission's opinion, Suncorp 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.**

## 5.9 Recommendations

---

Based on the Investigation and findings above, the Commission made a number of recommendations to Suncorp comply with the Equal Opportunity Act:

1. Suncorp develop a strategy for compliance with the Equal Opportunity Act in respect of its travel insurance products and services, which:
  - includes creating 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 advances in relevant medical knowledge
  - ensures any third party it uses to collect data or provide assessment for insurance cover complies with relevant anti-discrimination laws
  - incorporates a process for the strategy's regular review.
2. Suncorp should apply rigorous statistical and actuarial analysis to all policy terms it is using to offer or exclude travel insurance coverage to people with a mental health condition. Suncorp 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. Suncorp 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. Suncorp undertake 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. Suncorp develop risk profiles and appropriate coverage for differing mental health conditions within its travel insurance policies, as it does with differing physical conditions.
6. Suncorp 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.

To address and operationalise these recommendations, the Commission invited Suncorp to enact an action plan.<sup>82</sup>

## 5.10 Suncorp's response to findings and recommendations

---

Suncorp responded to the preliminary findings and recommendations of the Commission.

Suncorp acknowledged recommendations in relation to its travel insurance portfolio and noted it would consider the preparation

of the recommended action plan alongside the recommendations it was considering arising from the 2018 Royal Commission into Banking, Superannuation and Financial Services Industry, as well as the review of the General Insurance Code of Practice.<sup>83</sup>

## 5.11 Lessons learned from Suncorp's conduct

---

Based on the Commission's analysis of Suncorp in the Investigation, insurers should:

- ensure any material they rely on is accurate, up to date and reflects current medical understanding of a mental health condition. These principles are set out in the *DDA Guidelines*
- ensure that they have systems in place to continually monitor and update material they rely on
- ensure that any actuarial or statistical analysis has properly considered the range of possible options available to provide coverage to people with a mental health condition
- identify a measurable process toward achieving improved insurance cover for people with a mental health condition
- rather than providing ex gratia payments on an ad hoc basis, undertake to remove any discriminatory terms for which the company does not have a lawful basis to support
- understand that the size of their company does not operate as a single factor that reduces their obligations to comply with anti-discrimination laws.

## Notes

- 1 'Witness Statement of Gary Dransfield (Suncorp CEO)' *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Exhibit 6.251 SUN9999.0021.0019, 11 September 2018) <<https://financialservices.royalcommission.gov.au/public-hearings/Documents/exhibits-2018/17-september/EXHIBIT-6.251.pdf>>.
- 2 AAI Limited is a legal entity in Australia (ABN 48 005 297 807 & AFSL 23230859).
- 3 Letter from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, 1 June 2018 ('June letter').
- 4 Suncorp Product Disclosure Statement, *Holiday Travel (PDS Issue 5 12706)* dated 1 December 2010, and *Annual Multi-Trip PDS (PDS Issue 2 13579)*, dated 1 December 2010.
- 5 *Ibid*, 48.
- 6 June letter (n 3); Letter from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, 6 July 2018 ('July letter'); Letter from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, 31 January 2019 ('January letter').
- 7 June letter (n 3) 6.
- 8 *Ibid* 2.
- 9 January letter (n 6) 1.
- 10 For instance, as at April 2019, the policy sold through brand AAMI directs a potential consumer to a PDS which does not provide any coverage to people with a pre-existing mental health condition.
- 11 *Disability Discrimination Act 1992* (Cth), s 29A.
- 12 Available pursuant to the *Equal Opportunity Act 2010* (Vic) s 47(1)(a).
- 13 Email from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, dated 11 April 2019.
- 14 June letter (n 3) 2.
- 15 *Ibid* 4.
- 16 *Ibid* 4.
- 17 *Ibid* 5.
- 18 *Ibid* 5–6.
- 19 *Ibid* 7–8.
- 20 July letter (n 6) 6.
- 21 *Ibid* 4.
- 22 In correspondence with the Commission, Suncorp outlined that the *Vero Report* was "funded and commissioned by Suncorp" to "provide strategic analysis for Suncorp's travel insurance". June letter (n 3)
- 23 *Ibid* 1.
- 24 *Ibid* 1.
- 25 *Vero, A Statistical Review of Mental Health-Related Disorders in Australia and Relevance to Travel Insurance Claims Risk* (Report, 2008) 3–4.
- 26 *Ibid* 3–4.
- 27 *Ibid* 4–5.
- 28 *Ibid* 7.
- 29 *Ibid* 4.
- 30 Actuarial Edge, *VEOHRC Travel Insurance – Suncorp* (Report, 4 September 2018).
- 31 *Ibid* 9–10.
- 32 *Ibid* 9–10.
- 33 *Ibid* 4.
- 34 *Ibid* 10.
- 35 *Ibid* 10.
- 36 *Ibid* 10.
- 37 *Ibid* 10.
- 38 *Ibid* 10.
- 39 *Ibid* 11.
- 40 *Ibid* 5.
- 41 *Ibid* 15.
- 42 *Ibid* 16.
- 43 *Equal Opportunity Act 2010* (Vic) s 47(1)(a).
- 44 *Disability Discrimination Act 1992* (Cth), s 11. See also Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (Guidelines, November 2016) 20–23 ('*DDA Guidelines*').
- 45 *DDA Guidelines* (n 44) 21.
- 46 *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 [240] ('*Ingram v QBE*')
- 47 *DDA Guidelines* (n 43) 20.
- 48 *Ingram v QBE* (n46) [127].
- 49 Which suggests the impact on its overall business would be greater than an insurer with a larger market share.
- 50 See *Ingram v QBE* (n 46) where Member Dea concluded that when there is an absence of sufficient material to determine whether there would be an unjustifiable hardship to the insurer to rely on the exception, "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" [245]. Furthermore, "[I]t is apparent from the terms of section 29A that some hardship is justifiable" [127].
- 51 *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88 [53], as cited in *DDA Guidelines* (n 44) 11.
- 52 The Commission notes this could also be circumstances relating to a range of customers affected, such as those with a mental health condition.



- 53 Note the *Equal Opportunity Act 2010* (Vic) equivalent of “eliminating discrimination to the greatest extent possible”. *Equal Opportunity Act 2010* (Vic) s 3(a).
- 54 *DDA Guidelines* (n 44) 7.
- 55 *Ibid* 11–14.
- 56 *Ibid* 11.
- 57 *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [16] (referring to *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395 in which Dawson and Toohey JJ referred with approval to a decision of the Federal Court in *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251, 263). See also *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88, [51] (*‘QBE v Bassanelli’*).
- 58 See, for example, Suncorp Holiday Insurance PDS prepared 28 February 2018.
- 59 *DDA Guidelines* (n 44) 8–10. These specify that “if relevant data is available or could reasonably be obtained it must not be ignored” and that insurance of underwriting manuals “should be based on relevant actuarial or statistical data or medical opinion and updated as necessary to take into account advances in medical knowledge, rehabilitation, and treatment, adaptive technology, or other areas affecting the level of risk or loss associated with a particular disability”.
- 60 *Ibid* 16.
- 61 *QBE v Bassanelli* (n 57) [30].
- 62 See for example, AIG Annual, International and Domestic Travel Insurance Combined PDS and Policy wording (PDS JM 10/00273.4) prepared 28 February 2014; Columbus Direct Travel Insurance, Combined FSG, PDS and Policy wording V10, prepared 18 June 2014.
- 63 *Equal Opportunity Act 2010* (Vic) s 15(2).
- 64 June letter (n 3) 7.
- 65 *Ibid* 8.
- 66 *Ibid* 12. During the Investigation Period, Suncorp made three ex gratia payments to customers who made claims with first-presentation mental health conditions.
- 67 A community service organisation within Uniting Care Australia.
- 68 From March 2018.
- 69 July letter (n 6) 10.
- 70 *DDA Guidelines* (n 44) 19.
- 71 *Equal Opportunity Act 2010* (Vic) s 15(2).
- 72 The AAMI travel insurance product.
- 73 Email from Suncorp to the Victorian Equal Opportunity and Human Rights Commission, 29 March 2019.
- 74 Including 19,001 policies under AAMI, 17,055 policies under Vero and 5640 policies under Apia. June letter (n 3) 5.
- 75 July letter (n 6) 11.
- 76 January letter (n 6) 3.
- 77 *Ibid* 3.
- 78 *Ibid* 3.
- 79 Including under vicarious liability and authorising and assisting provisions, and the positive duty: *Equal Opportunity Act 2010* (Vic) ss 15, 105 and 109.
- 80 June letter (n 3) 10.
- 81 *Ibid* 10.
- 82 Pursuant to the *Equal Opportunity Act 2010* (Vic) s 152.
- 83 January letter (n 6).

# Chapter 6: Allianz and AGA

## 6.1 Summary

- From 1 July 2017 to 19 April 2018 (Investigation Period), Allianz and AGA provided travel insurance and issued travel insurance policies that excluded payment for claims arising on the basis of a person having a mental health condition (blanket exclusion term).
- Allianz and AGA unlawfully discriminated against people with a mental health condition because they were not able to demonstrate a sufficient basis to offer the blanket exclusion term under the *Equal Opportunity Act 2010* (Vic).
- Allianz and AGA produced a large volume of documents to the Commission and claimed that the blanket exclusion term was based on reasonable actuarial or statistical data. However, they were unable to demonstrate they had considered or sufficiently analysed the documents when they decided to offer policies with the blanket exclusion term.
- Allianz and AGA did not comply with their positive duty to “eliminate discrimination as far as possible”. Rather than removing blanket exclusion terms in their policies, Allianz and AGA made voluntary or ex gratia payments for mental health claims.
- Allianz and AGA have acknowledged the Commission’s recommendations and told the Commission they changed their policies in November 2017 to stop providing blanket exclusion terms relating to mental health. The Commission observes they have begun offering limited cover to people with a pre-existing mental health condition.

## 6.2 About Allianz and AGA

Allianz Australia Insurance Limited (Allianz) is an Australian subsidiary of the international company Allianz SE and Allianz Group. Allianz is one of Australia’s largest providers of travel insurance, with an estimated 25 per cent of the travel insurance market.

While Allianz does not issue and distribute travel insurance directly to the retail market in Australia, Allianz underwrites travel insurance policies that are issued and distributed by its related body corporate, AWP Australia Pty Ltd, trading as Allianz Global Assistance (AGA). AGA acts as an agent of Allianz.

In the 2017–18 financial year, Allianz collected approximately \$257 million in travel insurance premiums.<sup>1</sup> It sold more than 770,000 travel insurance policies.<sup>2</sup> Premiums paid for travel insurance have increased by more than 35 per cent from five years ago.<sup>3</sup>

A more detailed summary of Allianz and AGA is provided in Chapter 2.

## 6.3 What did we investigate?

### 6.3.1 ALLIANZ AND AGA'S PRODUCT DISCLOSURE STATEMENT

#### The use of a blanket exclusion term

For the purposes of the Investigation, the Commission identified travel insurance policies sold by Allianz, which included contracts of insurance sold to Australian consumers under a publicly available Product Disclosure Statement (PDS). This included the NAB Supplementary PDS (NAB SPDS) which was sold under an Allianz and AGA PDS.<sup>4</sup> Both these documents included the following clauses:

We will not pay under any circumstances if:

- (23) Your claim Arises from or is in any way related to depression, anxiety, stress, mental or nervous conditions<sup>5</sup> (the blanket exclusion term).

A similar blanket exclusion term was included in Allianz and AGA's most commonly sold travel insurance product at the same time, the Allianz Travel Insurance (Direct) policy (ATID PDS).<sup>6</sup>

#### The use of a pre-existing condition term

The NAB SPDS also stated that it would provide "no cover for medical expenses, cancellation costs or additional expenses arising from or related to" particular pre-existing conditions (pre-existing condition term) including:

- 10) Any mental illness as defined by DSM-IV including:
- a) Dementia, depression, anxiety, stress or other nervous condition; or
  - b) Behavioural diagnoses such as but not limited to autism; or
  - c) A therapeutic or illicit drug or alcohol addiction

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.

Under the terms of reference for the Investigation, the Commission considered whether the use of the blanket exclusion term and the pre-existing condition term were discriminatory. This included whether an exception to unlawful discrimination applied under the Equal Opportunity Act. The Commission considered that both terms had the potential to significantly impact on people with a mental health condition.

### 6.3.2 WHAT DID WE ASK ALLIANZ AND AGA?

The Commission requested Allianz and AGA to provide the following information to assist in assessing its compliance with the Equal Opportunity Act:

- All information that was considered by it or relied on to include the blanket exclusion terms in the identified PDSs.
- Its explanation of how any such information was relied upon in formulating the terms on which the insurance would be offered.
- Its explanation 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 for people who have, or have had, a mental health condition.

- The number of contracts sold and the number of rejections or additional indemnities for both the policies identified, as well as its most commonly sold contract of travel insurance.
- Measures it had taken in compliance with section 15(2) of the Equal Opportunity Act (positive duty).
- Details regarding its claims and dispute resolution processes in relation to people that have or have had a mental health condition.

## 6.4 Allianz and AGA's response to the Investigation

Allianz and AGA participated in the Investigation and assisted the Commission by providing written responses and supporting documents.<sup>7</sup> The Commission acknowledges Allianz and AGA's open and cooperative engagement.

Relevant information provided by Allianz and AGA is discussed below. Responses were received jointly by Allianz and AGA.

