

## 6. Insurance

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### Summary

6.1 A number of key concerns with respect to mature age workers and insurance were expressed during the course of this Inquiry. These concerns relate to the availability of, and information about, insurance products for mature age persons; and the relevance, transparency and accessibility of the actuarial and statistical data upon which age-based insurance underwriting and pricing occurs.

6.2 To facilitate the provision of clear and simple information about available insurance products for mature age persons, the ALRC recommends that the Insurance Reform Advisory Group (IRAG) consider options for the development of a central information source.

6.3 The ALRC recommends a two-fold approach to addressing concerns about actuarial and statistical data. First, the ALRC recommends that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which insurance offerings based on age rely. Secondly, the ALRC recommends review of insurance exceptions under Commonwealth, state and territory anti-discrimination legislation as they apply to age. A related recommendation is the development of guidance material about the application of any insurance exception under Commonwealth anti-discrimination legislation.

6.4 Finally, the ALRC recommends that the General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct be amended. The codes should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

## Insurance and mature age workers

6.5 Insurance is a ‘risk transfer, loss-spreading arrangement’.<sup>1</sup> Its purpose is to distribute risk through providing a mechanism for individuals and organisations to purchase, by way of a premium, insurance products to mitigate that risk. Risk is then transferred to the insurer which indemnifies the insured against future events that may cause loss. Rigorous risk assessment is the ‘basic principle that underpins the successful operation of insurance models’.<sup>2</sup> This risk assessment determines the criteria used in the underwriting process—in which individual applications for insurance are assessed—and pricing, which ‘ensures that the premiums paid by each policyholder reflect their risk relative to the whole pool’.<sup>3</sup>

6.6 At the Commonwealth level, the insurance industry is governed by two primary pieces of legislation.<sup>4</sup> There are three key categories of insurance in Australia: health, life and general insurance. Life insurance encompasses a variety of products that provide payment upon death or injury, including income protection insurance.<sup>5</sup> General insurance encompasses cover purchased by individuals—such as travel insurance;<sup>6</sup> and that purchased by organisations—including product and public liability and professional indemnity insurance. The general insurance industry in Australia is regulated by a prudential regulator<sup>7</sup> and a corporate regulator.<sup>8</sup>

6.7 The focus of this chapter is on life and general insurance, given their potential effect on the participation of mature age workers and volunteers. The key barriers for mature age workers appear to arise in relation to income protection insurance, travel insurance and volunteer insurance.<sup>9</sup> These barriers include: accessing information about available and appropriate insurance products; limitations on availability of insurance; and increased premiums and restriction of benefits as a result of the imposition of age restrictions.<sup>10</sup>

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

2 Insurance Council of Australia, *Submission 94*.

3 Financial Services Council, *Submission 89*.

4 *Insurance Act 1973* (Cth) and *Insurance Contracts Act 1984* (Cth). Chapter 7 of the *Corporations Act 2001* (Cth) governs the regulation of insurance intermediaries such as agents and brokers.

5 Income protection insurance is otherwise known as personal accident, sickness and disability insurance and protects the insured in the event of being unable to work due to sickness or injury (the ‘prescribed risk’). The benefit is provided by way of regular periodic payments—a wage substitute.

6 Travel insurance provides for the payment of agreed sums to cover losses or expenses, including medical expenses, incurred in the course of travel.

7 The prudential regulator is the Australian Prudential Regulation Authority (APRA), which is responsible for general administration of the *Insurance Act 1973* (Cth): *Australian Prudential Regulation Authority Act 1998* (Cth). 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.

8 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 1984* (Cth), monitoring and promoting market integrity and consumer protection and licensing: *Australian Securities and Investments Commission Act 2001* (Cth).

9 The types of insurance relevant to volunteers include public liability insurance, directors/officers insurance and personal injury/accident insurance.

10 See, eg, COTA, *Submission 51*; National Seniors Australia, *Submission 27*; South Australian Equal Opportunity Commission, *Submission 11*. See also Australian Human Rights Commission, *Working Past*

6.8 Such barriers may act as a disincentive to employment and other productive work for mature age persons.<sup>11</sup> For example, where mature age workers are unable to access income protection insurance, this leaves them vulnerable in the event of illness or injury. This is of particular concern to specific groups of workers, such as sole traders, where workers' compensation is not available.<sup>12</sup> A case study provided by the South Australian Equal Opportunity Commission highlights this point:

I am a self-employed primary producer now aged 69 years and cannot access accident or illness insurance to cover me at work. I was told I was too old for illness insurance, but could get some cover for accident insurance at greatly reduced benefits up to the age of 70. I have therefore been working full time without any illness cover for 5 years, and soon will have no accident cover either when I turn 70. I have a clean bill of health each year from my GP which I submit to the insurance company. The government encourages us to work after retirement age, but does not care that insurance companies say we are uninsurable.<sup>13</sup>

