

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.¹

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 Limited² underwrites these products.³

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.⁴

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 lag⁵
- (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.⁶ 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.⁷

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.⁸

Suncorp confirmed that, as at 24 December 2018, its "travel insurance products (across all brands) commenced providing coverage for pre-existing mental health conditions".⁹ 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.¹⁰ 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.¹¹

Suncorp argued that removing the blanket exclusion terms and offering travel insurance to consumers with a mental health condition would "impose unjustifiable hardship"¹² 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".¹³

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",¹⁴ 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.¹⁵

Suncorp considered larger travel insurers would have the benefit of claims data to enable more reliable actuarial decisions regarding claims frequency and costs.¹⁶ 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”.¹⁷

Suncorp also considered that its “conservative risk appetite” was a ‘relevant factor’.¹⁸ 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”.¹⁹

Finally, Suncorp considered that “there was no statistical and actuarial data upon which Suncorp could reasonably rely” in setting its policy terms.²⁰ 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.²¹

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)*.²² 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”.²³ Suncorp advised it commissioned the Report in order “to provide strategic analysis for Suncorp’s travel insurance”.²⁴

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.²⁵ 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).²⁶ 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.²⁷ 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.²⁸ Suncorp advised that it relied on the *Vero Report*’s recommendation in deciding that coverage should not be introduced for mental health conditions.²⁹

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.³⁰

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”,³¹ 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.³² 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.³³ 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”.³⁴
- 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”.³⁵
- 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”,³⁶ and that the “use of a blanket mental illness exclusion ignores this risk variation”.³⁷ 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.³⁸
- 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”.³⁹

- 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”.⁴⁰

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.⁴¹

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.⁴²

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.⁴³

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.⁴⁴

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.⁴⁵

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".⁴⁶

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".⁴⁷

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.⁴⁸

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,⁴⁹ the Commission notes that reduced profitability is not, of itself, a valid exception to unlawful discrimination.⁵⁰ 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".⁵¹

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

- practical and business considerations
- whether less discriminatory options are available
- the individual's particular circumstances⁵²
- the objects of the Disability Discrimination Act, especially eliminating disability discrimination as far as possible⁵³
- all other relevant factors⁵⁴ including medical opinions, opinions from other professional groups, the practice of others in the insurance industry and commercial judgment.⁵⁵

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”.⁵⁶

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”.⁵⁷

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,⁵⁸ 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.⁵⁹ 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".⁶⁰

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".⁶¹

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 2014.⁶² 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).⁶³ 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.⁶⁴

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 conditions⁶⁴
- 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 2018⁶⁵

- 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 liability⁶⁶
- providing awareness capability and specialist training with Uniting Kildonan⁶⁷ on the issues of elder abuse, mental health conditions, emotional vulnerability and other modules.⁶⁸

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”.⁶⁹

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.⁷⁰

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.⁷¹

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 product⁷² 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.⁷³ 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.⁷⁴

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.⁷⁵

Suncorp stated that it took this approach to "ensure consumers did receive payment for claims",⁷⁶ 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".⁷⁷ 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.⁷⁸

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.⁷⁹

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"⁸⁰ and instead Suncorp noted that this instruction was "verbally communicated".⁸¹ 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.⁸²

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.⁸³

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).