

4. Insurance

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Summary

4.1 This chapter examines some of the key concerns with respect to mature age workers and insurance that emerged during the course of this Inquiry. These concerns include: the availability of, and information about, insurance products for mature age workers; age-based limitations and premiums for some insurance products; and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing occurs.

4.2 The ALRC is of the view that the Insurance Reform Advisory Group (IRAG) is the most appropriate body to consider many of these matters in more detail. Accordingly, the ALRC proposes that IRAG examine mechanisms for reviewing age-based underwriting and pricing processes and ensuring reliance on relevant and appropriate actuarial and statistical data. The ALRC also suggests that IRAG consider options for the development of a central information source to provide clear information about available insurance products and discuss the design of comprehensive and affordable insurance products tailored to meet the needs of mature age persons. The ALRC also asks whether the General Insurance Code of Practice or similar industry standards or codes might usefully play a role in this area.

4.3 The second part of this chapter examines the operation of the insurance exemption under the *Age Discrimination Act 2004* (Cth) (ADA). The ALRC asks

whether, if retained in the course of the consolidation of Commonwealth anti-discrimination law, the exemption could be amended, for example, to limit its application. The ALRC also asks whether the powers of the Australian Human Rights Commission (AHRC) to request actuarial information from insurers are sufficient. The ALRC proposes that the AHRC and the insurance industry should develop guidance material about the application of any insurance exemption under the ADA or consolidated discrimination legislation.

Insurance in Australia

4.4 Insurance is a ‘risk transfer, loss-spreading arrangement’.¹ Its purpose is to distribute risk through providing a mechanism by which individuals and organisations purchase, by way of a premium, insurance products to mitigate that risk. Risk is then transferred to the insurer which indemnifies them against future events that may cause loss.

4.5 There are three key categories of insurance in Australia: health, life and general insurance. The focus of this Inquiry is on life and general insurance. Life insurance encompasses a variety of products that provide payment upon death or injury. General insurance encompasses cover purchased by individuals—such as travel insurance; and that purchased by organisations—including product and public liability and professional indemnity insurance.

4.6 There are several key insurance concepts of relevance to the discussion in this chapter. These include:

- insurance premium—the amount paid by an insured in return for the insurer undertaking to cover the agreed risks or events;
- underwriting—the process by which individual applications for insurance are assessed; and
- reinsurance—a form of insurance for insurers that allows the original insurer to ‘distribute its potential liability by giving off parts of its risk to another insurer (the reinsurer) with the object of reducing the amount of its possible loss’.²

Legislative and regulatory framework

4.7 At the Commonwealth level, the insurance industry is governed by two primary pieces of legislation—the *Insurance Act 1973* (Cth) and the *Insurance Contracts Act 1984* (Cth).³ Chapter 7 of the *Corporations Act 2001* (Cth) governs the regulation of insurance intermediaries such as agents and brokers.

1 G Pynt, *Australian Insurance Law: A First Reference* (2nd ed, 2011), 4.

2 Thomson Reuters, *The Laws of Australia* (2009) *Insurance*, 22.1.260.

3 Part V of the *Insurance Contracts Act 1984* (Cth) provides for a number of prescribed classes of insurance contract. Prescribed contracts are outlined in the *Insurance Contracts Regulations 1985* (Cth) and encompass a range of insurance policies, including sickness and accident insurance and travel insurance. The Regulations outline the minimum requirements for such policies, for example the minimum sum insured and the required risks or insured events covered by the contract.

4.8 The general insurance industry in Australia is regulated by a prudential regulator and a corporate regulator. The prudential regulator is the Australian Prudential Regulation Authority (APRA), which is responsible for general administration of the *Insurance Act*.⁴ APRA has the authority to set prudential standards for the general insurance industry and has developed a detailed framework of prudential standards and practice guides. The corporate regulator is the Australian Securities and Investments Commission (ASIC), which is responsible for, among other things, the general administration of the *Insurance Contracts Act*, monitoring and promoting market integrity and consumer protection and licensing.⁵

4.9 The Insurance Council of Australia (ICA) is the representative body of the general insurance industry in Australia. The ICA oversees the General Insurance Code of Practice—a self-regulatory code that binds all general insurers who are signatories to it.⁶ The Financial Services Council (FSC) is the industry association for the financial services sector, which includes the life insurance industry. Compliance with the FSC Code of Ethics and Code of Conduct is compulsory for all FSC members.⁷

4.10 Another key legislative regime with bearing on the insurance industry is the Commonwealth anti-discrimination regime, under which there are a number of exemptions for insurance. The ADA provides that insurers may discriminate on the grounds of age in offering an insurance policy, or the terms or conditions upon which such a policy is offered, if certain conditions are satisfied.⁸ The conditions are satisfied if the discrimination is:

- based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- reasonable having regard to the matter of the data and other relevant factors; or
- in a case where no such actuarial or statistical data is available, and cannot reasonably be obtained, reasonable having regard to any other relevant factors.⁹

4.11 Section 54 of the ADA provides power for the AHRC and its President to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the above exemptions, be unlawful. However, much of the data relied upon by insurance companies in the underwriting and pricing processes is not publicly available.

4.12 As outlined in Chapter 1, the Australian Government is currently conducting a process to consolidate Commonwealth anti-discrimination legislation. In the course of the consolidation the Government is considering the exemption which may be invoked

4 *Australian Prudential Regulation Authority Act 1998* (Cth).

5 *Australian Securities and Investments Commission Act 2001* (Cth).