### 6.4.1 POLICIES SOLD

During the Investigation Period, Allianz and AGA advised that:

- 94,510 people entered into contracts of travel insurance under the NAB SPDS and the ATID PDS (of which 24,409 were Victorian customers)
- in respect of both policies, Allianz and AGA refused to indemnify eight customers (including three Victorian customers) on the basis of a mental health condition<sup>8</sup>
- In respect of both policies, Allianz and AGA indemnified some people with a mental health condition on a different and detrimental basis to other customers, in accordance with the blanket exclusion term in its policies.<sup>9</sup>

Allianz and AGA told the Commission that, from 6 November 2017 to the end of the Investigation Period, they changed their policies for claims by people with a mental health condition and did not refuse to indemnify any customers for claims arising from a 'first-presentation' mental health condition.<sup>10</sup>

Allianz and AGA did not change their policies in relation to pre-existing conditions during the Investigation Period, but have confirmed that changes were made to begin offering limited cover from 1 November 2018.

### 6.4.2 ALLIANZ AND AGA'S POSITION

Allianz and AGA acknowledged that, up to 6 November 2017, its travel insurance policies excluded all claims arising from mental health conditions.<sup>11</sup> Allianz and AGA argued that they had not discriminated unlawfully against people with a mental health condition because the decision to offer policies with the blanket exclusion terms was based on actuarial and statistical data on which it was reasonable for them to rely in accordance with the exception to discrimination in section 47(1)(b) of the Equal Opportunity Act.<sup>12</sup>

### **The decision to offer the blanket exclusion terms**

Allianz and AGA advised the Commission that a preliminary internal review was conducted in 2013–14 (the 2013–14 review) to consider the feasibility of introducing cover for pre-existing and first-presentation mental health conditions.

In the absence of any direct internal data relating to mental health conditions, Allianz and AGA said they relied on internal claims data for physical injuries as a starting basis for analysis of potential claims arising out of a mental health condition.<sup>13</sup> This information was then used in the 2013–14 review to analyse and estimate the cost of cancellation and medical claims arising for pre-existing mental health conditions.

In addition, Allianz and AGA advised that they “considered Australian and overseas incidence data reflecting the rate of new cases of mental illness in the population”,<sup>14</sup> which was classified by the type of mental health condition in order to assess “the likelihood of first-presentation mental illness claims”.<sup>15</sup>

Allianz and AGA said the 2013–14 review determined that there were certain mental health conditions that demonstrated “a likelihood of experiencing a significant number of sizable claims”<sup>16</sup> and made the decision to include the blanket exclusion terms on this basis. Allianz and AGA did not consider that this constituted discrimination because Allianz and AGA, “like all other insurers, and consistent with the operation of a prudent insurer, excludes risks in respect of claims unrelated to mental illness, where there is a high likelihood of a number of sizable claims that exceed its risk tolerance”.<sup>17</sup>

Allianz and AGA provided supporting documents, which they claimed to have relied on in deciding to offer the blanket exclusion terms (discussed below).

### **The decision to retain the blanket exclusion term**

The NAB SPDS and the ATID PDS were offered for sale in July 2016 and March 2017 respectively. While the 2013–14 review was crucial to determining the terms to offer in these policies, Allianz and AGA advised the

Commission that they chose to maintain the blanket exclusion term in policies they offered because:

- data, statistics and information demonstrated that “based on AGA’s analysis during the relevant period, 2014 to 2017, the introduction of cover for mental illness would ... [have] introduced a high severity risk”<sup>18</sup>
- if they removed the blanket exclusion term there “was a real probability” of a material adverse impact on the profitability and sustainability of the business and there was “a high likelihood it would experience a significant number of sizable medical claims”<sup>19</sup>
- it would be inconsistent with AGA’s business model to extend the terms of the policy to include cover for mental health conditions.<sup>20</sup>

Allianz provided the Commission with documents outlining the decision to maintain the blanket exclusion term in their travel insurance policies (discussed below).

### **The decision to remove the blanket exclusion terms**

From November 2017, Allianz and AGA changed their policies to remove the blanket exclusion terms (approximately halfway through the Investigation Period).

Allianz advised the Commission that it now:

[P]rovides first presentation [sic] mental illness cover for all its travel insurance policies and is well advanced in the process of introducing cover for pre-existing mental illness, to be assessed on a case by case basis, and consistent with its risk tolerance outlined above.<sup>21</sup>

The Commission understands that offering to cover people with a pre-existing mental health condition is an important step by Allianz and AGA, and recognises the important shift towards better business practices.

### 6.4.3 ALLIANZ AND AGA'S DOCUMENTATION

In support of their position, Allianz and AGA provided the Investigation with a large number of documents that they claimed to have relied on:

- to consider whether and on what terms to offer coverage to people with a mental health condition in their travel insurance policies
- as background material that they continued to collect and hold to consider in their assessment of whether to maintain the blanket exclusion term.

The Commission reviewed these documents to assess whether they were sufficient to rely on the exception in section 47 of the Equal Opportunity Act. In particular, the Commission considered if, at the relevant time the NAB SPDS and ATID PDS were offered, the actuarial or statistical data was reasonable to rely upon to discriminate. The Commission's analysis of these documents is provided below.

The documents can be broadly divided into two categories:

1. external documents (sources created outside of Allianz and AGA)
2. internal documents (material created by Allianz and AGA).

The documents produced by Allianz and AGA greatly assisted the Investigation.

#### The external documents

Allianz and AGA provided 173 external documents in support of the claim that any discrimination by Allianz and AGA was based on actuarial and statistical data.<sup>22</sup> The external documents included publicly available reports, health statistics, data and studies that related to mental health conditions and insurance at a general level.

Given the significant number of external documents provided to the Investigation, the Commission requested that Allianz and AGA:

- identify, with precision, *what* information they relied on in the supporting documents
- explain *how* information in the supporting documents contributed to or led to the decision to offer or retain the blanket exclusion terms.

In response, Allianz and AGA informed the Commission that the external documents were "collected and considered throughout the relevant period of 2014–17" and were therefore "capable of being considered"<sup>23</sup> by the business prior to the NAB SPDS being offered.

Allianz and AGA also identified specific documents and statistics they relied on to consider prevalence and cost of policies, average physical condition treatment costs, and Australian and overseas data with estimates of average claim costs.

The Commission was not provided with any report of the 2013–14 review. Allianz and AGA did, however, provide external documents in support of its submission that the 2013–14 review *relied* on "publicly available statistics and data".

#### The internal documents

Allianz and AGA also provided 120 internal documents to the Commission. Allianz and AGA argued these evinced the process undertaken considering actuarial information and making subsequent decisions about coverage, both when the NAB SPDS and ATID policies were issued, and in their decision to continue to offer the policies thereafter.

The internal documents outline Allianz and AGA's internal considerations of whether and how to provide coverage for mental health conditions and include emails between the executive branch and actuarial teams, as well as internal projections and calculations. Allianz and AGA advised they did not retain any record of the calculations used to determine what price offerings could be made at the time.<sup>24</sup> Because Allianz and AGA were unable "to extract the primary policy and claims data ... that had been inputted into these calculations", they retrospectively recreated the calculations for the purposes of the Investigation.<sup>25</sup>

#### **Decision to offer blanket exclusion terms**

Fifty-eight of the internal documents were created prior to July 2016. Therefore, the Commission considered that they were capable of being relied on to create and issue the NAB SPDS in July 2016.



These documents show for example that:

- From as early as 2013, Allianz and AGA contemplated including coverage in travel insurance policies for people who experience a mental health condition<sup>26</sup>
- In October 2014, Allianz and AGA considered that development of, and change to, the travel insurance policy regarding coverage for mental health conditions would require seven-and-a-half weeks' time to activate<sup>27</sup>
- Allianz and AGA considered the ramifications of the *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 (*Ingram v QBE*) decision.<sup>28</sup>

Despite these efforts, by 1 July 2016, Allianz and AGA prepared and offered the NAB SPDS which retained the blanket exclusion term. Allianz and AGA advised there had ultimately been a "business decision"<sup>29</sup> to not offer coverage to people with a mental health condition in travel insurance policies for that particular product update.

#### **Decision to retain blanket exclusion terms**

A large number of the internal documents were dated after July 2016. The Commission considers these documents are not relevant to Allianz and AGA's formulation of the NAB SPDS. They are, however, relevant to Allianz and AGA's decision to maintain the blanket exclusion terms, including during the Investigation Period.

The Commission considers that these documents evidenced that:

- In August 2016 (the month following the preparation of the NAB SPDS), feedback provided to Allianz and AGA's underwriting team outlined a need for greater clarity about standards for potential discriminatory aspects of travel insurance, specifically noting the discrimination landscape had changed following the *Ingram v QBE* decision. Allianz and AGA reflected that the rates of new or similar cases raised is almost a "weekly event at AGA".<sup>30</sup> Allianz and AGA's underwriting team noted that it was awaiting outcome of key legal defences for alleged discrimination/disability cases.<sup>31</sup>
- By December 2016, Allianz and AGA's actuarial team reported that progressing coverage for mental health conditions had been fully detailed from an underwriting

perspective, but that progressing coverage had been "parked".<sup>32</sup>

#### **Decision to consider removing blanket exclusion terms**

Following notification of the Commission's proposed Investigation in July 2017, a significant volume of documents provided by Allianz and AGA demonstrated that they took active steps from approximately July 2017 toward changing their policies. Documents indicated that:

- by 14 August 2017 "with the changing competitor stance and increased regulatory interest in First Presentation [*sic*] coverage of mental illness in travel insurance, the business is keen to rapidly incorporate this coverage into its product range"<sup>33</sup>
- by 28 August 2017 a senior member of the underwriting team canvassed providing ex gratia payments to consumers with first-presentation mental health conditions.<sup>34</sup>

## 6.5 Opinion of an independent actuary

### 6.5.1 EXPERT ENGAGED BY COMMISSION

The Commission engaged an independent actuary to assist the Investigation in its examination of compliance under the Equal Opportunity Act. In particular, the Commission asked for an expert opinion on whether the conclusions drawn by Allianz and AGA about the data provided were actuarially sound, having regard to the information available and relied on by Allianz and AGA at the time.

The Commission engaged a private consultant, Actuarial Edge (the Actuary). The Actuary was asked by the Commission to consider Allianz and AGA's responses to the Commission's questions, together with relevant documents produced by Allianz and AGA to support its claim that the data it held justified lawful discrimination.

The Actuary produced a report to the Commission, outlining its analysis of the information and opinion on the options reasonably open to Allianz and AGA.<sup>35</sup>

### 6.5.2 ACTUARY'S ANALYSIS OF ALLIANZ AND AGA'S MATERIAL

#### Positive aspects of actuarial information

The Actuary acknowledged that Allianz and AGA had "examined many sources of data" and determined the hierarchy of data "seems reasonable and covered many sources".<sup>36</sup> The Actuary concluded that Allianz and AGA's review considerations, such as claim frequency, average costs of claims arising from mental illness conditions, and the impact on profitability, were all factors "reasonable and appropriate in considering whether to maintain the relevant exclusion".<sup>37</sup>

#### Shortcomings in Allianz and AGA's actuarial material and analysis

The Actuary reviewed Allianz and AGA's explanation and documentation and identified shortcomings in the quality and analysis of the information provided.

#### SUMMARY OF ACTUARY'S ANALYSIS

- Despite the large volume of documents, only approximately 20 documents included relevant actuarial or statistical data.
- The inclusion of mental health conditions claims would not exceed Allianz's stated risk tolerance.
- Some cover for some types of pre-existing mental health conditions was plausible and would not threaten the profitability of the travel insurance business.
- Allianz and AGA's documents did not appropriately consider the spectrum of risk for different mental health conditions.
- Allianz and AGA appear to have applied an additional loading for mental health conditions without providing analysis of how or why the loading was applied.
- Allianz and AGA were less likely to offer cover for mental health conditions compared to physical conditions without sufficient data or analysis.
- Allianz and AGA's conclusions about its Combined Operating Ratio (which considers the cost of insurance against the premiums collected) for mental health coverage were inconsistent and not supported by sufficient data or analysis.

While Allianz and AGA supplied numerous documents, the Actuary observed "only the conclusions and findings are documented. The supporting data, information and the analysis itself is not included",<sup>38</sup> noting there was "no single document that synthesises the data and analysis and sets out Allianz's findings, apart from commentary" contained in correspondence to the Commission.<sup>39</sup> On this basis, the Actuary found only approximately 20 documents included relevant actuarial or statistical information pertinent to the Investigation.<sup>40</sup>

While the Actuary agreed that mental health claims appeared to be technically riskier than physical claims, she considered that the inclusion of mental health conditions claims would not exceed Allianz's stated risk tolerance.<sup>41</sup>

In addition, the Actuary identified that, based on her analysis of the findings of Allianz and AGA's internal reviews, some cover for some types of pre-existing mental health conditions was plausible and would not threaten the profitability of the travel insurance book. This finding was "inconsistent with Allianz's conclusion".<sup>42</sup>

### **Spectrum of risk**

The Actuary noted that:

mental illness disorders can range from mild depression or anxiety, which does not affect a person's ability to undertake normal activities, to serious psychotic episodes requiring hospitalisation and various drug and non-drug interventions to treat the illness and enable the person to resume normal activities.<sup>43</sup>

The Actuary described this range of possible risk outcomes for different mental health conditions as a "spectrum of risk" and found that Allianz and AGA's documents did not appropriately consider the differences that arise from various mental health conditions in setting their policy terms.

Further, the Actuary identified that in the context of travel insurance, risks need to be considered carefully. Firstly, the category of people that choose to travel are a specific subcategory that needed to be taken into consideration when calculating risk. Secondly, the risk that a person suffers an episode serious enough to necessitate the cancellation of prepaid travel plans and/or requiring medical attention overseas, "would differ markedly for people at different points along this mental illness spectrum".<sup>44</sup>

At its core, given the vast differences in mental health conditions (for example, between a person who once experienced a mild episode of post-natal depression five years ago to a person who is experiencing acute and active psychosis) prospective risks to the insurer for cancellation or claims should also be differently rated.