6.9 In the case of mature age volunteers, the Tasmanian Anti-Discrimination Commissioner reported that, of the 25 insurance arrangements held by organisations examined by her, all private insurers had arrangements that discriminated on the basis of age.<sup>14</sup> Where insurance coverage for volunteers is not available, this either results in volunteering activity continuing without coverage, with potentially significant consequences, or acts as a barrier to volunteering. The following case study illustrates the potential consequences of continuing without coverage:

Whilst doing this volunteer work [my mother and father] were involved in a horrific accident which left my Dad in a coma for 6 months before he finally passed away. The [organisation] involved said that he was not covered by their insurance because he was too old (he was just 75.6 years old).<sup>15</sup>

6.10 However, the extent to which age-based limitations, premiums and restricted benefits 'influence mature age workforce participation will vary on the nature of each particular product'.<sup>16</sup>

6.11 To address the concerns outlined above would require systemic reform of certain elements of the insurance framework in Australia. Two key systemic issues have emerged which are much wider than the focus of this Inquiry on barriers to work for mature age persons. The first issue is whether age is an appropriate indicator of risk. The second issue involves the insurance products available in the market and their design.

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*Our 60s: Reforming Law and Policies for the Older Worker* (June 2012); National Seniors Australia and COTA, *Ageism in Travel Insurance 2012 Survey Report* (2012); Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report. At the time of writing, the ALRC was provided with an advance copy of the report, prior to its public release.

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

12 See, eg, South Australian Equal Opportunity Commission, *Submission 70*.

13 Ibid.

14 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, 34.

15 Private Submission to Ibid, 39. Note, this scenario also raises issues relating to common law liability of organisations with volunteers.

16 Suncorp Group, *Submission 39*.

6.12 There is a broad suite of underwriting and pricing factors, including an applicant's age, considered relevant to assessing risk.<sup>17</sup> The Insurance Council of Australia (ICA) emphasised that 'a lawful ability to reasonably differentiate on the basis of risk, is essential to the provision of affordable general insurance for the community'.<sup>18</sup> 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 this may affect insurance offerings and premiums.<sup>19</sup> In its submission, Suncorp emphasised the highly competitive nature of the insurance industry, noting 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.<sup>20</sup>

6.13 However, the Tasmanian Anti-Discrimination Commissioner rejected arguments that the removal of age-based distinctions would make offering certain insurance products 'uneconomic or distort the cost structure of insurance products'.<sup>21</sup> In addition, the Australian Human Rights Commission (AHRC) has suggested that risk assessment should be conducted on the basis of factors other than age.<sup>22</sup>

6.14 Examination of whether age is an appropriate indicator of risk, or should be used in the underwriting and pricing process at all, is a much wider question than the focus of this Inquiry. As a result, the ALRC makes no specific recommendations concerning the review or removal of age-based insurance pricing and underwriting.

6.15 The second systemic issue is product innovation and design. A number of stakeholders submitted that

the competitive marketplace and increasing market demand is the most powerful driver of product innovation. As the population ages and people remain in the workforce longer we submit that products have, and will continue, to be developed to meet the needs of older workers.<sup>23</sup>

6.16 Product innovation and design are essentially market-based issues and reform will require the cooperation of the insurance industry, seniors organisations, consumer groups and the Australian Government.<sup>24</sup> The ALRC recognises the nature of the

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17 Ibid; Insurance Council of Australia, *Submission 21*.

18 Insurance Council of Australia, *Submission 21*.

19 See, eg, Suncorp Group, *Submission 39*.

20 Ibid.

21 The Commissioner noted that there is no suggestion that insurers be required to make uniform insurance offerings. Any intention to account for different appetites for risk is not in and of itself discriminatory: Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, 85.

22 Australian Human Rights Commission, *Working Past Our 60s: Reforming Law and Policies for the Older Worker* (June 2012), 14.

23 Financial Services Council, *Submission 89*. See also Suncorp Group, *Submission 39*.

24 While product innovation and design are essentially market-based issues, refusal to offer an existing insurance policy to persons on the basis of their age would be unlawful under anti-discrimination legislation, except if the conditions under the insurance exception are satisfied.

insurance market and the importance of ‘risk appetite’ for insurance offerings. While not recommending legislative or regulatory reform in this area, the ALRC considers that IRAG is an appropriate forum for discussion of these issues.<sup>25</sup> The ICA has indicated that it ‘welcomes continuing discussions within IRAG on consumer needs and wants’ and recognises the ‘potential role of IRAG discussion as an inspiration for product innovation’.<sup>26</sup>

### Access to information about relevant insurance products

6.17 To improve access to information about relevant insurance products the ALRC recommends that IRAG, or a similar body, consider the development of a central information source. The source should provide mature age workers and volunteers with clear and simple information about insurance products relevant to their participation in paid employment or volunteering.