6 Insurance Council of Australia, *General Insurance Code of Practice*.

7 Financial Services Council, *Standard No 1, Code of Ethics and Code of Conduct*.

8 *Age Discrimination Act 2004* (Cth) s 37.

9 *Ibid* s 37(3).

by insurers. Submissions from a number of stakeholders were received on this issue.¹⁰ The ALRC will consider any changes to the insurance exemption arising from the consolidation process following the release of the exposure draft legislation expected later in 2012. A number of questions about the exemption are raised in the second part of this chapter.

Insurance Reform Advisory Group

4.13 In addition to the legislative and regulatory structures outlined above, in April 2011, an IRAG was established. The purpose of IRAG is to bring together peak industry bodies, consumer and government representatives to exchange views ‘about issues in the insurance field that should be considered for reform—be it legislative change or changes to regulatory or industry practices’.¹¹

How does insurance affect mature age workforce participation?

4.14 In its submission to this Inquiry, Suncorp expressed the view that it ‘has not observed that age-based limits and premiums have any noticeable influence over workforce participation rates’.¹² Suncorp went on to argue that:

in the unlikely event that the underwriting or pricing of insurance products does negatively influence workforce participation, Suncorp would contend that this influence is likely to be appropriate in the circumstances.¹³

4.15 It is recognised however, that ‘the extent to which age-based limitations and premiums influence mature age workforce participation will vary on the nature of each particular product’.¹⁴ Indeed, a number of other stakeholders have submitted that access to insurance poses difficulties for mature age workers. It was submitted that the imposition of age limits and the inclusion of age in the underwriting and pricing process, which may result in increased premiums, ‘act as a disincentive to employment and other productive work’.¹⁵

4.16 The key barriers for mature age workers appear to arise in relation to income protection insurance, travel insurance and workplace insurance. Each of these and their effect on mature age participation in the workforce is discussed below.

Income protection insurance

4.17 Income protection insurance (otherwise known as personal accident, sickness and disability insurance) protects the insured in the event of being unable to work due

10 See, eg, Insurance Council of Australia, *Submission to Consolidation of Commonwealth Anti-Discrimination Laws*, 1 February 2012.

11 InsuranceNEWS, *Shorten Sets up Another Insurance Review Body* <www.insurancenews.com.au> at 18 April 2011. See also The Hon Bill Shorten, ‘Launch of the Report Reducing the Risks: Improving Access to Home Contents and Vehicle Insurance for Low-Income Australians,’ (Paper presented at Brotherhood of St Laurence, Fitzroy, 9 June 2011).

12 Suncorp Group, *Submission 39*.

13 *Ibid.*

14 *Ibid.*

15 COTA, *Submission 51*. See also National Seniors Australia, *Submission 27*; The South Australian Equal Opportunity Commission, *Submission 11*.

to sickness or injury (the ‘prescribed risk’). The benefit is provided by way of regular periodic payments—a wage substitute.

4.18 Overall demand for income protection insurance in Australia is ‘low across all age groups’ and 69% of Australians choose not to take out income protection insurance.¹⁶ However, income protection insurance is of particular importance to specific groups of workers such as sole traders, where workers’ compensation is not available.

4.19 Significantly, with some exceptions, income protection insurance is unavailable to persons aged over 65.¹⁷ This leaves those persons who choose to continue to work after that age unable to cover themselves in this way in the event of illness or injury. In addition, some income protection policies have a limited benefit period and only provide a wage subsidy for limited time spent out of the workforce (generally two or five years).¹⁸

4.20 These limitations have implications for mature age workers who choose to work past aged 65. These also affect those who are forced to exit the workforce and upon the expiry of their benefit period must attempt to re-enter employment, particularly in light of discrimination faced by people seeking employment from the age of 45.¹⁹ This, compounded by illness or injury and a substantial period out of the workforce, presents a barrier to the workforce participation of mature age workers.

4.21 In addition, premiums for cover by income protection policies generally increase with age. These gaps in the availability and affordability of income protection insurance for workers aged over 65 may mean workers must rely on retirement savings or the Age Pension for any illness or injury sustained through work. This may act as a disincentive to workforce participation. It may also discourage mature age workers from embarking on self-employed enterprises as a transitional phase to retirement.

Travel insurance

4.22 Travel insurance provides for the payment of agreed sums to cover losses or expenses, including medical expenses, incurred in the course of travel. Age limitations and, in certain circumstances, higher insurance premiums, are placed on some travel insurance policies. Such limitations and premiums differ according to product and insurer,²⁰ however where they exist may exclude insurance for mature age persons. This is reinforced by the findings of a 2012 survey by National Seniors Australia and COTA Australia (COTA) on ageism in travel insurance, which found that:

16 Suncorp Group, *Submission 39*.

17 Aon Hewitt, ‘Time for a Change in Executive Remuneration Design?’ (2011) 1(2) *HR Connect Australia*

18 Income Protection Direct, *Income Protection Quotes* (2012) <www.incomeprotectiondirect.com.au/income-protection-insurance/compare-quotes> at 19 April 2012.

19 Australian Human Rights Commission, *Age Discrimination—Exposing the Hidden Barrier for Mature Age Workers* (2010).

20 For example, correspondence received from the Insurance Council of Australia outlined a range of travel insurance policies available to mature age people: Insurance Council of Australia, *Correspondence*, 29 August 2012.