In this regard, the Actuary concluded that the categories used by Allianz and AGA to test coverage for mental health conditions did not account for these variances.

### **Data analysis and lack of transparency**

Allianz and AGA produced documents that showed internal testing for whether coverage for mental health conditions was possible using "medical risk scores" for different mental health conditions. To provide mental health conditions with a score, Allianz and AGA compared the spectrum of risks for pre-existing physical conditions. The medical risk score leads to a weighted premium loading being allocated to a medical condition that applies when a consumer buys insurance.

The Actuary identified that Allianz and AGA appear to have applied an additional 'loading' for mental health conditions – in addition to the weighted premium loading derived from the medical risk score. The Actuary noted that there was no analysis provided by Allianz and AGA to explain how this loading was derived or why it was added.<sup>45</sup>

In addition, the Actuary identified that the cover threshold used by Allianz and AGA for mental health conditions appears to have been less tolerant when compared to thresholds used for other conditions. Specifically, the Actuary identified that "the upper score threshold for mental illness conditions is markedly lower ... compared to ... physical injury. Again, no data or analysis is available to support this selection". It would appear therefore, that Allianz and AGA were less likely to offer cover for mental health conditions compared to physical conditions.

The Actuary noted "it is difficult to ascertain exactly what information Allianz relied upon to maintain the relevant exclusion with respect to the NAB SPDS"; because the internal documents were prepared at different times, they contain different assumptions.<sup>46</sup>

The Actuary observed the limited explanation provided was "taking a more risk adverse view".<sup>47</sup> The Actuary further reflected that "while the types of analysis implied by the findings appear reasonable and appropriate, there was a general lack of detail and explanation about how the analysis was undertaken and how the assumptions were established".<sup>48</sup>

### **Combined operating ratio**

In order to advise an insurer regarding the appropriate level of risk coverage that can be offered within the financial position of a company, an actuary or statistician may have regard to a range of factors. One method commonly used to advise insurers is what the impact of certain coverage will be on its ability to retain a profitable 'combined operating ratio' (COR). A COR compares the cost of insurance (claims and expenses) against the premiums collected. As a general rule of thumb, a COR below 100 per cent means an insurance company is operating at an 'underwriting profit'.

The Actuary observed that the COR conclusions found in Allianz and AGA's internal documents were inconsistent.<sup>49</sup> The claim frequency and claim severities for mental health conditions had no "data or analysis to support the values quoted or why the relative risk of pre-existing mental illness conditions is higher than for the current policy". Nor did they have any "explanation as to why the values differ across different documents".<sup>50</sup>

Importantly, the Actuary's observations of Allianz and AGA's material suggest that the financial impact of including coverage for mental health conditions would not be onerous.

The Commission considers that documents produced by Allianz and AGA appear to have tested possible coverage for mental health conditions in circumstances where, without any clear conclusions or explanation based on actuarial or statistical data to explain otherwise:

- the tolerance for risk was lower than that for physical conditions
- a loading was added to risk scores for mental health conditions
- costs assumed to be incurred for mental health claims were unwarranted.

On this basis, the Commission considers that Allianz and AGA's consideration of possible coverage of mental health conditions was flawed.

### **The Actuary's conclusion: Coverage was possible**

While the Actuary agreed that there may be a likelihood of mental health claims that can be assumed to be riskier overall, she did "not agree the inclusion of [mental health] claims would exceed Allianz and AGA's pre-existing risk tolerance".

The Actuary instead considered that Allianz and AGA's documents "set out a proposal that appears to demonstrate the viability of using claims assessment processes to enable the inclusion of [mental health] claims".<sup>51</sup>

Relevantly, the Actuary's interpretation of the findings from the internal analysis is that cover *could* also "be provided for some pre-existing mental illness conditions".<sup>52</sup> Notably, by assessing the relative riskiness of conditions, determining if cover could be offered, and applying an appropriate premium, "the impact on the COR appeared to be negligible".<sup>53</sup>

In this regard, the Actuary has identified that, based on the statistical and actuarial information provided by Allianz and AGA, there was a viable option for offering coverage to mental health conditions, which was not adopted.

## 6.6 Did Allianz and AGA unlawfully discriminate?

As outlined in Chapter 3, Allianz and AGA have 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, unless they can lawfully claim an exception.

Allianz and AGA argued that they had a lawful basis to include the blanket exclusion terms in their travel insurance policies because they relied on appropriate data to satisfy the data exception under the Equal Opportunity Act.

While noting the complexities inherent in insurance coverage, the Commission considers that Allianz and AGA unlawfully discriminated against people with a mental health condition for the reasons set out below.

### 6.6.1 THE DISCRIMINATION WAS NOT BASED ON ACTUARIAL OR STATISTICAL DATA ON WHICH IT WAS REASONABLE TO RELY

#### The law

For an insurer to be lawfully permitted to discriminate, relying on the exception in section 47(1)(b) of the Equal Opportunity Act, the discrimination must be based on actuarial or statistical data on which it is reasonable for the insurer to rely.<sup>54</sup> The question of whether it is reasonable for an insurer to rely upon particular data involves “an objective judgment about the nature and quality of the actuarial or statistical data”.<sup>55</sup>

The Australian Human Rights Commission’s *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth) (DDA Guidelines)* include the following guidance for insurers:

- statistical or actuarial data should be current, complete, credible, based on sufficient sample size and applicable to the situation.<sup>56</sup>
- “as the data-limb exemption requires the discrimination to be ‘based’ on the relevant data, this means that the data must have been available at the time of the discrimination. In addition, the insurance ... provider must also be able to show that the data was actually considered and relied upon”.<sup>57</sup>

#### Commission’s analysis

The Commission acknowledges that Allianz and AGA produced a large volume of external data to the Investigation. The data sources, such as the Underwriting Manual, internal claims data for other injuries and other publicly available insurance data, are relevant and valid actuarial and statistical data sources.<sup>58</sup>

The Commission also notes that the Actuary concluded that the information provided by Allianz and AGA included appropriate data sources for assessing whether to provide insurance to people with a mental health condition.<sup>59</sup>

Allianz and AGA’s internal documents show, and the Actuary’s Report agrees, that Allianz and AGA took some steps to obtain quality data and to consider what coverage it could offer. Allianz and AGA stated that they excluded risk “where there is a high likelihood of a number of sizeable claims that exceed its risk tolerance”.<sup>60</sup>

#### Did Allianz and AGA have a lawful basis to provide the blanket exclusion terms?

##### *The external documents*

The documents, dated from 1998 to 2018, covered the period prior to and after the creation of the NAB SPDS and the ATID. Importantly, the Actuary noted that the sources provided by Allianz and AGA were capable of analysis which may, if it had been properly conducted, have provided a reasonable basis to discriminate.<sup>61</sup>

However, there was little to no reference to any of the external documents (or information contained in those documents) that Allianz and AGA could show they relied on to include the blanket exclusion terms. The Commission considers that it is not sufficient to simply collect documents that are capable of being considered, if an insurer cannot demonstrate that it used their contents to support a decision to discriminate. In order to rely on the data exception, the Commission considers that there should be sufficient and reasonable connection between the documents/data and the decision to discriminate.



## ***The internal documents***

More than half of the 120 internal documents provided by Allianz and AGA were created *after* the creation of the NAB SPDS, and could therefore not have been considered or relied upon at the time that the blanket exclusion term in the NAB SPDS was created.

The Commission also considers that none of the internal documents created prior to or at the time of developing the NAB SPDS:

- indicated any of the external documents were used to inform calculations and pricing discussions
- indicated data was actively considered or analysed
- outlined Allianz and/or AGA's findings.

For example, Allianz and AGA did not produce any documents identifying the outcome of the 2013–14 review. The Commission also notes that Allianz and AGA could not identify any material that “solely relates to the approach by the business not to alter the existing relevant exclusions”.<sup>62</sup> Allianz and AGA noted that the process of internally considering the “feasibility of introducing cover ... was not a structured process with regimented timeframes and formal reporting requirements”, such that it was “unable, given the passage of time, to identify with any additional precision the individual parts of the documents that were considered and relied upon”.<sup>63</sup>

The Commission therefore considers that, based on the documents provided to the Investigation, there was no formal review process undertaken to consider the inclusion of the blanket exclusion terms in its travel insurance policies.

Finally, Allianz and AGA also noted that they do not undertake separate analysis for the development of different policies. Instead, Allianz follows AGA's Underwriting Guidelines, which are based on the principle of underwriting “niche business with low severity, high volume and a high service component”.<sup>64</sup> Allianz and AGA explained that in July 2011 this principle required the inclusion of a blanket exclusion term.

## **Commission's conclusions**

Allianz and AGA's use of the blanket exclusion term was not based on actuarial or statistical data for which it was reasonable to rely. This is because:

- it is not clear if and how the documents provided to the Investigation formed the basis of Allianz and AGA's decision to exclude coverage for mental health conditions
- the Actuary's analysis shows that cover for some types of pre-existing mental health conditions was plausible (as set out in the 2013–14 review) and would not threaten the profitability of the travel insurance portfolio
- there were no documents provided to the Investigation that were created and analysed prior to the development of the NAB SPDS to inform its terms
- the Actuary identified shortcomings in data produced by Allianz and AGA, including inconsistent conclusions between documents, incident rates being drawn from different documents based on different countries, the reliance on 'severe' incidence data, and assumptions about mental illness claim costs.<sup>65</sup> For instance:
  - documents provided by Allianz and AGA do not adequately explain why the relative risk of pre-existing mental health conditions is considered to be higher and, at times, differ or become more risky throughout the reviews.<sup>66</sup>
  - loadings and values given to mental health conditions in documents testing or examining the feasibility of coverage do not appear to have been made consistently, or to have been based on any objective data.<sup>67</sup>

As a result, the Commission concludes that Allianz and AGA discriminated against people with a mental health condition by offering policies with the blanket exclusion term. This conduct was not based on sufficient actuarial or statistical data to satisfy the exception to discrimination.

From the documents provided by Allianz and AGA, the Commission also considers that Allianz and AGA did not have a sufficient legal basis to repeatedly re-issue the policy, including in February 2016, until its removal from the market in mid-2018.



## 6.6.2 THE DISCRIMINATION WAS NOT REASONABLE HAVING REGARD TO THAT DATA AND ANY OTHER RELEVANT FACTORS<sup>68</sup>

### The law

The exception to discrimination in section 47(1)(b) requires the discrimination to be based on data on which it is reasonable to rely, *and* the discrimination must be reasonable having “regard to that data and any other factors”.

Notwithstanding the Commission’s view that Allianz and AGA’s use of the blanket exclusion term was not based on data on which it was reasonable to rely, the Commission has also considered Allianz and AGA’s claim that its actions were “reasonable having regard to that data and the other relevant factors identified in the response”.<sup>69</sup> The ‘relevant factors’ identified by Allianz and AGA were its Underwriting Guidelines and the “circumstances prevailing during this time and presently”.<sup>70</sup>

### The Commission’s analysis

The Commission does not consider that Allianz and AGA have established their discriminatory conduct is ‘reasonable’ having regard to data or other factors.

Allianz and AGA claimed that:

- according to its data, the introduction of cover for mental illness would be a “high severity risk”
- such a risk would be inconsistent with its Underwriting Guidelines, which stated that its model was to underwrite a niche business with low severity, high volume and a high service component
- this does not constitute discrimination because Allianz and AGA “like all other insurers ... excludes risks in respect of claims unrelated to mental illness, where there is a high likelihood of a number of sizable claims that exceed its risk tolerance”.<sup>71</sup>

The Commission notes that the Federal Court has provided guidance on what could be considered a ‘relevant factor’, describing any “matter which is rationally capable of

bearing upon whether the discrimination is reasonable”.<sup>72</sup> The Australian Human Rights Commission further notes that factors may include “factors that increase the risk to the insurer as well as those that may reduce it”.<sup>73</sup>

The Commission agrees that an insurer is entitled to consider “practical and business considerations”, such as those highlighted by Allianz and AGA, as part of its analysis. However, this factor is not a sufficient basis on its own to demonstrate an insurer’s policies are ‘reasonable’ and lawful. Relevant case law requires a decision-maker to balance “the nature and extent of the discriminatory effect on the one hand against the reasons advanced in favour of the requirement or condition on the other”.<sup>74</sup>

### WHAT ARE ‘RELEVANT FACTORS’?

The Australian Human Rights Commission’s *Disability Discrimination Act Guidelines for Insurance and Superannuation 2016 (DDA Guidelines)* note that ‘relevant factors’ include:

- practical and business considerations
- whether less discriminatory options were available
- the individual’s particular circumstances (or, similarly, the circumstances of a range of customers affected, such as those with different mental health conditions)
- the objects of the Disability Discrimination Act, especially eliminating disability discrimination as far as possible<sup>75</sup>
- all other relevant factors of a particular case.<sup>76</sup> For example, medical opinions, opinions from other professional groups, the practice of others in the insurance industry and commercial judgment.<sup>77</sup>

Accordingly, while impact on profitability or the appetite for risk may be factors for consideration, they are not the only factors, nor are they determinative.

The Commission notes that the documents produced show some efforts in the lead up to the preparation of the NAB SPDS in July 2016 to provide coverage to consumers experiencing mental health conditions, particularly from the Allianz or AGA underwriting team. However, it appears that the Executive's business considerations meant that no change to the policy was made. The documents do not identify any consideration of the 'relevant factors' set out in the *DDA Guidelines*.