6.18 Mature age workers, like all consumers, have a level of individual responsibility for sourcing and comparing insurance policies. However, if lack of awareness is contributing to perceptions of age discrimination in insurance, or is acting as an additional insurance-related barrier to workforce participation, the development of information sources is a constructive option for reform.

6.19 A number of comments from respondents received as part of a 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.<sup>27</sup>

6.20 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’.<sup>28</sup>

6.21 The Financial Services Council (FSC) acknowledged that ‘it is likely that awareness of the range of products that are presently available for older Australians may be low’.<sup>29</sup>

6.22 There are a number of existing sources and initiatives in this area, including *MoneySmart*,<sup>30</sup> and the Consumer Referral Service (CRS) launched by the ICA in

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25 IRAG was established in April 2011. The purpose of IRAG is to bring together peak industry bodies, consumer and Australian 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’: InsuranceNEWS, *Shorten Sets up Another Insurance Review Body* <[www.insurancenews.com.au](http://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).

26 Insurance Council of Australia, *Submission 94*.

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

28 Ibid.

29 Financial Services Council, *Submission 89*.

30 ASIC, *MoneySmart* <[www.moneysmart.gov.au](http://www.moneysmart.gov.au)> at 21 March 2013.

2012. The CRS provides contact details of insurers, including a listing for ‘Seniors Travel Insurance’.<sup>31</sup> These sources could be revised, or could contribute to the development of a new central information source, to provide mature age persons with clear and simple information about available insurance products.

6.23 Suncorp acknowledged the limitations of the current CRS and indicated it is ‘committed to supporting the ongoing enhancement of the portal’.<sup>32</sup> If the CRS is extended or used as a model, Suncorp suggested that ‘enhanced search capabilities to meet the needs of consumers from diverse backgrounds will be an important function for inclusion in the portal going forward’.<sup>33</sup>

6.24 In addition, any such source should be accessible for all members of the community, including people with disability, Indigenous people and members of culturally and linguistically diverse communities. In developing such a source a number of practical issues would also need to be considered. These include: cost; responsibility for ongoing updates and maintenance; and the most appropriate ways to distribute such information in hard copy.<sup>34</sup>

6.25 Ideally, the information incorporated should extend beyond provision of contact details of insurers to include, for example: the products available; the terms of cover; and any age-related restrictions. However, general insurers sell on a ‘no advice’ model.<sup>35</sup> Insurers have submitted that obligations governing the provision of financial advice limit their ability and willingness to provide information to mature age consumers that may be considered general or personal advice rather than factual information.<sup>36</sup> For example, Suncorp suggested that such obligations and resulting uncertainty results in ‘a generally conservative approach being taken in the provision of information’ by insurers.<sup>37</sup> In addition, while the FSC indicated it is ‘supportive of initiatives to improve consumer awareness and accessibility of life insurance products offered by its members’, it submitted that

it is important to ensure that any proposals with respect to the centralisation of product-specific information are balanced with the appropriate consumer protection in

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31 Insurance Council of Australia, *Find an Insurer* <www.findaninsurer.com.au> at 21 March 2013. The service is similar to the British Insurance Brokers’ Association ‘Find a Broker’ service and website: British Insurance Brokers’ Association, *Find an Insurance Broker* <www.biba.org.uk/ConsumerHome.aspx> at 21 March 2013.

32 Suncorp Group, *Submission 66*.

33 *Ibid.*

34 See, eg, Insurance Council of Australia, *Submission 94*.

35 For example, *Corporations Act 2001* (Cth) ch 7; ASIC, *Regulatory Guide 36: Licensing Financial Product Advice and Dealing* (April 2011); ASIC, *Regulatory Guide 146: Licensing: Training of Financial Product Advisers* (July 2012); ASIC, *Regulatory Guide 175: Licensing: Financial Product Advisers—Conduct and Disclosure* (December 2012).

36 An Australian Financial Services (AFS) licence is not required to provide factual information regarding a product to customers. However, providing general or personal financial advice does require an AFS licence, and is the subject of obligations under the *Corporations Act 2001* (Cth) and the supporting Regulatory Guides issued by the Australian Securities and Investment Commission. See, eg, Insurance Council of Australia, *Submission 94*; Financial Services Council, *Submission 89*; Suncorp Group, *Submission 66*.

37 Suncorp Group, *Submission 66*.

light of regulatory requirements for product issuers in regard to obligations that limit the provision of personal versus general advice.<sup>38</sup>

6.26 The definition and scaling of factual information, general and personal advice is the focus of the ‘Future of Financial Advice’ reforms.<sup>39</sup> Consideration of these issues is broader than the scope of this Inquiry. However, insurer concerns and the effect these have on assistance provided to mature age persons seeking insurance need to be considered in the course of developing the central information source. The ALRC welcomes developments that will facilitate the provision of clear and simple information to all people seeking insurance, including mature age persons.<sup>40</sup>

**Recommendation 6–1** The Insurance Reform Advisory Group, or a similar body, should facilitate the development of a central information source to provide mature age persons with clear and simple information about relevant and available insurance products.