- almost a third of respondents (32%) reported that they have had to pay higher travel insurance premiums because of their age;
- five per cent of respondents reported that they had been refused travel insurance because of their age; and
- almost two-thirds of respondents (63%) have difficulty in understanding how age restrictions operate after reading through information provided by insurers in Product Disclosure Statements, brochures and websites.²¹

4.23 The higher cost, or unavailability, of travel insurance for these mature age persons may act as a barrier to work where a person is required to travel as part of his or her employment or wishes to volunteer, for example overseas or interstate.

4.24 Travel insurance for mature age persons is an issue specifically being considered by IRAG.²²

Insurance and volunteers

4.25 Personal accident and public liability insurance is generally taken out by organisations that have volunteers. The ALRC has heard that age limitations and age-related premiums on insurance can restrict volunteering opportunities for mature age people.²³ This is highlighted by the following case study:

In one case, a group of retired workers in a small country town offered to assist the state government to keep their railway station open by volunteering to build up the existing platform to the required height. However, their offer of voluntary assistance was refused because, due to their age, they could not be covered by the government's insurance provisions.²⁴

4.26 The Tasmanian Anti-Discrimination Commission has released an issues paper, as part of its current inquiry into volunteers, insurance and age discrimination, in which it notes that:

community organisations have argued that age discrimination in the provision of volunteer insurance can have a negative impact on the community, volunteer organisations, and individuals, by restricting volunteer opportunities for younger and older people.²⁵

21 The data for the survey was gathered from a survey of 7,500 National Seniors members and approximately 6,100 COTA members. Of survey respondents, 12% travelled within Australia and 6% travelled overseas for business or volunteer work: National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012).

22 A number of reports prepared for IRAG are publicly available. See, eg, *Ibid.*

23 See, eg, Volunteering Victoria, *Submission to the Inquiry into the opportunities for participation of Senior Victorians* (2011); Volunteering Australia, *Submission to the Core Consultative Group on Age Discrimination* (2002); Z Gill, *Older People and Volunteering* (2006), produced for the Office of Volunteers.

24 Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination* (2000), 84.

25 Office of the Anti-Discrimination Commissioner Tasmania, *Volunteers, Insurance and Age: Investigation Issues Paper* (2011), 2.

4.27 The impact of this is two-fold: it curtails the ability of organisations to benefit from the skills and experience of mature age volunteers; and acts as a barrier to volunteering and remaining engaged in productive work.

4.28 While the ICA recognised that some age limits in available insurance cover remain, it highlighted that

Volunteering Australia reports that access to ‘affordable insurance cover has improved over the past decade and there is evidence that access to insurance is not a significant barrier to volunteerism in formal not-for-profit agencies’.²⁶

4.29 However, in the same report Volunteering Australia concluded that

the changing nature of volunteering and the trend towards less formal, episodic and more mobile volunteer workforce may increasingly expose volunteers to situations where they find themselves unprotected by legislation or insurance coverage.²⁷

4.30 According to the ICA, the ‘changing nature and diversity of volunteering activities can present challenges to the assessment of the relevant level of risk to be covered’ but that there are a variety of volunteer insurance products available.²⁸ For example, Volunteering Australia and AON have developed a *Volunteers Vital Pack*—a package of insurance to cover volunteer organisations. However, these products include some age-related limitations.²⁹

4.31 The ICA acknowledged that

surveys have shown many volunteer organisations find insurance complex and there is a widespread lack of awareness of the level of insurance cover held by the volunteer organisation.³⁰

4.32 Volunteering Australia has also called for

greater harmonisation of Commonwealth and State legislation to ensure that all volunteers, regardless of the circumstances of their volunteer effort, enjoy universal protection against loss.³¹

4.33 The ALRC will consider any recommendations made by the Tasmanian Anti-Discrimination Commission in this area. However, at this stage the ALRC considers the most appropriate approach to insurance issues concerning volunteers is the systemic one proposed by the ALRC involving IRAG and the insurance exemption.

Insurance products and processes

4.34 A number of key tensions arise in the context of insurance, primarily between the importance of risk assessment and pricing that reflects the risk, and the insurance needs of groups within the community such as mature age workers.

26 Insurance Council of Australia, *Submission 21*.

27 Volunteering Australia, *Issues Related to Insurance Protection for Volunteers*, Issues Paper (2010), 11.

28 Insurance Council of Australia, *Submission 21*.

29 Volunteering Australia and AON, *Volunteers Vital Pack: Summary of Insurance Cover for Charitable, Not For Profit Voluntary Organisations and Organisations that Involve Volunteers* (2011).

30 Insurance Council of Australia, *Submission 21*.

31 Volunteering Australia, *Issues Related to Insurance Protection for Volunteers*, Issues Paper (2010), 11.

4.35 There is a broad suite of underwriting and pricing factors, including an applicant's age, considered relevant to assessing risk.³² The ICA emphasises that 'a lawful ability to reasonably differentiate on the basis of risk, is essential to the provision of affordable general insurance for the community'.³³ Throughout this Inquiry insurers have emphasised that any restriction on the use of age as an underwriting factor would have adverse consequences for the insurance market. In particular, insurers have argued that such consequences may affect insurance offerings and premiums.³⁴ In its submission, Suncorp emphasised the highly competitive nature of the insurance industry and noted that

the ability to target products and premiums to specific demographics—including age-based demographics—allows insurers to bring competitive offers to market. Regulation or restriction on the use of age as an underwriting factor, above what is already in place under anti-discrimination legislation, would significantly reduce competition in the market and lead to poor market performance.³⁵

4.36 However, as outlined above, a number of stakeholders have also expressed a range of concerns with respect to mature age workers and insurance.³⁶

4.37 The ALRC recognises that there is a need to improve the availability and affordability of insurance for mature age workers and to prevent discrimination against this group in insurance. However, in doing so there is a need to ensure that legislative and regulatory frameworks do not inadvertently hinder legitimate risk assessment by insurers.