In its formal response to the Commission's proposed recommendations and findings, Allianz and AGA noted that, "as a matter of compliance, it was not open for AGA's employees to expose the company to risk that was inconsistent with the Underwriting Guidelines".<sup>78</sup> The Commission reiterates that the commercial imperatives set out in underwriting guidelines are an internal policy of an insurer and do not necessarily reflect a legal standard. An insurer's policies *should* encourage its employees to identify risks of non-compliance with the law regardless of its commercial priorities.

### **Current policy offering**

The Commission has identified that the current NAB SPDS policy issued by Allianz and prepared 1 November 2018 (current NAB SPDS) does not include the blanket exclusion term. The Commission commends Allianz and AGA for this action. As noted above, Allianz and AGA confirmed they were also "well advanced in the process of introducing cover for pre-existing mental illness".<sup>79</sup>

Despite these positive steps, the Commission considers there are some aspects of the current NAB SPDS that may still be improved. For example, the revised definition of 'pre-existing medical condition' in the current NAB SPDS specifies this to be a condition "in the 10 years prior to the time of the policy being issued that involves a mental illness".<sup>80</sup>

This clause may be discriminatory as it treats people with a mental health condition unfavourably in terms of coverage. Further,

while the 10-year criterion also applies to physical conditions, another section of the SPDS lists specific pre-existing physical conditions for which Allianz and AGA "may cover with no additional premium payable".<sup>81</sup>

The Commission notes that such a policy would, just as the blanket exclusion term, be required to be based on rigorous, relevant and timely actuarial or statistical information to support such a time frame being imposed, which the Commission observes to be long.

The Commission has not considered the pre-existing condition clause in its findings below but it notes that, based on the statistical material provided to the Commission and the actuarial analysis provided by the independent actuary, broader coverage for pre-existing conditions was possible. As Allianz and AGA distinguish between certain types of physical conditions that they will and will not cover in the current NAB SPDS, we anticipate that it would be possible to distinguish between certain mental health conditions in the same manner.

However, Allianz and AGA continue to offer products through partner relationships, which do not provide cover for pre-existing health conditions (including mental health conditions), irrespective of severity or risk.<sup>82</sup>

A seamless, convenient or quick product needs to be based on actuarial or statistical data on which it is reasonable to rely, or be reasonable based on other relevant factors.

Allianz and AGA have, based on the analysis in this investigation, the capacity to distinguish between risk profiles of different conditions. They should use that capacity where possible to ensure that their disclosure obligations and exclusions in relation to illness or disability are no more than can be reasonably justified by the data.

## 6.7 Did Allianz and AGA comply with the positive duty to eliminate discrimination?

As noted in Chapter 3, insurers have a legal obligation under section 15(2) of the Equal Opportunity Act to take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible (positive duty). The positive duty requires insurers to be proactive and to take steps to monitor, identify and eliminate discrimination in the provision of insurance.

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.<sup>83</sup>

As outlined in Chapter 3, the Commission considers that, in order 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.

The Commission asked Allianz and AGA what steps they had taken in compliance with the positive duty.

### 6.7.1 ALLIANZ AND AGA'S RESPONSE

Allianz and AGA identified steps they had taken to meet the positive duty including:

- establishing a "policy wording interpretations committee" in September 2016 to create "clear and documented protocols for developing and approving new Underwriting Guidelines for claims and updates to policies when required, as well as to integrate feedback from internal dispute resolution, FOS Determinations and sales into potential changes to policy wording"<sup>84</sup>
- committing to a global strategy to employ

standardised, scalable products and policy wordings, to "ensure consistency of policy wording in all travel insurance products, including the removal of the first-presentation mental illness exclusion"<sup>85</sup>

- creating a product governance framework that "links product, sales, claims and monitoring to ensure Allianz meets its obligations to customers"<sup>86</sup>
- ensuring claims handling processes for claims arising from mental health conditions were treated in the same manner as all other medical claims. Allianz and AGA advised it had also broadened its definition of medical adviser to allow for clinical psychologists to provide a diagnosis<sup>87</sup>
- commencing a progressive update of all its PDSs to remove the pre-existing condition exclusion, though Allianz and AGA notes that some policies "for travel insurance products sold by its partners, still contain the first-presentation mental illness exclusions. In this regard Allianz notes it has approximately 100 major partners, each of whom require different processes to be completed to update policy and PDS terms".<sup>88</sup>

### 6.7.2 COMMISSION'S ASSESSMENT

The Commission acknowledges these efforts by Allianz and AGA to eliminate discrimination on the basis of mental health conditions across their products and across the range of services they provide. This is a positive step that demonstrates Allianz and AGA are improving their approach to compliance, and are changing their policies and practices to make a meaningful difference to the lives of consumers with a mental health condition.

The Commission notes that Allianz and AGA are updating their policies to remove the blanket exclusion terms. The blanket exclusion term was removed from the majority of policies in November 2017. In addition, changes have been made to coverage for pre-existing mental health conditions. A consumer purchasing an Allianz or AGA travel insurance policy with a pre-existing condition is now directed to assess the severity of their

pre-existing mental health conditions via a screening tool.<sup>89</sup>

Despite these efforts, in the Commission's view, Allianz and AGA did not meet their positive duty during the Investigation Period. The Commission's reasons for this assessment are outlined below.

### **Changes to policy terms**

Allianz and AGA stated they had undertaken measures to review policy wording to meet the positive duty.<sup>90</sup> Allianz and AGA referred to the establishment of a Policy Wording Interpretations Committee, the use of product framework Partner One, and the Allianz Product Governance Framework. They also took measures to meet the positive duty in their claims handling.<sup>91</sup> Specifically, they note that more experienced personnel are provided for mental health medical claims, and that clinical psychologists may provide a diagnosis of a mental health condition.

Of particular concern, Allianz and AGA referred to steps they had taken in accordance with their underwriting approach "having regard to its ordinary risk tolerance".<sup>92</sup> While risk tolerance is a valid consideration, insurers must nevertheless ensure they comply with anti-discrimination laws.

The Commission also notes that from at least July 2017, Allianz and AGA were considering whether they could continue to offer insurance with the blanket exclusion terms. Documents indicate they finalised removing the relevant exclusion 12 months later, when potentially

tens of thousands of contracts of insurance had been sold to Australian consumers in the interim. Allianz executives noted the need to "make meaningful change in a very short period of time".<sup>93</sup> However, despite this acknowledgement, Allianz and AGA did not:

- take urgent steps to remove the blanket exclusion terms from its policies
- advise consumers purchasing a policy of a different approach to claim.

This is of particular concern to the Commission given that Allianz and AGA had previously identified that removal could be achieved in under eight weeks.<sup>94</sup>

The Commission considers that the review of policies to remove pre-existing condition exclusions from its policies is the only example provided by Allianz and AGA that meets the positive duty.

The Commission considers that a company of a similar size should at least have:

- systems in place to ensure that all employees are aware of their obligations under anti-discrimination law
- practices to ensure that discrimination is identified, monitored and responded to (in particular, regarding its insurance policy development process).

In conclusion, the Commission considers that Allianz and AGA did not employ processes to effectively monitor the insurers' compliance with anti-discrimination law and were too slow to take action when they detected where change was needed.

## 6.8 Findings

---

The Commission makes the following findings about Allianz and AGA's compliance with the Equal Opportunity Act:

1. Within the Investigation Period (1 July 2017 – 19 April 2018), Allianz and AGA issued travel insurance policies, including the NAB Supplementary Product Disclosure Statement (SPDS) (A119163-0626) and Allianz Travel Insurance (Direct) Policy (ATID PDS):
  - a) on terms that excluded indemnity for any claim arising from or in any way related to depression, anxiety, stress, mental or nervous conditions
  - b) up until 6 November 2017, failed to indemnify people insured under such policies whose claims arose from or were in any way related to depression, anxiety, stress, mental or nervous conditions(together, the Conduct).
2. During the Investigation Period, Allianz and AGA 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 Allianz and AGA 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, Allianz and AGA contravened section 44 of the Equal Opportunity Act.
5. In the Commission's opinion, Allianz and AGA did not take reasonable and proportionate measures to eliminate discrimination as far as possible in accordance with their duty under section 15 of the Equal Opportunity Act during the Investigation Period.

## 6.9 Recommendations

---

Based on the Investigation and findings above, the Commission makes the following recommendations to Allianz and AGA to improve its compliance in future with anti-discrimination laws.

1. Allianz and AGA develop a strategy for compliance with the Equal Opportunity Act in respect of their travel insurance products and services, which:
  - includes creating 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 advances 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. Allianz and AGA should apply rigorous statistical and actuarial analysis to all policy terms it is using to offer or exclude travel insurance coverage to people with a mental health condition. Allianz and AGA 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
  - they consider whether there are less discriminatory options available in the development of policies.
3. Allianz and AGA contact travel insurance claimants denied an 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. Allianz and AGA undertake to provide their 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. Allianz and AGA develop risk profiles and appropriate coverage for differing mental health conditions within its travel insurance policies, as it does with differing physical conditions.
6. Allianz and AGA provide 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.



## 6.10 Allianz and AGA's response to findings and recommendations

---

Allianz and AGA provided the Commission with an extensive response to our proposed recommendations and findings.<sup>95</sup>

The Commission notes that Allianz and AGA disagreed with the Commission's conclusions regarding their conduct and compliance and considered that the findings were inconsistent with or went beyond evidence that was before the Commission. Nevertheless, Allianz and AGA acknowledged that they were, in principle, supportive of the Commission's proposed recommendations<sup>96</sup> and outlined they were willing to meet with the Commission

to discuss a proposed action plan to comply with anti-discrimination law. The Commission commends Allianz and AGA in this regard.

After careful consideration of Allianz and AGA's response, the Commission has determined that our analysis remains reasonable and valid, but did make some minor amendments. The Commission is grateful to Allianz and AGA for their fulsome engagement in this process.

## 6.11 Lessons learned from Allianz and AGA's conduct

---

Insurers should:

- ensure they use accurate and relevant actuarial and statistical information when considering whether to issue a policy or the terms on which it is offered
- record and document the analysis relied on to make decisions
- understand that underwriting guidelines are an internal guide for business, and that anti-discrimination laws must be complied with
- review and revise the basis for retaining clauses that are discriminatory when policies are issued and re-issued
- understand that an ex gratia payment for a mental health claim does not make discriminatory blanket exclusion terms lawful
- ensure staff, including executives, understand their obligations under anti-discrimination laws.

## Notes

- 1 'Witness statement of Michael Dean Winter (Allianz Australia Insurance Limited Travel Insurance)' *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Exhibit 6.263 (Rubric 6-63), 24 August 2018), 2.
- 2 Ibid.
- 3 Ibid. In 2013–14, premiums paid were \$188,803,107; in 2017–18, premiums paid were \$256,854,807.
- 4 Allianz Product Disclosure Statement 'NAB Supplementary Product Disclosure Statement' (SPDS) A119163-0626 (prepared 1 July 2016) (the NAB SPDS).
- 5 Ibid 57.
- 6 Allianz Travel Insurance (Direct) policy (ATID PDS) POL849DIR 03/17.
- 7 Allianz and AGA's substantive responses were provided in correspondence: Letter from Allianz and AGA to the Victorian Equal Opportunity and Human Rights Commission, 1 June 2018 ('June letter'); Letter from Allianz and AGA to the Victorian Equal Opportunity and Human Rights Commission, 6 July 2019 ('July letter'); and Letter from Allianz and AGA to the Victorian Equal Opportunity and Human Rights Commission, 4 February 2019 ('February letter').
- 8 June letter (n 7) 12.
- 9 Ibid.
- 10 Ibid. See key terms outlined in Chapter 1.
- 11 Ibid 6.
- 12 July letter (n 7) 5.
- 13 June letter (n 7) 6.
- 14 Ibid 6.
- 15 Ibid 6.
- 16 Ibid 7.
- 17 Ibid 7.
- 18 July letter (n 7) 6.
- 19 Ibid 7.
- 20 Ibid 6.
- 21 Ibid 18.
- 22 Ibid 16.
- 23 Ibid 5.
- 24 Ibid 16.
- 25 Ibid 8.
- 26 See, for example, documents 31, 33 of schedule of Allianz, 3A.
- 27 Document 43, 'RE: Estimate for Mental Illness in Healix', schedule of Allianz, 3A.
- 28 Document 111, schedule of Allianz, 3A, dated 18 December 2015.
- 29 July letter (n 7) 3 [15].
- 30 Document 30, schedule of Allianz, 3A, undated.
- 31 Document 30, schedule of Allianz, 3A, undated.
- 32 Document 38, dated 17 December 2015, schedule of Allianz, 3A.
- 33 Document 103, 'Questions from actuarial as part of peer review of claims estimates', schedule of Allianz, 3A, 2.
- 34 Document 91, 'Email from Chief Underwriting Officer to Chief Operating Officer about developing approach to pay FP MI claims', Schedule of Allianz, 3A, 1.
- 35 Actuarial Edge, *VEOHRC Travel Insurance – Allianz* (Report, 23 September 2018) ('*Allianz Actuarial Edge Report*').
- 36 Ibid. 12 Set out in June Letter (n 7).
- 37 *Allianz Actuarial Edge Report* (n 35) 12.
- 38 Ibid 19.
- 39 Ibid 13. June Letter (n 7) and July letter (n 7).
- 40 *Allianz Actuarial Edge Report* (n 35) 11.
- 41 Ibid 20.
- 42 Ibid 19.
- 43 Ibid 12. See also Actuaries Institute, *Mental Health and Insurance* (Green Paper, October 2017).
- 44 *Allianz Actuarial Edge Report* (n 35) 13.
- 45 Ibid 16–17.
- 46 Ibid 5.
- 47 Ibid 13.
- 48 Ibid 4.
- 49 Ibid 17.
- 50 Ibid 17.
- 51 Ibid 19–20.
- 52 Ibid 12.
- 53 Ibid 12.
- 54 See *Equal Opportunity Act 2010* (Vic) s 47(1)(b).
- 55 *QBE Travel Insurance v Bassanelli* (2004) 137 FCR 88 [30] ('*QBE Travel Insurance v Bassanelli*').
- 56 See Australian Human Rights Commission, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)* (Guidelines, November 2016) 9 ('*DDA Guidelines*'), referring to *QBE Travel Insurance v Bassanelli* (n 55).
- 57 *DDA Guidelines* (n 56) 9.
- 58 Ibid 9–11.
- 59 *Allianz Actuarial Edge Report* (n 35) 21.
- 60 June letter (n 7).
- 61 *Allianz Actuarial Edge Report* (n 35) 22.
- 62 July letter (n 7) 4.
- 63 Ibid 4.
- 64 June letter (n 7) 4.
- 65 *Allianz Actuarial Edge Report* (n 35) 17–18.