## Actuarial and statistical data

6.27 Data, in particular actuarial and statistical data, informs evidence-based risk assessment in insurance. Stakeholders expressed concerns about the accuracy, relevance and currency of data relied upon by insurers in making decisions about insurance on the basis of age. To address these concerns, the ALRC recommends that the Australian Government and insurers negotiate an agreement requiring the publication of data upon which decisions about insurance offerings based on age are made. In the course of negotiating such an agreement, the ALRC suggests that other approaches to addressing such concerns be explored.

### Agreement requiring publication of aggregate data

6.28 In assessing risk and determining ‘risk appetite’, insurers may use available data, including from the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, and their own claims book experience.<sup>41</sup> Insurers often also rely on guidelines issued by reinsurers.<sup>42</sup> However, aside from complaint processes under anti-discrimination legislation or formal judicial review, the current system offers

38 Financial Services Council, *Submission 89*.

39 Treasury, *Future of Financial Advice Reforms* <<http://futureofadvice.treasury.gov.au/Content/Content.aspx?doc=home.htm>> at 21 March 2013.

40 For example, ICA submitted that it has ‘had productive discussions with ASIC on how tailored information can be provided to a customer without triggering general or personal advice obligations. We are hopeful that the regulatory guidance which ASIC issues on this subject will facilitate the provision of clear and simple information which will help consumers make better insurance purchasing decisions’: Insurance Council of Australia, *Submission 94*. See also Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, rec 14.

41 Insurance Council of Australia, *Submission 21*.

42 Reinsurance is 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’: Thomson Reuters, *The Laws of Australia* (2009), Vol 22, ‘Insurance’ as at 14 March 2013, [22.1.260].

limited independent oversight of whether insurers are basing decisions on reasonable actuarial or statistical data.

6.29 The ALRC recommends that the Australian Government and insurers should negotiate an agreement requiring the publication of aggregate data upon which decisions about insurance offerings based on age are made.

6.30 A recent investigation by the Tasmanian Anti-Discrimination Commissioner into volunteers, age and insurance concluded that the data being relied upon by insurers and provided to the Commissioner was not ‘of sufficient detail or relevance’.<sup>43</sup> The Commissioner stated that the data was insufficient ‘to support the claim that older volunteers pose a greater insurance risk ... because of their age’.<sup>44</sup> The Commissioner also expressed the view that the current approach of insurers is ‘based solely on age and not on risk’.<sup>45</sup>

6.31 In addition, stakeholders in this Inquiry expressed broad concerns about lack of transparency. For example, the South Australian Equal Opportunity Commission submitted that

the lack of transparency and the imbalance of power compounds the disadvantage experienced. A more transparent industry would enable those seeking insurance to be provided with and understand the reasons behind any refusal.<sup>46</sup>

6.32 The ALRC is of the view that increased transparency around such data would address some of these concerns. The Association of British Insurers (ABI) and the British Insurance Brokers’ Association have entered into a non-statutory agreement with the UK government. The agreement 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.<sup>47</sup> The agreement was negotiated in part to respond to consumer concerns that changes in insurance premiums ‘due to a person’s age are not always proportionate to risk and the cost of claims’.<sup>48</sup> The agreement contains a number of general principles, including to:

- publish the aggregated data in the form of a table or chart;
- explain the chart or table, and any technical terms, in a form that is intelligible to someone who is not an insurance expert;
- identify which companies provided the data and the period to which it relates;
- review and, if necessary, update the data at intervals not exceeding one year; and

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43 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, iv.

44 Ibid, 83.

45 Ibid.

46 South Australian Equal Opportunity Commission, *Submission 70*.

47 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](http://www.abi.org.uk/Facts_and_Figures/Data_by_Age_and_Gender.aspx)> at 21 March 2013.

48 Ibid.



- make the data available free of charge on the ABI website, in electronic forms to other organisations and as a hard copy on request.<sup>49</sup>

6.33 However, insurers expressed significant concerns about disclosing data. For example, Suncorp submitted that

the data and analysis within the underwriting process is key intellectual property for insurers and is the process in which insurers can differentiate themselves and compete in the market.<sup>50</sup>

6.34 The ICA also stressed the sensitive nature of data and expressed some concern about the

utility of the proposal to require the provision of data, statistics and other relevant information, which is the intellectual property of insurers, and which would be difficult to interpret by most people without statistical or actuarial training.<sup>51</sup>

6.35 The ALRC recommends that the Australian Government and insurers should negotiate an agreement similar to the one in the UK. The agreement should require the publication of aggregate data upon which decisions about insurance offerings based on age are made. This approach allows consideration by key stakeholders of the need to balance increased transparency and confidence in the data and insurer decision-making with issues of commercial sensitivity and intellectual property. In line with the approach taken in the UK, the publication of such data should be: aggregated; easily understood by the general community; identify the contributing insurers and periods; up-to-date and reviewed as necessary; and accessible free of charge.