4.38 To address concerns about specific types of insurance—such as income protection, travel and workplace insurance—there is a need for systemic reform of some aspects of the insurance industry. The focus of such reform is: the availability of, and information about, insurance products for mature age workers; age-based limitations on some insurance products; and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing processes occur.

4.39 Many of the concerns highlighted by stakeholders require complex and multifaceted solutions. Such solutions may not involve legislative or regulatory changes, but are essentially market-based issues that will require cooperation between the insurance industry, seniors organisations, consumer groups and the Australian Government. IRAG is a key forum at which each of these stakeholders are represented. The ALRC therefore considers that IRAG is the most appropriate body to consider a number of the systemic reforms outlined in this chapter and accordingly makes two key proposals directed at this group.

32 Suncorp Group, *Submission 39*; Insurance Council of Australia, *Submission 21*.

33 Insurance Council of Australia, *Submission 21*.

34 Suncorp Group, *Submission 39*.

35 *Ibid.*

36 COTA, *Submission 51*; National Seniors Australia, *Submission 27*; The South Australian Equal Opportunity Commission, *Submission 11*. See also Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012).

4.40 The following sections of this chapter outline issues that stakeholders raised with the ALRC. The ALRC suggests that IRAG further consider these areas for reform in its work. The specific areas for reform—access to information about insurance products; age limits and the need to redesign insurance products; and underwriting and actuarial data—are outlined in turn below.

Access to information about insurance products

4.41 One of the difficulties for mature age workers, aside from the age-related barriers and limitations on insurance products themselves, is accessing information about available insurance products. While there are a range of insurance products available for mature age workers, many have differing age restrictions, coverage and premiums.³⁷

4.42 A number of comments from respondents received as part of the 2012 survey by National Seniors Australia and COTA on ageism in travel insurance noted difficulties in understanding and comparing insurance policies:

The schedules of what is covered and what is not are very difficult to compare as the insurance companies tend to use different and confusing language to describe the same thing.³⁸

4.43 Another respondent suggested that ‘it would be useful to have a website for travel insurance where one specifies their requirements and a list of qualifying requirements are displayed’.³⁹

4.44 While mature age workers, like all consumers, have a level of individual responsibility for sourcing and comparing insurance policies, if lack of awareness is contributing to perceptions of age discrimination in insurance, the development of information sources is one necessary aspect of reform. Consequently, as a preliminary reform step, the ALRC suggests that the insurance industry, seniors organisations, consumer groups and the Australian Government should work cooperatively to establish central information sources about insurance for mature age workers.

4.45 There are a number of existing sources and initiatives in this area including *MoneySmart*,⁴⁰ and the Consumer Referral Service launched by the ICA on 1 July 2012 that provides contact details for insurers, including a listing for ‘Seniors Travel Insurance’.⁴¹

4.46 These sources could be utilised, or contribute to the development of a new central information portal or source, in order to provide mature age people with clear

37 See, eg, Insurance Council of Australia, *Correspondence*, 29 August 2012 which provided an overview of some insurance products available for mature age people.

38 National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012), 24.

39 Ibid.

40 ASIC, *Moneysmart website* <www.moneysmart.gov.au> at 30 August 2012.

41 Insurance Council of Australia, *Find an Insurer* <www.findaninsurer.com.au> at 13 September 2012. The service is similar to the British Insurance Brokers’ Association ‘Find a Broker’ service and website: British Insurance Brokers’ Association, *Find a Broker* <www.biba.org.uk/ConsumerHome.aspx> at 13 September 2012.

and simple information about available insurance products. This information should extend beyond the provision of contact details for insurers. Any such guide should be available online and in hardcopy and be reviewed regularly.

4.47 The ALRC also suggests that insurers ensure appropriate training of employees in their insurance distribution networks about engaging with mature age people and the range of products available for them. There may also be a need for peak volunteering organisations to ensure employees who manage volunteers are provided with information about insurance and mature age workers, including coverage and available products.⁴²

Age limits and the need to redesign insurance products

4.48 Another key component of addressing barriers to workforce participation for mature age persons arising from insurance is the examination of age limits on insurance offerings, as well as the need to redesign insurance products to suit the needs and circumstances of mature age workers.

Reconsidering age limits

4.49 Age limits on insurance products currently offered in the Australian market for mature age workers differ, but tend to range from 65 to 70, and in some cases older.⁴³ The South Australian Equal Opportunity Commission submitted that age limits in insurance products

hail from a time when the 65 retirement age was ‘set in stone’. With the retirement age due to increase, and the better health of Australians leading to extended participation in the workforce, the 65 age limit imposed is no longer relevant. It prevents capable people from participating fully as a member of society.⁴⁴

4.50 The AHRC has expressed the view that ‘insurance companies should be encouraged to extend their coverage of workers based on health and wellbeing measures and not on age limits’.⁴⁵

4.51 Some insurers ‘have already lifted their age limits’.⁴⁶ For example, Suncorp submitted that it is ‘committed to increasing the maximum age of cover as soon as practicable’ and that ‘recent review of Suncorp’s age limits has shown that IP insurance is sustainable in some low risk occupations, and as a result, cover has been extended to age 70’.⁴⁷ However, insurers have also emphasised the importance of risk-based underwriting and pricing, including on the basis of age. Many warned that any move to prohibit consideration of age as a factor would have serious consequences for the insurance industry.