- 66 Ibid 21.
- 67 Ibid 13.
- 68 Pursuant to *Equal Opportunity Act 2010* (Vic) s 47(1)(b)(ii).
- 69 July letter (n 7) 5–6.
- 70 Ibid 6 [18].
- 71 June letter (n 7).
- 72 *QBE Travel Insurance v Bassanelli* [53], as cited in *DDA Guidelines* (n 56) 11.
- 73 *DDA Guidelines* (n 56) 11.
- 74 Ibid 14.
- 75 Note the *Equal Opportunity Act 2010* (Vic) equivalent of “eliminating discrimination to the greatest extent possible” at section 3(a).
- 76 *DDA Guidelines* (n 56) 7.
- 77 Ibid 11–14
- 78 February letter (n 7) 5.
- 79 June letter (n 7).
- 80 NAB SPDS Travel Insurance Policy, prepared 1 November 2018, see p 10–11.
- 81 July letter (n 7) 35–36.
- 82 Letter from Allianz and AGA to the Victorian Equal Opportunity and Human Rights Commission, 15 May 2019.
- 83 *Equal Opportunity Act 2010* (Vic) s 15(6)
- 84 July letter 15.
- 85 Ibid 16.
- 86 Ibid 16.
- 87 Ibid 16.
- 88 Ibid 14.
- 89 February letter (n 7) 12.
- 90 June letter (n 7), response to question 9.
- 91 Ibid, response to question 9.
- 92 Ibid, response to question 9.
- 93 Document 24, Schedule of Allianz, 3A, undated.
- 94 Document 43, schedule of Allianz, 3A.
- 95 February letter (n 7).
- 96 Ibid 1.

# Chapter 7: Zurich and Cover-More

## 7.1 Summary

1. Cover-More produced a specific, detailed report regarding the viability of offering coverage to people with a mental health condition in its travel insurance products. The report considered some coverage was viable.
2. Upon its purchase of Cover-More, Zurich undertook to remove blanket exclusion terms in relation to people who have a mental health condition from its CoverMore products in June 2017.
3. Zurich also use a 'screening tool', designed by Cover-More, to help it assess and provide coverage to people with a pre-existing condition, including a mental health condition. The screening tool asks a series of questions to a consumer to determine level of risk and indemnity to extend coverage for a condition.
4. While the Commission identified some inconsistencies in the application of the screening tool, which may warrant further review, the screening tool provides a useful and important example of the practical steps insurers can take to provide cover to people with a mental health condition.

## 7.2 About Zurich and Cover-More

Zurich Australia Insurance Limited (Zurich) offers travel insurance through third-party arrangements and across a range of well-known Australian brands, including Australia Post, Medibank and Flight Centre.

Zurich and its related entities<sup>1</sup> account for roughly 30 per cent of the overall Australian travel insurance market,<sup>2</sup> following its purchase of Cover-More Insurance Service Pty Ltd and Travel Insurance Partners Pty Ltd (collectively, Cover-More) in mid-2017.

Zurich underwrites Cover-More travel insurance policies.<sup>3</sup> Through this arrangement,

Zurich authorises Cover-More to provide it with a range of services, such as issuing policies, product design and claims management. Zurich, as the insurer, retains responsibility "for underwriting the product and ensuring the product is sustainable and that the product design meets its appetite risk".<sup>4</sup>

A detailed summary of Zurich and the role its subsidiary Cover-More performs is included in Chapter 2.

## 7.3 Zurich and Cover-More's role in the Investigation

The Commission identified that, following its purchase of Cover-More, Zurich had removed terms that excluded all mental health conditions from coverage (exclusion terms) from many of its travel insurance policies. On this basis, the Commission asked Zurich and Cover-More to provide assistance to the Investigation as 'non-party insurers'.

As non-party insurers, the Commission requested information from both Zurich and Cover-More including:

- why and on what evidentiary basis they removed the exclusion terms from their policies
- information about any subsequent claims related to mental health conditions
- what steps they had taken to comply with the positive duty to eliminate discrimination against people with a mental health condition in the provision of travel insurance.

The Commission commends Zurich's comprehensive response to the Investigation as a non-party insurer. Further, it is clear from

the Investigation that Zurich, through Cover-More, has demonstrated its commitment to providing more inclusive travel insurance products to people with a mental health condition since at least May 2017. Cover-More noted it "long recognised the importance of providing protection for travellers with existing mental illness conditions and to do more on this important social issue".<sup>5</sup> In this regard, the Commission considers that Zurich and Cover-More currently represent positive practice in travel insurance coverage for people with a mental health condition.

As a non-party insurer, the Commission did not make findings about Zurich's compliance with the *Equal Opportunity Act 2010* (Vic). However, the Commission made recommendations to enhance Zurich and Cover-More's approach to inclusive travel insurance products, thereby further promoting their corporate goal for customers to "keep travelling". Zurich and Cover-More have acknowledged these recommendations (see part 7.8 below).

## 7.4 Zurich and Cover-More's response to the Investigation

In response to the Commission's request for information, Zurich and Cover-More provided:

- initial letters to the Commission (Zurich May letter and Cover-More May letter)<sup>6</sup>
- further letters<sup>7</sup> (Cover-More July letter and Zurich July letter) (together, Zurich and Cover-More's response)
- the 2017 report *Mental Health Coverage: First Onset Pricing* ('*Mental Health Coverage Report*').<sup>8</sup>

Zurich endorsed Cover-More's responses to the Investigation and provided additional information to the Commission about its conduct as an underwriter.

### 7.4.1 COVER-MORE'S MENTAL HEALTH REVIEWS

Cover-More advised the Commission that in 2014 it commenced a review of its product design, which included "updating the historical understanding and rating of mental health risk".<sup>9</sup> Cover-More noted it has "taken the approach of treating existing mental health conditions in the same manner as any other existing health condition a customer may have".<sup>10</sup>

Cover-More noted that its corporate goal for customers to "keep travelling" has driven the development of a solution to provide mental health coverage in travel insurance. According to Cover-More, initial analysis of its data indicated that mental health issues continued to "present unacceptable risk from a premium pricing point of view" and outlined that the challenge was how to supply an insurance product that "included coverage for mental

health risk without that cost having to be passed on ... to the consumer".<sup>11</sup>

From approximately 2016, Cover-More advised that it undertook:

a comprehensive statistical and actuarial review of the underlying risk characteristics of Australian travellers that might suffer from mental health conditions, which included analysis of both pre-trip cancellation and post-departure medical and repatriation expenses.<sup>12</sup>

Cover-More provided the Commission with the 2017 *Mental Health Coverage Report*, which included analysis that led to the introduction of coverage for people with a first-presentation mental health condition during the period of coverage the consumer purchased the policy for. Relevantly, the *Mental Health Coverage Report* included the following information sources as relevant factors Cover-More considered before changing its travel policies:

- data from internal mental health claims arising in the previous year, and further complementing this with external sources
- data on claims frequency, severity, and prevalence for both pre-departure and post-departure claims
- information about the travelling population in Australia as a group – which concluded it was generally healthier than the overall population average
- data on the overall expected cost of claims for including coverage, per policy, and the estimated related underwriting premium increase
- data on the different treatments provided to people with varying mental health conditions, including what percentage required significant assistance through treatments such as those provided in hospitals, or lower cost treatments such as general practitioner consultations.

Significantly, the *Mental Health Coverage Report* considered that more than three quarters of mental health condition claims would fall into the low–medium severity estimate range. Further, Cover-More identified that of the mental health assessments it had considered, many were categorised as “low risk”.<sup>13</sup>

Zurich advised the Commission that it used the *Mental Health Coverage Report* to determine the terms on which it would agree to underwrite travel insurance by Cover-More, and the additional risk premium payable to extend coverage to first onset mental health conditions during the period of coverage.<sup>14</sup>

#### 7.4.2 COVER-MORE'S SCREENING TOOL

Cover-More used a screening tool – a platform to set risk relativities for existing health conditions (including mental health conditions) through a risk score.<sup>15</sup>

The purpose of a screening tool is to allow an insurer to better understand the risk of a particular event occurring, and to set cover, or price cover, accordingly. Many insurers already provide for cover for a consumer's pre-existing condition, if it falls within a defined category. Conditions such as asthma or high blood pressure, for example, are often covered. For some conditions, further information will be requested by an insurer to understand the type of condition, its severity, and how long a person has been affected by it.

Cover-More employed the use of a third-party external platform that incorporated claims data to create ‘risk bands’ that would inform its insurance pricing for coverage of health conditions (not just mental health conditions). Cover-More also sought out and relied on publicly available data sources, including the Australian Bureau of Statistics, for its risk assessment, as well as internal data and expertise drawn from Cover-More's medical assistance and employee assistance businesses.<sup>16</sup>

Cover-More explained that the medical score calculated from the screening tool is condition ‘agnostic’, meaning that it considers all health conditions according to risk. In this way, a heart condition with the same medical score as an anxiety condition would be given the same risk relativity. The medical score is then translated into a “premium based on claims cost”. This cost can vary according to which insurance product or brand is offered, as well as individual characteristics such as destination and trip length, which also affect the risk of a claim being made.<sup>17</sup>



From a consumer's perspective, a person purchasing a travel insurance product from Zurich or Cover-More is prompted to enter details about any pre-existing health condition that they wish to 'add' coverage for in their insurance policy.

After identifying the specific health condition, a consumer is asked a series of questions to further inform the insurer about the condition, such as whether:

- the health condition has active symptoms or was recently diagnosed
- the consumer has been hospitalised due to the health condition
- the consumer is travelling against medical advice.

Depending on the answers provided regarding the nature and severity of their health condition, a consumer may be offered an additional premium to ensure this specific health condition is 'added' to their policy coverage. The Commission was also advised that if a consumer considers their health condition is not captured in the options provided in the screening process, they may speak to a Cover-More nurse to have their circumstances individually assessed.<sup>18</sup>

### 7.4.3 ZURICH'S USE OF THE SCREENING TOOL

As outlined in Chapter 2, Zurich offers travel insurance through a range of its brands. Following the Zurich Insurance Group's purchase of Cover-More in 2017, Zurich began employing Cover-More's use of the external screening tool across all of its Cover-More products. Zurich noted that it took into account the way Cover-More historically covered pre-existing health conditions when determining its own risk assessment for its products.<sup>19</sup>

In its response to the Commission, Zurich advised that it "expected the new mental health conditions to present the same financial risks as the existing medical conditions that were covered and therefore the same risk premiums would apply".<sup>20</sup> Zurich advised that all medical conditions can receive a range of scores within the tool. The scores and risk rating reflect the condition's "risk profile" and are "based on the individual circumstances of the customer".<sup>21</sup>

However, the Commission notes the data held by Zurich does not separate or identify types of conditions.<sup>22</sup> Zurich was unable to provide the Commission with information about the scoring for different mental health conditions. As a result, the Commission cannot make any conclusions about how a consumer's specific mental health condition is assessed by Zurich. This is discussed further below.

## 7.5 Observations regarding Zurich and Cover-More

### 7.5.1 POSSIBLE IMPROVEMENT TO THE SCREENING TOOL

#### **Cover-More's screening tool is based on data analysis and evidence**

The Commission observes that Cover-More's screening tool has involved thorough testing and analysis. The use of a screening tool provides some transparency and options for consumers to test and understand, to some extent, the basis for the cost of providing cover for their mental health condition. It demonstrates a method for an insurer to offer coverage for certain mental health conditions based on relevant inputs such as the severity, history and treatment of their mental health condition.

The Commission considers that Cover-More's effort and systematic process to investigate what kind of travel insurance cover may be provided to people with mental health conditions is indicative of the kind of approach we would expect to see insurers undertake. In particular, the Commission notes that the *Mental Health Coverage Report* produced by Cover-More (which contributed to the development of its screening tool) shows rigour and analysis.

Cover-More sought and considered data from public and government bodies, as well as internal data sources. Notably, the *Mental Health Coverage Report's* testing questions and assumptions are targeted and specific. The report references current data, applies actuarial techniques and, importantly, records the processes undertaken to reach conclusions about coverage. The Commission

commends Cover-More on this documented internal evidence and process.