6.36 In addition, in the course of negotiating such an agreement the ALRC suggests that IRAG and similar bodies explore other approaches to addressing the concerns raised about data.

6.37 For example, one possible approach involves extending the Australian Prudential Regulation Authority's (APRA) existing prudential and data collection role. APRA's current focus is on prudential standards, and data is collected primarily for the purposes of feeding into APRA's supervision of insurers. The focus of such data includes insurers' financial performance, financial position and capital adequacy.<sup>52</sup> However, the Tasmanian Anti-Discrimination Commissioner recommended that 'insurers be required to submit for publication' information about 'products where age is a factor used to exclude coverage or determine premiums and benefits and the data on which these decisions rely'.<sup>53</sup> If APRA's role were extended to include the collection of such data, this would centralise reporting requirements for insurers.

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49 Association of British Insurers, *Age and Insurance: Helping Customers Understand Insurers' Use of Age in Motor and Travel Insurance* (June 2012), 5.

50 Suncorp Group, *Submission 66*.

51 Insurance Council of Australia, *Submission 94*.

52 See, eg, APRA, *Confidentiality of General Insurance Data and Changes to General Insurance Statistical Publications, Discussion Paper* (February 2013).

53 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, rec 8.

Moves towards increased insurance-related data transparency by APRA would, in turn, assist in increasing the transparency of age-related insurance data.<sup>54</sup>

**Recommendation 6–2** The Australian Government should negotiate an agreement with insurers offering products in the Australian market requiring the publication of data upon which decisions about insurance offerings based on age are made.

### **Anti-discrimination legislation and the insurance exception**

6.38 There are a range of different insurance exceptions under Commonwealth, state and territory anti-discrimination legislation. The exceptions allow insurers to 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. In the course of the Inquiry, stakeholders expressed concerns about two aspects of the insurance exception regime. First, stakeholders were concerned by the nature of the exceptions. Secondly, stakeholders expressed reservations about the relevancy, accuracy and availability of the actuarial or statistical data relied upon by insurers to satisfy the exceptions. The ALRC recommends that the Australian, state and territory governments review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation to address such concerns. The ALRC also recommends that guidance material be developed about the application of the insurance exception under Commonwealth anti-discrimination legislation.

#### ***How does the Commonwealth insurance exception operate?***

6.39 The *Age Discrimination Act 2004* (Cth) (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.<sup>55</sup> 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.<sup>56</sup>

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54 For example, the Australian Prudential Regulation Authority (APRA) is the prudential regulator and a national statistical agency for the Australian financial sector. APRA is proposing amendment to publication of data provided to it, including making such data non-confidential, introducing group-level statistics and incorporating more detailed industry-level statistics into its publications: APRA, *Confidentiality of General Insurance Data and Changes to General Insurance Statistical Publications*, Discussion Paper (February 2013).

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

56 *Ibid* s 37(3).

6.40 As outlined in Chapter 1, the Australian Government is in the process of consolidating Commonwealth anti-discrimination legislation. The specific insurance exception under the Human Rights and Anti-Discrimination Bill 2012 (Cth) (HRAD Bill) provides that an additional condition must be satisfied. If the individual has given the insurer a written request for access to the data, the insurer must have provided the individual with a copy of the data or reasonable access to the data.<sup>57</sup>

6.41 The HRAD Bill contains a different approach to exceptions from the one under existing Commonwealth anti-discrimination legislation. It proposes moving to a more general approach to exceptions, while retaining some specific exceptions. The Bill incorporates a general justifiable conduct exception. The specific exceptions under existing legislation, including in relation to insurance, fall within this general exception.

6.42 In addition, s 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 exceptions, be unlawful. However, the HRAD Bill replaces the AHRC's specific power to require production of data with a general power to obtain information in complaints and inquiries.<sup>58</sup>

6.43 A range of similar provisions operate at a state and territory level.<sup>59</sup>

#### ***Reviewing the exceptions***

6.44 A number of stakeholders expressed concerns about the operation of the insurance exception. Particular concerns included: that insurers may rely on the exception without considering whether they have the necessary and appropriate data; and whether reliance is reasonable having regard to other relevant factors. For example, the Tasmanian Anti-Discrimination Commissioner expressed the view that

decisions to exclude people within certain age brackets or to provide coverage on the basis of increased premiums and/or reduced benefits, is taking place without the evidentiary basis required.<sup>60</sup>

6.45 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. These included: access to insurance; the nature of, and access to, actuarial and statistical data; the nature of 'any other relevant factors'; and reliance on stereotypes.<sup>61</sup>

6.46 Stakeholders suggested a range of approaches to address such concerns. Some submitted that specific exceptions should be removed and that the general exception

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57 This must have occurred within a reasonable period after the request: Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 39(5)(a)(iii).