42 Insurance Council of Australia, *Submission 21*.

43 Insurance Council of Australia, *Correspondence*, 29 August 2012.

44 The South Australian Equal Opportunity Commission, *Submission 11*.

45 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012).

46 *Ibid.*

47 Suncorp Group, *Submission 39*.

4.52 In circumstances where age limits differ between insurers and products, the ALRC suggests that IRAG consider mechanisms for reviewing age-based insurance pricing and underwriting across the industry. In addition, given the effect of increased demand for insurance products on competition and the insurance pool, ‘financial education, increased information provision (both to consumers and insurers) and encouraging insurance uptake’,⁴⁸ approaches supported by stakeholders such as the AHRC and Suncorp, may also be worth considering.

4.53 In circumstances where insurers continue to consider age a vital factor in underwriting and pricing processes, there is a need to ensure that decisions considering age are based on relevant and appropriate actuarial and statistical information available to consumers, an approach discussed in more detail below.

Redesign of insurance products

4.54 Throughout the Inquiry the ALRC has heard concerns from stakeholders about the design of insurance products available to mature age workers. For example, the design of travel insurance was raised by stakeholders as problematic where a number of pre-existing medical conditions (common in mature age persons) limit access to travel insurance, necessarily precluding basic cover for luggage and personal effects.

4.55 Insurers have submitted that it is not necessary to resort to regulation with respect to insurance offerings, as

mature age workers represent a significant market opportunity for insurers and Suncorp is confident competition will ensure concerns surrounding age-based limitations and premiums are resolved as soon as practicable.⁴⁹

4.56 The ICA noted that

insurers constantly review the market and reassess opportunities for expansion of their business within their particular business objectives. It is therefore natural in a free market economy that insurers offer policies targeted at particular groups. Even with the best of policy goals in mind, requiring uniform policy offerings, for example in the case of seniors, would distort competition and significantly impact insurers’ prudential requirements.⁵⁰

4.57 The ALRC recognises the nature of the insurance market and the importance of ‘risk appetite’ for insurance offerings. However, in order to ensure there are a range of insurance products available to mature age workers with reasonable premiums, the ALRC suggests that IRAG should discuss appropriate product design and redesign, balancing the need for risk assessment with the potentially discriminatory effects for mature age people of existing insurance offerings and design of products. In particular, IRAG should examine the design and redesign of comprehensive and affordable insurance products tailored to the needs and circumstances of mature age people.

48 Ibid.

49 Ibid.

50 Insurance Council of Australia, *Submission 21*.

Underwriting and actuarial data

4.58 In order to ‘assess risk factors and determine ... risk appetite’, insurers ‘may consider available reliable data (such as the Australian Bureau of Statistics and the Australian Institute of Health and Welfare) and their claims book experience’.⁵¹

4.59 Aside from complaint processes under anti-discrimination legislation or formal judicial review, the current system offers no independent oversight of whether insurers are basing decisions on reasonable actuarial or statistical data. There are a number of possible approaches to addressing this issue in light of stakeholder concerns.

4.60 For example, IRAG may wish to consider the establishment of some body or mechanism by which this information could be considered independently. This could, for example, involve consideration of whether the Government should establish a body or group responsible for providing advice to the insurance industry on the relevance and use of age in insurance underwriting and pricing. This is an approach similar to the one recommended by the ALRC in *Essentially Yours*, ALRC Report 96, with respect to insurance and genetic information.⁵² The data collection role of any such body could draw upon the existing data collection functions of APRA or the Institute of Actuaries.

4.61 Another possible approach may involve the quarterly publication of a report by insurers outlining their claims experience based on age and other relevant data upon which their ongoing reliance on the exemption is based. Any such requirement would need to ensure commercially sensitive data was protected. By way of example, the Association of British Insurers (ABI) and the British Insurance Brokers’ Association have entered into a non-statutory agreement with the UK government which requires ABI to publish aggregate data for the industry as a whole indicating how age is used when assessing risk and pricing travel and motor insurance products.⁵³ The ALRC suggests that IRAG could consider a similar agreement and requirement in Australia. A number of alternative approaches are discussed below in the context of the insurance exemption, however the ALRC would be interested in stakeholder feedback on these potential approaches.

International developments

4.62 There are a range of developments, specifically in Europe, with respect to insurance that may increasingly be of relevance in an Australian insurance context.⁵⁴ In

51 Ibid.

52 Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96 (2003).

53 Association of British Insurers, British Insurance Brokers’ Association and HM Government, *Transparency and Access in Motor and Travel Insurance for Older People: An Agreement on Age in Insurance* (2012). The first data was made available in June 2012: Association of British Insurers, *Data by Age and Gender* <www.abi.org.uk/Facts_and_Figures/Data_by_Age_and_Gender.aspx> at 13 September 2012.

54 The Council of the European Union, *Council Directive 2004/113/EC*, 13 December 2004 prohibits all discrimination based on sex in the access to and supply of goods and services. However, there is an exemption (similar to the Australian exemption) on the basis of actuarial and statistical data provided it is reliable, regularly updated and available to the public. The European Court of Justice held that in the insurance services sector, reliance on the exemption (that is, derogation from the general rule of unisex

light of this, in addition to its consideration of the matters outlined in Proposal 4–1, the ALRC proposes that IRAG should keep a watching brief on developments in the insurance industry in relation to age, both in Australia and overseas, with a view to reviewing Australian insurance practices as the need arises. The ALRC also considers that bodies such as the ICA and FSC and individual insurers should be aware of, and respond to, such developments as necessary.