However, the Commission draws attention to Zurich and Cover-More's reliance on external data and screening tool platforms and notes that it is important that these tools also adopt a rigorous approach and ensure that any additional excess or indemnity offered to people with a mental health condition complies with the Equal Opportunity Act. In particular, if different and unfavourable premiums, excesses and indemnities are offered to people with a mental health condition, an insurer must ensure that it can lawfully rely on the exception to discrimination under the Equal Opportunity Act.

#### **Promoting best practice compliance in screening tools for Zurich and Cover-More**

The Commission notes that the screening platform enables Zurich and Cover-More to set prices for coverage for existing medical conditions. Cover-More states that "the price is set according to the risk the condition reflects; which is a combination of likelihood of incidences and the cost of those incidences".<sup>23</sup>

The Commission tested the screening tool by using a dummy consumer profile. We observed that, from a consumer perspective, the pricing results did not appear to be directly responsive to certain questions posed by the screening tool process. In particular we observed that, in some tests, the consumer would not receive a differently priced policy, despite entering what appeared to be notable differences in the severity of a mental health condition. This is explored further below.

## **CASE STUDY: TESTING THE SCREENING TOOL FOR ONLINE TRAVEL INSURANCE**

The Commission 'dummy tested' online travel insurance products, including a product insured by Zurich: 'Cover-More Travel Insurance'.<sup>24</sup>

The Commission tested the platforms using a consumer profile of a single, 31-year-old traveller heading to the United Kingdom between 1 and 8 December 2018. Using this profile, the Commission sought to 'add' cover for a pre-existing condition, and responded to the questions in the screening tool by confirming the consumer:

- was not travelling against medical advice
- was seeking cover for a condition of 'anxiety'
- was currently taking medication
- had not been treated for depression in the last three years.

The Cover-More Travel Insurance platform offered:

- without the pre-existing condition, a quote of \$74.00 to purchase a policy.
- an additional cost of \$80.00 to add to the insurance quote to provide cover for anxiety as a pre-existing condition, which would bring the total to \$154.00.

The Commission observes that the price to this policy was more than doubled in order to extend coverage to the consumer in the event they made a claim arising from a pre-existing mental health condition.

Further testing showed that the premium payable to the alias consumer did not change according to different responses to questions asked regarding a particular condition. For instance, in the tests conducted, the \$80.00 premium quoted by Cover-More Travel Insurance did not change if the option of 'not currently taking medication' was selected.

The Commission accepts that there may be an explanation for this difference and acknowledges Zurich and Cover-More's approach to offering coverage for pre-existing conditions was not the subject of this Investigation.

Nonetheless, the Commission wishes to highlight that if an insurance policy is offered on terms and conditions that are unfavourable to a person with a mental health condition, an insurance provider needs to be able to demonstrate that any discrimination is lawful under the Equal Opportunity Act.<sup>25</sup> This is true of any attribute group protected from discrimination at law, including disability (as in this investigation), age, sex, physical features, or pregnancy.<sup>26</sup>

More particularly, insurers need to be able to demonstrate that there is a lawful basis for charging premiums for different mental health conditions or based on the severity or currency of a mental health condition. Questions or tools that enable an insurer to assess the relative risk of covering a person's health condition should also ensure that an

appropriate and specific price is passed on to the consumer.

To avoid the risk of discrimination, insurers must be able to demonstrate that the use of screening tools (such as those used by Zurich and Cover-More) complies with anti-discrimination laws. This includes having a basis, in accordance with section 47 of the Equal Opportunity Act, for any terms or conditions that treat people with a mental health condition unfavourably – such as an increased indemnity.

Zurich and Cover-More both advised the Commission that they have a culture of continual improvement, and that they undertake periodic reviews of their products and services. The Commission notes that this culture was demonstrated through Zurich and Cover-More's acknowledgement of all the Commission's recommendations (see part 7.8).

## 7.6 Zurich and Cover-More's efforts to comply with the positive duty to eliminate discrimination

### 7.6.1 ZURICH AND COVER-MORE'S RESPONSE

Insurers also have a positive duty under section 15(2) of the Equal Opportunity Act to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.

In response to the Commission's request for information about Zurich and Cover-More's compliance with the positive duty, Cover-More advised the Commission of a range of actions it had taken or was undertaking, including:

- changing policy wording to remove the general exclusion of mental health conditions
- developing a solution to provide insurance cover for mental health conditions through the internal *Mental Health Coverage Report*, and subsequently providing coverage with the assistance of its screening tool
- conducting periodic reviews of its products and services, which has led to further review and adjustment of its application of the screening tools
- providing trauma counselling free-of-charge to customers involved in "horrific events overseas"
- committing to engaging with the Insurance Council of Australia in relation to a proposed data sharing initiative
- assisting delivery of Beyond Blue's national workplace program to employees across Australia.

### 7.6.2 THE COMMISSION'S OBSERVATIONS

The Commission commends Zurich and Cover-More's actions to comply with the positive duty. The Commission also commends the efforts taken, particularly by Cover-More, to develop coverage for people with first-presentation mental health conditions and the creation of a tool that has the capacity to provide a flexible and individual approach to offering coverage for pre-existing conditions.

### Zurich and Cover-More's reviews should incorporate the positive duty

To ensure compliance with the Equal Opportunity Act and the positive duty, the Commission considers that insurers should regularly review their products and services for potential unlawful discrimination, and to take steps to eliminate discrimination. This is particularly important in an area such as insurance coverage for a mental health condition, given the continual improvements in information and data about mental health relevant to insurance pricing.

Cover-More advised the Commission that it conducts periodic product reviews to ensure it is meeting customer expectations.<sup>27</sup> The Commission encourages Zurich and Cover-More to ensure that its discrimination obligations, and particularly its positive duty obligations, are built into and prioritised within its review processes.

### Zurich and Cover-More should investigate feasibility of automatic coverage in some cases

The Commission notes that Cover-More is able to offer automatic cover to certain physical medical conditions (such as asthma and glaucoma) under its current Product Disclosure Statement. Given the broad spectrum of possible mental health conditions and that Cover-More has stated that it takes "the approach of treating existing mental health conditions in the same manner as any other health condition",<sup>28</sup> the Commission recommends that Zurich and Cover-More investigate the feasibility of providing automatic coverage to certain pre-existing mental health conditions as more data becomes available. This would support Zurich and Cover-More's continued practice to eliminate discrimination, as far as possible.

## **Zurich and Cover-More should provide staff training and education**

The Commission would also expect organisations the size of Zurich and Cover-More to have a program of staff training

and education to ensure that employees understand their obligations under the Equal Opportunity Act. Such education should include the information about how to comply with the positive duty to eliminate discrimination and to not discriminate against people with a mental health condition.

## **7.7 Recommendations**

---

The Commission makes the following recommendations to Zurich and Cover-More to improve their compliance with the Equal Opportunity Act:

1. If Zurich and Cover-More have not done so already, develop a strategy for compliance with the Equal Opportunity Act in respect of its travel insurance products and services, which:
  - includes creating 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 advances in relevant medical knowledge
  - ensures any third party they use to collect data or provide assessment for cover complies with relevant anti-discrimination laws
  - incorporates a process for the strategy's regular review.
2. If Zurich and Cover-More have not done so already, undertake to provide their 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.
3. If Zurich and Cover-More have not done so already, ensure that risk profiles and appropriate coverage are developed for differing mental health conditions (as they do with differing physical conditions).
4. If Zurich and Cover-More do not do so already, they should provide 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.

## 7.8 Zurich and Cover-More's response to recommendations

### 7.8.1 COVER-MORE'S RESPONSE TO THE COMMISSION'S RECOMMENDATIONS

Cover-More acknowledged the Commission's recommendations and confirmed the recommendations will be incorporated into its compliance strategy, training programs, product design and customer communications.<sup>29</sup>

### 7.8.2 ZURICH'S RESPONSE TO THE COMMISSION'S RECOMMENDATIONS

Zurich advised it currently employs an integrated compliance framework; however, following the Commission's recommendations, it is considering implementation of a specific anti-discrimination law strategy in 2019 to further strengthen compliance in this regard. Planning for this has commenced.<sup>30</sup>

Zurich advised that it presently provides education to all staff on anti-discrimination law but will now separately consider other training to specific employees.<sup>31</sup>

Zurich also informed the Commission that, following its removal of the exclusion terms, it continues to review its products and will seek to make improvements regarding coverage for consumers experiencing mental health conditions.<sup>32</sup>

Finally, regarding information provided to consumers, Zurich advised there were few occasions where a person seeking a Cover-More policy would be refused all cover. Any consumer who is denied an indemnity is provided with reasons by email. Zurich will further examine its communications with consumers to make improvements in this regard.<sup>33</sup>



## Notes

- 1 Zurich Travel Solutions Pty Ltd.
- 2 IBISWorld, *Travel Insurance – Australia* (Market research report, June 2018) 21.
- 3 From 1 June 2017 pursuant to a binder arrangement
- 4 Letter from Cover-More to the Victorian Equal Opportunity and Human Rights Commission, 20 July 2018 ('Cover-More July letter').
- 5 Letter from Cover-More to the Victorian Equal Opportunity and Human Rights Commission, 17 May 2018 ('Cover-More May letter').
- 6 Ibid.
- 7 Cover-More July letter (n 4).
- 8 Cover-More, *Mental Health Coverage: First Onset Pricing* (Report, 24 May 2017).
- 9 Cover-More May letter (n 5).
- 10 Ibid.
- 11 Cover-More July letter (n 4).
- 12 Ibid.
- 13 Cover-More May letter (n 5).
- 14 Letter from Zurich to the Victorian Equal Opportunity and Human Rights Commission, 20 July 2018 ('Zurich July letter').
- 15 Ibid.
- 16 Cover-More July letter (n 4).
- 17 Zurich July letter (n 14).
- 18 Cover-More May letter (n 5).
- 19 Zurich July letter (n 14).
- 20 Ibid.
- 21 Ibid.
- 22 Ibid.
- 23 Cover-More May letter (n 5).
- 24 Cover-More, *Get a travel insurance quote* (Web page, 2017) <<https://secure2.covermore.com.au/content/2/en/?quoteEMCToken=A32C0170-E344-AF5A-35BE4BC52A964C1A&HashCode=810371199>>. Effective 20 September 2017
- 25 *Equal Opportunity Act 2010* (Vic) s 44.
- 26 Ibid s 6 contains a full list of attributes.
- 27 Cover-More May letter (n 5).
- 28 Ibid.
- 29 Letter from Cover-More to the Victorian Equal Opportunity and Human Rights Commission, 1 February 2019.
- 30 Letter from Zurich to the Victorian Equal Opportunity and Human Rights Commission, 1 February 2019.
- 31 Ibid.
- 32 Ibid.
- 33 Ibid.

# Chapter 8: Supporting enduring change in the travel insurance industry

## 8.1 Introduction: A focus on action

---

Although the Commission's Investigation revealed discriminatory policies and practices in the travel insurance industry during the Investigation Period, it also demonstrated that this is an industry willing to change. In the last few years, the travel insurance industry has taken a number of practical steps to improve practices and outcomes for people with a mental health condition. For example:

- in February 2017, the Insurance Council of Australia (ICA) commenced a review of its Code of Practice. The revised code includes specific guidance for insurers on mental health, including in the design of policies and claims.
- in October 2017, the Actuaries Institute released a Green Paper on mental health and insurance.<sup>1</sup> The paper explores the "systemic difficulties" facing the insurance industry in the way it considers mental health coverage.
- During the course of the Investigation, some party insurers took steps to remove blanket mental health exclusions and to introduce fairer policy terms for specific mental health conditions, including pre-existing ones.

### **LESSONS LEARNED TO DRIVE PRACTICAL CHANGE**

The lessons learned from the Investigation provide a strong foundation for practical action to drive enduring change in the industry. This includes:

- the need to listen to consumer experience (part 8.2)
- the need for better use and analysis of data (part 8.3)
- the need for stronger regulation (part 8.4)
- the need for better education and support (part 8.5).

The lessons learned from the Investigation have the potential for broader application to all travel insurers and across the insurance industry more generally (noting that the *Equal Opportunity Act 2010* (Vic) applies in the same way to the provision of all forms of insurance). These lessons reveal the critical need for the insurance industry to work together to address discrimination as a shared responsibility.

While the Equal Opportunity Act places a direct positive duty on insurers to eliminate discrimination as far as possible,<sup>2</sup> regulators and peak industry bodies such as the ICA and the Actuaries Institute also have an important role to play in supporting insurers to understand and comply with the law, and to facilitate best practice.

In 2016 the Australian Human Rights Commission (AHRC) reissued its guidance, *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth) (DDA Guidelines)*.<sup>3</sup> The *DDA Guidelines* provide detailed and expert guidance for insurers on

the application on anti-discrimination law to the insurance industry. The Commission does not seek to amend or duplicate that guidance. Rather, positive change needs to be driven by the practical application of existing guidance and the lessons learned from the Investigation set out below.

## 8.2 The need to listen to consumer experience

---

The Commission's Investigation focused on potential systemic discrimination in the travel insurance industry, including in the design, issue and application of insurance policies. Although the Investigation did not directly consider the lived experiences of consumers with mental health conditions, the Commission considered personal experiences through complaints made to bodies such as the Australian Financial Complaints Authority (formerly the Financial Ombudsman Service), as well as case studies provided to public inquiries, including the Royal Commission and case law.

It is important to remember the impact of discriminatory conduct on the individuals who have been denied travel insurance cover or claims, or experienced other discriminatory conduct, because of a mental health condition. Discrimination can result in financial hardship, can discourage people from seeking support, and embeds a stigma about mental health issues in the broader community.