58 Ibid cl 107, 140.

59 See, eg, *Anti-Discrimination Act 1998* (Tas) s 34; *Equal Opportunity Act 1984* (SA) s 85R(2).

60 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, 90.

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

included in the HRAD Bill should apply. Others argued that insurers should be required to apply for a specific exception. For example, the Law Society of New South Wales (LSNSW) submitted that

insurers ought to be required to apply for a specific exemption or show why an applicant over 65 years should not be covered by an insurance policy. This approach is favoured by the LSNSW rather than the general statutory exemption.<sup>62</sup>

6.47 The South Australian Equal Opportunity Commission supported a reverse onus of proof, suggesting that

any adverse decision based upon a ground protected by anti-discrimination legislation, such as age, should be assumed to be discrimination unless the insurance company provides evidence to rebut that presumption.<sup>63</sup>

6.48 However, a number of insurers and the ICA expressed strong support for retaining the insurance exception. The ICA submitted that

there is already in place in Australia a strong legislative regime to require the insurer to prove it meets all evidentiary requirements to rely on an insurance exemption.<sup>64</sup>

6.49 Suncorp submitted that ‘it is critical for the insurance industry to be able to lawfully discriminate during the underwriting process’.<sup>65</sup>

6.50 Insurers also highlighted the relatively low number of complaints in relation to insurance under the ADA. Insurers argue this suggests that the ‘current statutory insurance exemption accurately reflects insurer practice and assists insurers to explain the underwriting process to consumers, aiding early resolution of complaints’.<sup>66</sup> The ALRC considers that, given the individualised complaints-based nature of the ADA system, a low number of complaints does not necessarily mean the system is operating as intended.

6.51 In the Tasmanian context, the Tasmanian Anti-Discrimination Commissioner concluded that ‘the case had not been made for the application of the insurance exception’ under s 34 of the *Anti-Discrimination Act 1998* (Tas). As a result, insurers relying on the data provided to the Commissioner are ‘potentially offering services, in the form of insurance, in breach of the Tasmanian Act’.<sup>67</sup>

6.52 Amendment to the insurance exception under Commonwealth legislation would have a significant effect on all types of insurance, not just those types of insurance that are the focus of this Inquiry. Further, many of the suggested amendments to the exception involve a fundamental shift in the structure of the exception framework, for example from general and specific to general exceptions alone, or from permanent exceptions to temporary exceptions.

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62 Law Council of Australia, *Submission 96*. See also Brotherhood of St Laurence, *Submission 86*.

63 South Australian Equal Opportunity Commission, *Submission 70*.

64 Insurance Council of Australia, *Submission 94*.

65 Suncorp Group, *Submission 66*.

66 *Ibid.* See also Insurance Council of Australia, *Submission 94*; Financial Services Council, *Submission 89*.

67 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, iii.

6.53 As a result, the ALRC does not consider it appropriate to recommend the retention or removal of the insurance exception. However, the ALRC considers it would be useful to have a separate review of the insurance exception. A separate review would be particularly valuable given the de-regulatory focus of the consolidation process and the complexity and scope of the effect any amendment to the insurance exception may have. While the HRAD Bill provides for review of all exceptions in three years, the ALRC recommends that the Australian Government review the insurance exception in Commonwealth anti-discrimination legislation prior to this time.

6.54 In addition, the ALRC suggests that a review at a Commonwealth level presents a timely opportunity to review similar provisions under state and territory anti-discrimination legislation. This is particularly so in light of the recommendations arising from the Tasmanian investigation, national stakeholder concern and the lack of consistency between jurisdictions. This approach was supported by stakeholders such as Suncorp, which suggested that this offered an opportunity to ‘harmonise the insurance exemption clause across all Commonwealth anti-discrimination laws and nationally’.<sup>68</sup> The ALRC therefore recommends that the Australian, state and territory governments should review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.

6.55 In the course of reviewing the insurance exceptions, the ALRC suggests that a number of key issues which emerged in the course of this Inquiry should be considered. These include: provision for individuals to request and receive the data on which the decision was based;<sup>69</sup> that the data it is reasonable for insurers to rely upon; and the meaning of ‘other relevant factors’ for the purposes of the exception.<sup>70</sup> Further, the insurance exception requires and assumes that insurers possess data upon which age-based decisions are made. However, in practice insurers may rely on the data possessed by global reinsurers. As a result, this issue should also be considered in the course of the review.