Proposal 4–1 In April 2011, the Australian Government established an Insurance Reform Advisory Group. The group should examine:

- (a) options for the development of a central information portal or source in order to provide mature age persons with clear and simple information about available insurance products;
- (b) the design and redesign of comprehensive and affordable insurance products tailored to the needs and circumstances of mature age persons;
- (c) mechanisms for reviewing age-based insurance pricing and underwriting across the industry;
- (d) mechanisms for ensuring that the insurance industry utilises relevant and appropriate actuarial and statistical data upon which to make decisions about insurance offerings, based on age; and
- (e) training of insurance distributors in order to facilitate the provision of clear and simple information about available insurance products.

Proposal 4–2 The Insurance Reform Advisory Group should keep a watching brief on developments in the insurance industry in relation to age, both in Australia and overseas, with a view to reviewing Australian insurance practices as the need arises.

The General Insurance Code of Practice

4.63 The ALRC is of the view that it is not appropriate for the General Insurance Code of Practice (the Code), or any other industry code, to mandate the removal or extension of age-based limitations on insurance policies. However, the ALRC proposes that ways in which the Code could be amended to encourage insurers to consider the needs and circumstances of mature age workers in insurance should be examined in the current review of the Code.

4.64 The Code was developed and introduced by ICA in 1994. It applies to all general insurance products, including travel insurance and sickness and accident

premiums and benefits) is invalid with effect from 21 December 2012: *Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres (Test Achats)* (Unreported, ECJ, 1 March 2011). In light of this, the ALRC understands that there may be potential challenges to exemptions from anti-discrimination directives which discriminate on the grounds of age.

insurance. It does not apply to workers' compensation or cover reinsurance. The objectives of the Code are to:

- promote better, more informed relations between insurers and their customers;
- improve consumer confidence in the industry;
- provide complaint and dispute resolution mechanisms; and
- commit insurers and other insurance professions to high standards of customer service.⁵⁵

4.65 The Code is binding on all signatories, including members of the ICA. The Financial Ombudsman Service (FOS) monitors compliance with the Code. Its findings are reported to the independent Code Compliance Committee, which has power to make determinations and impose sanctions.⁵⁶ The ICA has indicated it will seek ASIC approval for the revised Code, as provided for under the *Corporations Act 2001* (Cth).⁵⁷

4.66 The Code provides that an independent party will be appointed by the ICA to review the Code every three years. The last review occurred in 2009, however other amendments were made in early 2012 and these commenced on 1 July 2012. In July 2012 a new review of the Code commenced. The review is being conducted by Mr Ian Enright and an advisory panel. An issues paper is due to be released in September 2012 and the final report in mid-2013.⁵⁸

Removing age-based limitations on insurance policies

4.67 In the Issues Paper, the ALRC asked whether insurance industry codes of practice should be amended to encourage or mandate the removal or extension of age-based limitations on insurance policies.⁵⁹

4.68 Any such amendment was strongly opposed by those stakeholders who addressed this question, on two bases.

4.69 First, the ICA submitted that mandating the removal of age-based assessments, through whatever means,

has the potential to adversely impact the willingness to offer particular insurance or, if offered, could lead to serious consequences in relation to an insurer's obligations under the prudential regime supervised by Australian Prudential Regulatory Authority where increased risk profiles have increased capital requirements.⁶⁰

55 Insurance Council of Australia, *General Insurance Code of Practice*, cl 1.17.

56 *Ibid.*, cls 7.13–7.23.

57 *Corporations Act 2001* (Cth) s 1101A. ASIC approves codes of conduct as set out in Australian Securities and Investments Commission, *Approval of Financial Services Sector Codes of Conduct*, Regulatory Guide 183.

58 General Insurance Code of Practice 2012 Review <www.codeofpracticereview.com.au/Home.aspx> at 18 September 2012.

59 Issues Paper, Question 51.

60 Insurance Council of Australia, *Submission 21*.

4.70 Secondly, other stakeholders suggested that the Code is not an ‘appropriate tool to mandate or encourage’ the removal of age-based limitations.⁶¹ In addition, Suncorp highlighted the customer service nature of the Code and submitted that the ‘inclusion of product availability and affordability promises in a customer service code would be counterintuitive’.⁶²

4.71 In the ALRC’s view it is not appropriate for the Code, or any other industry code, to mandate the removal or extension of age-based limitations on insurance policies.

A more appropriate role for the Code?

4.72 The Code sets minimum standards of customer service and contains a number of specific obligations of particular relevance for mature age workers. The existing provisions already contain some scope for addressing insurance issues faced by mature age workers.

4.73 COTA raised concerns about the effectiveness of industry codes. It submitted that

consumers do not have a great deal of faith in the self regulation model as they have seen little evidence that it provides strong consumer protection. We support some external regulation and believe a framework that requires insurance companies to provide detailed and contestable evidence as to why they should have age limits would be the best approach.⁶³

4.74 The ALRC suggests that IRAG’s consideration of the matters outlined above should encompass discussion of external regulation and the need for current, accurate and accessible evidence. However, the current review also provides an opportunity to consider useful potential amendments in this area. A number of stakeholders supported this approach.⁶⁴

4.75 Accordingly, the ALRC proposes that in the course of the current review, the independent reviewer should consider the following areas of the Code and ways in which they may be amended to incorporate the needs and circumstances of mature age persons seeking insurance:

- training of employees and authorised representatives;⁶⁵
- access to information relied upon in assessing claims;⁶⁶
- provision of up-to-date, clear and accessible information to customers;⁶⁷
- complaints handling procedures;⁶⁸ and

61 Suncorp Group, *Submission 39*.

62 Ibid.

63 COTA, *Submission 51*.

64 See eg, Suncorp Group, *Submission 39*; Insurance Council of Australia, *Submission 21*.

65 Insurance Council of Australia, *General Insurance Code of Practice*, cls 2.4, 3.7.

66 Ibid, cl 3.5.

67 Ibid, cl 5.

- any other relevant areas.