In practice, putting consumers at the heart of an insurer's business means ensuring that the lived experiences of consumers with a mental health condition inform future policies and practices. Insurers should also provide reasons to consumers about a decision to refuse travel insurance cover or deny indemnity because of a mental health condition. The Commission considers that there needs to be better information about complaint outcomes related to mental health. For this reason, we recommend that the ICA publish information and reasons regarding investigation outcomes of breaches of its code (discussed in part 8.4).

In light of the Commission's finding that three major Australian insurers – Allianz, Suncorp and World Nomads Group – issued discriminatory policies, the Commission

recommends in this report that those insurers contact consumers who had their claims denied during the Investigation Period because of a mental health condition to advise them of the Investigation and its outcomes.

External agencies, including the Commission and the AHRC, provide an avenue for consumers to make a complaint about discrimination in the insurance industry and insurers should advise consumers about these independent complaints mechanisms.

The Commission acknowledges the tireless work of consumers and their advocates (including the Public Interest Advocacy Centre, Mental Health Australia, Beyond Blue and SANE) in advocating for better practices and outcomes for people with a mental health condition in the insurance industry. The work of these advocates continues to shine a light on the impact of discrimination on everyday Victorians and Australians. Giving a voice to people who have experienced discrimination can create a vehicle for change.

## 8.3 The need for better use and analysis of data

The importance of data informing insurance policies and practices is clear. As the Actuaries Institute identifies:

Data and information is required in order to appropriately design products, underwrite them, inform claims processes, provide transparency of decision-making and evaluate the performance of the product, the players and the processes.<sup>4</sup>

Data is also at the centre of the exception under the Equal Opportunity Act that allows insurers to lawfully discriminate in the provision of insurance if the discrimination is based on “actuarial or statistical data”, which it is reasonable for the insurer to rely on and is reasonable having regard to that data and any other relevant factors (the data exception).<sup>5</sup> Where no such data is available or can be reasonably obtained, the discrimination may be lawful if it is reasonable having regard to any other relevant factors.<sup>6</sup>

In order to rely on the data exception, it is critical that insurers:

- use appropriate data that is up to date and relevant (part 8.3.1)
- undertake quality analysis of available data (part 8.3.2)
- consider alternatives to discrimination where risk is assessed as high (part 8.3.3)
- document the data relied on for a decision to discriminate (part 8.3.4).

### **THE COMMISSION’S OBSERVATIONS ABOUT THE USE OF DATA**

The Investigation revealed concerning practices related to data including:

- insurers using outdated data (when more up-to-date and relevant data existed)
- insurers using data that was not sufficiently relevant
- insufficient analysis of data to justify discrimination
- the failure to perform available analysis (such as considering the range of mental health conditions that could be treated differently)
- the failure to consider alternatives where risk is assessed as high.

The Commission encourages better use and analysis of data, and better transparency from insurers about the data they rely on to lawfully discriminate. This will help to ensure that insurers meet their positive duty to eliminate discrimination and will drive best practice in providing insurance cover to as many Victorians as possible.

### 8.3.1 USING APPROPRIATE DATA

In order to support a decision to discriminate against people with a mental health condition, insurers must use appropriate data.

#### **EXISTING GUIDANCE FOR INSURERS ON THE USE OF DATA<sup>7</sup>**

The *DDA Guidelines* provide guidance to insurers about the application of the data exception.

In determining whether it is reasonable to rely on particular actuarial or statistical data, the *DDA Guidelines* note that insurers should consider whether:

- the data is applicable to the particular decision in question
- the data is subject to any qualifications
- there is a sufficient sample for reliable use
- the data is complete
- the data is up to date
- the use of the data set has been discredited.

Importantly, relevant data that is available or could reasonably be obtained must not be ignored by insurers.

#### **The challenges with sourcing appropriate data**

The Actuaries Institute recently identified the lack of reliable and relevant data to inform coverage for mental health conditions as a key issue in the insurance industry.<sup>8</sup> Insurers including Allianz, Suncorp and World Nomads Group also raised the challenge of sourcing appropriate data, noting that:

- in the context of not previously offering insurance cover for mental health conditions, they did not have their own internal claims data to assess the likelihood and costs of future claims
- there were difficulties with collecting accurate data on a broader scale
- there were issues with consistency across data sources.

The ICA told the Commission that, in its view:

in order to create the right conditions for improved access to general insurance for those with a mental illness, more granular data is essential to accurately assess the risk of providing cover for mental illness related claims.<sup>9</sup>

The ICA noted that “while there is a wide availability of statistical data on mental health”, it is “not currently in a form that is useful for individual underwriting purposes”.<sup>10</sup> The ICA explained that constraints include the limited insights into the likelihood of mental health conditions recurring and challenges in capturing the different severities of mental health conditions.<sup>11</sup>

#### **The opportunities with data**

The Commission acknowledges the concerns raised with the Investigation about sourcing appropriate data. However, the Commission also considers that there are opportunities for insurers to consider the existing *DDA Guidelines* to make better use of available data and to better manage any data limitations.

The Commission observes that quality, accessible data about mental health conditions, their prevalence, severity and treatment, will continue to increase, including through the collection of data by insurers themselves. For this reason, it is critical that insurers regularly review the data they rely on and ensure that appropriate data informs the decisions they make that impact on people with mental health conditions.

Where an insurer faces data limitations, the independent actuary advising the Commission explained that it is possible for insurers to understand the potential impact to their profitability or viability of a product by modelling changes, stress testing and using monitoring strategies. These practical strategies can support insurers to meet their obligations under the Equal Opportunity Act.

Finally, the Commission notes that insurers including Columbus Direct<sup>12</sup> and Cover-More introduced coverage for people with a mental health condition more than five years ago. The Commission encourages all insurers to actively consider available data and ensure

that decision-making complies with their anti-discrimination legal obligations.

### **Ensuring that data is applicable to a particular mental health condition**

The growth in data on mental health conditions means that it is increasingly possible for insurers to consider and adjust insurance policies for particular mental health conditions (rather than treating all mental health conditions in the same way regardless of the type and severity of different conditions). Just as physical conditions are distinguished by their nature, incidence, prevalence and prognosis, mental health conditions should increasingly be considered in the same way. This perspective was supported by the independent actuary, and was considered part of good actuarial practice to ensure the 'spectrum of risk' and differences between conditions is properly taken into account.

For this reason, the Commission recommends in this report that insurers develop and implement appropriate coverage for different mental health conditions within their travel insurance policies, as they do with different physical conditions.

## **8.3.2 UNDERTAKING QUALITY ANALYSIS OF DATA**

The quality analysis of available actuarial and statistical data is critical to ensure that an insurer's decision to discriminate is lawful under the Equal Opportunity Act.

### **The important role of actuaries**

Actuaries perform an important function for insurers by identifying and evaluating risk through the application of mathematical, statistical, economic and financial analysis. Actuaries assist insurers by providing expert analysis on the use of actuarial and statistical data to estimate the expected number of claims and the expected size of those claims in order to establish an appropriate risk premium.

In undertaking risk analysis for insurers, it is critical that actuaries are aware of and understand insurers' legal obligations under anti-discrimination law. Part 8.4 of this report discusses the need for better education for actuaries to ensure that insurers' legal obligations inform the analysis of actuarial and statistical data.

The Actuaries Institute noted "the inadequacies of available data as one of the root causes of the difficulties with insurance responses" to mental health conditions.<sup>13</sup> The Actuaries Institute advised the Commission that based on anecdotal evidence from its members that it is not easy to understand the 'other relevant factors' limb of the data exception, "there is a clear need for informed professional judgment in exercising the exemption, in respect of both 'actuarial and statistical data' and 'other relevant factors'".<sup>14</sup> The Actuaries Institute explained that:

Information, understanding and expectations in this area are evolving. These aspects are therefore part of the Institute's ongoing public policy program, with a clear goal that the actuarial profession can serve the community in achieving effective application of the relevant anti-discrimination laws.<sup>15</sup>



## THE ACTUARIES INSTITUTE

The Actuaries Institute is the sole professional body for actuaries in Australia and represents the interests of more than 2400 actuaries.<sup>16</sup>

The Actuaries Institute represents and supports its members by providing education. It also contributes to the safeguarding of professional standards by establishing and monitoring the conduct of its members. Members of the Actuaries Institute are subject to a Code of Professional Conduct, which provides minimum standards of professional conduct. The standards acknowledge the importance of compliance with the law.

The Actuaries Institute has a longstanding interest in the application of anti-discrimination law to the provision of insurance, demonstrated by its participation in a 2014 steering group on anti-discrimination law facilitated by the Australian Human Rights Commission and the publication of two Green Papers: *The impact of big data on the future of insurance* (2014) and *Mental health and insurance* (2017).<sup>17</sup>

## 8.3.3 CONSIDERING ALTERNATIVES TO DISCRIMINATION

The Investigation found that the party insurers also failed to consider alternatives (such as establishing higher premiums) that would allow for the provision of insurance where the risk of providing cover was assessed as high. We observed that in some cases an insurer's commercial priorities appeared to override compliance with anti-discrimination law, unnecessarily limiting the provision of insurance for certain mental health conditions that may have otherwise been financially viable.

The *DDA Guidelines* emphasise the need for insurers to consider alternatives to refusing to provide cover. They note that the existence of the data exception "acknowledges that in some cases risks associated with a person's disability may be too high, or too uncertain, for an insurer to accept".<sup>18</sup> However, as the Federal Court has determined:

[B]efore declining to offer insurance to a person with a disability, an insurer or superannuation provider should consider whether risks can be reduced by restricting the cover, using an exclusion clause, applying a premium loading, or some other means. Discrimination will only be accepted as reasonable if the consequences of the discrimination are limited as far as reasonably possible.<sup>19</sup>

### 8.3.4 DOCUMENTING THE USE AND ANALYSIS OF DATA

In order to rely on the data exception, it is critical for insurers to document the reasons for a decision to discriminate including the actuarial and statistical data relied on to discriminate. As demonstrated in *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936 (*Ingram v QBE*), the data used by an insurer must have been available at the time of the discrimination and the insurer must be able to show that the data was actually considered and relied on to discriminate:

In *Ingram v QBE*, QBE accepted that it had no actuarial data to rely on when it included a mental illness exclusion in a travel insurance policy. QBE submitted an actuarial report at the hearing in 2015, but this could not be relied upon ... because it was not available to QBE at the time it made the decisions in relation to the content of the policy and Ms Ingram's claim

for indemnity. Instead, QBE referred to other contemporaneous data and asked the tribunal to infer that QBE took this data into account in making the relevant decisions. The tribunal refused to make the inference sought by QBE, noting that QBE had not produced any evidence to establish that any person involved in the drafting or approval of the policy wording had any knowledge of or regard to that contemporaneous data.<sup>20</sup>

#### **EXISTING GUIDANCE FOR INSURERS ON DOCUMENTATION<sup>21</sup>**

The *DDA Guidelines* provide that insurers should document the reasons for a decision to discriminate including the actuarial and statistical data relied on to support the decision. Failure to keep accurate records of data may mean that an insurer cannot rely on the data exception even if the data was publicly available at the time.

## 8.4 The need for stronger regulation

Committed leadership across the insurance industry is required to ensure that travel insurers comply with their anti-discrimination law obligations and achieve best practice. As discussed below, while the insurance industry is regulated by a code of practice, the code does not incorporate anti-discrimination law requirements as mandatory matters that can be effectively enforced. The Commission considers that effective regulation and enforcement is fundamental to sustained industry change.

#### **THE INSURANCE COUNCIL OF AUSTRALIA**

The Insurance Council of Australia (ICA) is the peak body for general insurance companies in Australia. The ICA represents the interests of more than 90 per cent of all insurance business transacted in Australia.<sup>22</sup> The ICA plays an important role in representing, promoting, assisting and guiding the culture and actions of its members, including providers of travel insurance.<sup>23</sup>

The ICA's aims include to "encourage improved service standards across the insurance sector and promote appropriate self-regulation".<sup>24</sup> As part of its industry leadership role, the ICA administers the General Insurance Code of Practice.

## The General Insurance Code of Practice

The ICA's General Insurance Code of Practice (Code) governs individual insurers and sets standards that general insurers must meet when providing services. Consumers wishing to make a complaint about an insurer can also refer to a complaint to the Code Governance Committee (CGC). The CGC's powers and functions are set out in its charter, which notes that the CGC is to:

- be responsible for the independent administration and enforcement of the ICA Code and to monitor and enforce Code compliance
- receive reports of possible Code breaches from the Australian Financial Complaints Authority (formerly the Financial Ombudsman Service)
- investigate, at its discretion, reports of alleged Code breaches and to make determinations, including setting corrective measures
- monitor the implementation of any measures and impose sanctions.<sup>25</sup>

In 2017, the ICA commenced a process to update the Code. The ICA advised the Commission that it considered mental health to be an industry priority that had seen significant policy change following the "turning point" of the landmark decision in *Ingram v QBE*<sup>26</sup> in 2015. Following a significant consultation process, including with leading consumer advocates, the ICA released the Final Report of the Code, which contained Draft Guidance on Mental Health (Guidance on Mental Health).<sup>27</sup>

## GUIDANCE ON MENTAL HEALTH

The ICA's Guidance on Mental Health includes new 'best practice principles' including that:

- when designing general insurance products, the needs of those who have a past or current mental health condition should be considered
- where possible, insurers should provide cover to people with a past or current mental health condition and manage risk through policy pricing, exclusions, limits or caps based on actuarial and statistical data and other relevant factors rather than not provide cover at all
- the risk assessment of people with past or current mental health conditions must be centred on available statistical or actuarial data on which it is reasonable for an insurer to rely, and the risk assessment must be reasonable having regard to the data and other relevant factors.<sup>28</sup>

## Enforcement of the Code and the Guidance of Mental Health

The Commission commends the ICA for its industry leadership in the consultative review of the Code and development of its Guidance on Mental Health. This demonstrates a proactive step towards increasing insurer knowledge about anti-discrimination law. However, the Commission is concerned that the Guidance on Mental Health does not form a part of the revised Code and is therefore not enforceable through CGC oversight and sanction powers.