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68 Suncorp Group, *Submission 66*.

69 In the Discussion Paper, the ALRC suggested that, at a Commonwealth level, provision for an individual to request and receive the actuarial or statistical data on which the action or decision was based, as under the *Sex Discrimination Act 1984* (Cth), may address some stakeholder concerns in this area. This provision was subsequently incorporated into cl 39(5)(a)(iii) of the HRAD Bill. While a number of stakeholders supported the inclusion of this provision, some were concerned about the ability of an individual consumer to understand the data, as well as the commercially sensitive nature of data. The ICA and FSC suggested that, instead, there be provision for a court or other body to request and receive ‘such information on a confidential basis and for use only in the matter under investigation’: Financial Services Council, *Submission 89*. See also Insurance Council of Australia, *Submission 94*.

70 *Age Discrimination Act 2004* (Cth) s 37(3); Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 39(5)(b). The meaning of ‘other relevant factors’ has been considered by the Federal Court in the context of the *Disability Discrimination Act 1992* (Cth) in *QBE Travel Insurance v Bassanelli*, 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. 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: *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

6.56 There are also a range of international developments with respect to insurance that may be of relevance in an Australian insurance context.<sup>71</sup>

**Recommendation 6–3** The Australian, state and territory governments should review insurance exceptions under Commonwealth, state and territory anti-discrimination legislation.

### *Guidance material*

6.57 To make certain insurers and consumers understand the operation of the insurance exception, the ALRC recommends that the AHRC should develop guidance material about the application of any insurance exception as it applies to age under Commonwealth anti-discrimination legislation. Such guidance should be developed in consultation with key insurance and superannuation bodies.

6.58 A range of stakeholders supported the development of such guidance material.<sup>72</sup> For example, Suncorp noted that although guidelines are not binding, they could provide the AHRC's 'view on the interpretation of the exemption under the Act and relevant case law'.<sup>73</sup> In addition, the ICA indicated it 'would be pleased to co-operate with the AHRC and industry stakeholders on this matter'.<sup>74</sup> The Tasmanian Anti-Discrimination Commissioner made a similar recommendation.<sup>75</sup>

6.59 By way of example, the AHRC developed *Guidelines for Providers of Insurance and Superannuation* with respect to the insurance and superannuation exceptions under the DDA. Last revised in 2005, the guidelines 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

71 See, eg, the release of United Nations Environment Program Finance Initiative, *Principles for Sustainable Insurance* (2012). In Europe, 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 exception) 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 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.

72 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; Insurance Council of Australia, *Submission 94*; Financial Services Council, *Submission 89*; ACTU, *Submission 88*; Brotherhood of St Laurence, *Submission 86*; Suncorp Group, *Submission 66*.

73 Suncorp Group, *Submission 66*.

74 Insurance Council of Australia, *Submission 94*.

75 Tasmanian Anti-Discrimination Commissioner, *Volunteers, Age and Insurance* (2013), Unpublished Report, rec 9.

- 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
- explain factors that courts may take into account in deciding a complaint about disability discrimination.<sup>76</sup>

6.60 The ALRC suggests that guidelines about the exception applying to age could: outline how the exception applies; discuss the nature of actuarial or statistical data that may be acceptable for the purposes of the exception; summarise recent case law; clarify the meaning of ‘other relevant factors’; and provide case studies.

**Recommendation 6–4** The Australian Human Rights Commission should, in consultation with key insurance and superannuation bodies, develop guidance material about the application of any insurance exception as it applies to age under Commonwealth anti-discrimination legislation.

## Insurance codes of practice

6.61 There are two key insurance industry codes of practice in Australia. The General Insurance Code of Practice (the Code) is a self-regulatory code that binds all general insurers who are signatories to it.<sup>77</sup> The FSC Code of Ethics and Code of Conduct (the FSC Code) is compulsory for all FSC members.<sup>78</sup> Industry codes such as these ‘play an important part in how financial products and services are regulated in Australia’.<sup>79</sup>

6.62 The ALRC recommends that both codes should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

### General Insurance Code of Practice

6.63 The Code was developed and introduced by the ICA—the representative body of the general insurance industry in Australia—in 1994. It applies to all general insurance products, including travel insurance and sickness and accident 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;

<sup>76</sup> Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* <[www.humanrights.gov.au/disability\\_rights/standards/Insurance/insurance\\_adv.html](http://www.humanrights.gov.au/disability_rights/standards/Insurance/insurance_adv.html)> at 21 March 2013.

<sup>77</sup> Insurance Council of Australia, *General Insurance Code of Practice*.

<sup>78</sup> Financial Services Council, *Standard No 1, Code of Ethics and Code of Conduct*. The Financial Services Council is the industry association for the financial services sector, which includes the life insurance industry.