4.76 The ALRC also welcomes stakeholder feedback on possible amendments to other industry standards or codes to encourage insurers to consider the needs and circumstance of mature age persons in insurance. However, the ALRC notes concern by some stakeholders about having to comply with multiple codes as industry associations develop new codes based on the Future of Financial Advice reforms.⁶⁹

Proposal 4–3 From 2012, the General Insurance Code of Practice is being reviewed by an independent reviewer. In the course of the review, the ways in which the Code could be amended to encourage insurers to consider the needs and circumstances of mature age persons should be examined.

Question 4–1 In addition to the General Insurance Code of Practice, are there other industry standards or codes that should be reviewed in order to encourage insurers to consider the needs and circumstances of mature age persons? For example, the Financial Services Council Code of Ethics and Code of Conduct?

Anti-discrimination legislation and the insurance exemption

4.77 The ADA contains an exemption which provides that insurers may discriminate on the grounds of age in offering an insurance policy, or the terms or conditions upon which such a policy is offered, if certain conditions are satisfied.⁷⁰ The conditions are satisfied if the discrimination is:

- based upon actuarial or statistical data on which it is reasonable for the discriminator to rely; and
- reasonable having regard to the matter of the data and other relevant factors; or
- in a case where no such actuarial or statistical data is available, and cannot reasonably be obtained, reasonable having regard to any other relevant factors.⁷¹

4.78 The Australian Government is currently considering exemptions in the course of the consolidation of Commonwealth anti-discrimination legislation. Specifically, the Government has asked whether any consolidated act should include a general limitations clause rather than retaining the existing range of specific exemptions, and whether any particular specific exemptions should be retained.⁷² Stakeholders who made submissions to the consolidation process expressed differing views on the merits of introducing a general limitations clause and retaining the insurance exemption.

68 Ibid, cl 6.

69 Treasury, *Future of Financial Advice Reforms* <<http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm>> at 13 September 2012.

70 *Age Discrimination Act 2004* (Cth) s 37.

71 Ibid s 37(3).

72 Australian Government Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper* (September 2011), 37.

4.79 In this Discussion Paper, the ALRC proceeds on the basis that the exemption will be retained in its current form for the purposes of age discrimination under any consolidated act. Following the release of the draft consolidated legislation in 2012, the ALRC may need to reconsider its approach to reform in preparing the final Report if there are changes to exemptions under the legislation.

4.80 At this stage, the ALRC is of the view that, in the course of the consolidation process, if a specific insurance exemption is retained, the Government should consider what changes may be needed to the exemption and its associated provisions to address stakeholder concerns. In order to facilitate further discussion of these issues in the final Report, the ALRC asks a range of questions below.

Should the insurance exemption be amended?

4.81 Throughout this Inquiry stakeholders have expressed a range of concerns with respect to the insurance exemption. The key concerns centre on the nature of the exemption itself and the relevancy, accuracy and availability of the actuarial or statistical data relied upon by insurers in invoking the exemption.

4.82 Some of these concerns echo those conveyed to the Productivity Commission in its 2004 review of the *Disability Discrimination Act 1992* (Cth) (DDA). The Productivity Commission outlined several concerns about the insurance exemption under the DDA, including: access to insurance; the nature of, and access to, actuarial and statistical data; the nature of ‘any other relevant factors’; and reliance on stereotypes.⁷³

The application of the exemption

4.83 A range of stakeholders have suggested amendments to the insurance exemption. Some stakeholders have suggested that the exemption should not apply automatically provided the conditions are satisfied. Instead, stakeholders have suggested that insurers should be required to apply for a specific exemption or show reasonable cause why an applicant over age 65 should not be covered by an insurance policy, or to justify discrimination in the terms or conditions of the policy. The ALRC is interested in stakeholder comments on the application and operation of the exemption as well as review mechanisms.

Disclosure of data to the customer

4.84 Other stakeholders have suggested that actuarial or statistical data relied on by insurers for the purposes of the exemption should be provided to the customer or to an independent regulator.

4.85 The *Sex Discrimination Act 1984* (Cth) (SDA) requires insurers to disclose the actuarial or statistical data to the customer, however there is no such requirement under

73 Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004).

the ADA. However, there are a range of obligations under the Code with respect to the provision of such information.⁷⁴

4.86 In its submission, Suncorp emphasised that actuarial and statistical data is commercially sensitive and expressed the view that

the publication of this data would reduce age-based competition by allowing all insurers access to their competitors internal actuarial and statistical data. Suncorp does not believe reduced age based competition is in the ultimate interests of mature age Australians. In addition, age data is commonly obtained from a variety of sources and is therefore difficult to interpret. Age data is used in conjunction with an insurer's commercial expertise to determine underwriting and pricing. Presenting data without the underlying knowledge of its meaning or intended use is likely to have limited value for the community.⁷⁵

4.87 However, the ALRC suggests that provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based may address some stakeholder concerns in this area.