The Commission understands that the ICA is seeking to register the Code with the Australian Securities and Investment Commission (ASIC) meaning that systemic breaches of the Code and serious misconduct must be reported to ASIC by the CGC.<sup>29</sup> In order to meet the requirements for ASIC approval, the Code will need to be amended to clarify that it is enforceable through CGC oversight and sanction powers and through the Australian Financial Complaints Authority

taking into account breaches of the Code when determining disputes.<sup>30</sup>

The ICA advised the Commission that the Guidance on Mental Health is intended to reflect a public commitment by the industry to continue to make progress on improving access to insurance. The ICA considered that continual progress by industry would be better served by “aspirational principles” in the Guidance on Mental Health, which was a more flexible approach to allow for benefits to competition in the insurance markets – including where systems and product changes would have a disproportionate impact on smaller insurers.<sup>31</sup>

The Commission is concerned that viewing the best practice principles as ‘aspirational’ is misleading and may undermine the importance of anti-discrimination law. This is because the best practice principles reflect the standards already required of insurers to comply with anti-discrimination law, rather than aspirational principles.

The Commission considers that the Guidance on Mental Health should be incorporated into the Code as mandatory matters, rather than standalone ‘best practice principles’. This will ensure that ICA members understand, value and comply with anti-discrimination law. The Commission considers that the ICA should not submit the revised Code to ASIC for consumer accreditation without incorporating the Guidance on Mental Health to ensure that it is both mandatory and enforceable.

## **RECOMMENDATIONS**

**Regarding the Insurance Council of Australia Code of Practice:**

- The Insurance Council of Australia should incorporate the Guidance on Mental Health as mandatory matters within the Code, rather than ‘best practice’ standards.
- The Insurance Council of Australia should not submit the Code to Australian Securities and Investments Commission for consumer accreditation without stronger and enforceable mental health guidelines which reflect anti-discrimination law requirements.
- The Code Governance Committee should publish information and reasons regarding investigation outcomes of serious breaches of the Code against parties on its website as well as in Annual Reports.

## **Transparent information about complaint outcomes**

As part of the Investigation, we also considered existing complaints information and outcomes regarding complaints under the Code that are reported to the CGC. The Commission considers that transparent reporting on the number, nature and outcomes of complaints can promote better outcomes by insurers. It also assists consumers by providing transparent information about complaint processes and possible outcomes. To this end, we encourage the CGC to publish information and reasons regarding outcomes of serious breaches of the Code.

## **RECOMMENDATION**

The Insurance Council of Australia develop an education program to inform insurers about their legal obligations under anti-discrimination law (or arrange for appropriate training to be provided).

## 8.5 The need for better education and support

The Investigation observed that there was a range of different approaches to insurers' anti-discrimination law obligations. The Commission commends insurers that had proactive compliance strategies, with policies that allow claims for mental health conditions and initiatives to better understand and price insurance for existing conditions. However, the Commission also observed:

- insurers that did not actively consider their legal obligations, and instead relied on outdated data or failed to provide evidence to support their policies and practices
- a limited understanding of anti-discrimination law by insurers
- limited documented evidence of the actions taken by insurers to comply with anti-discrimination law.

These concerning practices are despite the existing *DDA Guidelines* providing detailed and practical guidance to insurers on compliance with anti-discrimination law.

To drive better compliance with the law, it is critical that insurers, actuaries and relevant regulators (including the ICA and the Actuaries Institute) understand insurers' legal obligations under anti-discrimination law. The Commission considers that this can be effectively achieved through targeted education on anti-discrimination law and relevant guidance, such as the *DDA Guidelines*, including:

- insurers providing targeted education on anti-discrimination law to their staff, including executives and senior management, underwriters, complaint handlers, staff who draft policy terms and conditions and staff who handle claims
- the ICA providing education on anti-discrimination law to its insurer members
- the Actuaries Institute providing education on anti-discrimination law to its members.

### **RECOMMENDATIONS**

The Actuaries Institute should develop a strategy for educating members regarding anti-discrimination laws, which:

- outlines insurers' obligations regarding anti-discrimination laws
- outlines actuaries' role and obligations to comply with these laws as part of their professional obligations
- provides guidance on the standards of actuarial analysis required, having regard to the Australian Human Rights Commission's *Guidelines for providers of insurance and superannuation under the Disability Discrimination Act 1992 (Cth)*.

## 8.6 Response from the ICA and Actuaries Institute

---

The Commission notes that encouragingly both the ICA and the Actuaries Institute have agreed to progress the Commission's recommendations.<sup>32</sup>

The ICA advised the Commission that:

- it is committed to working with its National Code Committee to consider the Commission's recommendations as it works to finalise the new revised Code
- it has advised its National Code Committee of the Commission's recommendation about incorporating the Guidance on Mental Health as mandatory matters within the Code for consideration in the ongoing review of the Code
- it is, at the time of writing, submitting the proposal regarding the changes to the Code to the ICA Board<sup>33</sup>
- it has notified its members that the ICA will be working through the Commission's other recommendations in "great detail"
- it will "give thought to how the Code can play a greater role in assisting insurers' compliance with, and understanding of, disability discrimination legislation"
- it will "work with ASIC and the CGC to improve complaint handling practices and general reporting requirements across the industry"

- as part of the revised Code, the ICA will work with relevant organisations to develop a training suite to educate members on the new Code provisions, which "could provide the opportunity to develop training material specific to anti-discrimination requirements"
- it would like to continue working with the Commission to "explore the development of an industry action plan to improve the availability of general insurance for Australians with a mental health condition".<sup>34</sup>

The Actuaries Institute advised the Commission that it would:

[A]sk the Council of the Actuaries Institute to consider development of an action plan to respond [to the Commission's recommendations] that will include making improvements to our continuing education program and strengthening of professional standards to enhance actuaries' understanding and application of anti-discrimination law to advice in relation to insurance contracts.<sup>35</sup>

The Actuaries Institute also noted that its response to the recommendations "will be a national one covering all jurisdictions".



## Notes

- 1 Actuarial Institute, *Mental Health and Insurance* (Green Paper, October 2017) ('*Mental Health and Insurance*').
- 2 *Equal Opportunity Act 2010* (Vic) s 15.
- 3 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*').
- 4 *Mental Health and Insurance* (n 1) 26.
- 5 *Equal Opportunity Act 2010* (Vic) s 47(b).
- 6 *Ibid* s 47(c).
- 7 *DDA Guidelines* (n 3) 9.
- 8 *Mental Health and Insurance* (n 1) 26.
- 9 Letter from the Insurance Council of Australia to the Victorian Equal Opportunity and Human Rights Commission, 31 August 2018 ('ICA August letter').
- 10 *Ibid*.
- 11 *Ibid*.
- 12 For example, see Columbus Direct Travel Insurance Product Disclosure Statement, 'Combined FSG, PDS and Policy Wording V10', (18 June 2014).
- 13 Letter from the Actuarial Institute to the Victorian Equal Opportunity and Human Rights Commission, 18 February 2019 ('AI February letter').
- 14 *Ibid*.
- 15 *Ibid*.
- 16 Letter from the Actuarial Institute to Retirement Income Policy Division, The Treasury, 14 August 2018 <[https://www.actuarial.asn.au/Library/Submissions/Superannuation/2018/20180814SubmissionTreasuryre GregulationsFn1.pdf](https://www.actuarial.asn.au/Library/Submissions/Superannuation/2018/20180814SubmissionTreasuryre%20RegulationsFn1.pdf)>
- 17 *Mental Health and Insurance* (n 1) 26.
- 18 *DDA Guidelines* (n 3) 18.
- 19 *Ibid* 18.
- 20 *Ibid* 9.
- 21 *Ibid* 9.
- 22 Insurance Council of Australia, *About Us* (Web Page, 2019) <<http://www.insurancecouncil.com.au/about-us>> ('*ICA About us*').
- 23 IBISWorld, *Travel Insurance – Australia* (Market research report, June 2018) 28.
- 24 *ICA About us* (n 22).
- 25 Insurance Council of Australia, 'Code Governance Committee Charter', *General Insurance Code of Practice* (Web Page, 2019) <<http://codeofpractice.com.au/governance-and-monitoring>>
- 26 *Ingram v QBE Insurance (Australia) Ltd (Human Rights)* [2015] VCAT 1936.
- 27 Insurance Council of Australia, *Review of the General Insurance Code of Practice, 'Final Report'*, (Code Review, 26 June 2018).
- 28 *Ibid* 92-95.
- 29 *Ibid* 73.
- 30 *Ibid* 73. Note, the Australian Financial Complaints Authority was formerly the Financial Ombudsman Service.
- 31 ICA August letter (n 9).
- 32 Letter from the ICA to the Victorian Equal Opportunity and Human Rights Commission, 10 April 2019; AI February letter (n 13).
- 33 Email from ICA to the Victorian Equal Opportunity and Human Rights Commission, dated 10 April 2019.
- 34 AI February letter (n 13).
- 35 *Ibid*.

# Appendix: Glossary

**Blanket exclusion** is often used to describe a clause that expressly excludes or limits coverage for a category of people in a contract of insurance.

**Disability** includes a “mental or psychological disease or disorder” within the meaning of the *Equal Opportunity Act 2010* (Vic). It includes a disability that may exist in the future and behaviour that is a symptom or manifestation of a disability.

**Discrimination** includes ‘direct’ and ‘indirect’ discrimination under the Equal Opportunity Act on the basis of 19 protected attributes (including disability):

- **Direct discrimination** is when a person treats, or proposes to treat, a person with a protected attribute unfavourably because of that attribute.
- **Indirect discrimination** is when a person imposes, or proposes to impose, an unreasonable requirement, condition or practice that disadvantages or is likely to disadvantage people with a protected attribute.

Discrimination is unlawful when it happens in particular areas of public life including the provision of services, such as the sale of travel insurance products.

**Ex gratia** is a Latin term and means “(something granted) as a favour and not because of a legal obligation”.<sup>1</sup> In the context of the insurance industry, it generally means that a payment has been made voluntarily.

**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.

**Insured** is a term frequently used by insurers to refer to the status of a person who has successfully purchased a contract of insurance and is therefore ‘covered’ by an insurance policy.

**Investigation** is an investigation by the Commission under part 9 of the Equal Opportunity Act. References to ‘the Investigation’ in this report mean the investigation into potential unlawful discrimination in the travel insurance industry.

**Mental health condition** A mental health condition is a diagnosable health condition that significantly affects how a person feels, thinks, behaves and interacts with other people, which can vary in severity and duration and have a significant impact on the person.<sup>2</sup> Under Victorian law, a mental illness is defined in the *Mental Health Act 2014* (Vic) 2014 as a “medical condition that is characterised by a significant disturbance of thought, mood, perception or memory”,<sup>3</sup> and is considered a ‘disability’ for the purposes of the Equal Opportunity Act.

**Non-party insurers** means two insurers that had removed existing mental health exclusions by the time of the investigation and were asked to voluntarily provide information to the assist the Investigation: Zurich/Cover-More and QBE.

**Party or parties** means the three insurer parties to the investigation that maintained general mental health exclusions at the time of the investigation and were asked to provide data under section 130 of the Equal Opportunity Act: World Nomads Group, Suncorp and Allianz.

**PDS** is a Product Disclosure Statement, which is a document, or sometimes a group of documents, that contains information about a financial product including any significant benefits and risks, the cost of the financial product and the fees and charges that the financial product issuer may receive. Supplementary PDSs or 'SPDSs' may be issued from time to time and must be read in conjunction with the PDS to which they relate. Insurers, as financial service providers, are required to publicly issue a PDS when selling contracts of insurance.<sup>4</sup>

**Positive duty** is the legal obligation under section 15 of the Equal Opportunity Act for duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.

**Pre-existing** is a term frequently used to describe the status of a person who has previously experienced a symptom of, or has been diagnosed with, a health condition that they knew, or should have known, about.

**Systemic discrimination** is when discrimination becomes entrenched in an organisation or industry. Systemic discrimination can form part of organisational or industry culture and may be reinforced by discriminatory policies, procedures and practices.

## **Notes**

- 1 *Macquarie Dictionary Online*, (Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd, 2019) <<http://www.macquariedictionary.com.au>>.
- 2 T Slade, A Johnston, M Teesson et al. *The Mental health of Australians 2: Report on the 2007 national survey of mental health and wellbeing*. (Department of Health and Ageing Report, 2009).
- 3 *Mental Health Act 2014*, section 4.
- 4 ASIC Moneysmart, 'Product Disclosure Statement', *Glossary* (Web page, 10 May 2018) <<https://www.moneysmart.gov.au/glossary/p/product-disclosure-statement-pds>>.





# Contact us

Enquiry Line	1300 292 153 or (03) 9032 3583
Fax	1300 891 858
Hearing impaired (TTY)	1300 289 621
Interpreters	1300 152 494
Email	<a href="mailto:enquiries@veohrc.vic.gov.au">enquiries@veohrc.vic.gov.au</a>
Follow us on Twitter	<a href="https://twitter.com/VEOHRC">twitter.com/VEOHRC</a>
Find us at	<a href="https://facebook.com/VEOHRC">facebook.com/VEOHRC</a>

[humanrightscommission.vic.gov.au](http://humanrightscommission.vic.gov.au)