<sup>79</sup> ASIC, *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (March 2013), 183.1.

- 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.<sup>80</sup>

6.64 The Code is binding on all signatories, including members of the ICA.<sup>81</sup> The Financial Ombudsman Service monitors compliance with the Code. Its findings are reported to the Code Compliance Committee which monitors compliance with the Code and has power to make determinations and impose sanctions.<sup>82</sup>

6.65 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. A final report is due in May 2013.<sup>83</sup>

6.66 The ALRC proposed that the review examine ways in which the Code could be amended to encourage insurers to consider the needs and circumstances of mature age persons.<sup>84</sup> A number of stakeholders supported this approach.<sup>85</sup> Others, such as Suncorp, opposed the proposal on the basis that the Code

is a statement of principles designed to guarantee exceptional customer service standards and to protect the rights of policyholders and is supported by the objectives of the Code. Suncorp is of the view it is not appropriate, in any way, to limit these standards to a specific target group but considers it should apply to all consumers, without exception within the community.<sup>86</sup>

6.67 Similarly, the ICA submitted that while it ‘does not consider the Code an appropriate place to address anti-discrimination issues in detail, having regard to the strong regulatory regime already in place’ it recognised that

it may be appropriate to have an overarching principle in the Code committing Code participants to working to satisfy the general insurance needs of the whole community regardless of financial situation, age or disability.<sup>87</sup>

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

81 ASIC has the power to approve codes in the financial services sector such as the General Insurance Code of Practice as set out in *Regulatory Guide 183* and in accordance with the *Corporations Act 2001* (Cth) which provides ASIC with statutory power to approve voluntary industry codes of conduct: *Corporations Act 2001* (Cth) s 1101A; ASIC, *Regulatory Guide 183: Approval of Financial Services Sector Codes of Conduct* (March 2013).

82 Insurance Council of Australia, *General Insurance Code of Practice*, cls 7.13–7.23.

83 General Insurance Code of Practice 2012 Review <[www.codeofpracticereview.com.au/Home.aspx](http://www.codeofpracticereview.com.au/Home.aspx)> at 21 March 2013.

84 Australian Law Reform Commission, *Grey Areas—Age Barriers to Work in Commonwealth Laws*, Discussion Paper 78 (2012), Proposal 4–3.

85 National Welfare Rights Network (NWRN), *Submission 99*; Law Council of Australia, *Submission 96*; ACTU, *Submission 88*; Australian Chamber of Commerce and Industry, *Submission 85*.

86 Suncorp Group, *Submission 66*.

87 Insurance Council of Australia, *Submission 94*.



6.68 Mr Enright has indicated that issues of access and diversity have been raised in the course of the review, and they are ‘terribly important’. However he has suggested that addressing such issues in the Code at this stage would be a ‘significant shift’ and is not possible in the timeframe remaining for the review of the Code.<sup>88</sup> The ALRC suggests that issues of access and diversity, including in relation to mature age persons, might usefully be considered in the course of the next review of the Code and recommends the inclusion within it of a diversity statement or objects clause.

### **The FSC Code of Ethics and Code of Conduct**

6.69 The FSC is the industry association for the financial services sector, which includes the life insurance industry. Compliance with the FSC Code is compulsory for all FSC members.<sup>89</sup> It contains specific rules as well as broader ethical principles to guide decision-making.

6.70 In response to the ALRC’s question about the review of other industry codes such as the FSC Code, the FSC submitted that its Code is not life insurance specific or tailored and

is not relevant to the specific subject matter relating to insurers and mature age persons. Therefore it should not be reviewed in the context of insurers and mature age persons. The intent of the [FSC Code] is to promote the highest integrity among the broad FSC membership. We do not believe it is appropriate to limit (or tailor) the operation of this Standard to a particular group or demographic.<sup>90</sup>

6.71 The ALRC recognises the particular roles these two codes play in the context of Australia’s insurance industry. The ALRC does not consider it appropriate to encourage or mandate the removal or extension of age-based limitations on insurance policies, or to limit the standards contained in the codes to a specific group, in this case mature age persons. However, the ALRC is of the view that it is appropriate for the codes to contain a diversity statement or objects clause that encourages consideration of the needs and circumstances of a diverse range of consumers. Such a statement should include reference to mature age persons, among other consumers.

**Recommendation 6–5** The General Insurance Code of Practice and the Financial Services Council Code of Ethics and Code of Conduct should include diversity statements or objects clauses that encourage consideration of the needs and circumstances of a diverse range of consumers, including mature age persons.

88 InsuranceNEWS, *Code Overhaul to Move Compliance Committee “Front and Centre”*, 18 February 2013 <[www.insurancenews.com.au](http://www.insurancenews.com.au)> at 21 March 2013.

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

90 Financial Services Council, *Submission 89*.