Power to require data

4.88 The ADA enables the AHRC and its President to require the production of actuarial or statistical data where a person has acted in a way that would, apart from the stated exemptions, be unlawful. The ADA, SDA and DDA all contain an offence for failing to disclose the source of actuarial or statistical data to the AHRC.⁷⁶

4.89 Other than under the AHRC complaint process, or formal review by a court, the current system offers no independent oversight of whether insurers are basing decisions on reasonable actuarial or statistical data, or whether the decision is otherwise reasonable.⁷⁷ In light of this, stakeholders have expressed concerns about the limited nature of these powers.

4.90 However, insurers such as Suncorp submitted that, while 'it is appropriate for insurers to be required to justify their age-based underwriting and pricing ... Suncorp would encourage use of the existing regulatory framework, where necessary, to achieve this'.⁷⁸

4.91 The ALRC is interested in stakeholder feedback on whether the powers of the AHRC are sufficient, or whether there should be some other mechanism for requesting or requiring either the actual actuarial information relied upon by insurers seeking to rely on the insurance exemption, or a meaningful explanation for their reliance on that information.

74 Insurance Council of Australia, *General Insurance Code of Practice*.

75 Suncorp Group, *Submission 39*.

76 For example, it is a strict liability offence not to provide the source of any such actuarial or statistical data if required to do so and attracts a penalty of 10 penalty units: *Age Discrimination Act 2004* (Cth) s 52.

77 This concern was also expressed by the ALRC in *Essentially Yours*, in which the ALRC outlined concerns about the need for a mechanism to evaluate the reliability and relevance of actuarial data relied upon by insurers in relation to genetic information: Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, ALRC Report 96 (2003).

78 Suncorp Group, *Submission 39*.

Any ‘other relevant factors’

4.92 The insurance exemption provides that in a case where no actuarial or statistical data is available, and cannot reasonably be obtained, the condition is satisfied if the discrimination is reasonable having regard to any ‘other relevant factors’.⁷⁹

4.93 The meaning of ‘other relevant factors’ has been partly considered by the Federal Court in the context of the DDA in *QBE Travel Insurance v Bassanelli*,⁸⁰ in which Mansfield J held that an insurer cannot pick and choose which material it considers in the context of any ‘other relevant factors’. Instead, it must consider ‘any matter which is rationally capable of bearing upon whether the discrimination is reasonable’ and must not rely on stereotypes in doing so.⁸¹ The Federal Court also confirmed that the onus of proof is on an insurer to qualify for an exemption under the equivalent section under the DDA.

4.94 The ALRC welcomes stakeholder feedback on whether it is necessary to amend the insurance exemption to provide greater clarity as to what constitutes any ‘other relevant factors’ or whether this is best left for judicial interpretation and guidance material.

4.95 The ALRC does not suggest that insurers routinely make decisions without sufficient actuarial, statistical or other reasonable basis such that they fall outside the terms of the insurance exemption. However, given the preliminary concerns expressed by stakeholders, in addition to the mechanisms the ALRC suggests should be examined by IRAG, the ALRC welcomes stakeholder feedback on a range of potential reform options aimed at addressing these concerns.

The development of guidance material

4.96 Regardless of the form the exemption that covers insurance takes, it is necessary to develop guidance material for insurers about the application of any exemption.

4.97 The AHRC developed *Guidelines for Providers of Insurance and Superannuation* with respect to the insurance and superannuation exemptions under the DDA. Last revised in 2005, the guidelines are not binding but provide the AHRC’s view on the interpretation of the exemption under the Act and relevant case law. The Guidelines are intended to:

- clarify the difference between lawful and unlawful disability discrimination in providing insurance and superannuation; and
- help providers of insurance and superannuation in complying with the DDA, in making decisions in individual cases and in developing broader policies and procedures; and
- explain what distinctions or exclusions may be reasonable in offering insurances to people with a disability, and

79 *Age Discrimination Act 2004* (Cth) s 37(3).

80 *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

81 *Ibid.*

- explain factors that courts may take into account in deciding a complaint about disability discrimination.⁸²

4.98 The ALRC proposes that the AHRC develop such guidance material for the purposes of age, in consultation with the insurance industry. In particular, such guidelines could: outline what is reasonable;⁸³ list sources of actuarial or statistical data that are acceptable for the purposes of the exemption; summarise recent case law; outline what are ‘other relevant factors’; and provide case studies.

Question 4–2 In the course of the consolidation of federal anti-discrimination legislation, the Australian Government is considering the operation of the insurance exemption under the *Age Discrimination Act 2004* (Cth). If the specific exemption is retained, what changes, if any, should be made? For example, should:

- the application of the exemption be limited in some way;
- there be provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based; or
- clarification be provided as to what are ‘other relevant factors’?

Question 4–3 Is the power of the Australian Human Rights Commission under s 54 of the *Age Discrimination Act 2004* (Cth) sufficient, or should there be some other mechanism for requesting or requiring the actuarial or statistical information relied upon by insurers seeking to invoke the insurance exemption?

Proposal 4–4 The Australian Human Rights Commission, in consultation with the Insurance Council of Australia and the Financial Services Council, should develop guidance material about the application of any insurance exemption under the *Age Discrimination Act 2004* (Cth) or consolidated anti-discrimination legislation.

82 Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* <www.humanrights.gov.au/disability_rights/standards/Insurance/insurance_adv.html> at 13 September 2012.

83 For example, Mansfield J in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 outlined instances where data would not be reliable.